



September 27, 2017

U.S. Environmental Protection Agency  
EPA Docket Center  
WJC West Building, Room 3334  
1301 Constitution Avenue, NW  
Washington, DC 20004

Attention: Docket ID No. EPA-HQ-OW-2017-0203

**Re: Comments on Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899 (July 27, 2017)**

The National Corn Growers Association appreciates the opportunity to comment on the U.S. Environmental Protection Agency’s (EPA) and U.S. Army Corps of Engineers’ (Corps) proposal to rescind the 2015 definition of “waters of the United States” (WOTUS) and to re-codify the pre-2015 definition of WOTUS that currently governs administration of the Clean Water Act (CWA). For the reasons given below we support the rescission of the 2015 WOTUS and the use of the pre-2015 definition of WOTUS during the development of a new WOTUS rule. It is well within this Administration’s lawful authority to adopt a new, more sound, effective and practical policy as to when the nexus between upstream tributaries and their adjacent wetlands and downstream navigable waters is significant enough to make these upstream features jurisdictional waters. We believe new policy decisions about this nexus are needed to craft a WOTUS rule that gives us clarity and certainty as to what is WOTUS without the perverse effect of impeding our ongoing efforts to protect water quality.

The National Corn Growers Association represents more than 40,000 dues-paying corn farmers and the interests of more than 300,000 corn farmers across the United States. In 2017, U.S. farmers planted approximately 90.8 million acres of corn. The corn we produce is the primary ingredient used to feed this country’s beef, swine, poultry, dairy animals, an ingredient in a host of other food products, and is used to produce ethanol. Our members need and must manage water on their operations, including rainfall and surface and subsurface water through irrigation. In the case of the rain-fed corn, these farmers must manage water that is present generally only because of precipitation events, and they manage this agricultural stormwater using surface and subsurface drainage features that will often be many miles from the nearest “navigable” water. Other water features on their operations may be wet year-round but have not historically been considered jurisdictional for purposes of the CWA.

### Corn Farmers and Water Quality

Corn farmers take very seriously the important role they play in helping the country meet its water quality goals, as laid out in state and federal statutes, including the CWA. Our farmers depend on clean water for their livelihood, and they are committed to conservation practices that protect our nation's streams and rivers. This pride and care is reflected in several measures of corn farmers' environmental performance directly related to the Clean Water Act's (CWA) goals of restoring and protecting the nation's waters. For example, between 1980 and 2011, soil erosion was reduced by 67 percent per bushel of corn produced and by 43 percent per acre of corn planted.<sup>1</sup> Excess sediment lost to waterways from farmland is one of the nation's top water quality concerns, and corn farmers have reduced these losses by 147 tons per year in 2011 relative to 1980. Phosphorous loss from farm land often is directly related to sediment losses, and corn farmers' erosion reduction accomplishments translate directly into less phosphorus in runoff reaching surface waters.

Corn yields per acre over this period have gone up by more than 60 percent, about 60 bushels of corn per acre increase. Yet at the same time, the rates at which the primary corn nutrients (nitrogen, phosphorous, and potassium) have been applied per acre have declined. We produced 6.64 billion bushels of corn in 1980 and used 3.2 pounds of primary nutrients per bushel. By 2014 we produced 14.2 billion bushels of corn, but used only 1.38 pounds of nutrients per bushel. This equates to an 87 percent increase in nutrient use efficiency and translates directly into far greater quantity of nutrients being removed from the land in the form of corn grain than was the case in 1980. The net effect of this is fewer nutrients in the soil profile that might move into surface water.<sup>2</sup>

While we are proud of the progress made, we remain committed to increasing productivity while improving nutrient management practices to protect and restore water quality. These two challenges are among the most important we face as a farming sector. As we all now know, agricultural production must be nearly doubled over the next few decades to satisfy the needs created by 2 billion more people and the coming growth in incomes for billions of other people. We intend to meet these critical needs for corn while also improving the efficiency and effectiveness of nutrient management to help address needed water quality.

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<sup>1</sup> Field to Market (2012 V2). Environmental and Socioeconomic Indicators for Measuring Outcomes of On-Farm Agricultural Production in the United States: Second Report, (Version 2), December 2012. Available at: [www.fieldtomarket.org](http://www.fieldtomarket.org). See pages 41-50 for the results for corn.

<sup>2</sup> See The Fertilizer Institute, U.S. Fertilizer Consumption Table and U.S. Consumption of Primary Plant Nutrients. Derived from USDA NASS data (2011). Available at: <http://www.tfi.org/statistics/fertilizer-use>.

### General Comments on this Proposal

Our farmer members have the reasonable and lawful expectation that the drainage and erosional features on or next to their operations that carry water due to weather events, ephemeral or intermittently, are not subject to federal jurisdiction. The same is true for water features on their farms that hold water in them more permanently but have traditionally not been subject to the CWA.

