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RE: Docket ID No. EPA-HQ-OW-2017-0203 - Comments on the Definition of "Waters of the United States" – Recodification of Pre-Existing Rules

The California Farm Bureau Federation ("Farm Bureau") is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home, and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing approximately 48,000 agricultural, associate, and collegiate members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

Farm Bureau appreciates the opportunity to provide comments in support of the U.S. Environmental Protection Agency's ("EPA") and the U.S. Army Corps of Engineers' ("Corps") (together, "the Agencies") proposed rule: Definition of "Waters of the United States"—Recodification of Pre-existing Rules, 82 Fed. Reg. Vol. 34899 (July 27, 2017) ("Proposed Rule"). The Proposed Rule is the first step in a comprehensive, two-step process intended to review and revise the definition of "waters of the United States" consistent with the Executive Order signed on February 28, 2017, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." In addition to rescinding the 2015 Rule, this first step proposes to recodify the pre-existing rules regarding what "waters of the United States" should be considered jurisdictional under the Clean Water Act ("CWA"). Specifically, the agencies would apply the definition of "waters of the United States" as it is currently being implemented, i.e., the current legal regime under which the agencies are operating consistent with U.S. Supreme

Court decisions, the regulatory text and guidance documents that existed prior to the 2015 rule, and the U.S. Court of Appeals for the Sixth Circuit's October 9, 2015 order issuing a nationwide stay. The Proposed Rule's recodification of pre-existing rules and regulations that existed before the 2015 Clean Water Rule will provide continuity and certainty for regulated entities, such as farmers and ranchers, States, agency staff, and the public.

Farmers and ranchers need a waters of the United States ("WOTUS") definition to provide clarity and certainty. The Clean Water Rule, or 2015 Rule, as well as any subsequent rule, is of paramount importance to Farm Bureau's members who engage in activities on land and waters that are regulated under the CWA and often require a jurisdictional determination from the Corps prior to proceeding. Any change in CWA regulations governing how these determinations of jurisdiction are made, and particularly any expansion of federal jurisdiction, will have a substantial effect on our members' ability to timely obtain the permits necessary to continue existing agricultural operations or develop new or expanded agricultural ventures.

Given the importance of future CWA regulations and revisions, Farm Bureau offers the following comments in support of the Proposed Rule to rescind the 2015 Rule and recodify pre-existing rules and regulations:

I. The 2015 Rule Raises Significant Concerns Warranting Rescission[1]

The Agencies have valid and numerous legal justifications to rescind the 2015 Rule because the 2015 Rule's provisions are beyond the Agencies' statutory authority, inconsistent with U.S. Supreme Court precedent, and contrary to the goals of the CWA.

Overarching Points

- The 2015 Rule would have a substantial effect on our members and the ability for farmers and ranchers to continue to utilize the land. Farm Bureau has numerous concerns with the 2015 Rule as it improperly expands federal jurisdiction under CWA, substantially broadens all prior guidance documents and interpretations, and is inconsistent with existing case law and statutory direction from Congress.

- The 2015 Rule did not comport with the intent of Congress and the U.S. Supreme Court's body of cases interpreting federal jurisdiction under the CWA. For these reasons, the 2015 Rule must be withdrawn and replaced with a rule that respects the limits set by Congress and the Supreme Court (and, specifically, which comports with all U.S. Supreme Court precedent rather than one concurrence and one court case), while also recognizing the concurrent authority of states to manage waters, including non-federal waters, within their boundaries.

[1] Farm Bureau submitted detailed comments on November 14, 2014 commenting on the legal flaws with the 2015 Rule. These comments, which support the Proposed Rule's rescission of the 2015 Rule, are attached as Attachment A.

- The EPA's definition of "waters of the United States" should be based on objectively identifiable characteristics, rather than subjective, unpredictable, and fragmented case-by-case determinations.

- The EPA's "waters of the U.S." definition should clearly distinguish between federal and state waters to avoid future litigation and costs that divert scarce resources from actual protection of state and federal waters

- Although stated as providing clarity, the 2015 Rule did otherwise, expanding jurisdictional "waters of the U.S." and creating the uncertainty associated with "case-by-case" analyses and specific jurisdictional determinations. Any future rule must be easy to administer and should provide greater clarity, predictability, and reasonable flexibility for farmers and ranchers.

Guiding Principles

In addition to the overarching points above, Farm Bureau urges the Agencies, in subsequent rulemaking, to craft a new definition consistent with the following general principles:

- **Direct effect on navigable waters based on clear, objective characteristics:** Federal jurisdiction can extend beyond navigable waters to certain non-navigable water bodies and wetlands. To provide clarity and certainty to regulators and the public, the Agencies' definition of "waters of the U.S." should focus on water features likely to directly affect traditional navigable waters and that may be easily and objectively identified on the basis of readily observable features.

- **Non-navigable, isolated and intrastate waters and ordinarily dry features:** Federal jurisdiction cannot properly extend to non-navigable, isolated/intrastate waters and wetlands. Nor does it extend to ordinarily dry features, such as ephemeral streams.

- **Relevant permanence:** A water feature that is "relatively permanent" must contain water persistently and frequently. At a minimum, such water features must continuously carry water on a seasonal basis (such as throughout the spring season). Features that are usually dry or that only carry water when it rains are not "relatively permanent" waters.

- **Immediate adjacency to traditional navigable waters:** Wetlands should only be "waters of the U.S." when they are immediately adjacent to traditional navigable waters, meaning that they directly touch or share a common border with those waters. This would include wetlands that are beside such waters, but separated by a man-made or natural berm.

- **Retain existing and consider potential additional statutory exclusions:** Any revised definition should retain the long-standing codified exclusions from WOTUS and should consider the need for additional exclusions for features such as ditches or irrigation structures.

- **Effect on state water quality program:** The state of California has its own broad, multi-layered, comprehensive regulatory regime already stringently protecting water quality and water resources. In fact, California has some of the most comprehensive and rigorous water quality and water resource regulations in the nation. California's Porter Cologne Water Quality Control Act, Cal. Water Code § 13000 et seq., the primary water quality and resource protective law in the state, affords broader regulatory protection than the CWA. Porter-Cologne defines "waters of the state" as "any surface water or groundwater, including saline waters, within the boundaries of the state." (Cal. Water Code § 13050(e).) This definition alone, when compared with the federal definition of "waters of the United States" shows that the scope of resource protection in California is broader and more inclusive. (*Compare id.* with 33 C.F.R. § 328.3.) This notwithstanding, CWA 404 permits are a definite, often onerous, and duplicative part of California's regulatory landscape. By appropriately revising and limiting the scope of the 2015 Rule in any future rule, the Agencies will be respecting proper bounds of a federalist system without sacrificing any protection not within the authority of the State of California. At the same time, such a rule will respect Congress' mandate that the CWA first and foremost "recognize, preserve, and protect the primary responsibilities and rights of the States . . . to plan the development and use . . . land and water resources." (33 U.S.C. § 1251(b).) Furthermore, by crafting a rule that adheres more strictly to the relatively narrow statutory language of the Clean Water Act, the Agencies will avoid usurping land authorities that are traditionally the clear prerogative of state and local agencies.

Specific Comments

The 2015 Rule is purportedly based on the United States Supreme Court's decisions in *Rapanos v. U.S.* (2006) 547 U.S. 715, 780 and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (2001) 531 U.S. 159 ("*SWANCC"*), as well as other federal case law, but in many instances the 2015 Rule distorts these very cases in order to support an expansive view of CWA jurisdiction while also cherry-picking select opinions, such as Justice Kennedy's concurrence in *Rapanos*. These inappropriate interpretations, as seen in the 2015 Rule, result in significantly more federally controlled waters, including isolated, intrastate waters clearly excluded by *SWANCC* and subsequent guidance.

A. The *Rapanos* Plurality Opinion Should Determine the Scope of Any New Rule

To arrive from the plurality, two concurrences, and two dissents within *Rapanos* at something akin to clear guidance for the drafting of a new rule, the Agencies' inquiry must

begin with *Marks v. United States*. It is there established that, in the case of a divided court on the question of an ambiguous statute, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." (*Marks v. United States*, 430 U.S. 188, 193 (1977).) Here, the plurality's rule in *Rapanos* is certainly the narrowest: Namely, that "waters of the United States" must be "relatively permanent," not merely "intermittent" or "ephemeral," "adjacent" in the sense of "continuous" and not a "physically remote" connection—and, in the case of "wetlands," they must satisfy two requirements: First, that the wetland constitute a "relatively permanent body of water connected to traditional interstate navigable waters" and, second, that it have a "continuous surface connection with [such a traditional interstate navigable water], making it difficult to determine where the water ends and the wetland begins." (*Rapanos* at 739 and 742.) Beyond these tests, the plurality's cautions concerning the role of states and the Clean Water Act's underlying federalism, the limits of the Commerce Clause, and the distinction between water pollution control and land use regulation also tend to appropriately limit and narrow the reach of the Clean Water Act. In contrast, the "significant nexus" test laid out in Kennedy's concurrence is not only the broadest reading of the statute, but is also strongly criticized in both Scalia's plurality and Steven's dissent (joined by Souter, Ginsburg, and Breyer). (See *Rapanos* at 753-57 and 807-09.)

Whatever new rule the Agencies write, it must endeavor to fall between the narrower goal posts set by the plurality—and also eschew the much wider bounds set by Kennedy. Also, because the 2015 Rule essentially chose to adopt Justice's Kennedy's much broader "significant nexus" test, it is indeed appropriate to repeal that rule and start over again. Furthermore, to the extent several lower courts have erroneously applied Kennedy's "significant nexus" test to subsume the narrow—and, under *Marks*, controlling—plurality opinion in *Rapanos*, it is again clear that there is an urgent need for greater clarity and guidance from the Agencies, within the narrower bounds of the plurality's decision.

A majority of the Justices in *Rapanos* have in fact agreed that a clearer and more workable rule is needed from the Agencies[2] and that, once such a rule is developed, it will be subject to considerable deference.[3] To avoid future showdowns, however, the new rule must adhere to the narrower bounds set by the plurality in *Rapanos*. If not, we may well again soon find ourselves in the same situation lamented by Justice Roberts in *Rapanos*: "Rather than refining its view of its authority in light of our decision in SWANCC, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency." (*Rapanos* at 758.)

