Nevada Farm Bureau Federation
2165 Green Vista Dr., Suite 205, Sparks, NV 89431
1-800- 992-1106 | www.nvfb.org

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Damaris Christensen
Oceans, Wetlands and
Communities Division
Office of Water (4504–T)
Environmental Protection Agency
1200 Pennsylvania Avenue NW,
Washington, DC 20460

Stacey Jensen
Office of the Assistant
Secretary of the Army for
Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 20310–0104

RE: Docket ID No. EPA-HQ-OW-2021-0602

Revised Definition of "Waters of the United States" 86 Fed. Reg. 69,372 (Dec. 7, 2021)

The Nevada Farm Bureau Federation appreciates the opportunity to submit these comments to the U.S. Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") (together, "the Agencies") in response to the Agencies' December 7, 2021 Proposed Rule entitled "Revised Definition of Waters of the United States" ("Proposed Rule"). (See 86 Fed. Reg. 69,372 (Dec. 7, 2021). The purpose of these comments is to provide particular emphasis on those aspects of the Proposed Rule that most directly affect farmers and ranchers in Nevada.

Nevada Farm Bureau is the state's largest farm and ranch family organization in the state. We represent our members through their engagement in our annual policy development process and teaming with them to seek implementation of the policy that they have adopted. The efforts by the Agencies to have authority to regulate have been a needless whipsaw of attempts to exceed appropriate authority and exercise unwarranted federal controls.

Because of the critical nature of water in the driest state of the nation and also because of the private property ownership characteristics of water use in Nevada, we are deeply committed to protection of existing water rights and the essential authority of Nevada water officials, following state water law.

Nevada's statutory definitions of "Waters of the State" have been in place since 1973 and effectively addresses associated matters in a comprehensive manner. ***"The State has authority to protect all waters whether or not they are subject to Clean Water Act (CWA) jurisdiction, and carried out this authority effectively and efficiently for decades."***

We are extremely concerned about the proposal to scrap the extremely workable Navigable Waters Protection Rule (NWPR) to once again have federal agencies overreaching their authority.

In October of 2021, the Nevada Division of Environmental Protection offered their comments in response to the agencies' federalism consultation initiated for forthcoming rulemaking(s) on the definition of Waters of the United States (WOTUS) as contained in the Clean Water Act (CWA).

Those comments highlighted a number of critical and important factors which also stressed the advantages of NWPR and clearly defined and workable understanding for what waters the federal agencies should be dealing with, while leaving the State of Nevada to provide protection for those waters which don't belong under the federal thumb.

As that comment letter indicated…

> ***"As the federal agencies embark on yet another rewrite, Nevada will continue to protect the quality of our water resources using state permitting authority where federal authority may fall away. In actuality, less than a dozen of Nevada's 90 CWA Section 402 permits had the potential to transition to state permits, but the NWPR has not been in place long enough for some of these determinations to have come about."***

The Nevada Division of Environmental Protection went on to provide very practical insights on where the federal agencies have been specifically a problem…

> ***"The primary implementation challenge for Nevada was related to CWA Section 404 projects wherein the jurisdictional status was in question due to loss of political boundaries (i.e. State lines) as a defining factor to be a WOTUS. In cases where the Nevada state line was the only prior defining factor, the US Army Corps of Engineers (ACOE) would neither "disclaim jurisdiction" nor provide an assessment for project proponents absent a formal jurisdictional determination request or a 404- program permit application. Project proponents were in desperate need of guidance from a "reasonable person's" initial assessment of jurisdiction to know what permits to apply for. Absence of such input to potential permittees caused frustration and time-consuming round-robin communications among state, federal and private entities in attempts to provide a path forward. Several permittees received unofficial input from the ACOE indicating that it is better to simply get a 404 permit in case it is determined later on that the segment is jurisdictional and subjects the project to enforcement. This is inefficient governance for all parties involved."***

As you again seek to expand federal authority and pursue vague and confusingly worded meanings for whether the federal rules apply, we can only anticipate more of the same lack of reasonable service.

