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SUBMITTED TO THE COMMITTEE ON AGRICULTURE, NUTRITION AND FORESTRY OF THE UNITED STATES SENATE

WATERS OF THE UNITED STATES: STAKEHOLDER PERSPECTIVES ON THE IMPACTS OF EPA'S PROPOSED RULE

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Introduction

On behalf of the family farmers, ranchers and rural members of Rocky Mountain Farmers Union (RMFU), thank you for the opportunity to testify regarding the Environmental Protection Agency and Army Corps of Engineers' proposed changes to the definition of "waters of the U.S." We are especially grateful for the chance to address the misconception that all farmers are completely opposed to the rule. Founded in 1907, RMFU has grown to represent agriculture in New Mexico and Wyoming as well as Colorado. Together with other state organizations, it is part of the 250,000 member National Farmers Union. In this broader context, RMFU stands as an advocate for American producers, consumers and rural communities. Specific priorities include achieving profitability for family farmers and ranchers, promoting stewardship of land and water resources, and delivering safe, healthy food to consumers.

Clean water is vital to the productivity and well-being of America's farms, ranches and rural communities. The Clean Water Act (CWA) seeks to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[1] RMFU's members understand the importance of respecting clean water as a shared resource and believe the integrity of the nation's water can be protected without unnecessarily encumbering the activities of the regulated community.

There are ambiguities in the present regulatory landscape that many producers have found arbitrary and confusing. The EPA and Corps' (agencies) stated goal for the proposed rule is to improve protection of public health and water resources while increasing certainty for the regulated community and reducing troublesome and costly litigation. Protecting the nation's water resources is a complicated matter, and so by necessity are the CWA and any rule implementing it. This topic requires careful consideration and measured discourse over the legitimate concerns facing the regulated community. The inflammatory rhetoric that has been employed around this topic is counterproductive.

This proposed rule is so important because all discharges made to waters of the United States from point sources require a National Pollutant Discharge Elimination System (NPDES) Permit under the CWA. A discharge is any addition of a pollutant to a "water of the United States," including dredge or fill

[1] 33 USC §1241(a).

material. Although normal farming, silviculture and ranching activities are exempt from dredge and fill requirements under §404(f)(1)(A) of the CWA and certain activities pursuant to agriculture are exempted from NPDES permitting requirements under §402, the legal basis for the regulation of many construction and business activities rests on the definition of "waters of the United States."

RMFU's members recognize the agencies' rulemaking process on this matter as an opportunity to achieve their policy goals because the current regulatory landscape allows for inconsistent determinations that expand the CWA's definition of jurisdictional waters. The purpose of the following testimony is to provide the agencies with advice for drafting a final rule that confirms existing CWA jurisdiction and promotes consistent application of EPA policies, which aligns with the agencies' stated intent. This testimony will help the agencies avoid language that, even when drafted in good faith, could be taken out of context and used to stretch CWA jurisdiction in the future, while ensuring adequate protection for the 117 million people that rely on seasonal and rain-dependent streams for their drinking water.

The agencies' stated intent is to replace inconsistent practices with clear, bright-line tests through this proposed rule. If the testimony below is given proper consideration, the final rule will allow the regulated community the certainty it needs to conduct its business free from fear of undue regulatory interference and without sacrificing the agencies' ability to protect the United States' water resources. The proposed rule warrants comments on the agencies' changes to the definition of "waters of the United States" and the exclusions of certain waters from that definition.

I. Proposed Definition of "waters of the United States."

"Tributary"

The CWA establishes the agencies' permitting jurisdiction over specifically-listed waters. Paragraphs (a)(1)-(a)(5) of the proposed rule restate well-settled tenets of the agencies' jurisdiction under the CWA and do not warrant further comment. However, section (a)(5)'s inclusion of "All tributaries of waters identified in paragraphs (a)(1) through (4) of this section" warrants examination. This language has invoked significant concern in the regulated community that the proposed rule would increase the jurisdictional reach of the CWA. The agencies should address this concern and confirm this language does not increase jurisdiction by incorporating the following points in the final rule.