[2] See Roberts at 758; Breyer at 811-12.
[3] See Roberts at 758; Kennedy at 766; Stevens (joined by Souter, Ginsburg, and Breyer) at 788, 792-93, 799 and 808-09; Breyer at 811-12.

B. The 2015 Rule Improperly Misconstrued Kennedy's Significant Nexus Analysis

The 2015 Rule misrepresents Kennedy's "significant nexus" analysis in several ways, misstating the significant nexus standard by misconstruing the level of significance required to satisfy Kennedy's test, expanding the standard by using the disjunctive "or" in describing the effects that must be shown to establish a significant nexus, and applying it to apply to all waters instead of just wetlands

1. The 2015 Rule Misconstrues the Level of Significance Required to Satisfy the Kennedy Test Regarding Substantial

The 2015 Rule misconstrues the level of significance required to satisfy the Kennedy test by stating that a "significant nexus" will be found if a chemical, physical, or biological effect is more than "speculative or insubstantial." (80 Fed. Reg. 37106.) Kennedy's significant nexus test requires a "significant" or substantial effect on the chemical, physical, and biological integrity of other covered waters to demonstrate the requisite nexus. (*Rapanos* at 780.) A "speculative or insubstantial" effect is not equivalent to the "significant" effect required by the plain terms of the "significant nexus" test. Kennedy opined on this point by stating that when "wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters." (*Ibid*.) Therefore, if any future rule is to be true to Kennedy's significant nexus test, it must require a demonstration of a chemical, physical and biological effect that is *actually* substantial and significant, and not merely one which is "more than speculative or insubstantial."

2. The 2015 Rule's Concept of Jurisdictionally Connected Waters Diverges From Existing Supreme Court Precedent and the Plain Language of the Clean Water Act and Any Future Rule Must Make Clear that Biological or Ecological Linkage Alone Is Insufficient to Establish CWA Jurisdiction

The stated purpose of the CWA is "to restore and maintain the chemical, physical, *and* biological integrity of the Nation's waters." (33 U.S.C. § 1251(a), emphasis added.) In countless places, however, the 2015 Rule examines these three connective media not as a unity, but rather separately and in isolation from one another. In other words, the 2015 Rule views the presence of *any* measurable connection having a bearing on *any* of the three mentioned types of attributes as itself sufficient to afford evidence of the requisite "connection" to guide Agency policy on Agency jurisdiction under the CWA. (*See*, e.g., 80 Fed. Reg. 37067.) While this may be scientifically sound, it is practically and legally infirm. In particular, for example, if there is only some biological or chemical connection, yet no hydrological connection, it would appear difficult to sustain that the requisite connection exists between two separate *waters*, where there is no actual connection via some more or less continuous aqueous medium. The Agencies' substitution of the word "or" in the 2015 Rule for the word "and" in the "chemical, physical, *and* biological integrity" formation taken from Justice Kennedy's "significance nexus" standard has the effect of separating any remote possibility of an ecological or biological nexus alone from

the necessary circumstance of an actual, hydrologic connection that is more than "speculative or insubstantial." This language is no idle formation, as it in fact mirrors the language of the Clean Water Act, whose stated purpose is to "restor[e] and maintain[] the chemical, physical, *and* biological integrity *of the Nation's waters*." (33 U.S.C. § 1251(a).) Thus, while biology and ecology are potentially relevant components of CWA jurisdiction, *water* or actual *significant hydrologic connection* is not optional, but rather an absolutely essential element of this jurisdictional question.

It is by this simple substitution of the conjunctive "and" for the disjunctive "or" that the 2015 Rule would improperly assert jurisdiction over otherwise non-jurisdictional waters in any circumstance where Corps field staff might point to a potential "ecological interconnection between [a] wetland and [a] jurisdictional waterbody [including, for example,] resident species (e.g., amphibians, aquatic turtles, fish, or ducks) [that] rely on both the wetland and the jurisdictional waterbody for all or part of their life cycles (e.g., nesting, rearing, or feeding), that may demonstrate that the wetland is neighboring and thus adjacent."

The U.S. Supreme Court in *SWANCC* specifically rejected that such a biological or ecological connection in the absence of other relevant factors can be relied upon as the sole basis for an assertion of jurisdiction by the Agencies. While particular facts of *SWANCC* dealt with the Corps' migratory birds under the Corps' former "Migratory Bird Rule" (51 Fed. Reg. 41217), the legal ramifications of that decision are much broader and, in fact, go to the heart of the much broader question of the proper scope and meaning of the term "navigable waters." (See *SWANCC, supra,* 531 U.S. at 167, 171-172, 174.)

From a unified reading of all three of the U.S. Supreme Court's major precedents on the meaning of the phrase "waters of the United States," it is quite clear that an ecological or biological connection alone, in the absence of a hydrologic connection or "significant nexus" that is more than "speculative or insubstantial," is insufficient to support an assertion of jurisdiction by the Agencies. Without a clear hydrologic connection, among other properly documented factors and appropriate considerations sufficient to establish the existence of a "significant nexus," there simply is no valid basis upon which the Agencies may assert its jurisdiction.

3. Justice Kennedy Utilized His Significant Nexus Test Only for Purposes of Determining Whether *Wetlands*, and Not the Broader Universe of Potential *Waters*, Are Jurisdictional

Notwithstanding the question of whether significant nexus is even an appropriate test, the 2015 Rule improperly expands Kennedy's significant nexus test to all waters. (80 Fed. Reg. 37061.) Justice Kennedy utilized his significant nexus test exclusively for wetlands, not any other category of purported water of the United States. (*See generally, Rapanos,* 547 U.S. at 759-787 (Kennedy, J., concurring).) For example, in explaining his test and analysis, Justice Kennedy said: "[***W*]*etlands*** possess the requisite nexus . . . if the ***wetlands***, either alone or in combination with similarly situated lands in the region,

significantly affect the chemical, physical, and biological integrity of other covered waters . . . ." (*Rapanos* at 780 (emphasis added).)

Notwithstanding Justice Kennedy applying his significant nexus standard in *Rapanos* exclusively to wetlands, with eight Justices affirmatively refusing to adopt the significant nexus standard as the governing test of jurisdiction, the Agencies improperly decided to extend its application to all waters since "there was no indication in [Kennedy's] opinion that the analytical framework of his opinion…is limited to adjacent wetlands." (80 Fed. Reg. 37061.) Because of this fundamental limitation in Justice Kennedy's "significant nexus" standard, any future rule relying on Justice Kennedy's concurrence will be problematic and, instead, any future rule should properly utilize Justice Scalia and the plurality's opinion and previous precedent such as the U.S. Supreme Court's earlier direction in *SWANCC*.

C. Any Future Rule Must Utilize Scalia and the Plurality's Conclusion that Ditches are not Jurisdictional Waters of the United States

Any future rule must define tributaries to distinguish and appropriately exclude man-made roadside and agricultural ditches from the Agencies' definition of jurisdictional waters of the United States.

Rather than proceeding in a manner that conveys proper jurisdiction, the 2015 Rule employs an overly broad definition of "tributary," which "can be a natural, man-altered, or man-made water body" physically characterized by the presence of a channel with a defined bed and bank and an ordinary high water mark. (80 Fed. Reg. 37105; see also 80 Fed. Reg 87078, 37098.) This definition authorizes federal regulation of virtually *any ditch* through which water flows, including non-tidal agricultural conveyance structures employed during routine farming practices unless one of the 2015 Rule's extremely narrow exclusions apply. Since it is unlikely that an agricultural ditch can meet one of the three exclusions, under the 2015 Rule, the CWA would regulate all roadside and agricultural ditches that have a channel, have an ordinary high water mark, and can meet one of the five listed characteristics. (*Ibid*.) This attempt to regulate all ditches and channels is overly expansive and is an improper expansion of federal authority.

Ditches, canals, channels, conduits, and man-made conveyance systems have been used for decades and are necessary elements for the state of California to transport, store, and divert water for agricultural, municipal, commercial, and industrial uses. A quick review of the existing regulations and previous Guidance documents finds that such "ditches" were never formerly held to be jurisdictional waters of the United States. The current regulations do not define "ditches" as a category of jurisdictional waters and the 2008 *Rapanos* Guidelines generally excluded them. Further, as clearly concluded in *Rapanos*, a sweeping inclusion of all such systems is improper as these systems are not "waters of the United States."

> The restriction of "the waters of the United States" to exclude channels containing merely intermittent or ephemeral flow also accords with the

> commonsense understanding of the term. In applying the definition to "ephemeral streams," "wet meadows," storm sewers and culverts, "directional sheet flow during storm events," drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term "waters of the United States" beyond parody. The plain language of the statute simply does not authorize this "Land Is Waters" approach to federal jurisdiction." (*Rapanos, supra,* 547 U.S. at 733-734.)

As further stated in *Rapanos* and agreed upon by all of the Justices, "The separate classification of 'ditch[es], channel[s], and conduit[s]'—which are terms ordinarily used to describe the watercourses through which *intermittent* waters typically flow--shows that these are, by and large, *not* 'waters of the United States.'" (*Rapanos, supra*, 547 U.S. at 735-36, emphasis in original.) The Plurality went on to state:

> It is of course true, as the dissent and Justice Kennedy both observe, that ditches, channels, conduits and the like "can all hold water permanently as well as intermittently," post, at 802, 165 L. Ed. 2d, at 217 (opinion of Stevens, J.); see also post, at 771-772, 165 L. Ed. 2d, at 198-199 (opinion of Kennedy, J.). But when they do, we usually refer to them as "rivers," "creeks," or "streams." A permanently flooded ditch around a castle is technically a "ditch," but (because it is permanently filled with water) we normally describe it as a "moat." See Webster's Second 1575. And a permanently flooded man-made ditch used for navigation is normally described, not as a "ditch," but as a "canal." See id., at 388. Likewise, an open channel through which water permanently flows is ordinarily described as a "stream," not as a "channel," because of the continuous presence of water. *This distinction is particularly apt in the context of a statute regulating water quality,* rather than (for example) the shape of streambeds. (*Id*. at 736, fn. 7, emphasis added.)

