National Cotton Council of America

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Via: www.regulations.gov

February 7, 2022

Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

RE: Docket ID Number EPA-HQ-OW-2021-0602. Proposed Rulemaking on Revised 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. NCC and the cotton industry signatories signed below appreciate the opportunity to comment.

HISTORY

Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500, 86 Stat. 816, as amended, 33 U.S.C. 1251 *et seq.* (Clean Water Act (CWA) or Act) "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Central to the framework and protections provided by the Clean Water Act is the term "navigable waters,"[(1)] defined in the Act as "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

In response to President Joseph R. Biden Jr.'s Executive Order 13990, 86 FR 7037 (January 25, 2021), which directed federal agencies to review certain regulations, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) undertook a review of the Navigable Waters Protection Rule (NWPR). The agencies found that the NWPR did not appropriately consider the water quality impacts of its approach to defining "waters of

the United States." Therefore, the agencies are proposing to exercise their discretion under the statute to return generally to the familiar pre-2015 definition that has bounded the Act's protections for decades.

In this proposed rule the agencies are exercising their discretionary authority to interpret "waters of the United States" to mean the waters defined by the longstanding 1986 regulations, with amendments to certain parts of those rules to reflect the agencies' interpretation of the statutory limits on the scope of the "waters of the United States" and informed by Supreme Court case law (Riverside Bayview, SWANCC, and Rapanos). Thus, in the proposed rule, the agencies interpret the term "waters of the United States" to include:

- Traditional navigable waters;
- Interstate waters;
- The territorial seas and their adjacent wetlands;
- Most impoundments of "waters of the United States";
- Tributaries to traditional navigable waters, interstate waters, the territorial seas, and impoundments that meet either the relatively permanent standard or the significant nexus standard;
- Wetlands adjacent to impoundments and tributaries, that meet either the relatively permanent standard or the significant nexus standard;
- And "other waters" that meet either the relatively permanent standard or the significant nexus standard.

The "relatively permanent standard" includes waters that are relatively permanent, standing or continuously flowing and waters with a continuous surface connection to such waters. The "significant nexus standard" means waters that either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas.

COMMENTS

Pre-2015 rule/1986 rule

The agencies are temporarily replacing the 2020 Navigable Waters Protection Rule with the water regulations that preceded the 2015 rule, with the addition of some text based on relevant Supreme Court 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. Many of these farming practices are beneficial to environmental sustainability, soil health, and climate change, but could be once again interpreted to be contrary to the water regulations.

With the agencies' intent to incorporate Supreme Court decisions into these 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, possibly causing 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, potential 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

The Agencies should reinstate the NWPR until a new rule is proposed that is not a rehash of past, failed regulations. Otherwise the agencies should pause this rule until the Supreme Court rules in the Sackett case (Sackett, Michael, ET UX. V. EPA, ET AL).

Significant nexus and aggregation expand the 1986 rule into the 2015 rule

The proposal reincarnates the expansive "significant nexus" standard from the 2015 rule, thus opening the door to numerous assertions of jurisdiction that are as broad as the approaches the Supreme Court previously rejected. Under the proposal, significant nexus determinations can involve consideration of the cumulative effects of streams, wetlands, and open waters across entire watersheds or "in the region" (86 Fed. Reg. at 69,439-40). If the agencies determine that the waters, in the aggregate, have a "more than speculative or insubstantial" effect on a downstream traditional navigable water ("TNW"), interstate water, or territorial sea, they can claim jurisdiction over all of them.

It is hard to imagine an instance where a regulator could possibly find that waters, when aggregated across large regions, will not have some type of effect on either chemical, physical, *or* biological integrity of some downstream water (86 Fed. Reg. at 69,432). The proposal's approach to jurisdiction appears to be nearly limitless. The proposed rule would extend the definition of "waters of the United States" to features that are far from TNWs and carry minor water volumes, including ephemeral drainages, storm sewers and culverts, directional sheet flow during storm events, drain tiles, man-made drainage ditches, and arroyos, all of which a majority of the Court in *Rapanos v. United States, 547 U.S. (2006)* found are beyond the scope of federal jurisdiction. *Id.* at 734 (plurality); *id.* at 781 (Kennedy, J., concurring).

Recommendation

If the agency is going to 'temporarily' utilize the 1986 regulations, then use them without adding agency interpretations of later Supreme Court decisions. The original 1986 rule was confusing and expansive enough without adding to it.

