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Re: Docket ID No. EPA-HQ-OW-2025-0322; Updated Definition of "Waters of the United States"

The California Farm Bureau Federation ("California Farm Bureau") appreciates the opportunity to provide comments on the U.S. Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers' ("Corps") (hereinafter, collectively "Agencies") proposed revised definition of "waters of the United States" ("WOTUS") under the Clean Water Act ("CWA" or "Act"), *Updated Definition of "Waters of the United States*," 90 Fed. Reg. 52,498 (Nov. 20, 2025) (hereinafter, "Proposed Rule"). California Farm Bureau is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home, and the rural community. California Farm Bureau is California's largest farm organization, comprised of 54 county Farm Bureaus currently representing more than 27,000 agricultural, associate, and collegiate members in 57 counties. California Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources. California Farm Bureau engages in legislative, regulatory, and legal advocacy, particularly on issues that impact the ability of agricultural producers to continue farming and ranching sustainably and efficiently. California Farm Bureau also works to ensure that regulatory policies are based on sound science and balanced decision-making that considers both environmental conservation and the economic viability of agriculture.

As farm and ranch families working together to build a sustainable future of safe and abundant food, fiber, and renewable fuel for our nation and the world, the livelihood of farmers and ranchers depends on healthy soil and groundwater. California farmers and ranchers need a consistent and legally sound WOTUS definition to provide clarity and certainty in determining what waterbodies are subject to CWA jurisdiction. California Farm Bureau's members engage in activities on land and water that often require a jurisdictional determination from the Corps prior to proceeding. Any change in the CWA regulations governing how these determinations of jurisdiction are made, particularly any expansion of federal jurisdiction, will have a substantial effect on our members' ability to timely obtain the permits necessary to continue existing agricultural operations or develop new or expanding agricultural ventures. Given the impact of

CWA jurisdiction on family farms and ranches, California Farm Bureau offers the following comments.

I. Introduction

California Farm Bureau appreciates the Agencies' efforts to improve regulatory predictability and consistency by further clarifying the scope of WOTUS. When Congress enacted the CWA, it exercised its commerce power over navigation and specifically granted the Agencies the power to regulate "navigable waters," which the CWA defines as "waters of the United States." For decades, the Agencies' regulations and guidance—coupled with the Agencies' implementation and enforcement activity—steadily expanded the definition of WOTUS beyond constitutional and statutory boundaries. The Proposed Rule represents an important move toward realigning the regulatory definition of WOTUS with Congress's intended scope of federal regulatory authority under the CWA. It gives meaning to Congress's use of the term "navigable" throughout the statute and respects the CWA's express policy to preserve the states' traditional and primary authority over land and water use. Additionally, by codifying definitions of key terms that are central to determining the scope of the CWA's reach, the Proposed Rule avoids serious due process concerns raised by prior WOTUS regulations.

California Farm Bureau has a long history of involvement on the critical issues concerning the scope of federal jurisdiction under the CWA. California Farm Bureau has submitted comments on the Agencies' prior rulemakings and guidance documents on this issue. In all of their comments, California Farm Bureau has consistently advocated for regulatory approaches that offer predictability to regulated family farms and ranches while rejecting overly broad interpretations of federal authority that: (i) undermine state primacy in managing land and water resources; (ii) lack grounding in controlling Supreme Court jurisprudence; (iii) render the statutory term "navigable" meaningless; and (iv) inappropriately redefine the federal-state balance regulating land and water use.

II. Overarching Points and Guiding Principles

Farming and ranching are necessarily water-dependent enterprises. Fields on farms and ranches often have low spots that tend to be wet year-round or at least contain water seasonally. Some of these areas are ponds used for purposes such as stock watering, providing irrigation water, or settling and filtering farm runoff. Irrigation ditches also carry flowing water to fields throughout the growing season as farmers and ranchers open and close irrigation gates to allow water to reach particular fields. These irrigation ditches can be close to larger sources of water, irrigation canals, or actual navigable waters that are the source of irrigation water. At times irrigation systems also function as drainage systems, channeling flows back into these sources. In addition to the complexity of California's water delivery systems, California's climate is diverse with areas of intense snow and rainfall, areas of desert and little rainfall, differing lengths of the wet season, and growing seasons year-round in some parts of the state. California's diverse nature highlights the need for a clear, workable rule on what is and what is not a water of the U.S. In short, California's

farm and ranch lands are an intricate maze of ditches, ponds, wetlands, "ephemeral" drainages, and other water features. Given this, California Farm Bureau urges for a durable WOTUS rule consistent with the following general principles:

- The definition of "waters of the United States" should be based on objectively identifiable characteristics, rather than subjective, unpredictable, and fragmented case-by-case determinations.