Agricultural water conveyance structures are "ditches, channels, conduits and the like." (*Ibid*.) They are not streams, canals, moats, or other such systems. Therefore, any attempt to regulate these structures as outlined by the 2015 Rule is improper.

D. Landowner Experience with Lack of Consistent CWA Interpretation Amongst Agency Staff and the Need for Greater Clarity and Jurisdictional Restraint

Farmers and ranchers in California have expressed their frustration with the broad and inconsistent application of the Clean Water Act by Corps field staff. California has a diverse landscape that is unique from much of the rest of the United States; in this context, it is therefore especially important for jurisdictional determinations to be made consistently and transparently.

Based on how the Corps has been implementing the current Guidance and portions of the 2015 Rule, Farm Bureau fears that any rule lacking in greater clarity will allow the

Agencies to continue to assert claims of jurisdiction over many areas of California never before affected. This is particularly true of the transitional areas between the Central Valley floor and the surrounding low foothills, as well as the numerous other watersheds with similar topography. These areas often contain seasonal and/or isolated wetlands or swales. Because of the gradual elevation descent from the foothills to the valley floor, water runs downhill during rain events. The Central Valley has an arid, Mediterranean climate in which it only rains three months out of the year. It does not rain continuously during this time, but rather, rain events occur sporadically throughout those three months. It is during major rain events – often only a few days per year – that swales will direct water downhill, onto neighboring properties, and into the regional watershed. These watersheds contain numerous tributaries that are considered "non-navigable relatively permanent" (i.e. contain water at least 3 months of the year) under the current Guidance. These tributaries eventually reach a traditional navigable waterway. Under the 2015 Rule, it is conceivable that entire watersheds in California are deemed jurisdictional. Clearly, however, this was not the intent of the CWA, nor is it an effective use of resources to protect the true waters of the U.S.

Numerous landowners in the outer edges of the valley regions have transitioned from pasture or row crops to trees or vines in the past ten years. This is largely because of the economic imperative to increase profitability per acre as land values increase. In order to remain viable, farmers need the ability to rotate crops and otherwise manage their land as needed. Many areas along the valley outer edges are now 15-20 miles from major urban areas, and developmental pressures and land values continue to increase.

Farm Bureau is concerned about inconsistent enforcement of the CWA across the state and the Central Valley region. In the past five years, a handful of landowners in eastern San Joaquin County have received alleged CWA violations for ground work they performed on their land. This same ground work has occurred all up and down the eastern Central Valley because of the vast acres of foothill rangelands that have been converted to trees/vines/row crops in the past ten years. It is feared that the number of inconsistent enforcement actions will increase if the amount of jurisdictional waters also increases.

The 2015 Rule's allowance of the use of maps and aerial photos would also have become a major source of misinterpretation in jurisdictional determinations. (80 Fed. Reg. 37078, 37079, 37081, 37092.) While the use of maps and photos may help identify wetlands, this practice would also have led to probable misidentification of wetlands and the failure to demonstrate the significance of any hydrological connection. For example, areas that may appear to be wetlands or swales on an aerial photo may actually be a salt lick placement for cattle, cattle trails, or an area with shallow soil and no vegetative growth. For this reason, wetland delineations should not be determined solely based on aerial maps or similar tools.

Farmland provides many social and ecosystem benefits beyond a safe and affordable food supply, such as open space, habitat, carbon sequestration, and many others. It is important to note that different types of agriculture provide different environmental benefits (i.e. pasture vs. row crops vs. trees, etc.) Overly-broad implementation of the

CWA is one more regulation that farmers now must commit time and money to address. Any replacement rule for the 2015 Rule should be carefully written to improve clarity and consistency, and to avoid over expansive misapplication of the Act.

II. Legal Authority for the Present Action

The Agencies' discussion of the reasons for the Proposed Rule is quite sufficient on its face to satisfy the legal standard established in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502—namely, a "reasonable explanation" for a policy change that is "permissible under [statute]," supported by "good reason" and the agency's "belief" in the superiority of the newly selected alternative. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-515. This legal standard is indeed a low one—and particularly so where, as here, the rulemaking is being split into separate policy and substantive rulemaking steps. Some of the relevant and sufficient considerations adduced in support of the proposed rescission include:

- The entry of a new President and Administration with differing views, priorities and executive prerogatives under the law;

- The new Administration's valid policy assessment that the presently stayed 2015 Rule failed to adequately consider Congress' intent concerning "the responsibilities and right of States to prevent, reduce, and eliminate pollution";

- The 2015 Rule's failure to address the plurality opinion in *Rapanos v. United States*;

- The continuing need for clear regulatory guidance on the scope and reach of the Clean Water Act;

- The President's express policy directives in his February 28, 2017 Executive Order including states' rights, economic impacts, and the need for regulatory certainty;

- The background of widespread negative public comment on, and in opposition to, the 2015 Rule;

- The current posture of pending litigation regarding the 2015 Rule, including two judicial stays and an appeal to the U.S. Supreme Court;

- The fortuitous lack of any extensive reliance on the 2015 Rule before it was stayed—and, thus, the unique opportunity to return to the pre-2015 Rule, prior guidance, and prior judicial precedents that are, indeed, the legal *status quo*.

Because the Proposed Rule is a two-step process which defers consideration of complex technical and scientific information to a subsequent substantive rulemaking step,

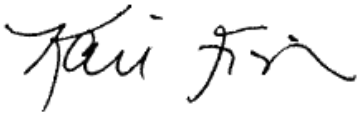
the broader policy-centered goals that underpin the present non-substantive rescission step are legally sufficient.

To this we would only add that, while the Agencies' notice fairly extensively discusses Congress' dual intent to prevent water pollution while at the same time respecting "the primary responsibilities and right[s] of States," it is also important to stress Congress' concern for economics in relation to the "economic growth" prong of the President's Executive Order, as evidenced by the Clean Water Act's many statutory references to social and economic costs. (See, e.g., 33 U.S.C. §§ 1311 ("Effluent Limitations"), 1312 ("Water Quality Related Effluent Limitations"), 1315 ("State Reports on Water Quality"), 1316 ("National Standards of Performance"), and 1375 ("Reports to Congress; Detailed Estimates and Comprehensive Study on Costs; State Estimates").) While these provisions evidence clear congressional concern for economics, the Agencies' regard for the potential economic effects, especially to farmers and ranchers, in the extremely expansive 2015 Rule is notable. Importantly, therefore, the Administration's proposed rescission of the 2015 Rule and promulgation of replacement rule is further supported by the Agencies' prominent omission of economic impacts in the 2015 Rule.

III. Conclusion

Farm Bureau appreciates the opportunity to provide input on the Agencies' Proposed Rule to rescind the 2015 Clean Water Rule and recodify the pre-existing rules and regulations that existed before the 2015 Clean Water Rule. Farm Bureau supports the Proposed Rule given the 2015 Rule's numerous legal flaws and expansive view of CWA jurisdiction, resulting in significantly more federally controlled waters, including isolated, intrastate waters clearly excluded by *SWANCC* and subsequent guidance. Given the paramount importance of any subsequent rule defining "waters of the United States" to Farm Bureau's members who are regulated under the Clean Water Act, Farm Bureau urges the Agencies to craft a new definition consistent with the principles expressed herein.

Respectfully,



KARI E. FISHER
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JUSTIN E. FREDRICKSON
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Enc. Attachment A

ATTACHMENT A

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November 14, 2014

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Water Docket
U.S. Environmental Protection Agency
Attn: Docket ID No. EPA–HQ–OW–2011–0880
Mail Code 2822T
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: ***Comments on the Definition of Waters of the United States Under the Clean Water Act, Docket No. EPA-HQ-OW-2011-0880***

Dear Ms. Downing and Ms. Jensen:

The California Farm Bureau Federation ("Farm Bureau") is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home, and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing approximately 78,000 agricultural, associate, and collegiate members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

Farm Bureau appreciates the opportunity to comment on the U.S. Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers' ("Corps") (hereinafter, collectively

"Agencies") *Proposed Rule Redefining the Definition of "Waters of the United Sates" Under the Clean Water Act* (hereinafter "Proposed Rule"). Farm Bureau's members engage in activities on land and water that often require a jurisdictional determination from the Corps prior to proceeding. Any change in the Clean Water Act ("CWA") regulations governing how these determinations of jurisdiction are made, particularly any expansion of federal jurisdiction, will have a substantial effect on our members' ability to timely obtain the permits necessary to continue existing agricultural operations or develop new or expanding agricultural ventures. Unfortunately, the Proposed Rule will have a substantial effect on our members and the ability for farmers and ranchers to continue to utilize the land. Farm Bureau has numerous concerns with the Proposed Rule as it improperly expands federal jurisdiction under CWA, substantially broadens all prior guidance documents and interpretations, and is inconsistent with existing federal law and case law.

I. The Proposed Rule Improperly Relies on the Connectivity of Streams Report

As stated in the Proposed Rule's preamble, the Agencies will be utilizing the Scientific Advisory Board's ("SAB") review of the *Connectivity of Streams and Wetlands to Downstream Waters* Report ("Report") as the scientific basis for any final regulatory action pertaining to the Proposed Rule. (79 Fed. Reg. 22,190 (April 21, 2014).) Therefore, the SAB's review of this Report has the potential for wide-ranging implications for many sectors of the economy including production agriculture.

Farm Bureau is concerned that this activity is the result of a problematic and flawed regulatory process. First, it is not logical that the Agencies would prepare a draft rule before the foundational science for the proposal is reviewed and finalized. Second, sending a proposed rule to the Office of Management and Budget before the SAB completes its scientific review of the underlying science suggests outcomes have been pre-determined. It is our understanding that the SAB only recently completed their review of the Report on October 17, 2014.

The optics of this approach raise legitimacy questions of the rulemaking process and reduces public confidence that the science is in fact determining policy; not the other way around. Additionally, the public should be afforded the opportunity to comment on the final Report prior to the deadline to review and comment on the Proposed Rule. Given that this has not occurred, the Proposed Rule's foundational reliance on the Connectivity of Streams Report is flawed.

