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U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attention: Docket ID No. EPA-HQ-OW-2018-0149

Re: National Corn Growers Association Comments on Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4,154 (Feb. 14, 2019)

The National Corn Growers Association (“NCGA”) appreciates the opportunity to comment on the United States Environmental Protection Agency’s and the United States Army Corps of Engineers’ (collectively “the Agencies”) Proposed Rule revising the definition of “waters of the United States” (“WOTUS”) under the Clean Water Act (“CWA”). NCGA has joined several other organizations in submitting group comments on the Proposed Rule under the auspices of the Agricultural Nutrients Policy Council (“ANPC”) and the Waters Advocacy Coalition (“WAC”).

NCGA represents nearly 40,000 dues-paying corn farmers nationwide and the interests of more than 300,000 growers who contribute through corn checkoff programs in their states. Our association is dedicated to helping farmers succeed in their efforts to protect water quality. In that spirit, we welcome the Agencies’ work to craft a WOTUS rule that is clear, practical, and able to ensure that farmers, as well as local, state, and federal governments, can work together to improve water quality. NCGA strongly believes that making a feature subject to federal jurisdiction is not the most important element in our efforts to protect and maintain water quality. Often, making features jurisdictional can have the perverse effect of preventing or impeding the collaborative efforts that are required to conserve and protect resources. It’s the collaboration in pursuit of shared goals that is most important.

The Proposed WOTUS Rule appropriately reflects the meaning and purpose of the CWA’s text and Congressional intent and is consistent with our Constitution. Congress provided for balancing critical efforts to protect the environment, while also pursuing other critical societal

WWW.NCGA.COM

NATIONAL OFFICE
632 Cepi Dr.
Chesterfield, MO 63005
(636) 733-9004
Fax: (636) 733-9005

WASHINGTON, DC OFFICE
20 F Street NW, Suite 600
Washington, DC 20001
(202) 628-7001
Fax: (202) 628-1933

objectives. Congress also explicitly sought in the CWA statutory provisions to ensure that the states' retained their primary responsibilities over pollution control and over planning the use of land and water resources. The Proposed Rule is highly consistent with these considerations.

Among the critical societal objectives that must be pursued in concert with efforts to protect the environment, is sustainably feeding and fueling a growing world. NCGA and our state affiliates work to balance these objectives. We are proactively and extensively working to help farmers fully utilize appropriate sustainability tools. Through the Soil Health Partnership, we are on the ground helping growers adopt soil health practices like cover crops and conservation tillage. We are a founding and active member of the Field to Market sustainability partnership. NCGA promotes growers' adoption of new integrated pest and nutrient management practices. Further, we are in active partnerships with environmental non-governmental organizations to support the above efforts and the adoption of practices like pollinator habitat, treatment wetlands, saturated buffers, and other measures.

Overall, NCGA supports the Proposed Rule. The proposed definition will go a long way to providing much needed clarity and certainty for farmers, however, there are still opportunities for the Agencies to improve the Proposed Rule. Below are NCGA's additional thoughts and comments.

1. The Clean Water Act requires us to work across the land, but it does not require all features that hold or carry water to be made jurisdictional.

The CWA does not cover all waters everywhere. If Congress intended the CWA to cover all waters, it could have clearly stated so. It did not. The Supreme Court, including Justice Kennedy in his discussion of his "significant nexus" test, has made it abundantly clear that under the CWA there is a certain point beyond which waters cannot be subject to federal jurisdiction. That is because they are too distant from, or contribute too little volume to, those that are navigable and therefore reasonably considered subject to the Constitution's Commerce Clause. The question before the Agencies since the CWA was passed has been where to draw that line in the landscape. Relying on the areas of agreement in the Supreme Court majority's opinions in the *Rapanos* decision, the Agencies placed that line in a location that gives legitimate and defensible meaning to the language of the CWA and its premise that jurisdictional waters must ultimately be part of waters that exhibit navigability characteristics and are subject to being used to transport commerce.

2. Exclude drainage features from WOTUS that are part of a highly managed agricultural storm water drainage system, undertaken prior to 1972.

The Proposed Rule excludes features that have water in them only ephemerally, after precipitation events. Ditches constructed wholly in upland areas (not in tributaries or adjacent wetlands) are also excluded from WOTUS no matter how long water flows in them (ephemeral,

intermittent or perennial flow does not change the non-WOTUS status of the upland ditch). Ditches constructed in tributaries (those naturally-formed channels with intermittent or perennial flow) or adjacent wetlands are WOTUS. While NCGA supports these proposals in general (see the ANPC and WAC comments that seek important refinements to these measures), we believe these proposals are not appropriate for many of the extensive, highly planned, designed and operated agricultural storm water management systems in wide use in corn-producing areas of the country.