- The "waters of the United States" definition should respect the federal-state balance regulating land and water use and clearly distinguish between federal and state waters to avoid future litigation and costs that divert scarce resources from actual protection of state and federal waters.

- The "waters of the United States" definition should comply with U.S. Supreme Court caselaw, should not expand jurisdictional "waters of the U.S.," and should not create uncertainty associated with "case-by-case" analyses and specific jurisdictional determinations.

- Any future rule must be easy to administer and should provide greater clarity, predictability, and reasonable flexibility for farmers and ranchers.

- **Non-navigable, isolated and intrastate waters and ordinarily dry features:** Federal jurisdiction cannot properly extend to non-navigable, isolated/intrastate waters and wetlands. Nor does it extend to ordinarily dry features, such as ephemeral streams.

- **Relevant permanence:** A water feature that is "relatively permanent" must contain water persistently and frequently. Features that are usually dry or that only carry water when it rains are not "relatively permanent" waters. Ephemeral streams, especially those in the Western United States, should not be considered relatively permanent features. The *Rapanos* plurality decision exempted ephemeral streams, and the 2020 Navigable Waters Protection Rule largely exempted ephemeral streams.

- **Immediate adjacency to traditional navigable waters:** Wetlands should only be "waters of the United States" when they are immediately adjacent to traditional navigable waters, meaning that they directly touch or share a common border with those waters.

- **Retain existing and consider potential additional statutory exclusions:** Any revised definition should retain the long-standing codified exclusions, especially those for agriculture, prior converted cropland, and irrigation ditches and drains, from WOTUS and should consider the need for additional exclusions for features such as irrigation structures and other drain types.

- **Effect on state water quality program:** The state of California has its own broad, multi-layered, comprehensive regulatory regime already stringently protecting water quality and

water resources. In fact, California has some of the most comprehensive and rigorous water quality and water resource regulations in the nation. California's Porter-Cologne Water Quality Control Act, Cal. Water Code, § 13000 et seq., the primary water quality and resource protective law in the state, affords broader regulatory protection than the CWA. Porter-Cologne defines "waters of the state" as "any surface water or groundwater, including saline waters, within the boundaries of the state." (Cal. Water Code, § 13050(e).) This definition alone, when compared with the federal definition of "waters of the United States" shows that the scope of resource protection in California is broader and more inclusive. (*Compare id.* with 33 C.F.R. § 328.3.) This notwithstanding, CWA 404 permits are a definite, often onerous, and duplicative part of California's regulatory landscape. By appropriately interpreting "waters of the United States," "relatively permanent," and "continuous surface connection," the Agencies will be respecting proper bounds of a federalist system without sacrificing any protection not within the authority of the State of California. At the same time, such proper interpretations will respect Congress' mandate that the CWA first and foremost "recognize, preserve, and protect the primary responsibilities and rights of the States . . . to plan the development and use . . . land and water resources." (33 U.S.C. § 1251(b).) Furthermore, by crafting definitions that adhere more strictly to the relatively narrow statutory language of the CWA, the Agencies will avoid usurping land authorities that are traditionally the clear prerogative of state and local agencies.

- **The scope of *"continuous surface connection,"* definition of "*adjacent,"* definition of *"abut,"* and to which features this phrase applies**: In *Sackett v. Environmental Protection Agency* (2023) 598 U.S. 651 ("*Sackett*"), the Supreme Court provides additional clarity by offering two considerations: 1) The adjacent body of water is itself a WOTUS (streams, ocean, river, or lakes) and 2) The wetland has a continuous surface connection with that water in a manner that makes it difficult for an ordinary person "to determine where the 'water' ends, and the 'wetland' begins." (*Sackett, supra*, p. 678.) If an area does not meet these two criteria it should not be considered a wetland. This treatment of wetlands is similar to the regulatory regime pre-2015.

- **The scope of *"relatively permanent"* waters**: The Supreme Court was clear in *Sackett* that terms such as relatively permanent should be interpreted through the lens of "ordinary parlance as 'streams, oceans, rivers, and lakes.'"