II. The Proposed Rule Would Unlawfully Conflict with Existing Supreme Court Precedent and the Plain Language of the Clean Water Act

A. Jurisdictional Background

The CWA provides federal jurisdiction over "waters of the U.S." defined as "navigable waters" and originally understood to mean interstate waters or intrastate waters connected to the sea that were navigable in fact. This navigability in fact was once thought to provide the

constitutionality of the CWA by ensuring that the federal regulation of such waters fell under the Commerce Clause of the U.S. Constitution. As federal assertions of jurisdiction over other waters have, over the last several decades, challenged the original narrow scope of the CWA as intended by Congress, the U.S. Supreme Court has been compelled to intervene on the question of CWA jurisdiction in three major cases to date. Relying in large part on language regarding Congress' intent in the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (33 U.S.C. § 1251(a)), EPA and the Corps have attempted over time to greatly broaden the scope of their jurisdiction under the CWA, pushing, and many would argue, at times exceeding the bounds of both the CWA and the Constitution. At each step in this process, however, the clear direction from the Supreme Court has reiterated that the EPA's and the Corps' jurisdiction under the CWA is not unlimited, but rather limited.

In the 1985 case of *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121 (1985) ("*Riverside Bayview Homes*"), the Supreme Court allowed a relatively modest expansion of the CWA beyond "waters of the U.S." that are strictly "navigable in fact" to include adjacent wetlands "inseparably bound up with" navigable waters. However, adjacency, close connection, and the character and physical location of the land in relation to navigable water were the clear limiting factors on any over-broad expansion of jurisdiction. In the 2001 case of *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (2001) 531 U.S. 159 ("*SWANCC"*), the Supreme Court rejected regulation of "isolated waters" lacking a "significant nexus to navigable waters"—and, particularly, under the facts of the *SWANNC* case, including those "isolated waters" where there was no discernible hydrologic connection, but rather the only conceivable connection to any navigable water was a biological connection, provided by the movement of certain migratory birds.

After *SWANCC*, the Agencies adopted a broad, but ill-defined and imprecise interpretation that "waters of the U.S." included any water "connected" to navigable water, depending on the subjective case-by-case judgment of agency field staff. This, in turn, set the stage for the Supreme Court's most comprehensive look to date at the question of federal jurisdiction under the CWA in the 2006 case of *Rapanos v. United States* (2006) 547 U.S. 715 ("*Rapano*s"). While there was no commanding consensus of all of the Court in *Rapanos*, a majority of justices agreed in rejecting the Agencies' interpretation that *any "connection*" to a navigable water whatsoever would be sufficient. Thus, the plurality opinion by Justice Scalia (joined by Justices Thomas, Alito, and Roberts and supported in a concurring opinion by Kennedy) expressly rejected the notion that federal jurisdiction under the CWA extends to ephemeral streams, ditches, and drains, and instead limited federal jurisdiction to "relatively permanent waters." (*Rapanos, supra*, at pp. 733, 734, 739.) Meanwhile, a separate opinion by Justice Kennedy concurred with the plurality in clarifying that the scope of the CWA is not unlimited, but rather qualified, requiring at least a "significant nexus" to some navigable water. (*Id*. at p. 779.) Additionally, Justice Kennedy's concurring opinion included extensive discussion of the concept of "reasonableness" within the constitutional bounds of the commerce clause and consistent with traditional notions of state's rights and federalism, in addition to "significance," as a built-in practical and constitutional control on the extent of

the Agencies' jurisdictional reach. (*See*, e.g., *Rapanos, supra,* at pp. 738, 767, 776; *see*, also, *SWANCC*, *supra*, 531 U.S. at pp. 172-174.)

Controversy and confusion since *Rapanos* have centered on Justice Kennedy's concurring opinion and the theory that an assertion of federal CWA jurisdiction requires not merely *any* connection, but rather some connection to a navigable water sufficient to be called a "significant nexus." Agency efforts to retool and extrapolate from this "significant nexus" formulation have struck at latent ambiguities, including the nature and extent of the connection—whether physical, chemical, or biological—and at the significance of connection, either individually or cumulatively. Erring liberally (if not to say "aggressively") on the side of over-inclusion, Agency interpretations to date, including the Proposed Rule, have again focused on the presence, not of a *significant* connection, but rather of *any* connection at all. Such interpretations have buttressed such broad readings of the new "significant nexus" test with postulations that *any* connection, even if insignificant on to itself, can be cumulatively significant when taken in combination with the universe of other connections. Thus, despite repeated admonishments by the Supreme Court that the jurisdiction under the CWA *is not* limitless, the Agencies' view, as evidenced in the Proposed Rule, again appears to be that essentially *any* connection is sufficient to establish jurisdiction. The Proposed Rule provides little more than a broad confirmation of the unremarkable scientific proposition that virtually all land and water are connected at a molecular and atomic level to all other lands and waters, whether individually or cumulatively, physically, chemically, or biologically. The Proposed Rule's "any connection" reinterpretation of Justice Kennedy's "significant nexus" test, however, ignores fundamental legal and practical constraints on the Agencies' authority, and again lands the Agencies and their staff, the courts, the states, and private individuals throughout the nation in the same constitutional peril that has tormented real world application of the CWA these last several decades.

B. The Proposed Rule Improperly Expands Jurisdiction

The Proposed Rule improperly expands the reach of the CWA by broadly interpreting "waters of the United States" in order to inflate the definition to cover waters never previously deemed jurisdictional under existing regulations, previous guidance documents, or federal case law. The Proposed Rule then extends that interpretation to *all programs* authorized under the Act, including the Section 402 National Pollutant Discharge Elimination System ("NPDES") permit program, the Section 311 oil spill program, the water quality standards and total maximum daily load programs under Section 303, and the Section 401 state water quality certification process. The existing 2003 and 2008 guidance documents are *limited* to CWA Section 404 determinations.

The Proposed Rule is purportedly based on the United States Supreme Court's decisions in *Rapanos* and *SWANCC*, as well as other federal case law, but in many instances the Proposed Rule distorts these very cases in order to support a very broad view of CWA jurisdiction. This inappropriate interpretation, if adopted, will result in significantly more federally

controlled waters, including those waters, such as isolated waters, which were clearly excluded by *SWANCC* and subsequent guidance.

The Proposed Rule's stated purpose is to "enhance protection for the nation's public health and aquatic resources, and increase CWA program predictability and consistency by increasing clarity as to the scope of 'waters of the United States'' protected under the Act. (79 Fed. Reg. 22,188.) But in actuality, the Proposed Rule will do the exact opposite; it will reduce clarity and create great uncertainty by expanding jurisdiction beyond the four corners of the CWA, current regulations, and Supreme Court decisions. Further, given that under the Proposed Rule, the Agencies could now regulate almost any low spot on a farmer's field where water sometimes stands or channels, the Proposed Rule's expanding jurisdiction exposes farmers to unknowing violations of the law by farming in, and discharging typical farm nutrients and pesticides into, features that look more like land than water. (*Rapanos, supra,* 547 U.S. at p. 734, "The plain language of the statute simply does not authorize this "Land Is Waters" approach to federal jurisdiction.") Specific examples of improper expansion of jurisdiction include:

- Applies a broadened view of Justice Kennedy's significant nexus standard not only to wetlands but also to all waters including tributaries and isolated waters;
- Finds that a hydrological connection is *not* necessary to establish a significant nexus;
- Allows the Agencies to "aggregate" the contributions of all similar waters (small streams, adjacent wetlands, ditches or certain otherwise isolated waters) *within an entire watershed*, thus making it far easier to establish a significant nexus between these small intrastate waters and traditional navigable waters;
- Regulates all roadside and agricultural ditches as tributaries that have an ordinary high water mark and contribute flow directly or indirectly through another water;
- Makes all waters not in any of the other categories (also known as the "other waters") subject to the significant nexus standard.

This sweeping expansion of federal jurisdiction exceeds federal authority, contradicts explicit U.S. Supreme Court directives, and abrogates existing state authority.

C. The Proposed Rule's Concept of Jurisdictionally Connected Waters Diverges From Existing Supreme Court Precedent and the Plain Language of the Clean Water Act

The stated purpose of the CWA is "to restore and maintain the chemical, physical, <u>and</u> biological integrity of the Nation's waters." (33 U.S.C. § 1251(a), emphasis added.) In countless places, however, the Proposed Rule examines these three connective media not as a unity, but rather separately and in isolation from one another. In other words, the Proposed Rule appears to view the presence of *any* measurable connection having a bearing on *any* of the three mentioned types of attributes to itself afford sufficient evidence of the requisite "connection" to guide Agency policy on Agency jurisdiction under the CWA. (*See*, e.g., 79 Fed. Reg. 22,213.) While this may be scientifically sound, it may well be legally infirm. In particular, for example, if there is only some biological or chemical connection, yet no

hydrological connection, it would appear difficult to sustain that the requisite connection exists, between two separate *waters*, where there is no actual connection via some more or less continuous aqueous medium. Indeed, the *SWANCC* case would appear to stand for precisely this proposition.

Addressing this question in his concurring opinion in *Rapanos*, Justice Kennedy requires that wetlands must "significantly affect the chemical, physical, *and*, biological integrity of other covered waters" in order to find a nexus. (*Rapanos, supra*, 547 U.S. 780.) Specifically, Justice Kennedy concluded:

> The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the law to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and it pursued that objective by restricting dumping and filling in "navigable waters," §§ 1311(a), 1362(12). With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters--functions such as pollutant trapping, flood control, and runoff storage. 33 CFR § 320.4(b)(2). *Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable."* 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." (*Rapanos, supra*, 547 U.S. 779-80, emphasis added.)

The Proposed Rule's examination of *separate* chemical, biological, and hydrological connection, especially in the preamble's discussion of "other waters," ignores the Supreme Court's earlier direction in *SWANCC*, as well as Justice Kennedy's test for a significant nexus in *Rapanos*. (*See,* Discussion on Significant Nexus, *infra*, at Section III. C., entitled "The Proposed Rule Misapplies the Significant Nexus Test.")

D. The Proposed Rule Ignores the Requirement that Findings of Jurisdiction Must be Based on Reasonableness

Notwithstanding various interpretations on the definition of "waters of the United States," U.S. Supreme Court precedent to date is clear that a fundamental limit on the Corps' and the EPA's jurisdiction under the CWA is the "reasonableness" of a jurisdictional determination, particularly in light of the outer limits of congressional and executive power under the Commerce Clause and the basic principles of federalism that are the foundation for our system of government.