The preamble to the proposed rule notes that the proposed rule sets forth, for the first time, a regulatory definition of "tributary."[2] The proposed rule defines "tributary" as "a water physically characterized by the presence of a bed and banks and ordinary high water mark. . . which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section."[3] In order to provide more clarity to the regulated community, the agencies should note in the final rule that these features take years to form. This should mitigate concern that temporary accumulations directly related to isolated rain events will be considered jurisdictional. The agencies should add further clarifying language, including but not limited to descriptive examples of water and events that are not considered tributaries, in the final rule in order to ensure these distinctions are well-understood in the regulated community.

The preamble notes that existing Corps regulations define the ordinary high water mark (OHWM) "as the line on the shore established by fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the banks, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas. 33 CFR 328.3(e)."[4] The agencies should incorporate this definition within the final rule so that the regulated community can refer to one place for as much of the information that is needed to maintain compliance as possible.

These points should ensure that the definition of "tributary" in the proposed rule will not bring any water into jurisdiction that would not be found jurisdictional under the "significant nexus" test that is applied to "other waters." If incorporated, they would create regulatory certainty and lessen administrative burden by settling jurisdiction for waters that would have been subject to a case-by-case determination but ultimately found jurisdictional.

Also, the proposed rule treats wetlands that are connected to tributaries as tributaries themselves, but the preamble requests comment on this approach and offers an alternative.[5] Wetlands should not be considered tributaries unless the wetland is in a flood plain. Treating wetlands as tributaries would negate the bed, bank and OHWM criteria the Corps uses for identifying tributaries. The agencies should enact the alternative proposed in the preamble and "clarify that wetlands that connect tributary segments are adjacent wetlands, and as such are jurisdictional waters of the United States under (a)(6)." This alternative creates a bright-line definition for "tributary" without relinquishing any opportunities to

[2] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22198,(proposed April 21,2014) (amending 33 C.F.R. §328.3).
[3] *Id* at 22263.
[4] *Id.* at 22202.
[5] *Id*. at 22203.

protect water resources while protecting navigable waters from pollutants that may accumulate in wetlands within floodplains.

"Adjacent"

The proposed rule would change section (a)(6) from an articulation of the CWA's jurisdiction over wetlands adjacent to "waters of the United States" to an explanation of the CWA's jurisdiction over "All waters, including wetlands, adjacent to" waters identified in (a)(1) to (a)(5) as jurisdictional. As with the definition of "tributary" discussed above, this change is causing apprehension among the regulated community. The agencies should consider the following points in drafting the final rule to make clear that this change does not expand jurisdiction.

The proposed rule defines "adjacent" as "bordering, contiguous or neighboring" at (c)(1). It notes further that "Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent waters.'"

The jurisdictional reach of "adjacent waters," then, is largely dependent on the definition of "neighboring." This proposed rule defines "neighboring" for the first time. The preamble notes that the term is currently applied broadly, but the proposed rule defines "neighboring" as "waters located within the riparian area or floodplain of a water identified in (a)(1) through (5) of this section, or waters with a shallow subsurface hydrological connection or confined surface hydrologic connection to such a jurisdictional water."[6]

Waters located in the riparian area or floodplain of a jurisdictional water, or with a confined surface hydrologic connection to a jurisdictional water, would be found jurisdictional under the "significant nexus" test, even without the proposed rule's explanation of jurisdiction over adjacent waters. This inclusion of "adjacent waters" as per se jurisdictional increases certainty for the regulated community and alleviates administrative burden without increasing the CWA's jurisdictional reach.

The preamble explains that, to date, the agencies' professional judgment has been a factor in determining matters of adjacency. "The agencies recognize that this may result in some uncertainty as to whether a particular water connected through confined surface or shallow subsurface hydrology is an 'adjacent' water." The preamble then specifically requests comments on options for providing clarity and certainty on these matters.

[6] *Id*. at 22207.