The regulation of low spots on farmlands and pastures as jurisdictional "waters" means that any activity on those lands that moves dirt or applies any product to that land could be subject to regulation. Everyday activities such as plowing, planting, or fence building in or near ephemeral drainages, ditches, or low spots could trigger the Clean Water Act's (CWA) harsh civil or even criminal penalties unless a permit is obtained.

The tens of thousands of additional costs for federal permitting of ordinary farming activities, however, is beyond the means of many family or small business farming or ranching owners. And even those farmers and ranchers who can afford it should not be forced to wait months, or even years, for a federal permit to plow, plant, fertilize, or carry out any of the other ordinary farming and ranching activities on their lands. For all of these reasons, farmers and ranchers have a keen interest in how the Agencies define "waters of the United States."

The Agencies should keep the NWPR in place, rather than revert to definitions of WOTUS that test the limits of federal authority under the Commerce Clause and are not necessary to protect the Nation's water resources. The Agencies can ensure clean water for all Americans through a blend of the CWA's regulatory and non-regulatory approaches, just as Congress intended. It is unnecessary (and unlawful) to define non-navigable, intrastate, mostly dry features that are far removed from navigable waters as "waters of the United States" to try to achieve the Act's objective.

In their letter of October 2021 the Nevada Division of Environmental Protection noted…

> ***"The NWPR provided needed clarity on many aspects of a WOTUS definition. Given that the federal agencies are starting over, it is prudent to bring Nevada's prior comments back to the forefront of the discussion for agency consideration moving forward in 2021 and beyond."***

These "prior comments" refer back to the 2015 Nevada Division of Environmental Protection (NDEP) comments which spelled out in clear detail the perspectives that needed attention in order to address critical points for our state…

> ***"Nevada Key Comments – April 15, 2019 re. Definition of WOTUS and their continued relevance:***
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> ***• The NWPR groundwater exclusion is a critical issue for the State of Nevada, and we seek to have it continued in future definition development. NDEP continues to request additional clarification for the exclusion by adding the language, "including diffuse or shallow subsurface flow."***
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> ***• Establishment of state lines as a factor in WOTUS determination should be revisited. If not in all cases, at least where "CWA Section 303(d) impaired waters cross interstate boundaries. Surface water bodies in the arid west that cross interstate boundaries may not [be TNWs] and a co-regulator role for the USEPA in assuring restoration of those waters is warranted."***
>
> ***• Additional exclusions in the NWPR are also important to Nevada and NDEP will continue to support exclusions for ephemeral features and diffuse stormwater runoff, artificial lakes and ponds constructed in uplands, water filled depressions crated in uplands incidental to mining or construction activity and fill, sand and gravel pits, wastewater recycling structures constructed in uplands, and waste treatment systems.***
>
> ***• NDEP supports exclusions for ditches to be explicit in applying the exclusion to agricultural features.***

> ***• For prior converted cropland, the period of non-use, "should either be extended or tolled for periods of non-use resulting from water right curtailment or inability to call for water right diversion. The extended timeframe should endure the duration of time the agricultural producer is denied water." NDEP attempted to acquire a list of prior converted cropland areas without success, having been told that the information is protected. Likewise, implementation of this aspect of the NWPR has not been tested.***
>
> ***• NDEP requests the agencies enhance the co-regulator partnership with states and tribes regarding the Jurisdictional Determination (JD) process. Specifically: (1) The US ACOE should actively solicit state involvement and provide the state a meaningful role when Nevada Comments Federalism Consultation & EPA Docket #EPA-HW-OW-2021-0328 making JDs; (2) JDs made by one agency (i.e. the US ACOE) should apply to other applications of the CWA (i.e. Section 402); and (3) Case-by-case JDs should remain in place for longer than 5 years, or alternatively, remain in place until disproven and removed. The third suggestion will improve efficiency in maintaining an understanding of jurisdictional waters over time and will work hand in hand with needed improvements in mapping the nation's waters."***

Nevada Farm Bureau asserts that each of these points warrant due consideration for inclusion in the rule the Agencies will be seeking to impose.