In *SWANCC*, the Court laid the groundwork for the basic proposition that federalism, states' rights, and the limits of the Commerce Clause define the outer bounds of federal CWA

authority. "Where an administrative interpretation of a statute invokes the outer limits of Congress' power," the *SWANCC* Court observed, "we expect a clear indication that Congress intended that result." (*SWANCC, supra*, 531 U.S. at p. 172.) The *SWANCC* opinion continues:

> This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. [Citation.] This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. […] Thus, "where an otherwise acceptance construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." (*SWANCC, supra,* 531 U.S. at pp. 172-173, 174.)

The plurality in *Rapanos* also touched on this issue:

> Regulation of land use, as through the issuance of the development permits sought by petitioners in both of these cases, is a quintessential state and local power. [Citations.] […] We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority. [Citations.] […] [J]ust as we noted in *SWANCC*, the Corps' interpretation stretches the outer limits of Congress's commerce power and raises difficult questions about the ultimate scope of that power. (*Rapanos, supra,* 547 U.S. at p. 738.)

Moreover, as both the plurality and Justice Kennedy note (*see, Rapanos, supra,* 547 U.S. at 723-724, 776), the CWA itself expressly declares that "[i]t is the policy of Congress 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 the exercise of his authority under this chapter." (33 U.S.C. § 1251(b).)

Picking up where *Riverside Bayview Homes* and *SWANCC* left off, Justice Kennedy's opinion frames the question of "reasonableness" as follows:

> *Riverside Bayview* and *SWANCC* establish the framework for the inquiry in the cases now before the Court: Do the Corps' regulations, as applied to the wetlands in *Carabell* and the three wetlands parcels in *Rapanos*, constitute a *reasonable interpretation* of "navigable waters" as in *Riverside Bayview* or an invalid construction as in *SWANCC?* Taken together these cases establish that in some instances, as exemplified by *Riverside Bayview*, the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a

> "navigable water" under the Act. In other instances, as exemplified by *SWANCC*, there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking. (*Rapanos, supra,* 547 U.S. at p. 767, emphasis added.)

The Kennedy opinion later places this question in the context of the Commerce Clause and states' rights questions raised in *SWANCC*:

> In *SWANCC*, as one reason for rejecting the Corps' assertion of jurisdiction over the isolated ponds at issue there, the Court observed that this "application of [the Corps'] regulations" would raise significant questions of Commerce Clause authority and encroach on traditional state land-use regulation. [Citation.] As *SWANCC* observed, [Citation], and as the plurality points out here, [Citation], the Act states that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources," [Citation]. The Court in *SWANCC* cited this provision as evidence that a clear statement supporting jurisdiction in applications raising constitutional and federalism difficulties was lacking. [Citation.] [¶] […] In *SWANCC*, by interpreting the Act to require a significant nexus with navigable waters, the Court avoided applications—those involving waters without a significant nexus—that appeared likely, as a category, to raise constitutional difficulties and federalism concerns. (*Rapanos, supra,* 547 U.S. at 776.)

Thus, as opined in various cases, federal CWA authority is not boundless. Rather, it is limited by reasonable findings of jurisdiction and the constitutional bounds of the Commerce Clause and states' rights. Unfortunately, the Proposed Rule interprets "waters of the U.S." so broadly as to impermissibly "readjust the federal-state balance" and ignore "Congress['s] "cho[ic]e to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources.'" (*SWANCC*, *supra*, 531 U.S. at p. 174 (quoting 33 U.S.C. § 1251(b)).) Further, Congress has not provided the Agencies with "clear and manifest" (SWANCC, *supra*, 531 U.S. at p. 172; *Rapanos, supra*, 547 U.S. at p. 738) authorization in which the Agencies can unprecedentedly intrude into traditional state authority over the regulation of land and water use. Therefore, the Agencies' intention to stretch their regulatory reach under the CWA past the outer limits of Congress' constitutional authority raises "significant constitutional questions" and "would result in a significant impingement of the states' traditional and primary power of land and water use.[1] (*SWANCC, supra*, 531 U.S. at p. 174.)

[1] The State of California has a stringent nonpoint source program which regulates irrigated agriculture, in addition to other classes of discharges.

E. The Proposed Rule Incorrectly Uses the "Similarly Situated Waters" Concept to Find "Other Waters" Jurisdictional

The Proposed Rule states it adopts Justice Kennedy's "alone or in combination with similarly situated waters" concept in order to determine if a significant nexus for "other waters" exist and thus are jurisdictional. (*See,* 79 Fed. Reg. 22,212.) Specifically, the Proposed Rule states, "'*Other waters'* will be evaluated either individually, or as a group of *waters* where they are determined to be similarly situated in the region." (*Id.* at 22,211, emphasis added.) In order to establish a significant nexus, the Proposed Rule lays out the following test:

> [*O]ther waters, including wetlands*, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a 'water of the United States' so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (a)(3). This combination of functionality and proximity to each other or to a ''*water* of the United States'' meets the standard provided by Justice Kennedy.

(79 Fed. Reg. 22,213, emphasis added.) However, this test, relied upon for *all waters,* improperly expands Justice Kennedy's similarly situated *wetlands* assessment test from one that is applicable to only finding jurisdictional *wetlands* to one that is now used to find *any water* jurisdictional. Justice Kennedy's actual similarly situated wetlands assessment test states:

> Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if *the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable*." 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." (*Rapanos, supra*, at p. 780, emphasis added.)

The Proposed Rule's expanded use of the similarly situated concept, however, ignores clear limitations of the CWA's scope. First, although Justice Kennedy's significant nexus test contemplates the aggregation principle, the test is not without bounds. Under his test, a wetland may "significantly affect" a navigable water not only by itself, but also "either alone or in combination with similarly situated lands in the region." (*Rapanos, supra,* at p. 780, emphasis added.) However, Justice's Kennedy's "significant nexus" standard was specific to determining jurisdiction for wetlands and does not apply to all waters such as tributaries. (*Id.* at pp. 780-781.) Kennedy expressly rejected the propriety of expanding this aggregation standard to tributaries. Thus, to apply the similarly situated assessment and significant nexus standard to all waters directly contravenes the clear distinction drawn in Justice Kennedy's concurring opinion.

Second, as mentioned previously herein, one relatively clear boundary that can help to draw the elusive line at the blurry edges of Kennedy's expansive "significant nexus" standard is the notion of "reasonableness" in relation to the "significant constitutional questions" raised in *SWANCC*. The best point of reference here is, again, the discussion in *SWANCC* that remains the Court's most complete treatment of these constitutional issues to date:

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. [Citation.] This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. [Citation.] This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. [Citation.] Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." [Citation.] (*SWANCC, supra,* at pp. 172-173. *See*, also, *id.* at p. 174.)

Thus, any regulation of wetlands must be reasonable and not push the outer boundaries of the CWA's constitutional envelope. Further, any discussion of similarly situated aggregation or combination should be limited in scope, applying only to wetlands and not all navigable waters. The Proposed Rule's similarly situated assessment for finding a significant nexus, unfortunately, is neither reasonable nor limited to wetlands, and thus is improper.

III. Core Elements of the Proposed Rule Improperly Lead to Jurisdictional Expansion, Are Ambiguous, and Cause Confusion

A. The Proposed Rule Misapplies the Law

Throughout the Proposed Rule, references are made to U.S. Supreme Court cases in order to support the fundamental changes for establishing jurisdiction under the CWA. Unfortunately, in many cases, the assertions only utilize portions of the cases, specifically favorable language in the law, leaving out the corresponding limiting requirements. A review of the full statement of the law limits jurisdiction more narrowly than that proposed in the Proposed Rule. As discussed throughout, the Proposed Rule improperly expands the definition of tributaries, misconstrues and misapplies the significant nexus test, and ignores the touchstone requirement of navigability.

B. Improper Expansive Interpretation of the Tributaries Standard

The Proposed Rule categorically asserts jurisdiction broadly over all tributaries with no site-specific analysis required. By rule, anything with a bed, bank, and ordinary high water mark which may directly or indirectly contribute flow to jurisdictional water, without regard to its

impact on downstream waters will be found to be a tributary. Further, again by rule, wetlands, lakes, and ponds are tributaries even if they lack beds, banks, or ordinary high water marks. (79 Fed. Reg. 22,201.)

The Agencies claim the Proposed Rule is faithful to key Supreme Court decisions, yet the Supreme Court previously admonished the Agencies' for using the ordinary high water mark indicator. The plurality opinion in *Rapanos* faulted the use of the ordinary high water mark as an indicator of jurisdiction because it "extended the waters of the United States to virtually any land feature over which rainwater or drainage passes and leaves a visible mark—even if only the presence of litter and debris." (*Rapanos, supra*, at p. p. 725, internal quotations omitted.) Kennedy too found fault with the ordinary high water mark indicator, finding that it provided no assurance of a reliance standard for determining a significant nexus. (*Id*. at p. 781.)

The Agencies' decision to use the presence of an ordinary high water mark as one of the factors for considering a water to be a tributary under Kennedy's standard is directly counter to Kennedy's clear directive. Kennedy clearly stated:

> 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, defined as a "line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics," § 328.3(e). This standard presumably provides a rough measure of the volume and regularity of flow. Assuming it is subject to reasonably consistent application, it may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute "navigable waters" under the Act. *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 toward 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. (*Rapanos, supra,* at pp. 780-782, citations omitted, emphasis added.)

As evidenced in the above language, Kennedy determined that the inconsistent application of the ordinary high-water mark *precludes* its use as a factor for determining if a waterbody meets the definition of a tributary. (*Ibid*.) By disregarding the directive, the Proposed Rule's reliance on the ordinary high water mark is not a reasonable measure of whether a tributary possesses a significant nexus with traditional navigable water.

C. The Proposed Rule Misapplies the Significant Nexus Test

The "significant nexus" concept is derived from Supreme Court cases in which Court applied the "significant nexus" test to *wetlands*. However, the Proposed Rule applies the significant nexus standard to *all categories of waters*, including tributaries, ditches, wetlands, adjacent waters, and "other waters" that, under current regulation, are deemed jurisdictional *only if a nexus is found to interstate commerce*. (*See,* 79 Fed. Reg. 22,199, 22,209-10 (regarding finding adjacent waters to have a significant nexus with traditional navigable waters), 22,211.) Such expansion of the test is improper.