One of the proposed alternatives put forth by the agencies is "asserting jurisdiction over adjacent waters only if they are located in the floodplain or riparian area of a jurisdictional water."[7] This is the proper way to address these waters. It creates certainty for the regulated community since waters located a substantial distance from a jurisdictional water would not be subject to jurisdiction due to an insubstantial connection to the jurisdictional water. Even in the current regulatory framework, the agencies consider distance from a jurisdictional water when determining whether a water that is located outside the floodplain or riparian area of the jurisdictional water, but that is connected to the jurisdictional water by a shallow subsurface or confined surface hydrologic connection, is adjacent to that jurisdictional water.[8]

This alternative also reserves to the agencies the ability to address waters that could actually have a consequential impact on the quality of a water of the United States, since the water located outside the floodplain and riparian area of the jurisdictional water, unless otherwise excluded, would be subject to the "significant nexus" test. Holding the definition of "adjacent water" to waters within a jurisdictional water's floodplain or riparian area allows the regulated community maximum certainty without encumbering the agencies' ability to protect water resources.

The agencies also request comment on whether a water with only a small confined surface or shallow subsurface hydrologic connection to a jurisdictional water should be exempt if it is outside a specified distance from the jurisdictional water. For the same reasons why the best approach to "adjacent waters" is to limit the category to waters within the floodplain or riparian area of a jurisdictional water as discussed above, placing a cap on the distance from a jurisdictional water within which other waters may be considered "adjacent" is a second-best alternative. Under this approach, more waters that do not have the actual ability to affect the water quality of a jurisdictional water will be considered jurisdictional than the "floodplain and riparian area-only" alternative. This will result in greater administrative burden for the regulated community and the agencies. However, a bright-line rule limiting the area surrounding a jurisdictional water in which a water may be found "adjacent" could still be referenced, increasing certainty compared to the regulatory framework as it exists today.

The preamble also asks for specific comment "on whether the rule text should provide greater specificity with regard to how the agencies will determine if a water is located in the floodplain of a jurisdictional water."[9] The agencies should uniformly use a 20 year flood interval zone when evaluating these waters. This will provide the regulated community with certainty without inhibiting the agencies' ability to protect waters of the United States, since waters not captured within this zone will still be

[7] *Id*. at 22208.
[8] *Id*.
[9] *Id*. at 22209.

jurisdictional under the "significant nexus" test if they have the potential to impact a jurisdictional water.

The agencies should also provide clarity to the regulated community by stating in the final rule, "mere proximity to a jurisdictional water is not cause for a determination that a water is jurisdictional as 'neighboring' or 'adjacent,' and a scientifically-verifiable, substantial surface connection must be present for any water outside a floodplain or riparian zone to be found jurisdictional."

"Significant Nexus"

Other waters not covered by the above-discussed jurisdictional categories may fall within the CWA's jurisdiction if a case-by-case determination is made finding the water has a "significant nexus" with a water identified in sections (a)(1) through (3).

The proposed rule at section (c)(7) says "The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs(a)(1) through(3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section." The proposed rule also states "Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a 'water of the United States' so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through(a)(3) of this section." The agencies intend that this language more precisely describes the scope of jurisdiction by explicitly leaving out waters that have a mere commercial connection to navigable waters and codifies the agencies' practice since the Supreme Court's decision in *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers,* 531 U.S. 159 (2001).

The term "similarly situated" must be examined, since it allows the agencies to consider multiple waters together in making "significant nexus" determinations. The prerequisite condition for "other waters" to be considered "similarly situated," before any assessment of geographic proximity to additional "other waters" or jurisdictional waters, is performance of similar functions. The preamble further explains that a "similarly situated" determination requires an evaluation of whether waters in a region "can reasonably be expected to function together in their effect on the chemical, physical, or biological integrity of downstream traditional navigable waters, interstate waters, or the territorial seas," and whether waters are "sufficiently close" to each other or a jurisdictional water.[10]

[10] *Id*. at 22213.

The description of "similarly situated" waters above includes so many variables that it would be difficult for the regulated community to accurately anticipate the outcome of such a determination, opening the door to increased uncertainty. To give the regulated community more clarity in anticipating the results of "similarly situated" evaluations, the agencies should provide a list of functions that a group of waters must perform together in order to be considered "similarly situated." These functions include affecting the reach and flow of a jurisdictional water and allowing or barring the movement of aquatic species, nutrients, pollutants or sediments to a jurisdictional water.