III. Regulations of WOTUS Must be Consistent with the Clean Water Act and U.S. Supreme Court Precedent

The U.S. Supreme Court's decision in *Sackett* provided clarifying judicial guidance regarding the proper test to use to determine waters of the United States. *Sackett*, along with previous caselaw, including *Rapanos v. United States* (2006) 547 U.S. 715 ("*Rapanos*") and others mentioned below, provide direction for the Agencies when revising and/or clarifying the definition of WOTUS. Consistent with the Clean Water Act and U.S. Supreme Court precedent, California

Farm Bureau provides the following comments to aid in this revision for a legally sound and durable WOTUS rule.

A. Regulations of WOTUS Must be Consistent with the Clean Water Act

The stated purpose of the CWA is "to restore and maintain the chemical, physical, ***and*** biological integrity of the Nation's waters." (33 U.S.C. § 1251(a), emphasis added.) Justice Kennedy, in his opinion in *Rapanos,* requires that wetlands must "significantly affect the chemical, physical, *and* biological integrity of other covered waters" in order to find a nexus. (*Rapanos, supra*, 547 U.S. 780, emphasis added.) Specifically, Justice Kennedy concluded:

> The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the law to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and it pursued that objective by restricting dumping and filling in "navigable waters," §§ 1311(a), 1362(12). With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters--functions such as pollutant trapping, flood control, and runoff storage. 33 CFR § 320.4(b)(2). *Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable."* When, in contrast, wetlands" effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters." (*Rapanos, supra*, 547 U.S. at pp. 779-80, emphasis added.)

Thus, the definition of WOTUS and associated regulations must be consistent with the Clean Water Act's required nexus.

B. Regulation of WOTUS Must be Limited to Navigable Waters

The Clean Water Act, 33 U.S.C. §§ 1251-1387, regulates "navigable waters," which are defined as "waters of the United States." Areas that are not "the waters of the United States" are not regulated under the CWA. Under the Rivers and Harbors Act of 1898, navigable waters are generally those waters capable of transporting interstate commerce among states. Formally adopted regulations further define "waters of the United States" as "all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." (33 C.F.R. § 328.3(a)(1).) These federal regulations along with the multitude of federal case law defining and interpreting "navigable waters" dating back decades and even hundreds of years, show that the definition of "waters of the United States" is limited; it does not encompass *all waters*, including those that may or may not have the likelihood of being classified as "navigable" at some future date. Any

regulation of WOTUS must be limited to "navigable waters" that are "susceptible to use in interstate or foreign commerce." (33 C.F.R. § 328.3(a)(1).)

California Farm Bureau appreciates the Agencies' efforts to improve regulatory predictability and consistency by further clarifying the scope of WOTUS. The Proposed Rule represents an important move toward realigning the regulatory definition of WOTUS with Congress's intended scope of federal regulatory authority under the CWA. It gives meaning to Congress's use of the term "navigable" throughout the statute and respects the CWA's express policy to preserve the states' traditional and primary authority over land and water use. And by codifying definitions of key terms that are central to determining the scope of the CWA's reach, the Proposed Rule avoids the serious due process concerns that prior WOTUS regulations gave rise to.

C. Guiding U.S. Supreme Court Opinions on Federal Jurisdiction

The CWA provides federal jurisdiction over "waters of the U.S." defined as "navigable waters" and originally understood to mean interstate waters or intrastate waters connected to the sea that were navigable in fact. This navigability in fact was once thought to provide the constitutionality of the CWA by ensuring that the federal regulation of such waters fell under the Commerce Clause of the U.S. Constitution. As federal assertions of jurisdiction over other waters have, over the last several decades, challenged the original narrow scope of the CWA as intended by Congress, the U.S. Supreme Court has been compelled to intervene on the question of CWA jurisdiction in four major cases to date. Relying in large part on language regarding Congress' intent in the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (33 U.S.C. § 1251(a)), EPA and the Corps have attempted over time to greatly broaden the scope of their jurisdiction under the CWA, pushing, and many would argue, at times exceeding the bounds of both the CWA and the Constitution. At each step in this process, however, the clear direction from the U.S. Supreme Court has reiterated that the EPA's and the Corps' jurisdiction under the CWA is not unlimited, but rather limited.