Agricultural storm water systems were created pursuant to and remain subject to state and local land and water use management laws. These systems have always entailed surface and subsurface drainage components, and the movement of water away from farm fields through managed surface drains, commonly as ditches. These systems commonly predate the CWA by decades and in many cases by a century or more. Agriculture storm water systems were and continue to be as integral to corn production as is seed, fertilizer, machinery and all the related elements and systems.

We believe that it is a fundamental error to consider the component features of these managed drainage systems as being the class of features whose own chemical, physical and biological integrity the CWA was created to protect. These systems need to be managed to maintain their proper drainage functions, which is the purview of state law. This does not negate corn growers' responsibility or desire to protect downstream features and water quality. Rather, it means that our challenge is to operate and farm around these agricultural storm water management systems in a manner that will also restore, maintain, and protect the chemical, physical and biological integrity of downstream features that are more properly considered WOTUS.

As discussed in detail in the ANPC and WAC comments, Congress clearly intended the States to have the lead role in regulating state land and water resources and protecting upstream non-navigable waters and regulating land use. We refer you to those comments for a detailed explanation of how this was done and for what purposes.

The role and authority given to the States under the CWA, and the qualities, characteristics and purposes of the agricultural storm water management systems, and the context in which they were created, has profound implications for how features in these systems should be treated under the CWA. Corn production's agricultural landscape, while rural and continuing to express pastoral qualities, is in fact a landscape that has been designed, changed, and is now highly managed to make modern production agriculture possible. This work was, and continues to be, conducted primarily as a matter of state law and state authority, which the CWA was expressly designed to respect.

As a result, we ask the Agencies to exclude from WOTUS any significantly man-altered feature that is an integral component to an agricultural storm water management system and that was created or undertaken **prior to** the passage of the CWA in 1972 (pursuant to or consistent with state law or state land use policies). As for upland ditches under the Proposed Rule, this exclusion would apply no matter the length of time water is flowing through these significantly man-altered features.

Given the interplay and application of federal and state law once the CWA was signed into law in 1972, the Proposed Rule's tests could properly apply. In the case of a newly man-altered feature in an agricultural storm water management system that was undertaken **after** the passage of the CWA in 1972, whether the feature is WOTUS would depend on whether it is in a tributary (with intermittent or perennial flow) or adjacent wetland. Note, the key determinant is whether the system (to which this feature is being added) was undertaken before or after 1972. Changes made in the form of modifications or additions to features to a system that was undertaken before 1972, should be excluded from treatment as a WOTUS. Only if the system in question was undertaken after 1972 should the Proposed Rule's tributary or adjacent wetland tests apply.

3. Identifying ephemeral and intermittent features.

Outside of the systems and features discussed above that have been created or modified to manage and drain agricultural storm water before the CWA was created, NCGA supports the Proposed Rule's use of the boundary between ephemeral and intermittent to determine what are WOTUS. Naturally formed features in the landscape that have water in them with no, or only ephemeral surface outflow (such as isolated wetlands), or drain surface water that is only present after precipitation (ephemeral) events, and are otherwise dry during the rest of the year are sufficiently isolated from navigable waters to merit exclusion from federal jurisdiction.

We recognize the inherent and unavoidable imprecision that will commonly occur from the use of any indicator of the extent and length of flow of water that needs to be present in a tributary to make it intermittent. No single indicator, or even set of indicators that are practical and reasonable to use by Agency personnel in the field will ever be 100% correct in all circumstances, certainly across regions but even within the same region. In those areas outside of the highly managed agricultural storm water management systems referenced above, we recognize the Agencies' policy since 2007 of treating 90 days of continuous flow of water as the standard to determine a tributary's intermittency. This standard is clear and has precedential value.

4. Additional comments regarding ditches.

NCGA recommends that the final rule not include a WOTUS category for "ditches." The Proposed Rule's treatment of those ditches that are WOTUS are in fact only man-altered conditions that are located in or relocate tributaries or are in adjacent wetlands. We suggest that

the Agencies amend the tributary and adjacent wetland categories to reflect that their status as WOTUS does not change when man-made ditches are installed in or relocate them, and that the ditches so-installed are themselves WOTUS.

The exclusion in the Proposed Rule for all other ditches should be retained in the final rule. The aforementioned exclusion of any significantly man-altered feature that is an integral component to an agricultural storm water management system, that was created or undertaken **prior to** the passage of the CWA in 1972, could be incorporated in this section.

The Proposed Rule excludes ditches constructed wholly in uplands (not in a tributary or adjacent wetland). This language should be retained in the final rule but clarified to state explicitly that such ditches are excluded no matter whether they carry ephemeral, intermittent, or perennial flow.

5. Lakes and Ponds

Lakes and ponds that have an intermittent or perennial connection to downstream jurisdictional waters are themselves proposed as jurisdictional. Lakes and ponds that are constructed in uplands and have, at most, an ephemeral connection to downstream waters, are excluded from WOTUS.