The agencies should also require "other waters" to have a confined surface connection to each other in order to be considered "similarly situated." This distinction would be helpful to the agencies and to the regulated community because "other waters" that are completely separate and distinct from a jurisdictional water will not be able to form a significant nexus with a jurisdictional water cumulatively unless they maintain such a nexus individually or with each other. The final rule should also strictly limit the distance allowed between separate waters that can be considered "similarly situated."

Otherwise, no "other waters" should be determined to be similarly situated, as the agencies put forth as an alternative in the preamble.[11] The limited environmental benefit of bringing waters that would not trigger jurisdiction by themselves into jurisdiction as "similarly situated" does not justify the uncertainty and administrative burden that would be created for the agencies and the regulated community. The "significant nexus" evaluation ensures that waters of genuine concern are jurisdictional.

The agencies request comment as to whether the agencies should evaluate all "other waters" in a single point of entry watershed as a single landscape unit for purposes of determining whether these "other waters" are jurisdictional.[12] This would create substantial negative economic impact by unduly imposing a regulatory burden on many waters that cannot affect the integrity of "waters of the United States." It would also increase the agencies' administrative load without a return of environmental benefit, since the agencies would have to perform more case-by-case jurisdictional determinations. Since this approach to evaluating "other waters" would create significant administrative burden for the agencies and the regulated community, and would not produce an environmental benefit, the agencies should not include this approach in the final rule.

[11] *Id*. at 22215.
[12] *Id*. at 22217.

Additional Clarity

The agencies can alleviate agriculture's concerns by noting that waters not listed under section (b) of the proposed rule are not jurisdictional by default and will not be considered within CWA jurisdiction unless they fall into one of the categories listed in sections (a)(1) to (a)(7).

The agencies should also make clear in the final rule that any wetland determination made by the Department of Agriculture's Natural Resource Conservation Service (NRCS) will be considered final and ruling. While NRCS' wetlands determinations are not jurisdictional determinations, the ability to rely on NRCS' decisions regarding the presence of a wetland would increase clarity for the regulated community, reduce the agencies' administrative burden and prevent inconsistent wetland determination.

II. Excluded Waters and Exempted Activities

Ditches

In section (b) of the proposed rule, the agencies list several categories of waters that are explicitly excluded from the definition of "waters of the United States," placing them outside the jurisdiction of the CWA. The proposed rule specifically excludes two types of ditches that otherwise would have been subject to a case-by-case determination, increasing regulatory certainty and reducing the CWA's jurisdictional reach. The exclusion of these ditches increases certainty for the regulated community without impairing the agencies' ability to protect the nation's water resources.

Sections (b)(3) and (b)(4) explain the circumstances in which a "ditch" is not a "water of the United States." These sections exclude ditches that do not contribute flow, directly or through other waters, to a "water of the United States," and any ditches that are wholly within an upland and drain only uplands and are without perennial flow. These explicitly-stated exclusions do not interfere with the CWA's objective of protecting water resources because the ditches concerned are unlikely to impact the integrity of waters of the United States. The exclusions at (b)(3) and (b)(4) will give the regulated community added certainty, allowing them to conduct their business without fear of regulatory action.

With regards to section (b)(3), the preamble states "Ditches that are excavated wholly in uplands means ditches that at no point along their length are excavated in a jurisdictional wetland (or other water)."[13] The agencies should restate this description of "upland ditches" as a definition of "uplands" by writing, "an upland is any land that is not a wetland, floodplain, riparian area or water." This definition should be included in the final rule in order to provide clarity.

[13] *Id*. at 22219.

The agencies should provide further clarity to the regulated community by defining "perennial flow" in section (c) of the final rule. The description of "perennial flow" in the preamble[14] could be altered slightly to function as the definition, codifying that "perennial flow" is "the presence of water in a tributary year round when rainfall is normal." Including this definition in the final rule would reduce the administrative burden for members of the regulated community as they attempt to maintain compliance with the CWA.