As explained in more detail below, our farmers and ranchers have significant concerns with the Agencies' Proposal to codify both the "relatively permanent" and "significant nexus" approaches in a radical expansion of the Agencies' jurisdiction as compared with the NWPR and even as compared to the pre-2015 regulatory regime that the Agencies are currently implementing. Moreover, given the Supreme Court's recent decision to revisit the Agencies proper scope of jurisdiction under the CWA, the Agencies should pause this rulemaking until after the Court rules in Sackett v. Environmental Protection Agency.

The Proposed Rule Will Profoundly Affect Everyday Farming and Ranching Activities.

Farming and ranching are necessarily water-dependent enterprises. Fields on farms and ranches often have low spots that tend to be wet year-round or at least contain water seasonally. Some of these areas are ponds used for purposes such as stock watering, providing irrigation water, or settling and filtering farm runoff. Irrigation ditches also carry flowing water to fields throughout the growing season as farmers and ranchers open and close irrigation gates to allow water to reach particular fields. These irrigation ditches are typically close to larger sources of water, irrigation canals, or actual navigable waters that are the source of irrigation water—and they channel return flows back to these source waters. In short, America's farm and ranch lands are an intricate maze of ditches, ponds, wetlands, and so-called "ephemeral" drainages.

Considering drains, ditches, stock ponds, and other low spots on farmlands and pastures as jurisdictional "waters" opens up the potential for regulation of activities on those lands that move dirt or apply products to the land. Farmers need to apply weed, insect, and disease control products to protect their crops. Fertilizer application is another necessary and beneficial aspect of many farming operations that is nonetheless swept into the CWA's broad scope (even organic fertilizer, i.e., manure). 40 C.F.R. § 122.2 (defining "pollutant").

On much of our most productive farmlands (i.e., areas with plenty of rain), it would be extremely difficult to avoid entirely the small wetlands, ephemeral drainages, and ditches in and around farm fields when applying crop protection products and fertilizer. And yet, permits could also be required for those activities, and even accidental deposition would be unlawful, even when those features are completely dry and even harder to differentiate from the rest of the fields.

Many family and small business farm and ranch owners can ill afford the tens of thousands of dollars in additional costs for federal permitting of ordinary farming activities. Even those who can afford the permitting should not have to wait months, or even years, for a federal permit to plow, plant, fertilize, or carry out any of the other ordinary farming and ranching activities on their lands. Yet this is exactly what could occur should the Agencies finalize their Proposal.

The Proposed Rule Thrusts Farmers and Ranchers Back Into a World of Uncertainty and Inconsistency.

The 2015 Rule - where it took effect - dramatically expanded the scope of CWA jurisdiction over land used for normal farming and ranching activities. The Agencies' proposal this time around is different only in degree and timing, not kind. Their aggregation policy potentially allows the Agencies to assert jurisdiction over any sometimes-wet feature which, taken together with other sometimes-wet features in the region (broadly defined), have what the Agencies consider to be a "significant nexus" on a "foundational water." But the term "significant nexus" generated significant confusion and inconsistent results under the pre-2015 regime, and the Proposed Rule is likely to only make things worse.

Furthermore, the process to arrive at a jurisdictional determination is tortuous and costly. A jurisdictional determination could take between six months and a year to receive, and in the meantime a farmer or rancher is stuck in limbo. (Please refer again to the comments from the Nevada Division of Environmental Protection that we included on page 2 of this letter. Our concerns are definitely borne out from experience.)

The harm from delay is only compounded once an affirmative jurisdictional determination occurs, with the cost of consultants, engineers, permit applications, and mitigation and compliance costs that make the process simply untenable for many. Indeed, it can amount to a $500/acre or greater decrease in value of the land. Mitigation costs to proceed with development could be into the thousands of dollars per linear foot. Adding insult to injury, the Agencies' proposed approach of case-by-case analysis threatens to create a seriously unequal playing field, where identical features may be viewed as jurisdictional or not depending upon where the property is located. This is not a dependable, clear rule. Rather, the Agencies are setting up a system that is based in arbitrary decision-making.