Agricultural stormwater and irrigation return flow exclusions are threatened

Agricultural stormwater discharges and return flows from irrigated agriculture are excluded from the definition of "point source" under the CWA and are exempted from NPDES permitting even if the stormwater or irrigation water contains pollutants and is channeled through a conveyance that would constitute point source under NPDES permit requirements. (33 U.S.C. §§ 1362(14), 1342(*l*)(1)). The proposal's narrowing of excluded ditches would appear to bring into jurisdiction many of the conveyances that are ever-present and necessary on farms. The narrowing or loss of those exclusions would make it almost impossible to apply pesticides or fertilizers, even in dry ditches that would later carry water.

Recommendation

The intent of Congress is clear in their exclusions of these waters and conveyances from permitting and the definition of 'point source'. The agencies should follow the will of Congress and stop trying to expand their jurisdiction beyond what was granted. Agriculture cannot comply if every wet spot, or dry spot that can possibly carry or hold water, is regulated.

Proposal reduces the effectiveness and consistency of the Prior Converted Cropland Exclusion

The Prior Converted Cropland (PCC) exclusion is an important and necessary exclusion for agriculture. While NCC supported the agencies' statements that PCC was being carried forward in the new rule, we were disappointed to see it reduced to the complicated and abused version from 2005 and beyond. The NWPR successfully and succinctly defined the PCC to aid in interpretation of the exclusion but this version was deleted from the current proposal. The lack of a clear definition of PCC has presented problems in the past and will now do so again.

Congress first passed laws in 1985 to protect wetlands on farmland. In 1993 the agencies codified how the PCC exclusion would work "due to the degraded and altered nature of" the land (58 Fed. Reg. 45,008, 45032). In the 2005-2009 timeframe, the Corps issued informal guidance (the infamous "change in use" interpretation), without public notice and comment, that changed how PCC would be handled from then on, with a narrower view of the PCC and more enforcement power to the Corps. That guidance and interpretation was set aside by a court decision[1], however the damage was already done, and the agencies continued to interpret the PCC using the guidance document's more narrow focus.

Part of the problem with the narrow interpretation was that the authors and enforcement personnel were not familiar with farming. Field personnel often brought their own biases and views of how farming should work with them and sometimes misinterpreted a normal farming practice as a practice that would eliminate the PCC exclusion. This continuous and long-term mismanagement of the PCC exclusion eventually led to the clarification codified within the NWPR.

[1] *New Hope Power Co. v. U.S. Army Corps of Eng'rs*, 746 F. Supp. 2d 1272, 1276 (S.D. Fla. 2010)

If such confusion should continue to occur in this proposal or its replacement rule, the damage will be more severe because agriculture has become much more complicated with the advent of practices designed to protect and enhance soil health, sustainability, and climate change, along with all the various accompanying rules from local, state, and Federal agencies. Failure to correct the proposed form of the PCC exclusion will not only affect the above but also the value of privately-owned land as well as extending Federal overreach beyond the limits set by the courts.

The NWPR firmly rejected the "change in use" doctrine and returned to a definition that was in line with the 1993 regulation. (85 Fed. Reg. at 22,339) (58 Fed. Reg. at 45,032 & 45,034). It also covered and specified 'abandonment and recapture' policies, again consistent with the 1993 rule (58 Fed. Reg. at 45,034) as well as normal farming and conservation practices. The NWPR also affirmed various types of documentation such as aerial photographs, topographical maps, cultivation maps, crop expense or receipt records, field- or tract-specific production records, State/Federal documents, and other records generated and maintained in the normal course of doing business that could be used to establish "agricultural purposes." (85 Fed. Reg. at 22,321). For these and other reasons, the NWPR's clarification of the PCC exclusion is vastly superior to the current proposal.

Recommendation

The agencies should return the PCC exclusion to the language set forth in the NWPR. The agencies should retain consistency with the 1993 PCC rule and withdraw any inconsistent guidance documents and interpretations. And the agencies should also have staff familiarize themselves with modern farming and conservation practices and consult regularly with USDA-NRCS staff so that approved conservation and agricultural practices are not misinterpreted as violations of the CWA.

Agencies expansion of Federal jurisdiction threatens Section 404(f) Exemption for Normal Farming and Ranching Activities

In response to an expansion of Federal jurisdiction by the agencies, Congress amended the Section 404 "dredge and fill" permit to exempt farming, ranching and forestry. Under this exemption, "normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices" are generally exempt from Section 404 permitting requirements (emphasis added) (33 U.S.C. § 1344(f)(1)(A)). Congress also exempted construction and maintenance of farm/stock ponds and irrigation/drainage ditches in waters of the U.S.

The agencies however, interpret the exemption to only apply to continuous farming ongoing at the same location since 1977 when the rule was adopted. The agencies continuously claim that these exemptions are untouched (86 Fed. Reg. at 69,377) but they never mention these exemptions only apply to the specific operations established by 1977 and still in existence, thus as they expand the scope of WOTUS jurisdiction, the scope of 404(f) exemption is reduced.