In developing the 2015 rule, EPA and the Corps (Agencies) relied heavily on Justice Kennedy's concurring opinion in the U.S. Supreme Court's *Rapanos* decision.<sup>3</sup> It is not at all established that Justice Kennedy's concurring opinions and the tests discussed within it regarding what qualifies as a WOTUS should be relied upon to the extent done so in the 2015 rule. There is other case law, but it is also relevant to consider the overall structure, purpose, and approach in the CWA, particularly the considerable emphasis given to and role provided for states to play in the implementation of the CWA under the Acts' foundational principle of cooperative federalism. That said, we believe that in developing the 2015 rule, the Obama Administration selectively read and misinterpreted Justice Kennedy's understanding of the concept of "significant nexus" and how it should be utilized on a case-by-case basis or in a specific rulemaking as to determinations of jurisdiction under the CWA. On that basis alone, the 2015 rule is unlawful. Furthermore, the 2015 rule is also bad policy; this alone is sufficient reason to rescind the 2015 rule and use the rules in place as of the late 1980s while the Administration develops a new rule.

In our view, the 2015 WOTUS rule adopted a pre-determined interpretation as to what constituted a "significant nexus" between upland features and downstream navigable waters that was so broad as to encompass essentially all waters, everywhere, should the Agencies, or the courts, choose to do so. The goal was to capture as many features as possible across the entire U.S. landscape, through a selective reading of Justice Kennedy's opinion. The 2015 rule is inconsistent with a sound reading of the CWA's purpose, programs, and requirements. It also has the perverse effect of making it harder for farmers to practice good soil and water conservation, nutrient management, and water quality protection practices in general.

### Specific Comments on this Proposal

**Upland, managed drainage features and erosional features on farms are subject to federal jurisdiction under the 2015 rule, or are potentially subject to that rule, depending on its application by the federal agencies or its interpretations in the court system.** The 2015 WOTUS rule includes in the definition of what are WOTUS a "tributary or tributaries." The rule defines tributary as "waters" that "contributes flow either directly or through another water" to waters used, or are susceptible to use, in foreign or interstate commerce, to interstate waters, and to territorial seas, where such tributary "is characterized by the presence of the physical indicators of a bed and banks" and "so long as...an ordinary high water mark can be identified

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<sup>3</sup> *Rapanos*, 547 U.S. at 777 (Kennedy, J., concurring in judgment)

upstream of the break.” An ordinary high water mark is defined as “that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, 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.” See 33 C.F.R. §§ 328.3(a), 328.3(c).

As a practical matter, this definition of the “ordinary high water mark” (OHWM) does not and cannot be used to make reasonable, meaningful distinctions between erosional features in upland areas and true tributaries that carry sufficient water in them, often enough, to merit treatment as WOTUS. This definition can be reasonably interpreted to include commonly found, managed drainage and erosional features on upland areas of farms, making these features subject to federal jurisdiction under the 2015 rule.

The Corps’ guidance on this topic states that the physical characteristics indicative of an OHWM include the presence of things such as a “[N]atural line impressed on the bank...Shelving...Changes in the character of soil...Destruction of terrestrial vegetation...Presence of litter and debris...Vegetation matted down, bent, or absent...Multiple observed flow events...Water staining” and other physical indicators. The guidance goes on to state that the list of these characteristics is not exhaustive, that there are no “required” physical characteristics that must be present to make this kind of determination, and that where these characteristics are “inconclusive, misleading, unreliable, or otherwise not evident” field staff may “determine the OHWM by using other appropriate means that consider the characteristics of the surrounding areas...”. See USACE RGL No. 05-05, December 7, 2005, Section 3(c).



Such guidance is open to wide interpretation and considerable subjectivity in its application. The stream depicted to the left is from Corps' guidance on the application of the OHWM in western and coastal regions of the US (page 19).<sup>4</sup> Its obvious bed and banks would make identifying it as having a OHWM relatively straightforward. If the application of the OHWM standards and methodology would identify only such tributaries with clear, stream-like characteristics, it might be possible then to accept the OHWM methodology to identify WOTUS under the CWA.



Unfortunately, the OHWM methodology as applied by the Corps can also identify common, upland drainage features as WOTUS. For example, see on the left the picture from this same guidance (page 23). The OHWM features that would, in the opinion of the Corps, make this a tributary and, therefore, a WOTUS under the 2015 rulemaking. This could easily result in WOTUS determinations for upland drainage features in farm fields that have been actively cultivated for generations. Such features in farm fields can occur after a significant rainfall event, only to disappear through subsequent cultivation and related activities in the fields, as they have always been conducted. The 2015 rulemaking could easily be interpreted by future Administrations and/or the federal court system as encompassing these ephemeral drainage features in farm fields, using this definition of an OHWM.