Perversely, the Agencies' broad assertion of jurisdiction can make it more difficult for farmers and ranchers to engage in soil conservation activities. Farmers and ranchers have more incentive than most to try to preserve topsoil on their land; as such, where land is at risk of erosion they may want to engage in mitigation activities. Farmers also often take on projects that provide stormwater management, wildlife habitat, flood control, nutrient processing, and improve overall water quality in uplands and ephemeral features. But if a farmer could not do this without applying for a federal permit, it may be cost-prohibitive, resulting in environmental degradation, not protection.

In sum, the Proposed Rule threatens to impede farmers' and ranchers' ability to provide safe, affordable, and abundant food, fuel, and fiber to the citizens of this nation and the world. The concerns that farmers and ranchers have are not hyperbole nor are they isolated occurrences. They are lived experiences illustrating the pitfalls of returning to an overly expansive definition of "waters of the United States" and, specifically, an outsized view of what it means for a water to have a "significant nexus."

Rather than Providing Clarity and Certainty for Farmers and Ranchers, the Proposed Rule Makes Opaque Pronouncements Leading to Potentially Unlimited Jurisdiction.

A. 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.

While the Agencies have resisted the urge to again categorically regulate all tributaries and all adjacent waters like they did in the 2015 Rule, the case-by-case approach in the Proposed Rule is no less of an overreach. The Agencies once again propose to resurrect the same broad and confusing significant nexus standard that was the foundation for the 2015 Rule. It is clear the Agencies will just expand their jurisdiction one watershed at a time, instead of by general fiat—but it is only a matter of time until the Agencies will find a significant nexus. This illustrates the almost limitless jurisdiction that the Agencies will have over private property.

The significant nexus standard can be used to assert jurisdiction over tributaries, adjacent wetlands, and basically any "other water" because the Proposed Rule uses undefined, amorphous terms like "similarly situated" and "more than speculative or insubstantial" that will leave farmers and ranchers guessing about whether waters on their lands are WOTUS. (See 86 Fed. Reg. at 69,449-50.) To make things worse, the Agencies throw out a bunch of alternatives for implementing some of these terms. (See id. at 69,439-40.) This suggests that regulators can manipulate the standard to reach whatever outcomes they please and that farmers and ranchers may not know the outcomes until they are already exposed to civil and criminal liability, including devastating penalties.

> In Nevada's Division of Environmental Protection October 2021 comments, they also drew attention to this issue…***"NDEP cautions against revisiting use of the "the connectivity report".*** *In Rapanos, the court determined that a key factor in jurisdictional determinations should be whether there is a significant nexus with a clearly jurisdictional waterway.* ***The 2014 WOTUS proposal "was accompanied by a connectivity report: a compilation of scientific studies which purported to show that all waters are connected physically, chemically or biologically no matter how speculative or insubstantial the connection might be. EPA used the report to conclude that all waters are connected, so every tributary has a significant connection and is therefore jurisdictional, regardless of size or frequency of flow. Such a conclusion directly contradicts the Supreme court's determination and represents an inappropriate and unreasonable expansion of federal regulation to include insignificant streams and even dry channels which may not see water for years at a time. This overly simplistic position is unacceptable and illogical: insignificant streams cannot have significant impacts. Sweeping jurisdiction of large features such as flood plains and wetlands provides unwarranted authority over extensive tracts of waters and lands that were not previously regulated under the CWA."***

Because of the subjective nature of the Proposed Rule, it all but guarantees that regulators' assessments are bound to vary from field-office to field-office and case to case. This approach does not give ordinary farmers and ranchers fair notice of when the CWA actually applies to their lands or conduct, nor does it provide any assurance against arbitrary or discriminatory enforcement.

Nevada Farm Bureau strongly urges that the significant nexus standard portion of the rule be struck.