Recommendation

The agencies need to be transparent with the increasing restrictions to Section 404(f).

Proposed language expanding jurisdiction and regarding impoundments on "dry land" negates the farm pond exemption

Farm ponds and other agricultural impoundments are normally built where there is some water source, such as an ephemeral drainage, often situated to capture precipitation runoff in the drainage as well as sheet flow, and/or in low areas that can accumulate water. The proposal expands jurisdiction to include ephemerals, isolated wetlands and "other waters". In addition, the proposal only recognizes the exclusion for artificial ponds created in "dry land". (86 Fed. Reg. at 69,433). The term "dry land" would exclude almost any natural area for constructing an impoundment and render the exemption meaningless.

Recommendation

The agencies should remove the "dry land" language and should not regulate ephemeral drainages.

Agencies have failed in their required public notice and comment process

Over the course of this process, the agencies have repeatedly stated that replacing the NWPR with the old rules from 1986 (or pre-2015 per the EPA) is the easy thing to do because the regulated community is "familiar" with the older rules.

The agencies ignore that fact that the 1986 rules were, over time, warped, reshaped and abused by guidance documents and interpretations that consistently expanded Federal jurisdiction at the cost of State authority and the rights of private landowners. These actions shaped negative stakeholder perceptions of the EPA and the Corps that remain to this day and are once again ingrained into their minds with proposed actions such as these. Many stakeholders remember this previous regulatory framework, and the accompanying expensive consultants, litigation, enforcement decisions, and conflicting agency instructions that went along with it.

Stakeholders are also concerned when the agencies vacated the NWPR on a nation-wide basis even though the rule brought consistency and clarity on paper and was working in the field. What's now known as "The 333 List" contained over 300 instances of environmental harm allegedly created by the NWPR. There was not enough time or information for stakeholders to verify each incident on the list but some of these would be considered differences in opinion regarding a jurisdictional decision, and in one case that was presented in a public hearing, the supposedly harmful project was a Federally-guided, conservation effort resulting in wildlife and pollinator habitat.

In return, the agencies provide for public comment with virtual meetings with practically no time for individual stakeholder comments, followed by an inadequate 60-day comment period, and some regional roundtables that have yet to materialize. Even the 2015 rule offered over 200 days for comments. Sixty days is not long enough for the amount of material in this docket, and it limits the time that busy stakeholders have to accurately scrutinize the proposal.

Recommendation

The agency should pause the rule in deference to the very recent Supreme Court decision in the Sackett case to allow the court to proceed in making a decision that may very well affect the rule. At such time as the decision is handed down, if the proposal is to continue, it should have at least a 180-day extension to the comment period.

Claims of zero economic impact are indefensible

The agencies have stated verbally, printed in their economic analysis, and in the preamble to the proposal, that the cost-benefit shows no additional costs, compared to a baseline of the 1986 rule. The proposal then adds in two standards: significant nexus and relatively permanent. The proposal also adds a new "other waters" category. The "other waters" category in the proposal changes the 1986 rule by applying the relatively permanent and significant nexus standards to a massive number of currently non-jurisdictional water features that are outside of any stream network. This change will greatly expand federal regulatory authority under the CWA.

Given that the agencies can use the significant nexus standard on the entire "reach" (undefined term) of a stream and aggregate all streams within a watershed, there is no logical way the costs can be zero (86 Fed. Reg. at 69,439).

Recommendation

The economic analysis must be redone to provide stakeholders and decision makers with reasonable and valid numbers.

CONCLUSION:

The agencies have sacrificed good policy for politics in this rush to be rid of the NWPR and have compounded the problem by proposing to replace it with a regulation from the past that was not well received by the stakeholder community. Adding in their own interpretations of later Supreme Court decisions while expanding Federal jurisdiction is a recipe for future litigation.

The result is, and will be, a continuation of flip-flopping rules with no clarity or consistency for the regulated community. The agencies should have left well enough alone but instead have only continued the twisted and tortured path of Clean Water Act regulations that have plagued the agricultural and rural communities for decades with no end in sight.

Signed:

Agricultural Council of Arkansas

Alabama Cotton Commission

American Cotton Producers

Arizona Cotton Growers

California Cotton Ginners and Growers Association

Delta Council

Georgia Cotton Commission

National Cotton Council

North Carolina Cotton Producers

Plains Cotton Growers, Inc.

Rolling Plains Cotton Growers

Southern Cotton Growers, Inc.

South Texas Cotton & Grain Association

Western Agricultural Processors Association