1. The Proposed Rule Ignores the Conjunctive Use of "And" in Justice Kennedy's Test for Significant Nexus

The stated purpose of the CWA is "to restore and maintain the chemical, physical, *and* biological integrity of the Nation's waters." (33 U.S.C. § 1251(a), emphasis added.) Justice Kennedy, in his opinion in *Rapanos* requires that wetlands must "significantly affect the chemical, physical, *and*, biological integrity of other covered waters" in order to find a nexus. (*Rapanos, supra*, 547 U.S. at p. 780.) Specifically, Justice Kennedy concluded:

> The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the law to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and it pursued that objective by restricting dumping and filling in "navigable waters," §§ 1311(a), 1362(12). With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters--functions such as pollutant trapping, flood control, and runoff storage. 33 CFR § 320.4(b)(2). *Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable."* 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." (*Rapanos, supra*, 547 U.S. pp. 779-80, emphasis added.)

The Proposed Rule disregards Justice Kennedy's test for significant nexus by consistently substituting "or" for "and." (*See,* e.g., 79 Fed. Reg. 22,211, 22,212.) Such arbitrary substitutions lower the threshold for finding a nexus and vastly expand jurisdictional determinations. This improper revision not only disregards Justice Kennedy's "significant nexus" test, it also disregards the stated purpose of the CWA.

2. The Significant Nexus Test Must Find Chemical, Physical, *and* Biological Connections to Establish CWA Jurisdiction

The plurality and Kennedy opinions in *Rapanos* can be reconciled to coalesce in the common view that an "ecological" or "biological" connection alone, without evidence of a "hydrologic linkage … in the traditional sense," or a "significant nexus" that is more than "speculative or insubstantial," is insufficient to establish the Agencies' jurisdiction.

The Proposed Rule's substitution of the word "or" in the Proposed Guidance, for the word "and" in the "chemical, physical, *and* biological integrity" formation taken from Justice Kennedy's "significance nexus" standard has the effect of then separating any remote possibility of an ecological or biological nexus alone from the necessary circumstance of an actual, hydrologic connection that is more than "speculative or insubstantial." Kennedy's language is no idle formation, as it in fact mirrors the language of the Clean Water Act, whose stated purpose is to "restor[e] and maintain[] the chemical, physical, *and* biological integrity *of the Nation's waters*." (33 U.S.C. § 1251(a), emphasis added.) Thus, while biology and ecology are potentially relevant components of CWA jurisdiction, *water* or actual *significant hydrologic connection* is not optional, but rather an absolutely essential element of this jurisdictional question.

It is by this simple substitution of the conjunctive "and" for the disjunctive "or" that the Agencies would improperly assert jurisdiction over otherwise non-jurisdictional waters in any circumstance where Corps field staff might point to a potential "ecological interconnection between [a] wetland and [a] jurisdictional waterbody [including, for example,] resident species (e.g., amphibians, aquatic turtles, fish, or ducks) [that] rely on both the wetland and the jurisdictional waterbody for all or part of their life cycles (e.g., nesting, rearing, or feeding), that may demonstrate that the wetland is neighboring and thus adjacent."

The U.S. Supreme Court in *SWANCC* specifically rejected that such a biological or ecological connection in the absence of other relevant factors—including, especially, evidence of an actual hydrological connection that is more than "speculative or insubstantial"—can be relied upon as the sole basis for an assertion of jurisdiction by the Agencies. Specifically, the broader issue in *SWANCC* was not the Corps' Migratory Bird Rule alone, or migratory bird habitat in isolated waters, but rather more generally the issue of a "significant [hydrologic] nexus," as previously hinted in *United States v. Riverside Bayview Homes* and now reaffirmed in *Rapanos*. (*See, SWANCC, supra,* 531 U.S. at p. 167; *Riverside Bayview Homes, supra,* 474 U.S. at pp. 131-132; *Rapanos, supra,* 547 U.S. at pp. 779-780.)

From any unified reading of all three of the U.S. Supreme Court's major precedents on the meaning of the phrase "waters of the United States," it is quite clear that an ecological or biological connection alone, in the absence of a hydrologic connection or "significant nexus" that is more than "speculative or insubstantial," is insufficient to support an assertion of jurisdiction by the Agencies—and this is true whether the "biological interconnection" is a migratory bird, an endangered species, a frog, a snake, a mosquito, or a gnat. Without a clear

hydrologic connection, among other properly documented factors and appropriate considerations sufficient to establish the existence of a "significant nexus," there simply is no valid basis upon which the Agencies may assert their jurisdiction.

3. Justice Kennedy's Guiding Principles on Determining Significant Nexus

While it can be said that the limits of federal CWA authority latent in the phrase "waters of the United States" are the constitutional bounds of the Commerce Clause and states' rights, and that the bounds, according to Justice Kennedy, are defined by the existence (or non-existence) of a "significant nexus," what constitutes a "significant nexus" in any given case is less than clear.

Faced with the large uncertainty of an undefined "significant nexus" test and the attendant risk of overbroad *ad hoc* applications of that standard, Justice Kennedy's opinion in *Rapanos* does appear to provide a few guiding principles as follows:[2]

1. The wetland, tributary, or other potential "water of the United States" must have a "significant nexus" to an actual "navigable water" in the "traditional sense" (that is, in the sense of a water that is "navigable in fact" and in some way connected to interstate commerce).

2. The must be an actual "hydrologic connection," in addition to any ecological or chemical connection, and this connection must be more than "speculative" or "insubstantial."

3. For the connection to be a "significant nexus," it must "significantly affect" some water of the United States, whereas the "significance" of a connection must be assessed in terms of the central "goals and purposes" of the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

4. In asserting and exercising their jurisdiction, the Agencies must make a factual "showing" sufficient to establish the existence of a "significant nexus" and "necessary to avoid unreasonable application of statute" in light of the "potential overbreadth of the Corps' regulations," including especially the constitutional risks associated with the federalism and Commerce Clause-related concerns raised in *SWANCC*.

5. To be "reasonable," such an assessment must not be based on "an undue degree speculation" and must "identify substantial evidence supporting [the agency's] claims."

6. In addition to "substantial evidence supporting [the agency's claims]" (or, rather, as *a part* of that "substantial evidence"), the factual record and documentation in every case must include consideration of "factors relevant to the jurisdictional inquiry" sufficient to "permit application of the appropriate legal standard," or in Justice Kennedy's view whether there is a "significant nexus with navigable waters."

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[2] All arguments taken from, and based upon Justice Kennedy's opinion in *Rapanos, supra,* pp. 779-786.

Therefore, when making jurisdictional determinations, the Agencies must incorporate the above points from Justice Kennedy's opinion regarding "reasonable" findings. Unfortunately, the Proposed Rule does not incorporate these above factors and, therefore, does not conform to the Supreme Court's directive.

D. The Proposed Rule Attempts to Improperly Expand Traditional "Navigable Waters"

The Clean Water Act, 33 U.S.C. §§ 1344, 1251-1387, regulates "navigable waters," which are defined as "waters of the United States." Areas that are not "the waters of the United States" are not regulated under the CWA. Under the Rivers and Harbors Act of 1898, navigable waters are generally those waters capable of transporting interstate commerce among states. Formally adopted regulations further define "waters of the United States" as "all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." (33 C.F.R. § 328.3(a)(1).)

Notwithstanding formal regulations and the multitude of federal case law defining and interpreting "navigable waters," dating back decades and even hundreds of years, the Proposed Rule attempts to ignore current regulatory definitions and, instead, redefine the term in order to encompass *all waters*, including those that may or may not have the likelihood of being classified as "navigable" at some future date. Specifically, the Proposed Rule states "waters will be considered traditional navigable waters if: …they are susceptible to being used in the future for commercial navigation, including commercial waterborne recreation." (79 Fed. Reg. 22,200.) As seen by the plain language of the current regulations, the Proposed Rule misstates the law. Current regulations require "navigable waters" to be "susceptible to use in interstate or foreign commerce." (33 C.F.R. § 328.3(a)(1).) As drafted, the Proposed Rule fails to correctly define the requirements necessary for a water to be classified as "navigable waters." Such regulations remain valid, as neither *SWANCC* nor *Rapanos* invalidated any of the regulatory provisions defining "waters of the United States." Thus, the Proposed Rule's attempt to expand the definition of "navigable waters" to cover any waterbody that can support "one-time recreational use" is improper and inappropriate.

E. The Proposed Rule Improperly Expands Jurisdiction to Regulate Ditches

The Proposed Rule specifically defines the term "tributary" to include "ditches" and "channels," and would categorically regulate virtually every ditch that *ever* carries *any* amount of water that eventually flows (over any distance and through any number of other ditches) to a navigable water. (79 Fed. Reg. 22,203.) Although the Proposed Rule contains two exclusions for ditches, these exclusions are very limited such that many farm ditches will not fall within the two exclusionary categories. (*Ibid*.) The Proposed Rule limits the exclusions only to those ditches with less than perennial flow that are excavated in uplands (the term uplands is not defined in the Proposed Rule, but presumably means not waters or wetlands) at *all* points "along their entire length," or to those ditches that do not contribute

flow to any tributary. (*Ibid*.) Given California's landscape and the very nature of ditches to carry water, these exclusions are very narrow and will likely not be applicable to many farmers and ranchers.

Ditches, canals, channels, conduits, and man-made conveyance systems have been used for decades and are necessary elements for the State of California to transport, store, and divert water for agricultural, municipal, commercial, and industrial uses. A review of the existing regulations and the previous guidance documents find that these "ditches" are not jurisdictional waters of the United States. The current regulations do not define "ditches" as a category of jurisdictional waters and the 2008 *Rapanos* guidelines generally excluded them. Further, as clearly concluded in *Rapanos*, a blatant inclusion of all such systems is improper as these systems are not "waters of the United States."

> The restriction of "the waters of the United States" to exclude channels containing merely intermittent or ephemeral flow also accords with the commonsense understanding of the term. In applying the definition to "ephemeral streams," "wet meadows," storm sewers and culverts, "directional sheet flow during storm events," drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term "waters of the United States" beyond parody. The plain language of the statute simply does not authorize this "Land Is Waters" approach to federal jurisdiction." (*Rapanos, supra,* 547 U.S. at pp. 733-734.)