B. "Tributaries" Cannot Include Ephemeral Drainages.

Most of the time, ephemeral drainages are dry land—they are not flowing rivers or streams. It is simply shocking to farmers and ranchers that the Agencies could interpret a "tributary" as reaching ephemerals and thereby sweeping in many features that look just like land. The NWPR provided important clarification regarding the status of ephemeral streams that flowed only in response to precipitation by correctly concluding that they were not WOTUS. The Agencies' rapid about-face in this proposal is disappointing, to say the least.

We again wish to draw attention to this being another point that the Nevada Division of Environmental Protection Agency noted in their position… (This point was made on page 3 of our letter, but bears repeating in this context.)

> ***• Additional exclusions in the NWPR are also important to Nevada and NDEP will continue to support exclusions for ephemeral features and diffuse stormwater runoff, artificial lakes and ponds constructed in uplands, water filled depressions crated in uplands incidental to mining or construction activity and fill, sand and gravel pits, wastewater recycling structures constructed in uplands, and waste treatment systems.***

The Agencies set off on the wrong foot by failing to define tributary in the first place. The lack of a definition of tributary with measurable criteria results in significant vagueness and fairness concerns, especially where the application of "tributary" could substantially expand or limit the scope of jurisdiction under the CWA.

By failing to provide clarity, the Agencies are forcing farmers and ranchers to either:

> (1) presume that an ephemeral drainage that carries water only when it rains will be deemed a jurisdictional tributary, or
> (2) seek a jurisdictional determination from the Corps, or
> (3) take a chance that their activities near or in such features may result in unlawful discharges carrying civil penalties of nearly $60,000 a day. (See 87 Fed. Reg. 1,676, 1,678 (Jan. 12, 2022).

Even worse, a farmer could face criminal liability with jail time and up to $100,000 a day in fines. With such stiff statutory penalties at stake—including the loss of one's own personal liberty—farmers and ranchers deserve more clarity.

The Agencies' approach to seasonal flow under the relatively permanent standard could also unlawfully sweep in some ephemeral water features (and too many intermittent features for that matter). The Agencies' propose to employ a vague "flow at least seasonally" approach, where by "seasonally" they mean generally three months, or possibly even less time depending on what part of the country the water feature is located in. The Agencies do not articulate any scientific or legal basis for interpreting seasonal flow to mean three months.

Ultimately, the question is not whether tributaries or ephemeral streams are "important" or may as a scientific matter have some connection with downstream navigable waters, (see, e.g., 86 Fed. Reg. at 69,390;) rather, the question is whether they should be considered as falling within the bounds of federal jurisdiction. As with so many other categories in the Proposed Rule, the agencies collapse that distinction.

C. The Adjacency Category Should Be Limited to Wetlands that Directly Abut Other WOTUS.

Nevada Farm Bureau recommends that the Agencies assert jurisdiction over only wetlands, and only those wetlands that are directly abutting other "waters of the United States." The Proposed Rule instead grasps at the constitutional limits of the Agencies' jurisdiction.

First, the Proposed Rule's approach to "relatively permanent" is not consistent with the plurality's opinion in Rapanos v. United States, 547 U.S. 715 (2006), because the Agencies deprive the Court's requirement for a "continuous" connection of all meaning by turning it into a mere "physical connection or ecological connection" test. (Id. at 69,435.) Further, the criteria for establishing whether a wetland is "adjacent"—such as whether a "shallow" subsurface connection exists or whether wetlands are in reasonably close proximity to a jurisdictional water—stray too far from the plurality's test and raise vagueness and fair notice concerns.

Second, we also oppose the significant nexus approach to adjacent wetlands in the Proposed Rule. The Agencies' approach of aggregating wetlands is flatly contrary to Justice Kennedy's requirement that each wetland be judged in its own right to determine whether it (and it alone) bears a significant nexus to traditional navigable waters.

Finally, the Agencies' proposal to aggregate the functions performed by all of the wetlands in an entire watershed (or similarly broad region) to evaluate whether a significant nexus is present expands the reach of the significant nexus test even farther, and is even less clearly implementable.

Rather than finalize the Proposed Rule, the Agencies should assert jurisdiction over only those wetlands that are directly abutting "waters of the United States;" in so doing, the Agencies would provide much needed clarity that is capable of easy application in the field. Only those wetlands that directly touch "waters of the United States" would meet our definition of "adjacent."