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<sup>4</sup> A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valleys, and Coast Region of the United States. US Army Corps of Engineers, Cold Regions Research and Engineering Laboratory. August 2014





For example, the photograph to the left is of a farm field in Tennessee with a rainfall-related erosional feature. When this property owner sought to convert this property to another use, the Corps found this feature to have a bed, bank and a OHWM and required the landowner to mitigate, at the cost of many thousands of dollars, the loss of the “stream functions” when this property would be developed.

We estimate that over the last 10 years there are approximately 160 million or more cropland acres that are in a crop rotation that regularly includes corn.<sup>5</sup> The drainage and erosional features that concern us in this regard can be found essentially on each of these acres where corn is commonly raised. The magnitude of the potential for the identification of drainage features with OHWM-like features, and therefore possibly as WOTUS, is enormous.

**These drainage features are, in general, sufficiently remote from navigable waters to not be considered subject to federal jurisdiction.** The Agencies used their interpretation of one of the important terms from the case law on this topic, “significant nexus,” as the foundation of the 2015 rule. This term appears most recently in the Supreme Court’s *Rapanos* decision. In his concurring opinion, Justice Kennedy used it to identify those wetlands not immediately adjacent to a navigable water, but instead removed from such navigable waters that yet may have sufficient connection to the navigable water to warrant the wetlands’ treatment as a WOTUS. The concept of “significant nexus,” as used by Kennedy and others, effectively encompasses both wetlands and surface water systems, as the predominant means for the chemical, physical and biological effects (significant or not) of wetlands in higher elevations that might be observable in lower elevation navigable waters, as a matter of geology and hydrology, will be through surface features in which water moves by gravity. How we understand what constitutes a nexus and what makes it significant is, in effect, how we understand what is a tributary that is WOTUS.

The Agencies adopted a meaning for the word “significant” that was so broad as to make it possible to find any drainage feature (using the problematic Corps guidance discussed above) as WOTUS, no matter how limited or infrequent the movement of water through that feature

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<sup>5</sup> Derived from USDA data on the average amount of acres planted to corn over the previous 10 years, and then increasing that number by 75%, which is the USDA – ERS estimate of the percentage of corn acres that are rotated from corn to soybeans and then back to corn again.

might be. Furthermore, relying on the fact that water most commonly moves from higher elevations to lower elevations due to gravity, the Agencies lump together as WOTUS millions of surface features through which water will move by gravity by assuming that, in every case, the effects of the water moving by gravity through surface features are substantial. These so-called “tributaries” are given this treatment no matter how small the amount of water that might move through them or how infrequently. The largest number of these so-called tributaries will, in fact, only have water in them immediately after it rains (the ephemeral tributaries). The Agencies selectively read Justice Kennedy’s discussion of significant nexus and tributaries in his *Rapanos* opinion, and, in so doing, adopted a far broader reading of that term than Justice Kennedy himself intended.

Justice Kennedy makes clear in his opinion the following critical considerations in deciding whether a specific feature that carries or holds water is a WOTUS, and whether a specific regulation that creates classes of waters that are deemed WOTUS are a reasonable application of the statute:

- While the CWA statute provides for certain “other” waters besides navigable waters to be WOTUS, the term navigable must be meaningfully applied to these so-called other waters (“Nevertheless, the word “navigable” in the Act must be given some effect.” See page 22 of *Rapanos*.)
- In discussing whether a wetland might have significant enough effects on the downstream navigable water to warrant treating the wetland as WOTUS, the identification of those effects must be established in fact. This test necessarily applies to surface drainage such as upland drainage features that are remote from navigable waters and where enormous uncertainty can exist, in fact, as to the existence of a relevant and important hydrological connection to the navigable water. (“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.” See page 23.)
- Some aggregation of surface features as tributaries being WOTUS is permissible, given the nature of this class of features. (“Through regulations or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.” See page 24.)
- The number of such features that carry water in them that can be so-categorized is substantially constrained by a very real test that will obviously exclude large numbers of surface features that carry water, and the Agencies’ use of the OHWM to determine a

surface feature as being a WOTUS tributary will not meet this test. (“The Corps. existing standard for tributaries, however, provides no such assurance. As noted earlier, the Corps deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark...This standard presumably provides a rough measure of the volume and regularity of flow....**Yet the breadth of this standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it**—precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act’s scope in *SWANCC*.” See pages 24-25.)