The agencies request comment on whether perennial flow is the proper distinction to use in separating excluded ditches from ditches that may be jurisdictional under section (b)(3).[15] Given the agencies' stated goal of providing clarity to the regulated community, perennial flow is the proper distinction. The presence or absence of perennial flow is easily-verifiable. Using perennial flow as the distinction allows the regulated community to be confident in their own assessment of ditches, which encourages the normal course of business and reduces unexpected enforcement actions. It also checks the agencies' administrative burden, since the presence or absence of perennial flow would also be easier for the agencies to verify than intermittent flow.

Exemptions for Agricultural Activities

The preamble indicates that the proposed rule does not affect existing regulatory exemptions for agricultural activities.[16] There is nothing in the proposed rule that calls this assertion into question. Some of these exemptions are referenced in the Interpretive Rule Regarding Applicability of the Exemption from Permitting under section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices" (Interpretive Rule), which was published on the same day as the proposed rule.[17] The Interpretive Rule states the list of exempted practices is illustrative rather than exhaustive and the CWA exempts those, like other activities conducted in the normal course of agriculture production, including conservation activities, are also exempted from CWA permitting requirements. In order to provide the regulated community with increased certainty, the agencies should consider codifying the Interpretive Rule and adding language explicitly stating that engaging in these exempted activities does not invoke any reporting requirement or other obligation to the agencies, including when these activities take place on land newly brought into farming. The agencies should also explicitly note that conservation activities do not need to follow specific National Resource Conservation Service guidelines for cost-share or technical assistance eligibility when engaging in these activities in order for their actions to remain exempt from permitting requirements.

[14] *Id*. at 22203.
[15] *Id*. at 22219.
[16] *Id*. at 22218.
[17] http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_section404f_interpretive_rule.pdf

The proposed rule also specifically continues the exclusion of prior converted cropland from the definition of "waters of the United States" at section (b)(2). The proposed rule and preamble's direct confirmation of these matters provides clarity for the regulated community. The agencies should provide further clarity for the regulated community on this point by stating in the final rule, "This rule does not require a permit for any plowing and planting activity that was legally conducted without a permit before this rule was issued." This language captures the intent of the agencies and provides the regulated community with the certainty it needs to continue farming its existing planted acreage without threat of new interference.

III. Miscellaneous Matters

Shallow Subsurface Hydrologic Connections

The existing regulatory framework defining "waters of the United States" and the proposed rule assume that a shallow subsurface hydrologic connection is sufficient for finding that waters with this connection to a jurisdictional water are "neighboring" and so jurisdictional themselves as "adjacent waters." Hydrologic science does not support such a uniform determination. Shallow subsurface hydrologic connections should be carefully studied to assess their impacts on jurisdictional waters, and the perennial nature of many of these connections should be taken into account. Further research must be conducted before the agencies determine which, if any, subsurface hydrologic connections can be considered sufficient grounds for finding such waters "adjacent" to jurisdictional waters. Until more scientific evidence is provided, groundwater connections alone should not be used to find non-navigable waters jurisdictional.

Pesticide Applications

The proposed rule does not address pesticide applications other than applications directly to a jurisdictional water. Similarly, it is clear that the proposed rule does not specifically address fertilizer applications. This is not the proper venue for discussing these applications. Future opportunities will arise to work with EPA on these topics, especially the problem of redundant CWA and Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) regulations governing pesticide applications.

Army Corps' Engagement

Given the importance of this rule to the regulated community, the Corps' lack of participation in discussion of this proposed rule is frustrating. The Corps is ultimately tasked with jurisdictional determinations under the final rule. The Corps' refusal to provide any insight on how it plans to interpret and implement the proposed rule undermines the regulated community's confidence that our good

faith involvement in the rulemaking process will result in adequate consideration of our help when jurisdictional determinations will actually be made. The Corps must join this discussion immediately.

IV. Conclusion

RMFU understands the agencies' stated goal of enhancing protections for our nation's water resources while providing increased certainty to the regulated community. The testimony above reflect RMFU's understanding of the proposed rule and explain ways the proposed rule could be improved to more effectively accomplish the agencies' stated goal in the final rule while maintaining conformity with RMFU's policy. RMFU stands ready to offer further assistance in this regard as the agencies may find helpful. Thank you for your consideration of this testimony.

Sincerely,

Kent Peppler
President