D. The Broad Sweep of the Agencies' Proposal for "Other Waters" Is Likewise Unlawful.

This new category would reach many intrastate, non-navigable water features that would be considered "isolated" under Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001). This category would extend federal regulatory authority to, for example, any relatively permanent (defined too broadly), standing or continuously flowing "other water" that has a continuous surface connection to a relatively permanent, non-navigable tributary (i.e., an (a)(5)(i) water) of a non-navigable interstate water or wetland. (See 86 Fed. Reg. at 69,449-50 (proposed 33 C.F.R. § 328.3(a)(3)(i) & 40 C.F.R. § 120.2(a)(3)(i)).

Worse still is the Proposed Rule's application of the significant nexus standard to "other waters," not least because, if that standard is ever to be applied, it should be to wetlands, and wetlands only. Applying the significant nexus standard elsewhere allows the Agencies to aggregate all similarly situated "other waters" (e.g., prairie potholes or ponds that are not part of a tributary system) across an entire watershed and claim jurisdiction over all such features based on a finding that they collectively perform a single important function for a downstream "foundational" water.

This is plainly not what Congress could have intended, and not what the Supreme Court would allow. It appears, though, that under this Proposal, countless small wetlands or other small waters that are far removed from traditional navigable waters (including ephemeral tributaries and ditches) or coast nevertheless will be potentially within the scope of federal jurisdiction. For these reasons, the Agencies should withdraw the "other waters" category.

E. The Agencies Should Clearly Exclude Farm Ditches and Artificial Farm Ponds.

We again wish to draw attention to this being another point that the Nevada Division of Environmental Protection Agency noted in their position… (This point was made on page 3 of our letter, but bears repeating in this context.)

• NDEP supports exclusions for ditches to be explicit in applying the exclusion to agricultural features.

Ditches and similar water features commonly found on farms that are used to collect, convey, or retain water should be excluded from the definition of "waters of the United States." Without adequate drainage, farmlands could remain saturated after rain events and unable to provide adequate aeration for crop root development. Drainage ditches and other water management structures can help increase crop yields and ensure better field conditions for timely planting and harvesting. In areas without sufficient rainfall, irrigation ditches and canals are needed to connect fields to water supplies and to collect and convey water that leaves fields after irrigation. Put simply, ditches are vitally important to support American agriculture and ultimately to feed the growing population.

Therefore, farmers and ranchers strongly recommend that the definition of WOTUS should retain standalone exclusions for ditches (including, but not limited to drainage ditches and irrigation ditches), and artificial ponds (including, but not limited to, stock watering ponds, irrigation ponds, and sediment basins). But if these exclusions are to be meaningful, they must not be limited to features constructed on dry land or upland. Because these features are constructed to store water, it would not typically be useful for them to be constructed along the tops of ridges, for example. Rather, often the only rational place to construct a ditch or a farm or stock pond is in a naturally low area to capture stormwater that enters the ditch or pond through sheet flow and ephemeral drainages. Depending on the topography of a given patch of land, ditch or pond construction may be infeasible without some excavation in a natural ephemeral drainage or a low area with wetland characteristics.

The NWPR appropriately recognized the practical realities surrounding ditches on farm and ranch lands by excluding ditches so long as they are not constructed in WOTUS and by excluding other water features found on agricultural lands (e.g., farm, irrigation, and stock watering ponds) so long as they were "constructed or excavated in upland or in non-jurisdictional waters." (See 85 Fed. Reg. at 22,338.) We strongly support both of these exclusions as codified in the NWPR.

F. The Agencies Must Give Full Effect to the Prior Converted Cropland Exclusion.

In regard to Nevada's unique circumstances, we wish to draw attention to the point that the Nevada Division of Environmental Protection Agency noted in their position… (This point was made on page 4 of our letter, but bears repeating in this context.)

