



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

Waters of the United States/U.S. Environmental Protection Agency/Army Corps of Engineers Proposed Rule: Agricultural Organizations Submit Comments

02/09/2022

Twenty-two agricultural organizations submitted February 7th comments to the United States Environmental Protection Agency (“EPA”) and Army Corps of Engineers (“Corps”) addressing the federal agencies’ joint proposed rule to revise the Clean Water Act definition of waters of the United States (“WOTUS”). See revised definition of WOTUS 86 Fed. Reg. 69,372(Dec. 7, 2021).

The 22 agricultural organizations include:

- American Farm Bureau Federation
- Agricultural Retailers Association
- Minnesota Agricultural Water Resources Council
- National Council of Farmer Cooperatives
- The Fertilizer Institute
- National Corn Growers Association
- National Pork Producers Council
- Illinois Corn Growers Association
- Illinois Farm Bureau
- U.S. Poultry & Egg Association
- United Egg Producers
- Indiana Pork Producers Association
- National Milk Producers Federation
- Idaho Dairymen’s Association
- South East Dairy Farmers Association
- Iowa Farm Bureau Federation
- Milk Producers Council
- Washington State Dairy Federation
- Oregon Dairy Farmers Association
- Texas Association of Dairymen
- Dairy Producers of Utah
- Dairy Producers of New Mexico

(collectively “Agricultural Organizations”)

EPA and the Corps announced on November 19, 2020, a revised definition of WOTUS. They had previously withdrawn the revisions to the Clean Water Act definition promulgated during the Trump Administration. The proposed revised definition was issued on December 7, 2021.

The Agricultural Organizations initially note the importance of the definition of WOTUS to farmers and ranchers stating:

. . . Whether they are growing plants or raising animals, farmers and ranchers need water. For that reason, farming and ranching tend to occur on lands where there is either plentiful rainfall or adequate water available for irrigation. Often there are features on those lands that are wet only after it rains and that may be miles from the nearest “navigable” water. These features would be unrecognizable to farmers and ranchers as regulable waters of the United States; to them, these features are simply low spots on fields.

The Agricultural Organizations state their support for the Trump Administration’s previous revisions to WOTUS (denominated the Navigable Waters Protection Rule) which they describe as a:

. . . clear, defensible rule that appropriately balanced the objective, goals, and policies of the Clean Water Act (“CWA”), and the Agricultural Groups feel strongly that the Agencies should have kept it in place, rather than refuse to defend it and revert to definitions of WOTUS that:

- test the limits of federal authority under the Commerce Clause;
- cast significant uncertainty upon property owners’ understanding of the jurisdictional status of their land; and,
- ultimately, are not necessary to protect the Nation’s water resources

Additional concerns expressed by the Agricultural Organizations include:

- Given the Abundance of Water Features on Farm and Ranch Lands, an Expansive Definition of “Waters of the United States” Could Lead to Substantially Increased Permitting Requirements.
- The Proposed Rule Thrusts Farmers and Ranchers Back Into a World of Uncertainty and Inconsistency.
- Mechanisms Already Available to the Agencies to Protect Water Quality
- The Proposed Rule’s Case-by-Case, “Significant Nexus” Approach Is Unconstitutionally Vague, Leaving Farmers and Ranchers without Any Clarity of What the Status of Their Land May Be.
- The Agencies’ Approach to Specific Categories of Waters Are as Flawed as the Agencies’ General Approach.
- “Tributaries” Cannot Include Ephemeral Drainages.
- The Adjacency Category Should Be Limited to Wetlands that Directly Abut Other WOTUS.
- The Broad Sweep of the Agencies’ Proposal for “Other Waters” Is Likewise Unlawful.
- The Agencies Should Clearly Exclude Farm Ditches and Artificial Farm Ponds.
- The Agencies Must Give Full Effect to the Prior Converted Cropland Exclusion.
- The Agencies’ Expanded Assertion of Federal Jurisdiction Threatens to Shrink the Scope of Congress’s Exclusions to the Point of Uselessness.
- Expansive WOTUS Definitions Undermine the Section 404(f) Exemption for “Normal” Farming and Ranching Activities.
- Expansive WOTUS Definitions Undermine the Section 404(f) Exemption for Construction or Maintenance of Farm Ponds.
- Expansive WOTUS Definitions Undermine the Statutory Exclusions for Agricultural Stormwater and Return Flows from Irrigated Agriculture.
- The Proposed Rule Exceeds the Scope of the Federal Government’s Authority Under the Commerce Clause.

- The Proposed Rule Raises All of the Significant Federalism Concerns that Underpinned the Supreme Court's Rejection of Broad Federal Regulatory Authority in SWANCC
- The Agencies Have Failed to Provide a Meaningful Opportunity for Notice & Comment
- The Agencies Do Not Need to Define Water Features as "Waters of the United States" to Ensure Their Protection.

A copy of the comments can be downloaded [here](#).