In the 1985 case of *United States v. Riverside Bayview Homes, Inc.* (1985) 474 U.S. 121 ("*Riverside Bayview Homes*"), the Supreme Court allowed a relatively modest expansion of the CWA beyond "waters of the U.S." that are strictly "navigable in fact" to include adjacent wetlands "inseparably bound up with" navigable waters. However, adjacency, close connection, and the character and physical location of the land in relation to navigable water were the clear limiting factors on any over-broad expansion of jurisdiction. In the 2001 case of *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (2001) 531 U.S. 159 ("*SWANCC"*), the Supreme Court rejected regulation of "isolated waters" lacking a "significant nexus to navigable waters"—and, particularly, under the facts of the *SWANNC* case, including those "isolated waters" where there was no discernible hydrologic connection, but rather the only conceivable connection to any navigable water was a biological connection, provided by the movement of certain migratory birds.

After *SWANCC*, the Agencies adopted a broad, but ill-defined and imprecise interpretation that "waters of the U.S." included any water "connected" to navigable water, depending on the

subjective case-by-case judgment of agency field staff. This, in turn, set the stage for the Supreme Court's comprehensive look at the question of federal jurisdiction under the CWA in the 2006 case of *Rapanos.* While there was no commanding consensus of all of the Court in *Rapanos*, a majority of justices agreed in rejecting the Agencies' interpretation that *any "connection*" to a navigable water whatsoever would be sufficient. Thus, the plurality opinion by Justice Scalia (joined by Justices Thomas, Alito, and Roberts and supported in a concurring opinion by Kennedy) expressly rejected the notion that federal jurisdiction under the CWA extends to ephemeral streams, ditches, and drains, and instead limited federal jurisdiction to "relatively permanent waters." (*Rapanos, supra*, at pp. 733, 734, 739.) Additionally, Justice Kennedy's concurring opinion clarifying that the scope of the CWA is not unlimited, but rather qualified, including extensive discussion of the concept of "reasonableness" within the constitutional bounds of the commerce clause and consistent with traditional notions of state's rights and federalism, in addition to "significance," as a built-in practical and constitutional control on the extent of the Agencies' jurisdictional reach. (*See*, e.g., *Rapanos, supra,* at pp. 738, 767, 776; *see*, also, *SWANCC*, *supra*, 531 U.S. at pp. 172-174.)

Controversy and confusion since *Rapanos* have centered on Justice Kennedy's concurring opinion and the theory that an assertion of federal CWA jurisdiction requires not merely *any* connection, but rather some connection to a navigable water sufficient to be called a "significant nexus." Agency efforts to retool and extrapolate from this "significant nexus" formulation have struck at latent ambiguities, including the nature and extent of the connection—whether physical, chemical, or biological—and at the significance of connection, either individually or cumulatively. Erring liberally on the side of over-inclusion, Agency interpretations to date, have focused on the presence, not of a *significant* connection, but rather of *any* connection at all. Such interpretations have buttressed such broad readings of the new "significant nexus" test with postulations that *any* connection, even if insignificant on to itself, can be cumulatively significant when taken in combination with the universe of other connections. Thus, despite repeated cautions by the Supreme Court that the jurisdiction under the CWA *is not* limitless, the Agencies' previous view, Justice Kennedy's "significant nexus" test, appears to be that essentially *any* connection is sufficient to establish jurisdiction. The "any connection" reinterpretation of Justice Kennedy's "significant nexus" test, however, ignores fundamental legal and practical constraints on the Agencies' authority, and again lands the Agencies and their staff, the courts, the states, and private individuals throughout the nation in the same constitutional peril that has tormented real world application of the CWA these last several decades.

The U.S. Supreme Court provided clarity in *Sackett v. Environmental Protection Agency* (2023) 598 U.S. 651, by rejecting Kennedy's "significant nexus" test and holding that the Clean Water Act only applies to wetlands with a "continuous surface connection" to "relatively permanent, standing, or continuously flowing" WOTUS as opined by Scalia in *Rapanos*. (*Sackett*, *supra*, 598 U.S. at pp. 651, 671, 678.) The *Sackett* decision provides a very clear standard that substantially restricts the Agencies' ability to regulate all types of wetlands and streams, and holds that the mere presence of water is too broad to assert jurisdiction. Specifically, wetlands that do not have a continuous surface connection with a traditional navigable water are not federally jurisdictional. (*Id*. at 678-679.) Thus, the CWA's protections do not extend to wetlands separated from jurisdictional waters by barriers like dikes or berms. The ruling narrowed the scope of the

Agencies' authority and shifted more responsibility to states for regulating wetlands not meeting the continuous connection requirement. Thus, the U.S. Supreme Court's decision in *Sackett* provides much needed judicial guidance for the Agencies in clarifying which waters are WOTUS.