> ***• For prior converted cropland, the period of non-use, "should either be extended or tolled for periods of non-use resulting from water right curtailment or inability to call for water right diversion. The extended timeframe should endure the duration of time the agricultural producer is denied water." NDEP attempted to acquire a list of prior converted cropland areas without success, having been told that the information is protected. Likewise, implementation of this aspect of the NWPR has not been tested.***

Nevada's farmers and ranchers support the Agencies' proposal to maintain the decades-old exclusion for prior converted croplands ("PCC"). Farmers and ranchers across Nevada rely on this critical exclusion which establishes that PCC may be used for any purposes so long as wetland conditions have not returned. In practice, however, numerous issues have arisen regarding the interpretation and application of the PCC exclusion. For this reason, we have long advocated for a clear, commonsense definition and clarification of PCC in the Agencies' regulations. We welcomed the NWPR's approach to PCC, which was designed to improve clarity and consistency regarding the implementation of the exclusion, and are disappointed to see that the Agencies are not proposing to carry it forward. The lack of a clear definition of PCC has presented problems in the past regarding when, for example, PCC can be "recaptured" and treated as jurisdictional.

We oppose implementation of the PCC exclusion for CWA purposes in a manner consistent with the USDA's "change in use" principle. The 1996 Farm Bill adopted that concept relevant to USDA wetlands certifications (not PCC certifications), but those changes did not affect the Agencies' determination of what constitutes "waters of the United States" for CWA purposes.

Far from merely codifying the pre-2015 regulatory regime that the Agencies claim to be implementing, incorporating a "change in use" policy into the PCC exclusion would upend nearly 30 years of largely consistent implementation in accordance with the 1993 Rule.

We recommend that the Agencies retain the following clarifications from the NWPR, which will help reduce confusion over how the PCC exclusion is implemented:

> (i) formal withdrawal of the 2005 Joint Guidance and any other guidance that is inconsistent with the 1993 regulations;
> (ii) a site can be PCC regardless of whether there is a PCC determination from either USDA or the Corps, as there is no specific requirement for issuance of a formal PCC determination, and USDA does not provide determinations unless a farmer is seeking benefits under the conservation compliance programs; and
> (iii) PCC designations are retained so long as land has been used for a broad range of agricultural purposes at least once in the preceding five years.

The Agencies' Expanded Assertion of Federal Jurisdiction Threatens to Shrink the Scope of Congress's Exclusions to the Point of Uselessness.

Congress plainly expected that most activities on farmlands and pastures would be covered by state programs aimed at controlling nonpoint source pollution and would not be subject to federal permit requirements. Congress specifically included in the CWA several critical statutory exemptions for agriculture, each of which would be unlawfully undermined by the Proposed Rule:

- Section 404 exemption for "normal" farming and ranching activities
- Section 404 exemption for construction of farm or stock ponds
- Exclusions of agricultural stormwater discharges and return flows from irrigated agriculture from the definition of "point source" and hence, from Section 402 permitting

When Congress enacted these exemptions, it used language that assumed that farming and ranching activities generally occur on land, not in "waters of the United States." An expansive interpretation of the phrase "waters of the United States"—one that effectively defines land to be water—would nullify Congress' specific choice to avoid federal permitting requirements for fanning and ranching.

The Proposed Rule Raises Significant Federalism Concerns

The Agencies continue to give States short shrift in the Proposal, leaving to the States only very few water features the Agencies do not deem fit to regulate themselves. But the Agencies do so at their peril, for it simply is not the case that Congress intended to diminish States' role in water quality protection so completely. Rather, in the CWA Congress sought to preserve and protect States' primary responsibilities and rights to plan the development and use of land and water resources, which the Supreme Court has recognized.

