National Cotton Council of America

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VIA REGULATIONS.GOV

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Re: Docket ID No. EPA-HQ-OW-2021-0328. Recommendations on the Definition of "Waters of the United States"

The National Cotton Council (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 10 and 14 million acres of cotton with production averaging 12 to 20 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 115,000 workers and produce direct business revenue of more than $22 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 265,000 workers with economic activity of almost $75 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 U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps'") have requested pre-proposal recommendations on defining "waters of the United States" ("WOTUS") with the idea of repealing and replacing the Navigable Waters Protection Rule (NWPR). Based on the last-minute court decision (the Arizona decision; court's decision) from the United States District Court for the District of Arizona[1], and with these comments due to the agencies by week's end, NCC does not have a clear understanding of the results of the decree for the NWPR to

[1] Pasqua Yaqui Tribe, et al.,Plaintiffs v. United States Environmental Protection Agency, et al.,Defendants. Filed August 30, 2021.

be "vacated and remanded for reconsideration." Furthermore, EPA has stated that both agencies are reviewing the decision for its ramifications.

Therefore, based on our own interpretation of potential outcomes and absent a Federal interpretation from the agencies, it is possible that the court's decision vacates the 2020 NWPR in all or some part of the country and replaces it with the pre-2015 regulations governing clean water issues. As such, our comments will be based on that interpretation and may need adjustment based on further analysis and response by the agencies.

If nothing else, the sudden decision by the court demonstrates the need for the agencies to extend the comment period for all stakeholders, as NCC and many others have commented, both in writing and repeatedly on the agencies' stakeholder calls.

COMMENTS:

Pre-2015 rule:

Aside from the court decision, the agencies suggest that once they repeal or rescind the 2020 NWPR they will temporarily replace it with the water regulations that preceded the 2015 rule, with the addition of some text based on relevant Supreme Court (SC) decisions.

The rules that preceded, and were replaced by, the 2015 rule were confusing and were used and misused to expand Federal jurisdiction beyond statutory authority, in some cases forcing landowner decisions regarding farming practices on private property. Some of those farming practices are now identified as beneficial to environmental sustainability, soil health, and climate change but could be contrary to the water regulations.

With the agencies' intent to incorporate SC decisions into those rules, the result will only be more onerous and confusing. The agencies have shown no data to assert that the pre-2015 rule was much more environmentally beneficial than the NWPR. The agencies do not consider the confusion and problems that will occur in such a switch of regulatory authority, likely causing more environmental harm, only to be followed soon after by changing to **another** rule that the agencies propose to write in the near future. This would likely lead to greater uncertainty, increased compliance enforcements against stakeholders brought about by either the stakeholders' or the regulators' lack of understanding of what is required, potentially more environmental degradation, and more work for the agencies' staff.

Taking the regulated community back to outdated regulations does nothing for the environment or the stakeholders.

> **Recommendation: If the agencies fully intend to write a new rule, then appeal the Arizona decision and keep the NWPR in place until the new rule is final instead of switching to an ancient, confusing rule and then back again to something new.**

NWPR:

The cotton industry has been an interested stakeholder throughout the ongoing, decades-long, process of ensuring a clean water rule that is also clear, concise and fair to the regulated community. While no rule can be perfect, after years of confusion, government overreach and varied interpretations of the same rules, the Navigable Waters Protection Rule (NWPR) struck a balance with clear rules and a division of authority that worked for agriculture. Although the NWPR has not been in effect very long, it has brought clarity and the ability to farm without constant worry about confusing rules.

NWPR also recognized the rights of states to provide the necessary protection of their own waters giving the regulated community easier access to more locally-based regulators as well as providing states the opportunity to provide more refined protection that a federal rule cannot appropriately do for 50 states of diverse geographic, climatic and geologic conditions. In the past, the Federal Clean Water Act (CWA) rule had inappropriately expanded its reach beyond the authority granted by Congress and delved into areas that were supposed to be in the control of state and local governments.

In their explanation for repealing the NWPR, the agencies cite 333 instances where the NWPR is allegedly causing "significant environmental degradation". No data is provided to justify the claims on these instances, so it is impossible to tell what "significant" harm is occurring, considering the database is listed as "unavailable." What is the basis for comparison? If the 333 instances are being compared to being regulated under the 2015 rule, that rule was legally suspect and overreached its authority. Claims against the NWPR should be based on actual harm, but again, the data needed to make a determination is not available.

Furthermore, the rule has not been in effect long enough to determine its true effect. In many instances, the claims of harm are unsubstantiated-without any obvious examples of harm. The NWPR is protective of the nation's waters and clarified key areas for agriculture and is defensible on the merits, notwithstanding the Arizona decision.

Recommendation: The agencies should appeal the court's decision to vacate and abandon the effort to repeal and replace the NWPR and keep that rule in effect. If the vacatur stands, then implement the NWPR anywhere not subject to the Arizona decision.

Exclusions

Traditional Navigable Waters (TNWs) – Over the decades since the enactment of the Clean Water Act (CWA), the EPA and the COE (the agencies) have expanded what they consider to be “navigable waters”. The term has become meaningless with each regulatory overreach to assert jurisdiction over every ditch and dry, hillside runnel. NCC believes that the agencies should remain true to the original, Congressional intent of TNWs being waters used in interstate commerce. Only then can the agencies regain the respect of the regulated community that looks askance every time a regulator calls a dry ditch a ‘navigable water of the U.S.’.

Prior Converted Croplands (PCCs) – Since 1993 when it was codified, the agencies’ regulations have excluded PCCs from the definition of waters of the U.S., and thus from CWA regulation as well.

This is a long-standing regulatory exclusion that was maintained by the prior Administration in the 2015 WOTUS Rule. The preamble to the 1993 regulations confirms that farmers can use PCCs as they so choose, for any purposes, including non-agricultural ones, so long as it is farmed once in a five-year period and wetlands conditions have not returned.

The PCCs exclusion encompasses areas that were drained or manipulated for the purpose, or having the effect, of making production of agricultural products possible; and agricultural drainage features, including ditches and conveyances, are part of the PCCs. Within this definition, agricultural products must include annual crops, tree fruit and nut crops, forages, hay, as well as fallow and grazing uses.

CONCLUSION

The NCC recommends that the agencies appeal the decision of the District Court of Arizona and support the continued use of the NWPR. If the agencies insist on moving forward with a new rule, there is no reason to repeal the NWPR and revert to the prior rule for the interim. The agencies should keep the NWPR while they work on a new rule that is consistent with the intent of Congress and statutory authority while providing clear and concise definitions and rules that can be easily followed by stakeholders.

One additional recommendation that is not tied to the proposed rewrite of the regulations is that the EPA and the COE should be in close contact with the USDA and its sub-agencies to ensure that water regulations are implemented consistently and cooperatively with USDA agricultural and conservation programs and not used, as they have been in the past, to block or overburden the use of those programs' efforts to protect and preserve the nation's soil and water resources and any accrued environmental benefits.

Regards,

Gary Adams
President & CEO
National Cotton Council