D. Findings of Jurisdiction Must be Based on Reasonableness

In addition to the clarity provided by *Sackett*, U.S. Supreme Court precedent to date is clear that a fundamental limit on the Corps' and the EPA's jurisdiction under the CWA is the "reasonableness" of a jurisdictional determination, particularly in light of the outer limits of congressional and executive power under the Commerce Clause and the basic principles of federalism that are the foundation for our system of government.

In *SWANCC*, the Court laid the groundwork for the basic proposition that federalism, states' rights, and the limits of the Commerce Clause define the outer bounds of federal CWA authority. "Where an administrative interpretation of a statute invokes the outer limits of Congress' power," the *SWANCC* Court observed, "we expect a clear indication that Congress intended that result." (*SWANCC, supra*, 531 U.S. at p. 172.) The *SWANCC* opinion continues:

> This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. [Citation.] This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. […] Thus, "where an otherwise acceptance construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." (*SWANCC, supra,* 531 U.S. at pp. 172-173, 174.)

The plurality in *Rapanos* also touched on this issue:

> Regulation of land use, as through the issuance of the development permits sought by petitioners in both of these cases, is a quintessential state and local power. [Citations.] […] We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority. [Citations.] […] [J]ust as we noted in *SWANCC*, the Corps' interpretation stretches the outer limits of Congress's commerce power and raises difficult questions about the ultimate scope of that power. (*Rapanos, supra,* 547 U.S. at p. 738.)

Moreover, as both the plurality and Justice Kennedy note (*see, Rapanos, supra,* 547 U.S. at 723-724, 776), the CWA itself expressly declares that "[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." (33 U.S.C. § 1251(b).)

Picking up where *Riverside Bayview Homes* and *SWANCC* left off, Justice Kennedy's opinion in *Rapanos* frames the question of "reasonableness" as follows:

> *Riverside Bayview* and *SWANCC* establish the framework for the inquiry in the cases now before the Court: Do the Corps' regulations, as applied to the wetlands in *Carabell* and the three wetlands parcels in *Rapanos*, constitute a ***reasonable interpretation*** of "navigable waters" as in *Riverside Bayview* or an invalid construction as in *SWANCC?* Taken together these cases establish that in some instances, as exemplified by *Riverside Bayview*, the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a "navigable water" under the Act. In other instances, as exemplified by *SWANCC*, there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking. (*Rapanos, supra,* 547 U.S. at p. 767, emphasis added.)

The Kennedy opinion later places this question in the context of the Commerce Clause and states' rights questions raised in *SWANCC*:

> In *SWANCC*, as one reason for rejecting the Corps' assertion of jurisdiction over the isolated ponds at issue there, the Court observed that this "application of [the Corps'] regulations" would raise significant questions of Commerce Clause authority and encroach on traditional state land-use regulation. [Citation.] As *SWANCC* observed, [Citation], and as the plurality points out here, [Citation], the Act states that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources," [Citation]. The Court in *SWANCC* cited this provision as evidence that a clear statement supporting jurisdiction in applications raising constitutional and federalism difficulties was lacking. [Citation.] [¶] […] In *SWANCC*, by interpreting the Act to require a significant nexus with navigable waters, the Court avoided applications—those involving waters without a significant nexus—that appeared likely, as a category, to raise constitutional difficulties and federalism concerns. (*Rapanos, supra,* 547 U.S. at 776.)

Thus, as opined in various cases, federal CWA authority is not boundless. Rather, it is limited by reasonable findings of jurisdiction and the constitutional bounds of the Commerce Clause and states' rights. Previous WOTUS Rules have improperly interpreted "waters of the U.S." so broadly as to impermissibly "readjust the federal-state balance" and ignore "Congress['s] "cho[ic]e to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources.'" (*SWANCC*, *supra*, 531 U.S. at p. 174 (quoting 33 U.S.C. § 1251(b)).) Further, Congress has not provided the Agencies with "clear and manifest" (SWANCC, *supra*, 531 U.S. at p. 172; *Rapanos, supra*, 547 U.S. at p. 738) authorization in which the Agencies can unprecedentedly intrude into traditional state authority over the regulation of land and water use. In past WOTUS Rules, the Agencies' have stretched their

regulatory reach under the CWA past the outer limits of Congress' constitutional authority, raising "significant constitutional questions" and "result[ing] in a significant impingement of the states' traditional and primary power of land and water use.[1] (*SWANCC, supra*, 531 U.S. at p. 174.) The updated definition of "waters of the United States" within the Proposed Rule attempts to properly maintain this federal-state balance.