As the Nevada Division of Environmental Protection asserted in their October 2021 letter, commenting in advance of the proposed rule…

- ***Nevada's statutory definition of "Waters of the State" has been in place since 1973 and is broad. "The State has authority to protect all waters whether or not they are subject to Clean Water Act (CWA) jurisdiction, and has carried out this authority effectively and efficiently for decades."***

- ***"Although the proposed rule was presented by EPA as an attempt to add clarity, if passed in its present form it would result in inappropriate expansion of jurisdiction in direct contradiction to Supreme Court determination, in particular Rapanos v. United States, 547 U.S. 715 (2006) (Rapanos)." The 2015 Clean Water Rule did, in fact, result in Nevada joining the North Dakota case, effectively staying its implementation in our State. NDEP would seek to have EPA and the ACOE revisit the details of the North Dakota case as needed to prevent revisiting history. The 2020 Navigable Waters Protection Rule (NWPR) improved the situation, particularly with respect to the exclusion of groundwater. Nevada would seek any new WOTUS definition to ensure the groundwater exclusion carries forward, at a minimum.***

- ***"States are the primary protectors of water quality, either through state law or through federal delegation, and the [WOTUS definition] should give as much weight and deference as possible to state needs, priorities and concerns."***

We also believe that it is important to recognize the different situations and conditions across the United States. Instead of a one-size-fits-all, the Nevada Division of Environmental Protection made what we believe to be a sound proposal in their October 2021 letter…

> ***"Consideration of Regional Approach***
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> ***During upcoming revisions to the WOTUS definition, Nevada believes that much of the difficulty in both writing and implementing a WOTUS definition is rooted in attempts to craft a national rule. Nevada is interested in exploring a proposal that is regional in nature and recognizes the vast variability in hydrogeology across the country. As part of the desert southwest with an average of 8 inches of rain a year, or less in some parts of Nevada, it is simply not viable to attempt to craft regulation for this region that fits with precipitation and flow regimes of the East Coast or Northwest United States."***

<u>The Agencies Have Failed to Provide a Meaningful Opportunity for Notice & Comment</u>

The Agencies' meager 60-day public comment period for this proposal does not provide an appropriate opportunity for interested stakeholders to review all of the supporting documents in the docket—not all of which were even available when the comment period was opened—and comment on the proposed rule. Moreover, the Agencies' "regional roundtables" are focusing not on this Proposal, but rather on identifying regional similarities and differences that should be considered as part of a separate rulemaking. Even the Obama Administration provided more time—207 days, in all—to comment on the proposal.

Perhaps the Agencies did not believe that a lengthy comment period would be necessary, since they describe the Proposed Rule as a mere codification of prior practice. (E.g., 86 Fed. Reg. at 69,406.) That description provides little comfort about this proposal, given the Agencies' past exceedances of their authority under the Constitution and the Act.

Moreover, that description is inaccurate. The Proposed Rule is not as limited in scope as the Agencies suggest; to the contrary, the Proposed Rule is a thinly-veiled attempt to expand how the Agencies are currently implementing the relatively permanent and significant nexus standards by, among other things, appealing to purported deference to the Agencies' evolving ecological judgment. In essence, the Agencies are attempting to convert a test that Justice Kennedy intended to be a check on "unreasonable applications of the statute," (Rapanos, 547 U.S. at 782 (Kennedy, J., concurring) into a justification for reaching as far as, or arguably further than, the Agencies did under the Migratory Bird Rule or the "any hydrological connection" theories. The Agencies cannot pretend that the Proposed Rule—which required dozens of pages of the Federal Register and even more in supporting documents—requires so little time to review and comment on.

Given the importance of this issue and the inadequately short comment period, the Agencies should respect the calls for more time.

Conclusion

Nevada's farmers and ranchers recommend that the Agencies withdraw the Proposed Rule. Retaining the NWPR is a far preferable alternative, given the certainty and predictability it provided. Even were the Agencies to seek to amend it, the NWPR is a more appropriate foundation for a durable and defensible rule than a return to the flawed pre-2015 framework. Regardless of the course the Agencies choose, they must include all stakeholders in a more robust and meaningful dialogue to arrive at a rule that respects congressional intent and the limits the Supreme Court has recognized.

We thank the Agencies for the opportunity to provide these comments. We also look forward to massive changes in the proposed rule and recognition of comments received for building those changes into the next round of the U.S. government's attempt to once again redefine the "Waters of the U.S.."

Sincerely,

Bevan Lister, President
Nevada Farm Bureau Federation.