As further stated in *Rapanos* and agreed upon by all of the Justices, "The separate classification of 'ditch[es], channel[s], and conduit[s]'-- which are terms ordinarily used to describe the watercourses through which *intermittent* waters typically flow--shows that these are, by and large, *not* 'waters of the United States.'" (*Rapanos, supra*, 547 U.S. at pp. 735-36, emphasis in original.) The Plurality went on to state:

> It is of course true, as the dissent and Justice Kennedy both observe, that ditches, channels, conduits and the like "can all hold water permanently as well as intermittently," post, at 802, 165 L. Ed. 2d, at 217 (opinion of Stevens, J.); see also post, at 771-772, 165 L. Ed. 2d, at 198-199 (opinion of Kennedy, J.). But when they do, we usually refer to them as "rivers," "creeks," or "streams." A permanently flooded ditch around a castle is technically a "ditch," but (because it is permanently filled with water) we normally describe it as a "moat." See Webster's Second 1575. And a permanently flooded man-made ditch used for navigation is normally described, not as a "ditch," but as a "canal." See id., at 388. Likewise, an open channel through which water permanently flows is ordinarily described as a "stream," not as a "channel," because of the continuous presence of water. *This distinction is particularly apt in the context of a statute regulating water quality,* rather than (for example) the shape of streambeds. (*Id*. at p. 736, fn. 7, emphasis added.)

Agricultural water conveyance structures are "ditches, channels, conduits and the like." (*Ibid*.) They are not streams, moats, or other such systems. Any attempt to regulate all ditches and channels will not only be overly expansive, but also an improper expansion of federal authority.

IV. The Proposed Rule Will Result in Negative Implications for California Agriculture

The legislative history of the Clean Water Act clearly illustrates that Congress expected that most activities on farmlands and pastures would not be subject to federal CWA permit requirements, but rather would be regulated by state nonpoint source programs. To further illustrate its intent, Congress specified that the term 'point source' "does not include agricultural stormwater discharges and return flows from irrigated agriculture." (33 U.S.C. § 1362(14).) In addition to the CWA's express language defining agricultural stormwater discharges and return flows as non-point sources, the CWA provides a statutory exemption from the NPDES permitting program for agricultural irrigation return flows. (33 U.S.C. § 1342(L)(1).) Additionally, EPA's implementing regulations specifically exempt agricultural irrigation return flows from the NPDES permitting program. (40 C.F.R. § 122.3(f).) Therefore, Congress affirmatively amended the CWA to exempt irrigated agriculture from NPDES permitting requirements and from regulation as point sources. Further, CWA Section 404 was amended to exempt "normal" farming, ranching, and silviculture activities from CWA Section 404 "dredge and fill" permit requirements. (33 U.S.C. § 1344(f)(1)(a).) CWA Section 404 also provides an exemption for construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches. (*Id*. at 1344(f)(1)(c).)

When Congress wrote these exemptions, it used language that presumes that farming happens on land, and not in "waters of the United States." Unfortunately, the Proposed Rule's expansive interpretation of the phrase "waters of the United States" appears to impermissibly take the '"Land Is Waters' approach to federal jurisdiction." (*Rapanos, supra,* 547 U.S. at pp. 733-734.) Besides being incompatible with *Rapanos*, such an approach would be incompatible with Congress's intent to exempt crop land regulation and would result in unintended federal permit requirements for countless farming activities.

A. Implications for California Agriculture

The Proposed Rule would modify existing regulations which have been in place for decades regarding which waters fall under federal jurisdiction under the CWA, directly impacting Farm Bureau's members. Potential impacts from jurisdictional expansion include the need for additional CWA permits, CWA permits triggering other federal and state requirements (such as ESA, NEPA, and NHPA compliance), regulatory enforcement and fines, third party litigation, lower land values for property owners due to lands deemed "jurisdictional," and the possible erosion of existing exemptions and exclusions applied to agriculture. As currently outlined herein, the Proposed Rule's broad conclusions will result in expanded regulatory jurisdiction under the theory that all streams and wetlands, no matter how remote

or isolated, are connected to downstream waters. This interpretation of "connectivity" is not limited to clarifying current uncertainty concerning the jurisdiction of the CWA that has arisen as an outgrowth of recent Supreme Court decisions. Rather, it is a vast expansion that threatens existing regulatory exemptions and exclusions, including those that apply to the agricultural sector that ensure the continuing production of food, fiber, and fuel to benefit all Americans. In addition to threatening the existence of the exemptions and exclusions, the Proposed Rule further compounds the difficulties faced by farmers who must show that the exemptions exist on their farms and ranches.

1. Improper Encroachment on Agriculture

Based on how the Corps has been implementing the current guidance, Farm Bureau fears that the Proposed Rule (and forthcoming guidance based upon the Proposed Rule) will greatly expand the Agencies' claim of jurisdiction over many areas of California that were - appropriately - heretofore unaffected. This is particularly true of the transitional areas between the Central Valley floor and the surrounding low foothills, as well as the numerous other watersheds with similar topography. These areas often contain seasonal and/or isolated wetlands or swales. Because of the gradual elevation descent from the foothills to the Valley floor, water runs downhill during rain events (Central Valley has an arid, Mediterranean climate in which it only rains three months out of the year). It does not rain continuously during this time, but rather, rain events occur sporadically throughout those three months. It is during major rain events – often only a few days per year – that swales will direct water downhill, onto neighboring properties, and into the regional watershed. These watersheds contain numerous tributaries that are considered "non-navigable relatively permanent" (i.e. contain water at least 3 months of the year) under the current guidance. These tributaries eventually reach a traditional navigable waterway, but not for any extended period of time, and not in any significant volume.

Based on the plain language of the Proposed Rule and its preamble, it is conceivable that entire watersheds in California could be deemed jurisdictional. Clearly this was not the intent of the CWA, nor is it an effective use of resources to protect the true waters of the U.S.

Farmland provides many social and ecosystem benefits, such as open space, habitat, carbon sequestration, and many others. It is important to note that different types of agriculture provide different environmental benefits (i.e. pasture vs. row crops vs. trees, etc.). Overly-broad implementation of the CWA, on a theory of mere "connectedness," regardless of "significance," threatens farmers' and ranchers' abilities to continue to utilize their lands for food and fiber production while simultaneously protecting the environment.

2. Future Erosion of Agricultural Exemptions

The Proposed Rule states that it will not affect prior converted cropland, normal farming practices, or irrigated agricultural return flows. (79 Fed. Reg. 22,217.) Unfortunately, the expansiveness of the general concept of "connectivity" as defined in the Connectivity Report and the Proposed Rule's Scientific Evidence in Appendix A (*Id.* at 22,222 *et seq*.) opens vast

new frontiers of ambiguity into which various exceptions to the exceptions may likely predictably creep.

In 1993, the Corps adopted a rule that established that agricultural lands that were converted from wetlands prior to 1985 ("prior converted croplands") were categorically excluded from the definition of "the waters of the United States" and, therefore, were not subject to regulation under Section 404 of the CWA, 33 U.S.C. § 1344. (*See,* Final Rule, Clean Water Act Regulatory Program, 58 Fed. Reg. 45,008 (Aug. 25, 1993) ("1993 Final Rule") (codified at 33 C.F.R. § 328.3(a)(8) (2009)). There are over 53 million acres of prior converted cropland throughout the country. (*See,* U.S. Department of Agriculture, Natural Resources Conservation Service, RCA Issue Brief #8, "Wetlands Programs and Partnerships," (Jan. 1996), *available at* http://www.nrcs.usda.gov/technical/rca/ib8text.html ["The Corps and EPA agreed to final regulations ensuring that approximately 53 million acres of prior-converted cropland will not be subject to wetland regulation."]; U.S. Army Corps of Eng'rs, "Two Years of Progress: Meeting Our Commitment for Wetlands Reform; Protecting America's Wetlands: A Fair, Flexible and Effective Approach August 1993 - August 1995," *available at* http://www.usace.army.mil/CECW/Documents/cecwo/reg/materials/wetland_policy1995.pdf ["To make the Federal wetlands program more consistent and predictable for farmers, the Clinton Administration clarified that 'prior converted croplands' are not subject to regulation under Section 404 of the Clean Water Act. Nearly 53 million acres of farm land are covered by this action which exempted lands that no longer perform the wetlands functions as they did in their natural condition."].) Notwithstanding subsequent case law[3] decided after the adoption of this formal rule, the Corps continues to lack jurisdiction over such lands and no jurisdictional determination or Corps permit is required for their use. Thus, any attempt by the Proposed Rule to infringe upon the "prior converted cropland" exemption is improper and invalid.

V. The Proposed Rule's Interplay with Interpretive Rule

In addition to the Proposed Rule's impacts, farmers and ranchers also have to now comply with the Interpretative Rule that requires compliance with previously voluntary Natural Resources Conservation Service ("NRCS") standards for normal farming and ranching activities.

The prospect of additional federal land use controls or removal of land from agricultural production is concerning. EPA's and the Corps's Proposed Rule, along with the Interpretive Rule, will have material economic impacts on our members. Coupled together, the Proposed Rule and the Interpretive Rule will significantly increase potential liability for farmers and ranchers. Many ephemeral streams, ponds, depressions, and ditches found across fields and pastures will now fall under EPA's and the Corps' jurisdiction, and may require permits for activities taking place on the land. While the Agencies have exempted 56 farming and ranching practices, as long as they meet the specific NRCS standards, any deviation from

[3] *Rapanos* does not affect the conclusion that prior converted croplands are not subject to the Agencies' CWA jurisdiction.

these standards can result in hefty fines. Further, the exemptions only apply to CWA Section 404 and do not provide any insulation from CWA Section 402 NPDES permitting requirements for waters that may become jurisdictional under the Proposed Waters of the U.S. Rule. For example, while the Interpretive Rule may allow a farmer to plant cover crops in jurisdictional waters without first seeking a CWA Section 404 permit, the Interpretive Rule will not prevent the need for a CWA Section 402 NPDES permit for other activities that may result in a discharge of pollutants. (*See,* Farm Bureau's July 7, 2014 comments submitted on the Interpretive Rule entitled *Comments on Interpretative Rule Regarding the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices, Docket No. EPA-HQ-OW-2013-0820,* attached as Attachment 1.)