IV. Proposed WOTUS Rule

A. Any Clarifications Must Maintain Longstanding Exemptions

California Farm Bureau urges that any clarification to the definitions of "waters of the U.S.," "relatively permanent," continuous surface connection," and "adjacent," not affect longstanding exemptions for ditches, prior converted cropland, normal farming practices, or irrigated agricultural return flows.

1. Ditches

California farmers and ranchers rely heavily on ditches to support their agricultural activities. Ditches, canals, channels, conduits, and man-made conveyance systems have been used for decades and are necessary elements for the state of California to transport, store, and divert water for agricultural, municipal, commercial, and industrial uses. In areas of the state without consistent or sufficient rainfall, ditches convey water to fields and collect runoff. In areas with adequate rainfall, ditches provide necessary field drainage to allow for planting and crop growth. Drainage ditches and other water management structures are valuable and necessary tools that play a significant role in boosting crop yields and creating optimal field conditions for planting and harvesting at the right time. A quick review of the existing regulations and previous Guidance documents finds that such "ditches" were never formerly held to be jurisdictional waters of the United States.[2] Further, as clearly concluded in *Rapanos*, a sweeping inclusion of all such systems is improper as these systems are not "waters of the United States."

[1] The State of California has a stringent nonpoint source program which regulates irrigated agriculture, in addition to other classes of discharges.

[2] Historically, the Agencies have excluded non-tidal ditches from the definition of "waters of the United States," though the Agencies gradually expanded their jurisdictional reach over ditches beginning in the 1980s. For instance, the Corps' 1975 regulations broadly stated that "[d]rainage and irrigation ditches have been excluded" from the definition. (*See* 40 Fed. Reg. 31,320, 31,321 (July 25, 1975).) Two years later, the revised regulations more precisely stated that "manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition." (42 Fed. Reg. 37,122, 37,144 (July 19, 1977).) The preamble to the 1977 rule further clarified that "nontidal drainage and irrigation ditches *that feed into navigable waters* will not be considered 'waters of the United States' under this definition." (*Id.* at 37,127 (emphasis added).) To the extent ditches cause water quality problems, the Corps appropriately concluded they "will be handled under other programs of the [CWA], including Section 208 and 402." (*Id*.)

In the preamble to the 1986 regulations, the Corps began to soften on its historical position regarding the exclusion of ditches and stated that although it "generally do[es] not consider [drainage and irrigation ditches excavated on dry land] to be 'waters of the United States,'" it would reserve authority to claim jurisdiction on a "case-by-case" basis. (51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).) Subsequently, in 2000, the Corps indicated that "ditches constructed entirely in upland areas" are not considered "waters of the United States," but nontidal ditches *would* be considered

> The restriction of "the waters of the United States" to exclude channels containing merely intermittent or ephemeral flow also accords with the commonsense understanding of the term. In applying the definition to "ephemeral streams," "wet meadows," storm sewers and culverts, "directional sheet flow during storm events," drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term "waters of the United States" beyond parody. The plain language of the statute simply does not authorize this "Land Is Waters" approach to federal jurisdiction." (*Rapanos, supra,* 547 U.S. at 733-734.)

Numerous landowners in the outer edges of the valley regions have transitioned from pasture or row crops to trees or vines in the past ten years. This is largely because of the economic imperative to increase profitability per acre as land values increase. In order to remain viable, farmers need the ability to rotate crops and otherwise manage their land as needed with the aid of ditches and conveyance systems. Many areas along the valley outer edges are now 15-20 miles from major urban areas, and developmental pressures and land values continue to increase.

Farmland provides many social and ecosystem benefits beyond a safe and affordable food supply, such as open space, habitat, carbon sequestration, and many others. It is important to note that different types of agriculture provide different environmental benefits (i.e. pasture vs. row crops vs. trees, etc.) Overly-broad implementation of the CWA threatens farmers' and ranchers' abilities to continue to utilize their lands for food and fiber production while simultaneously protecting the environment. The Agencies' proposed exclusion for ditches aligns with the *Rapanos* plurality's clear understanding that ditches generally are distinct from WOTUS. Equally important, the Agencies' proposed ditch exclusion would appropriately limit federal jurisdiction over ditches, thereby restoring primary responsibility over land use and water resources to state and local authorities. (*See* 33 U.S.C. § 1251(b); *see also Hess v. Port Auth. Trans-Hudson Corp.,* 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments."). As such, California Farm Bureau supports the Agencies' proposal to retain a standalone exclusion for ditches and their efforts to provide increased clarity with respect to the regulation of ditches.

