



Nevada Farm Bureau Federation

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September 3, 2021

Damaris Christensen
Oceans, Wetlands and Communities Division
Office of Water (4504-T)
Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, D.C. 20460

Stacey Jensen
Office of the Assistant Secretary of the Army
for Civil Works
Department of the Army
108 Army Pentagon
Washington, D.C. 20310-0104

Re: Docket ID No. EPA-HQ-QW-2021-0328
“Definitions of “Waters of the United States”; Request for Pre-Proposal Recommendations

The Nevada Farm Bureau Federation is in strong support for retaining the Navigable Waters Protection Rule (“NWPR”) – in spite of the Arizona judge’s decision that the federal agencies sought – and we are in opposition to the proposed action to repeal this appropriate regulation for an improper definition of what waters that the federal government should be responsible for. NWPR was a clear, defensible rule that properly balanced the objective, goals and policies of the Clean Water Act. We maintain that the agencies should keep the NWPR in place and not revert to the flawed definitions of WOTUS that exceed the limits of federal authority and are not effective means for protection of our country’s water resources.

We strongly object to the unlawful concept of defining non-navigable, intrastate – and mostly dry features – that are far removed from navigable waters as “waters of the United States.” These efforts fall outside of the authority provided by the Clean Water Act.

The NWPR was an effective method to implement the objective of the Clean Water Act to restore and maintain the integrity of the nation’s waters. This approach properly struck a reasonable and appropriate balance between what waters which fit within the jurisdiction of the federal government and waters that fall within the authority for state government.

From our perspective, and one of the more critical foundations of importance for any regulation, NWPR provided clarity for farmers and ranchers to be able to identify what features on their private land which could be jurisdictional. The purpose of federal regulations are first to be understood and recognizable as warranting regulation. The direct and simple approach NWPR took was to avoid significant permit costs and production loss that the earlier WOTUS rules sought to impose.

In spite of the Arizona judge’s decision that the federal agencies sought the Nevada Farm Bureau Federation still maintains that the agencies should work to adopt the principles that NWPR was built on. There are many other regulatory and non-regulatory actions under the Clean Water Act that the agencies could do to improve and protect water quality.

As you chase the ultimate goal that you are pursuing – command and control of not only how water is managed by federal agencies, but also thwarting private property rights of lands, we wish to remind the agencies that past U.S. Supreme Court cases have reinforced important limits that Congress has placed on the scope of federal jurisdiction under the Clean Water Act. Notably, this includes the use of “navigable.” We wonder; how effective meaningful progress can be anticipated when consideration is given to the track record in the courts for the 2015 WOTUS Rule?

If the choice is to replace NWPR and dream up new restrictive methods of federal command and control, the agencies must not overlook the Clean Water Act 101(b) provisions...

The express policy from Congress in the Clean Water Act 101(b) – “to recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources and to consult with the Administrator in exercise of his authority under this chapter.”

The federal government serves in a support role to states as they exercise their authority over the broader category of “any waters.” This is in sharp contrast to the Clean Water Act’s proper restraint on the federal government’s regulatory authority over “navigable waters.”

Protection of “navigable waters” does not require federal agencies to control every feature which might be characterized as “water” – (past federal attempts to define waters of the United States didn’t even pretend that “water” had to be present). Not only is stretching the definition of “waters of the United States” unnecessary to achieve the Clean Waters Act goal of protecting water quality – it directly contradicts clear policy of the U.S. Congress!

We repeat our contention that NWPR should have been retained – in spite of the Arizona judge’s decision that the federal agencies sought. We also want to make it clear that if the agencies are going to mess this up with their “new” definition and rule...farmers and ranchers (and all private property owners) need a rule that draws clear lines of jurisdiction that they can actually see and understand without hiring consultants and lawyers. Farmers and ranchers must know before engaging in use of their property with agricultural activities what features on the farm/ranch are – or are not – “waters of the United States.”

We strongly oppose any federal regulation which would hinge on subjective, case-by-case determinations. It is not acceptable that federal jurisdiction might be asserted on the basis of desktop analyses of historical aerial photos or other remote imagery where the landowner lacks notice and clarity about what conduct is lawful.

Future endeavors to seek further control of waters of the United States should not reach beyond traditional navigable waters. Federal regulation of isolated features like ephemeral streams and wetlands adjacent to those streams inappropriately encroach on the authority of States and the congressionally-stated policy of Section 101(b) in the Clean Water Act.

The Nevada Farm Bureau Federation also supports the longstanding exclusion for prior converted cropland and the definition found in the NWPR definition of prior converted cropland. The NWPR brought much needed clarity to the prior converted cropland exclusion and should continue to be used.

Given our responsibilities in representing our members who work in a desert-based agriculture, Nevada Farm Bureau maintains that farm/ranch ditches, canals, ponds and similar features should be exempt from federal authority related to Clean Water Act jurisdiction.

In closing, we wish to repeat our contention that the Navigable Waters Protection Rule – in spite of the Arizona judge’s decision that the federal agencies sought – was a superior approach for the federal agencies to follow. We are in opposition to the proposed action to repeal this appropriate regulation for an improper definition of what waters that the federal government should be responsible for.

Sincerely,

A handwritten signature in black ink, appearing to read "Bevan Lister". The signature is written in a cursive, flowing style.

Bevan Lister, President
Nevada Farm Bureau Federation