



November 17, 2017

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U.S. Environmental Protection Agency
EPA Docket Center
WJC West Building, Room 3334
1301 Constitution Avenue, NW
Washington, DC 20004
Attention: Docket ID No. [Docket ID No. EPA-HQ-OW-2017-0480](#)

Re: Comments on U.S. Environmental Protection Agency's Listening Sessions and Definition of "Waters of the United States"

National Corn Growers Association (NCGA) appreciates the opportunity to comment on the U.S. Environmental Protection Agency's (EPA) listening sessions. Founded in 1957, NCGA represents more than 40,000 dues-paying corn farmers nationwide and the interests of more than 300,000 growers who contribute through state corn checkoff programs. NCGA and its 49 affiliated state organizations work to create and increase opportunities for corn growers. I am a corn grower from North Dakota and NCGA's president. I spoke on behalf of the organization during the October 17, 2017 session and submit the following additional comments for consideration.

- **Corn Farmers Commitment to Water Quality** – We cannot overemphasize the importance of our shared primary goal to restore and maintain water quality. Corn growers stand ready to work with industry stakeholders, as well as state and federal agencies, to achieve this goal. We encourage the EPA to focus on how states and EPA can collaborate with the agricultural community to improve water quality and ensure the policies adopted through WOTUS rulemaking do not impede such efforts.

Corn growers are committed to helping the country reach its CWA water quality goals. Between 1980 and 2011, soil erosion was reduced by 67 percent per bushel of corn produced and by 43 percent per acre of corn planted.¹ Accomplishing this reduction in erosion leads to less phosphorus in runoff reaching surface waters. Additionally, between 1980 and 2010, nitrogen use efficiency increased by 87 percent. The net effect of these increases in efficiency is fewer nutrients in the soil profile that might move into surface water.²

We are proud of the progress that has been made and recognize the continuing challenge of protecting and restoring water quality. Agricultural production must be nearly doubled over the

¹ Field to Market (2012 V2). Environmental and Socioeconomic Indicators for Measuring Outcomes of On-Farm Agricultural Production in the United States: Second Report, (Version 2), December 2012. Available at: www.fieldtomarket.org. See pages 41-50 for the results for corn.

² See The Fertilizer Institute, U.S. Fertilizer Consumption Table and U.S. Consumption of Primary Plant Nutrients. Derived from USDA NASS data (2011). Available at: <http://www.tfi.org/statistics/fertilizer-use>.

next few decades to satisfy the needs of 2 billion more people, and the income growth for billions of other people. We intend to meet these critical needs for corn, while also improving the efficiency and effectiveness of nutrient management.

- **Jurisdictional Waters Must Have a Substantial and Non-Hypothetical Connection to Navigable Waters** – There are large and important areas of substantive and conceptual agreement in the opinions written by the majority in *Rapanos v. United States*, and we encourage the EPA to use these areas of agreement as guidance in defining jurisdiction. In particular:
 - The term “navigable waters” must be given importance and effect.
 - To be jurisdictional, non-navigable waters must have a substantial relationship with traditional navigable waters.
 - The presence of a hydrologic connection to navigable-in-fact waters is not enough to make an upstream feature jurisdictional. The connection must not be speculative and there should be substantial and relatively persistent flows of water involved.
 - A wetland’s adjacency to a tributary is not enough to make it jurisdictional, and jurisdictional authority does not reach all wetlands or all non-isolated wetlands.
- **Ephemeral and Modest Intermittent Drainage Features and Isolated Wetlands Should Not be Considered WOTUS** – The agricultural landscape has innumerable drainage features that have water in them only when it rains (ephemeral features) or for short periods after the rainy season or at the end of winter (intermittent features). Given the applicable Supreme Court decisions, including *Rapanos v. United States*, ephemeral features, and at least some portion of the intermittent features in the agricultural landscape, should not be considered WOTUS. The use of the Ordinary High Water Mark (OHWM) to determine what is and is not jurisdictional is a highly subjective and inappropriate tool. It should not be applied in the agricultural landscape where ephemeral and intermittent features dominate. Additionally, consistent with *Rapanos v. United States*, wet areas or wetlands in such a landscape should not be considered WOTUS.
- **Certainty** – Regulatory programs that impose costs and constraints on the regulated community require transparency and certainty. It is critical that clarity is provided about what is and is not jurisdictional under the Clean Water Act (CWA). It is incorrect to presume that an upstream feature dominated by stormwater flows must be considered subject to jurisdiction to improve water quality in that feature or the downstream waters it may affect. Not only is this overall presumption incorrect, making features in settings where stormwater dominates the flow can, and often will, impede water quality progress.

It is important to corn growers that there be certainty in the new WOTUS rule. Subjective decisions by regulatory personnel in the field, and judicial decisions seeking to interpret what policies and judicial precedents mean in practice have contributed to confusion. If the agency adopts policy that could be interpreted differently by different regulatory personnel, through the subjective application of the OHWM indicator, for example, uncertainty is created. Even if the agency currently does not expect to see such an interpretation in the field, judicial decisions could force the agency to do so. These judicial decisions contribute to the uncertainty of the regulated parties. History

shows that much of today's CWA policies are shaped or determined in exactly this manner. Of course, this allows for a change of procedure when new staff enters the field and when cases are on the table for judicial review. Fortunately, much of this uncertainty will be eliminated for corn growers if the rule is clear that ephemeral drainage features, isolated wet areas and/or wetlands, and intermittent features are not WOTUS.

Thank you again for the opportunity to provide comments. NCGA looks forward to offering the agency detailed views when the proposed rule is published for public comment.

Sincerely,

Kevin Skunes
President
National Corn Growers Association