2. Prior Converted Cropland

California Farm Bureau urges that any clarifications to the definition to WOTUS or guidance documentation do not infringe the "prior converted cropland" exemption.

In 1993, the Corps adopted a rule that established that agricultural lands that were converted from wetlands prior to 1985 ("prior converted croplands") were categorically excluded from the definition of "the waters of the United States" and, therefore, were not subject to

"waters of the United States if they extend the [ordinary high water mark] of an existing water of the United States." (65 Fed. Reg. 12,818, 12,823 (Mar. 9, 2000).) This gradual expansion of federal regulation over ditches as WOTUS occurred without any Congressional authorization.

regulation under Section 404 of the CWA, 33 U.S.C. § 1344. (*See* Final Rule, Clean Water Act Regulatory Program, 58 Fed. Reg. 45,008 (Aug. 25, 1993) ("1993 Final Rule") (codified at 33 C.F.R. § 328.3(a)(8) (2009)). There are over 53 million acres of prior converted cropland throughout the country. (*See* U.S. Dep't of Agriculture, Natural Resources Conservation Service, RCA Issue Brief #8, "Wetlands Programs and Partnerships," (Jan. 1996) ["The Corps and EPA agreed to final regulations ensuring that approximately 53 million acres of prior-converted cropland will not be subject to wetland regulation."]; U.S. Army Corps of Eng'rs, "Two Years of Progress: Meeting Our Commitment for Wetlands Reform; Protecting America's Wetlands: A Fair, Flexible and Effective Approach August 1993 - August 1995," ["To make the Federal wetlands program more consistent and predictable for farmers, the Clinton Administration clarified that 'prior converted croplands' are not subject to regulation under Section 404 of the Clean Water Act. Nearly 53 million acres of farmland are covered by this action which exempted lands that no longer perform the wetlands functions as they did in their natural condition."].) Notwithstanding subsequent case law[3] occurring after the adoption of this formal rule, the Corps continues to lack jurisdiction over such lands and no jurisdictional determination or Corps permit is required for their use.

Although prior to the Navigable Waters Protection Rule ("NWPR") (90 Fed. Reg. at 52,535) , the term "prior converted cropland" was not defined in the regulatory text, the preamble to the 1993 Final Rule explained that PCC are "areas that, prior to December 23, 1985, were drained or otherwise manipulated for the purpose, or having the effect, of making production of a commodity crop possible [and that are] inundated for no more than 14 consecutive days during the growing season[.]" (*Id.* at 45,031.) This exclusion reflects the recognition that PCC generally have been subject to such extensive modification and degradation as a result of human activity that the resulting "cropped conditions" constitute the normal conditions for such lands. (*See id.* at 45,032.) The 1993 Final Rule preamble clarified that PCC do not lose their status merely because the owner changes use. (*See id.* at 45,033-34.) Thus, the Agencies intended that even if the PCC are used for a non-agricultural use, they remain excluded from the definition of WOTUS. That interpretation was upheld in *United States v. Hallmark Construction Co.*[4] and in *New Hope Power Co. v. U.S. Army Corps of Engineers*.[5] The 1993 Final Rule preamble instead made clear that the critical inquiry for determining whether a PCC loses its status is whether wetland conditions (as determined using the Corps' 1987 Wetlands Delineation Manual) have returned to the area. (58 Fed. Reg. at 45,034.)

The Agencies propose to continue excluding prior converted cropland from the definition of WOTUS and to codify a definition of PCC in proposed paragraph (c)(7) that is identical to the definition of PCC in the NWPR. (90 Fed. Reg. at 52,535.) Among other things, that definition clarifies that an area is no longer considered PCC for CWA purposes when the "cropland is abandoned (*i.e.,* the cropland has not been used for or in support of agricultural purposes for a period of greater than five years) *and* the land has reverted to wetlands." (*Id.* at 52,536.) The

[3] *Rapanos* does not affect the conclusion that prior converted croplands are not subject to the Agencies' CWA jurisdiction.
[4] 30 F. Supp. 2d 1033, 1035, 1040 (N.D. Ill. 1998)
[5] 746 F. Supp. 2d 1272 (S.D. Fla. 2010).