VI. Suggested Points of Needed Clarity and Possible Changes to the Proposed Rule

Notwithstanding the concerns and flaws raised within, Farm Bureau presents the following concepts that may provide additional clarity within the Proposed Rule:

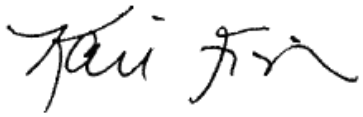
- Revise the Interpretive Rule to delete the requirement to comply with NRCS standards and the corresponding 56 practices, and instead, simply reaffirm that existing exemptions from CWA Section 404 permits for normal farming, ranching, and silviculture practices remain unchanged.
- Analyze the possibility of utilizing effective pilot programs to account for geographic differences and existing stringent nonpoint source state programs, such as California's stringent regulation of irrigated agriculture, in order to comply with federal requirements.
- Define the term "uplands."
- Expand the Proposed Rule's exclusions for ditches, and clarify the requirement that ditches must be excavated in uplands for the entire length in order to be deemed not to be tributaries or waters of the U.S.
- Analyze the possibility of future CWA amendments that include protections from and limitations to third party lawsuits, such as requirements for plaintiffs to pay attorney fees if a lawsuit is deemed meritless.

VII. Conclusion

As detailed herein, Farm Bureau is concerned with the Proposed Rule's new approach to establish jurisdiction. Specifically, Farm Bureau is concerned with Agencies' decision to compile the science of connectivity in isolation from relevant legal and practical constraints, the failure to provide any information on the "significance" of a connection separate from its mere existence, and the failure to clarify the science in specific areas of past controversy. Further, the Proposed Rule improperly expands federal jurisdiction under the Clean Water Act, introduces new definitions and tests, substantially broadens all prior guidance documents and interpretations, and is inconsistent with existing federal law and case law. Farm Bureau urges retraction of the Proposed Rule and the associated Interpretive Rule in

their current state, in order for the Agencies to properly clarify jurisdiction under the Clean Water Act and retain protections for agriculture. Thank you for the opportunity to comment and for the consideration of our comments.

Respectfully,



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ATTACHMENT 1

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Comments E-Filed and Emailed
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RE: Comments on Interpretative Rule Regarding the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices, Docket No. EPA-HQ-OW-2013-0820

To Whom It May Concern:

The California Farm Bureau Federation ("Farm Bureau") is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to

the problems of the farm, the farm home, and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing nearly 78,000 agricultural, associate, and collegiate members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

Farm Bureau appreciates the opportunity to provide comments on the *Notice of Availability Regarding the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices* and associated documents ("Interpretive Rule"). Farm Bureau is concerned with the practical and precedential impacts of the Interpretive Rule and provides the following comments herein. Farm Bureau also incorporates by reference those comments raised by the American Farm Bureau Federation in its letter submitted on July 7, 2014.

The Interpretive Rule Fundamentally Narrows Existing Normal Farming Exemptions

Farm Bureau has significant concerns with the Interpretive Rule, which took immediate effect on April 3, 2014, and fundamentally limits the longstanding normal farming exemptions under Clean Water Act ("CWA") Section 404(f)(1)(A) by tying them to mandatory compliance with previously voluntary Natural Resources Conservation Service ("NRCS") standards. In 1977, Congress amended the CWA to exempt "normal" farming, ranching, and silviculture activities from CWA Section 404 "dredge and fill" permit requirements. (33 U.S.C. § 1344(f)(1).) Thus, for nearly four decades, normal agricultural activities, such as fencing, brush management, and pruning shrubs and trees, on established operations have been exempt from CWA Section 404 "dredge and fill" permit requirements. Under the Interpretive Rule, however, these longstanding normal agricultural activities have been extensively narrowed. In order to be exempt from Section 404 when undertaking a normal farming activity, a farmer now *must* satisfy federally mandated NRCS practice standards, of which only 56 such standards are included. Therefore, in addition to many ongoing and customary agricultural activities being subject to new requirements, other normal farming activities, for which standards have not been developed, may lose their exemption entirely.

NRCS practices and programs have always been voluntary in nature. Under the Interpretive Rule, the Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") (together, "Agencies") would now require farmers and ranchers to meet otherwise voluntary NRCS standards for everyday normal farming activities or else face CWA liability and enforcement. Further, the Interpretive Rule removes all flexibility in how farmers and ranchers conduct normal farming activities on their land. By linking the normal farming practices exemption to NRCS standards, the rule not only makes voluntary conservation standards mandatory and subject to EPA enforcement, but upends the pinnacle of farmers' and ranchers' protection of natural resources through voluntary conservation programs.

Moreover, as discussed *supra*, even if farmers and ranchers are able to comply with the complicated, costly, and potentially onerous NRCS practice standards, such compliance does not insulate their land from any CWA Section 402 permitting requirements now resulting from the Agencies' proposed broadened *Definition of "Waters of the United States" Under the Clean Water Act* Rule ("Proposed Waters of the U.S. Rule").

The Interpretive Rule is Legislative in Nature

Although characterized as "interpretive" or a "guidance" document, the Interpretive Rule does not merely provide "guidance" on normal farming activities deemed exempt under the CWA, nor does it simply provide clarity on existing exemptions. Rather, it is a "legislative" rule that imposes new legally binding obligations on farmers and ranchers by fundamentally changing longstanding normal farming, ranching, and silviculture practice exemptions under CWA Section 404(f)(1)(A). Specifically, the Interpretive Rule modifies existing regulations interpreting the statutory term "normal farming, ranching and silviculture." (See 40 C.F.R. § 232.3(c)(1)(ii)(A); 33 C.F.R. § 323.4(a)(1)(ii).) Although it purports to continue existing statutory and regulatory exemptions, the Interpretive Rule actually narrows the Section 404(f)(1)A) exemption by identifying 56 activities that will be exempt only if they are conducted in a manner that is consistent with NRCS conservation practice standards and as part of an established (*i.e.*, ongoing) farming operation. Under the Interpretive Rule, previously voluntary NRCS conservation standards become mandatory and are made fully enforceable as part of the CWA regulatory program. This fundamentally changes legal obligations for farmers and ranchers under the CWA and is legislative in nature.

Further illustrating the legislative nature of the Interpretive Rule, the rule uses mandatory terms to describe exactly how a farmer must comply with the 56 NRCS technical standards in order to be exempt from Section 404. Failure to comply with the standards results in an unlawful discharge in violation the CWA, subjecting the farmer to CWA penalties. As a result, on its face, this so-called "interpretive" rule is a "legislative" rule that imposes new binding legal obligations on the public.

This new Interpretive Rule became effective immediately upon publication in the Federal Register, without advance public notice and comment, and established binding and enforceable requirements for farmers. This structure creates additional regulatory uncertainty for the agricultural community because EPA and/or NRCS could narrow or change the exemptions at any time without public notice or a formal rule making. This circumvents due process requirements for rule making and creates uncertainty. Given that the Interpretive Rule was not subject to the Administrative Procedure Act ("APA") prior to enactment and is legislative in nature, the Agencies should withdraw the Interpretive Rule and ensure that any future changes to the longstanding normal farming exemptions comply with the APA.

The Interpretive Rule Will Negatively Impact Agriculture

As a result of the Interpretive Rule, farmers and ranchers will now be subject to burdensome requirements which dictate the manner in which they must conduct such normal farming and ranching activities. The 56 listed NRCS conservation practice standards include typical farming activities, such as "irrigation canal or lateral," "irrigation field ditch," "mulching," and "fence," all of which were already exempt from regulation under CWA Section 404(f)(1)(A) if conducted as part of an established farm or ranch operation. The NRCS conservation practices themselves add new and additional requirements to routine practices as the standards are detailed, may trigger federal land use restrictions and consultations with state and federal wildlife agencies, and will require a substantial expenditure of time and money and even expose farmers and ranchers to potential liability for lack of compliance.

Under the longstanding normal farming activities exemption, farmers and ranchers could engage in ordinary farming activities without the need for a CWA section 404 permit, a jurisdictional determination whether discharges were occurring in waters of the United States, or a site-specific pre-approval from either the Corps or EPA. Now, as a result of the Interpretive Rule, it will be more onerous to qualify for CWA Section 404(f)(1)(A) exemptions or engage in ordinary farming activities without needing permits, consultations, or determinations. Further, permits are far from guaranteed, may take months to obtain, and often include onerous paperwork and reporting requirements in addition to any requirements aimed at protecting water quality. Thus, the Interpretive Rule negatively impacts agriculture and makes routine farming practices more onerous, restrictive, and costly.

Coupled with the Proposed Waters of the U.S. Rule, the Interpretive Rule Will Increase Liability for Farmers and Ranchers

Coupled with the proposed *Definition of "Waters of the United States" Under the Clean Water Act* Rule ("Proposed Waters of the U.S. Rule") expanding the jurisdictional reach of the EPA and the Corps under the Clean Water Act, the Interpretive Rule will increase liability for farmers and ranchers. Many ephemeral streams, ponds, depressions, and ditches found across fields and pastures will now fall under EPA's and the Corps' jurisdiction, and would require permits for activities taking place on the land. While the Agencies have exempted 56 farming and ranching practices, as long as they meet the specific NRCS standards, any deviation from these standards can result in fines of up to $37,500 per day. Further, the exemption only applies to CWA Section 404 and does not provide any insulation from CWA Section 402 NPDES permitting requirements for waters that may become jurisdictional under the Proposed Waters of the U.S. Rule. For example, while the Interpretive Rule may allow a farmer to plant cover crops in jurisdictional waters without first seeking a CWA Section 404 permit, the Interpretive Rule will not prevent the need for a CWA Section 402 NPDES permit for other activities that may result in a discharge of pollutants.

Conclusion

Farm Bureau appreciates the opportunity to provide comments on the Interpretive Rule. For all these reasons, Farm Bureau urges the Agencies to withdraw the Interpretive Rule and ensure that any future changes to the normal farming activities exemptions comply with the APA.

Very truly yours,

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KEF/pkh