While NCGA supports this exclusion for ephemerally connected lakes and ponds, we believe this exclusion should include lakes and ponds that may not have been constructed in uplands. Please see the ANPC comments for additional discussion of this matter.

We also note that it is common for agricultural ponds to be constructed in uplands (i.e., in an ephemeral drainage feature), and yet to accumulate enough ephemeral water in the storage pool to create intermittent or perennial outflow. The final rule's exclusion of lakes or ponds should make clear that any lake or pond constructed in upland (i.e., in an area characterized by ephemeral flow) is always excluded from WOTUS, no matter the length of the outflow from the constructed lake or pond.

6. Burden of Evidence

We agree with the Agencies that, when it comes to implementing the final rule, the landowner should have the benefit of the doubt with respect to determining jurisdiction. Waters should not be WOTUS unless the agency can point to evidence solidly backing that designation. Keeping the burden of proof on the agency is especially important when it comes to making determinations about things like whether a ditch was constructed in a jurisdictional tributary or wetland after 1972. Many farmers simply lack the means or opportunity to conclusively establish the answer. Similarly, farmers should not have to prove that farm ponds were constructed in upland, as opposed to a jurisdictional wetland. Burdens like those properly fall on the agency

because, as between the agency and the regulated party, the agency is in a much better position to make a conclusive showing.

7. Exclusions

In addition to those matters discussed above involving certain exclusions from WOTUS, we offer these comments on the other exclusions included in the Proposed Rule.

A. Prior Converted Cropland

We support the Proposed Rule's treatment of prior converted cropland ("PCC") excluding it from WOTUS. The Agencies should clarify that there are multiple uses of PCC that constitute being "in support of" agricultural purposes. These include such practices as idling or treating land for conservation purposes; idling land to protect wildlife; and allowing land to lie fallow following natural disasters such as hurricanes. While these uses may look like the land has been abandoned, they are "in support of" agricultural purposes and should be expressly recognized as such. Furthermore, any features within PCC should be treated as upland features and the final rule should state as such in regard to ditches, canals, ponds and other features that can be found within PCC.

B. Groundwater

We support the exclusion of groundwater from consideration as WOTUS. Furthermore, neither groundwater nor shallow subsurface flow should be WOTUS and we support an exclusion that would expressly exempt both from federal jurisdiction. We note that tile drainage water is not groundwater as it is agricultural storm water that has moved through the soil profile until it hits the tile layer, and then moves laterally out of the field. This tile layer is above the soil's groundwater table and does not intersect it.

C. Artificially Irrigated Areas

We support the Proposed Rule's exclusion for artificially excluded areas. The final rule should make it clear in plain text that any artificially irrigated areas, not just those fields flooded for rice or cranberry growing, are excluded.

D. Stormwater Control Features

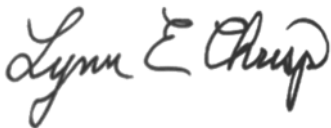
We support the Proposed Rule's exclusion for stormwater control features, but suggest it be expanded. Stormwater control features should not be limited to urban and suburban settings and features used in those settings. The Agencies should either clarify that this exclusion encompasses conservation infrastructure found on agricultural lands—such as grassed waterways, treatment wetlands, and sediment basins—or that such infrastructure falls under another exclusion. Farmers rely on a variety of conservation infrastructure to support their operations, including grassed waterways, terraces, sediment basins, biofilters, and treatment wetlands. These features serve important functions such as slowing stormwater runoff, increasing holding time before water enters a stream, sediment trapping, increasing soil

infiltration, and pollutant filtering. To avoid creating disincentives to water quality conservation practices and infrastructure, the Agencies should make it clear that these conservation features are not jurisdictional so long as they were not constructed in WOTUS.

In conclusion, we wish to repeat that NCGA supports much of the Proposed Rule and believes it is grounded in a sound reading of the law and represents sound policy. We want clear, practical, effective rules that respect the role of state governments in land use and water management decisions.

This rule will be more modest in jurisdictional scope than many of the Agencies rulemaking efforts. We firmly and wholeheartedly believe that making features jurisdictional that are at the margin of what can be construed as federal, is not what will lead to better water quality in this country. Collaboration among stakeholders and the federal state agencies in pursuit of shared goals is what is needed. We look forward to when this rule is finalized, and we can turn our attention to the tough collaborative work that must encompass land use and activities involving non-WOTUS and WOTUS features alike. This is a complicated and difficult challenge no matter where the line of federal jurisdiction is drawn, but corn growers accept the challenge and seek to work collaboratively with others to meet it.

Sincerely,

A handwritten signature in cursive script that reads "Lynn E. Chrisp". The signature is written in black ink and is positioned above the typed name and title.

Lynn E. Chrisp
President, National Corn Growers Association