Proposed Rule also makes clear that the Agencies will recognize USDA designations, but where such designations are not available, a landowner may seek a PCC determination for CWA purposes from either the USDA or the Agencies. (*Id.* at 52537.) The Agencies importantly clarify that a cropland that loses PCC status because it has been abandoned and has reverted to wetlands is not automatically jurisdictional. (*Id*.) Rather, the wetland would only be jurisdictional if it has a continuous surface connection to a jurisdictional water to itself be jurisdictional. (*Id*.)

The Proposed Rule also states a site can be a PCC regardless of whether there is a prior PCC determination from either USDA or the Corps. Because USDA does not provide PCC determinations unless a farmer is seeking benefits covered under the wetland conservation provisions, the 2023 definition of PCC was too restrictive in limiting the PCC exclusion to areas that are designated as PCC by the USDA. B y contrast, the approach in the Proposed Rule appropriately recognizes that PCC determinations for CWA purposes should not depend on USDA actions, and EPA has the final authority to determine PCC status, consistent with longstanding CWA policy.

California Farm Bureau supports the Agencies' continued exclusion of PCC and the proposed definition of PCC, because it ensures consistency with the original 1993 rulemaking that first codified the PCC exclusion ("1993 Final Rule"). (58 Fed. Reg. 45,008, 45,033 (Aug. 25, 1993).)

3. Normal Farming Activities

CWA Section 404 specifically exempts "normal farming" activities – such as plowing, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products from the permit requirement. This exemption exists for "established, ongoing" agricultural operations and applies for "the planting of different agricultural crops as part of an established rotation." Ripping and disking activities performed on the property are considered "normal farming" activities, as explained in the Natural Resources Conservation Service ("NRCS") Conservation Practice Standard. Code 548 explains "grazing land mechanical treatment" and Code 324 addresses "deep tillage." Given these regulatory protections of agriculture, any guidance document or changes in WOTUS definitions must maintain such protections.

4. Groundwater

The Agencies propose to exclude "groundwater, including groundwater drained through subsurface drainage systems," from the definition of WOTUS. (90 Fed. Reg. at 52541.) As the Agencies explain in the Proposed Rule's preamble, they have "never interpreted [WOTUS] to include groundwater and would continue that practice through this proposed rule by explicitly excluding groundwater." (*Id.)* California Farm Bureau supports the Agencies' proposal to expressly exclude groundwater from the definition of WOTUS, which is consistent with the CWA's text, agency practice, and case law finding groundwater is not WOTUS.

To clarify confusion regarding the distinction between groundwater and "shallow subsurface hydrological connections," and provide clarity on the applicability of the groundwater

exclusion, California Farm Bureau recommends that the Agencies revise the language in proposed paragraph (b)(9) to state "groundwater, including **diffuse or shallow subsurface flow and** groundwater drained through subsurface drainage systems."

V. The Definition of "Waters of the United States" Should Include Clear Terms that are Easy to Apply in the Field

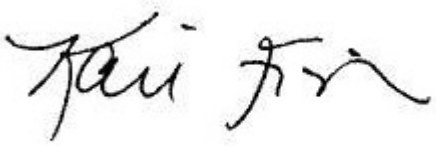
Farmers and ranchers cannot overstate the importance of a rule that draws clear lines of jurisdiction that can be understood without the need to hire an army of consultants and lawyers. The CWA is a strict liability statute that carries huge civil fines and criminal penalties for persons who violate the Act's prohibitions.

Prior regulatory interpretations of "waters of the United States" were needlessly complex, unclear, and confusing on their face, which allowed the Agencies continually to broaden their interpretation of the scope of the CWA. California farmers and ranchers want to comply with the CWA. But to do so, they must know—before engaging in agricultural activities—which features on their farms are jurisdictional and which are not. Thus, to ensure that law-abiding farmers and other landowners can understand and comply with the CWA, the Agencies must provide clarity and certainty without having to undertake burdensome scientific determinations. The Proposed Rule attempts to do this.

VI. Conclusion

Expansion and constant change to WOTUS regulations have a substantial effect on California farmers' and ranchers' ability to conduct ordinary agricultural activities. Additionally, any misunderstanding or mistakes in interpreting WOTUS regulations have the potential to lead to large civil fines as well as criminal charges for farmers and ranchers. California Farm Bureau supports the Proposed Rule, which provides much needed clarity and certainty consistent with *Sackett* for California's family farmers and ranchers. Thank you for the opportunity to provide comments and for consideration of our requests.

Sincerely,



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