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August 13, 2018

Office of Water (4504-T)
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Docket No. EPA-HQ-OW-2017-0203. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) Supplemental Notice of Proposed Rulemaking: Definition of Waters of the United States-Recodification of Preexisting Rule

The NCC is the central organization of the United States cotton industry. Its members include producers, ginners, cottonseed processors and merchandizers, merchants, cooperatives, warehousers and textile manufacturers. A majority of the industry is concentrated in 17 cotton-producing states stretching from California to Virginia. U.S. cotton producers cultivate between 9 and 12 million acres of cotton with production averaging 12 to 18 million 480-lb bales annually. The downstream manufacturers of cotton apparel and home furnishings are located in virtually every state. Farms and businesses directly involved in the production, distribution and processing of cotton employ more than 125,000 workers and produce direct business revenue of more than $21 billion. Annual cotton production is valued at more than $5.5 billion at the farm gate, the point at which the producer markets the crop. Accounting for the ripple effect of cotton through the broader economy, direct and indirect employment surpasses 280,000 workers with economic activity of almost $100 billion. In addition to the cotton fiber, cottonseed products are used for livestock feed and cottonseed oil is used as an ingredient in food products as well as being a premium cooking oil.

The National Cotton Council supports rescinding the 2015 Waters of the U.S. Rule (2015 Rule, or WOTUS) because it is inconsistent with Supreme Court precedent, expands federal jurisdiction beyond measure into geographical features which are demonstrably not “waters” in any sense of the word, opens up farmers to huge liability for common agricultural practices, fails to preserve the States’ authority to regulate non-navigable waters, and fails to provide needed clarity and certainty for

both regulators and the regulated community. However, as the Environmental Protection Agency and the Army Corp of Engineers (EPA, ACOE) draft a replacement, there are certain errors from previous regulations that need to be avoided or addressed in the new rulemaking.

Congress granted EPA and the Corps very specific, limited powers to regulate "navigable waters," defined as "the waters of the United States." 33 U.S.C. § 1362(7). In line with these statutory objectives, the Supreme Court has recognized important limits on Clean Water Act (CWA) geographic jurisdiction. As noted in the supplemental notice, in the intervening months all of the courts that have reviewed the merits of the 2015 Rule have indicated that it exceeds the Agencies' CWA authority.[1]

In the years since the CWA's creation, the Supreme Court has solidified limits on the jurisdiction of the CWA most notably in *Riverside Bayview*[2], *SWANCC*[3], and *Rapanos*[4]. The 2015 Rule ignores these limits in favor of unprecedented expansion of authority and jurisdiction. In *SWANCC*, the Supreme Court emphasized that Congress's use of the term "navigable waters" reflects a fundamental limit on the Agencies' permitting authority.[5] The term "navigable" has at least some importance and must be given effect.[6] The 2015 Rule ignores and misinterprets the limits imposed by the Supreme Court, reads the term "navigable" out of the statute, and instead adopts an overly expansive view of federal CWA authority.

In *Riverside*, the Supreme Court decided that the Act's definition of "navigable waters extended beyond the term "navigable" in the traditional sense to include wetlands that abutted a navigable waterway.[7]

Later, the *SWANCC* Court held that "nonnavigable, isolated, intrastate" ponds which didn't abut a navigable waterway – were not jurisdictional under the CWA.[8] Furthermore the Court found that for the federal government to claim jurisdiction over these waters would impinge upon States' rights to control these resources, would raise "significant constitutional questions", and would need clear Congressional intent to back it up.[9]

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[1] *Georgia v. Pruitt*, No. 2:15-cv-00079, 2018 WL 2766877 (S.D. Ga. June 8, 2018) ("*Georgia*"); *North Dakota v. U.S. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015).
[2] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).
[3] *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 168 n.3 (2001), ("*SWANCC*").
[4] *Rapanos v. United States*, 547 U.S. 715 (2006).
[5] *SWANCC*, 531 U.S. at 171 (citing *Riverside Bayview*, 474 U.S. at 138).
[6] *SWANCC*, 531 U.S. at 172.
[7] *Riverside*, 474 U.S. at 133,135.
[8] *SWANCC*, 531 U.S. at 168.
[9] *Id.* at 174.

In *Rapanos* the Supreme Court rejected the federal government's assertion that they could use connections such as ditches to regulate wet areas not connected (in this case by 20 miles) to navigable waters.[10] Justice Kennedy's "significant nexus" test for isolated wetlands came into being with this case.[11]

Despite these limitations, the 2015 Rule exceeds the agencies statutory authority.