- Establishing without speculation that the effects of features carrying water to navigable-in-fact waters are substantial, and are therefore having a “significant nexus,” must meet real standards. (“Given the potential overbreadth of the Corps’ regulations, this showing is necessary to avoid unreasonable applications of the statute.” See page 25.)
- The Agencies can establish by specific regulation that certain classes of waters will have the required significant nexus. (“Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries.” See page 25.)

The 2015 WOTUS rule created by the previous Administration does not meet the tests Justice Kennedy established in his *Rapanos* opinion. Those tests must be met for a regulation “to avoid unreasonable applications of the statute” when determining whether categories or classes of waters are WOTUS. These are real tests with high standards, as is befitting a rulemaking with such enormous breadth in its consequences and effects.

1. The term “navigable” must be given some meaning when waters are deemed to be WOTUS.
2. There must be a serious, non-speculative basis for a finding that each of the waters in a class are WOTUS; it must be clearly established that their effects on navigable waters are known with some certainty to be substantial.
3. The rulemaking must use a standard that doesn’t rely on an OHWM to place a surface feature in a category of waters deemed jurisdictional, as the OHWM encompasses features that are “remote from any navigable-in-fact waters and carrying only minor water volumes towards it.”



The 2015 rule uses the OHWM to establish surface features as jurisdictional tributaries, where the application of that OHWM can be found in erosional drainage features with water in them only after it rains or during short seasonal periods, and where the effects of those waters on downstream navigable-in-fact waters are, by definition, speculative (as their effects can be shown to be highly variable in their existence, scope, and frequency.) In using a highly speculative standard that fails to give the term “navigable” any effective meaning in determining what are WOTUS, and by capturing features that carry minor volumes of water, the 2015 rule constitutes an “unreasonable application of the statute.”

**Making ephemeral and intermittent features jurisdictional has the perverse effect of discouraging farmers from adopting practices in upland areas that benefit water quality downstream.** Under the CWA, several requirements are brought to bear on any jurisdictional water:

- The need to establish a designated use for jurisdictional water;
- The establishment of water quality criteria that would allow a regulator to determine whether this jurisdictional water is attaining its designated use;
- Evaluation of the jurisdictional water by the regulator to determine whether it is attaining its designated use;
- The “listing” of this water as in nonattainment if it is not meeting its designated use; and
- The creation of a total maximum daily load (TMDL) for the pollutant that is causing the nonattainment where the maximum load would allow the water to return to attaining its designated use.

Should ephemeral and even intermittent features on or near farms be made jurisdictional, as is the case under the 2015 rule, the full weight of this CWA regulatory machinery can be brought to bear on these features, whether by administrative action or as the result of litigation. For farmers who find themselves with these drainage features on or associated with their farms, this federal presence on their farms would be highly disruptive and enormously costly. Therefore, it is no minor matter that the scope and reach of the CWA be properly delineated.

Furthermore, agricultural activities involving the use of fertilizers, manure, and pesticides in support of crop production qualify for the CWA “agricultural stormwater exemption” from CWA permitting under the National Pollution Discharge Elimination System (NPDES). Despite this clear statutory exemption from permitting for these agricultural activities, activists routinely seek to subject these activities to federal NPDES permitting by arguing that these activities result in the direct discharge of pollutants to WOTUS, which is a point source activity under the CWA and therefore subject NPDES permitting. Should drainage features on or next to farms be made WOTUS, there is potential for spurious challenges to their farming activities created by the

proximity of the agricultural activities, that otherwise qualify for the agricultural stormwater exemption, to be deemed in the legal system as resulting in the direct discharge of pollutants to WOTUS. Again, this is no minor matter and points to the importance of getting the scope of jurisdiction properly determined.

Lastly, the net effect of these two consequences, should these drainage features on or near farms be made WOTUS, will be the perverse outcome whereby farmers have significant disincentives to adopt practices with known conservation and nutrient management benefits next to or even in these features. This includes establishing and managing grass waterways or other conservation practices to manage surface runoff that can lead to erosional features and using pesticide products near drainage features known to support agronomic systems that increase organic matter content in the soil, therefore reducing soil erosion and nutrient loss to surface water systems.

For these reasons, we find that the 2015 rulemaking was unlawful and ill-advised policy, and we support fully rescinding this rule. We also support, as interim measures, the codification of the rules that were established in the late 1980s for how CWA jurisdiction is understood and applied. We support the Administration's effort to create a new WOTUS rule that accounts for all the tests established by Justice Kennedy in the *Rapanos* decision, respects the critical and substantial role that states must play under the CWA's cooperative federalism principal in implementing the statute, and does not mire agriculture in counterproductive regulatory machinery that effectively discourages conservation and nutrient management practices that protect water quality.

Sincerely,

A handwritten signature in black ink, appearing to read 'Wesley Spurlock', written in a cursive style.

Wesley Spurlock  
President, National Corn Growers Association