First, the overly broad definitions including those for the terms "tributary," "adjacent," and "significant nexus" did not add clarity to the 2015 rule, which was intended to provide clarity. Instead it made it practically impossible for a farmer to know how an agency regulator would determine possible water features on the farm. Regarding the definition of "tributary," the 2015 Rule would extend CWA jurisdiction to any channelized feature (*e.g.*, ditches, ephemeral drainages, and storm water conveyances), lake, or pond that contributes flow to navigable waters, without consideration of the duration or frequency of flow or proximity to navigable waters.[12] The *Rapanos* Justices criticized the agency for attempting to extend their jurisdiction to conveyances and waters such as, but not limited to, those listed above, and for using "ordinary high water marks" (OHWM).[13]

The definition of tributary depends on the presence of an "ordinary high water mark".[14] The OHWM can be determined by agency personnel using desktop analysis, remote sensing, historical records, etc.[15] In *Georgia,* the court ruled that the 2015 Rule definition of tributary was similar to the one that was previously invalidated in *Rapanos*.[16] Furthermore, this action doesn't allow the landowner to know whether features are jurisdictional or to have a chance to challenge a decision. If the agencies want to regulate to this degree, then they owe it to the landowner to make field-level determinations.

The adjacency/neighboring (adjacent waters) definitions referred to the 100-year floodplain. The agencies stated they would rely on updated and outdated FEMA Flood Zone maps, modeling, and other tools to determine nexus. Once again, under this approach, there is no way for a landowner to know if they are jurisdictional or not or be able to challenge a determination. The 2015 Rule's assertion of

[10] *Rapanos*, 547 U.S. at 720 (plurality).
[11] *Id.* at 767 (Kennedy, J., concurring).
[12] 80 Fed. Reg. 37,054, 37,105 (June 29, 2015).
[13] *Rapanos*, 547 U.S. at 734 (plurality), 781 (Kennedy, J., concurring).
[14] 33 C.F.R. §§ 328.3(c)(3), 328.(c)(6);
[15] 80 Fed. Reg. 37,076-77.
[16] *Georgia*, 2018 WL 2766877, at *4.

jurisdiction over "adjacent waters," includes any wetland, water, or feature located within the floodplain of and within 1,500 feet of a jurisdictional water.[17] This definition is contrary to decisions found in *Riverside*, *SWANCC*, and *Rapanos.*

Second, the 2015 rule trespassed upon the state's rights to regulate water and land resources within their individual state. Congress spoke of state authority in section 101(b) of the Clean Water Act (CWA) when they stated the need to "recognize, preserve, and protect the primary responsibilities and rights of States." This action is a basis of a challenge to the rule by 31 states.[18] Under the 2015 Rule, the federal government can assert jurisdiction over intrastate land and water features that are miles away from any navigable-in-fact waters and that carry flow only after precipitation events.

Third, the slow creep of reducing and removing (whole or in case-by-case determinations) the Section 404(f)(1) exemptions for normal farming practices must stop, and the exemptions must regain their historical meaning. Intertwined with this, the EPA and the Corps must recognize farming practices and conservation efforts deemed appropriate by other federal agencies. It is inappropriate to enforce against a landowner for recognized farming and conservation practices such as planting a cover crop, rotating crops, fallowing land, or alternating between land management practices for crops and livestock.

Fourth, WOTUS was titled as a definition, however the rule imposed limitations and required permits. The agencies need to actually, and succinctly, define waters of the U.S. and/or navigable waters once and for all, in a clear and concise manner that is easily understandable to landowners and other stakeholders. The final definition should be clear and concise and not based on subjective characteristics or variable precedents set by case-by-case determinations of the past. In order to provide clarity and certainty to stakeholders, the definition of waters of the U.S. must focus on traditional navigable waters first, with emphasis on nearby water features that directly affect traditional navigable waters. Federal jurisdiction should not cover non-navigable waters with no significant connection to navigable waters. Jurisdiction should not extend to isolated waters and wetlands and intrastate waters that are the rightful jurisdiction of the state. Federal jurisdiction should not extend to normally dry features. In addition, manmade ditches (roadside, agricultural, etc.) are not tributaries. WOTUS' overly broad definition of

[17] 80 Fed. Reg. at 37,104-05

[18] Opening Brief of State Petitioners, *In re: EPA & Dep't of Def.*, No. 15-3799, at 57-58 (6th Cir. filed Nov. 1, 2016)

tributary made any ditch a jurisdictional water.[19] This encapsulation of ditches into federal jurisdiction cannot remain in the final rule.

In conclusion, the definitions within any new rule must be specific and, as much as possible, not open to variable interpretation. They must also be reasonably narrow and not so broad as to encompass every low area that might transport precipitation.

Codified exclusions and exemptions such as those for agriculture must be retained in their historical meaning. Additional exemptions may be necessary to clarify and protect the right to farm. The agencies must also work with other federal agencies to ensure that they do not work at cross purposes and that the EPA and the Corps do not enforce against stakeholders that complied with instructions of another federal agency.

State authority must be maintained. Their jurisdiction over certain waters and water quality programs should not be usurped by federal overreach.

For all the above reasons, the 2015 Rule must be rescinded and eventually replaced with a sensible, well-defined rule that provides stakeholders with regulatory certainty and fairness.

The National Cotton Council appreciates the opportunity to comment now and in the future on this critical rulemaking that has far-reaching and significant implications across all of agriculture. Please contact us with any questions or for further clarification and input.

Regards,

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[19] 80 Fed. Reg. 37,105