American Agri-Women (AAW) promotes the welfare of our national security through a safe and reliable food, fiber and energy supply. Since 1974, AAW members have worked together to educate consumers; advocate for agriculture; and offer networking and professional development opportunities. Go to the AAW website for more information to join, www.americanagriwomen.org. Find AAW on social media on Facebook (facebook.com/AgriWomen), Twitter (@Women4Ag) and Instagram (@americanagriwomen).


At an event in Washington, D.C., U.S. Environmental Protection Agency (EPA) Administrator Andrew Wheeler and Department of the Army Assistant Secretary of the Army for Civil Works R.D. James announced that the agencies are repealing a 2015 rule that impossibly expanded the definition of “waters of the United States” (WOTUS) under the Clean Water Act. The agencies are also recodifying the longstanding and familiar regulatory text that existed prior to the 2015 Rule—ending a regulatory patchwork that required implementing two competing Clean Water Act regulations, which has created regulatory uncertainty across the United States.

“Today, EPA and the Department of the Army finalized a rule to repeal the previous administration’s overreach in the federal regulation of U.S. waters and recodify the longstanding and familiar regulatory text that previously existed,” said EPA Administrator Andrew Wheeler. “Today’s Step 1 action fulfills a key promise of President Trump and sets the stage for Step 2—a new WOTUS definition that will provide greater regulatory certainty for farmers, landowners, home builders, and developers nationwide.”

“Today, Administrator Wheeler and I signed a final rule that repeals the 2015 Rule and restores the previous regulatory regime exactly how it existed prior to finalization of the 2015 Rule,” said R.D. James, Assistant Secretary of the Army for Civil Works. “Before this final rule, a patchwork of regulations existed across the country as a result of various judicial decisions enjoining the 2015 Rule. This final rule reestablishes national consistency across the country by returning all jurisdictions to the longstanding regulatory framework that existed prior to the 2015 Rule, which is more familiar to the agencies, States, Tribes, local governments, regulated entities, and the public while the agencies engage in a second rulemaking to revise the definition of ‘waters of the United States.’”

Today’s rule is the first step—Step 1—in a two-step rulemaking process to define the scope of “waters of the United States” that are regulated under the Clean Water Act. Step 1 provides regulatory certainty as to the definition of “waters of the United States” following years of litigation surrounding the 2015 Rule. The two federal district courts that have reviewed the merits of the 2015 Rule found that the rule suffered from certain errors and issued orders remanding the 2015 Rule back to the agencies. Multiple other federal district courts have preliminarily enjoined the 2015 Rule pending a decision on the merits of the rule. In this action, EPA and the Army jointly conclude that multiple substantive and procedural errors warrant a repeal of the 2015 Rule. For example, the 2015 Rule:

- Did not implement the legal limits on the scope of the agencies’ authority under the Clean Water Act as intended by Congress and reflected in Supreme Court cases.
San Francisco Baykeeper v. Cargill Salt Division, 481 F.3d 700, 704 (9th Cir. 2007) ("By not defining further the meaning of "waters of the United States," Congress implicitly delegated policy-making authority to the EPA and the Corps, the agencies charged with the CWA's administration.").

The Proposed Rule accounts for the gradient concept, which shows that certain waters (e.g., perennial and intermittent streams) have a stronger influence on downstream waters than others (e.g., isolated wetlands and ephemeral streams). E.g., 84 Fed. Reg. at 4,175-76. The science does not and cannot tell us that the mere fact that a water might have some influence on downstream waters is a sufficient basis to deem it a WOTUS and assert federal jurisdiction. Rather, the Agencies have balanced the relevant concerns, including the objective to protect navigable waters and the need to construe the Act to avoid raising significant constitutional questions, and appropriately proposed to define WOTUS in a way that leaves ephemeral and isolated features as parts of the Nation's waters that remain under state control. And this finds support in the science. E.g., 84 Fed. Reg. at 4,175-76 (discussing gradient concept and explaining the decreased probability that ephemeral streams will impact downstream waters compared to perennial and intermittent streams); id. at 4,177 (explaining how connections become less obvious as the distance between wetlands and flowing waters increases).

III. Comments and Recommendations on Proposed WOTUS Categories

In general, the undersigned organizations support the revised definition of WOTUS, and we believe it is protective of water resources, while respecting the careful federal-state balance that Congress struck when it enacted the CWA. Nonetheless, we do have recommendations for providing additional clarity, which we set forth in the following sections.

A. Traditional Navigable Waters

At the heart of the Proposed Rule’s definition of WOTUS is what the Agencies call the traditional navigable waters ("TNWs") or the "(a)(1) waters." The scope of this category is of critical importance because all other categories of WOTUS tie back to it. The Proposed Rule does not change the longstanding text in (a)(1), with the exception of including territorial seas in the same category. See 84 Fed. Reg. at 4,170. Thus, the proposed regulatory text would define
governs what waters are subject to Rivers and Harbors Act jurisdiction: (i) waters that are or were navigable-in-fact or are capable of being made so with reasonable improvements; and (ii) waters that, alone or in combination with other waters for a continuous highway to transport goods in interstate commerce. Importantly, in finding that the term “navigable” in the CWA shows that Congress had in mind its traditional jurisdiction over navigable waters in SWANCC, the Court cited to Appalachian Elec. Power. See 531 U.S. at 172 (citing Appalachian Elec. Power Co., 311 U.S. at 407-08). And although the plurality and Justice Kennedy referred to “traditional interstate navigable waters” and “navigable waters in the traditional sense,” respectively, both opinions cited to The Daniel Ball and Appalachian Elec. Power to clarify what waters they were referring to. See Rapanos, 547 U.S. at 723, 734, 760-61 (citations omitted).

Rather than adhere to the traditional two-part test for navigability, the Agencies have expanded the traditional meaning of navigability by referring to “use in interstate or foreign commerce” in the regulatory text of (a)(1), as opposed to the phrase “use to transport interstate or foreign commerce” or similar language. This subtle but important difference means that TNWs need not be highways to transport commerce; it is enough for them to be subject to any use in interstate commerce. To be clear, this expansion is not theoretical. In the past decade or so, the Agencies have issued TNW determinations for waters based merely on their potential to support recreation. For example, EPA declared portions of the Santa Cruz River (AZ) that carry no significant flow in dry seasons to be TNWs. Flow in the Santa Cruz River is primarily in direct response to precipitation or because of sewage effluent that is discharged from upstream sources. Despite a lack of evidence that the portions of the river in question could be used as highways to transport interstate or foreign commerce, they nevertheless made a TNW determination based on recreational use. [Cite TNW Determination]

Second, the undersigned organizations are concerned that the Agencies’ interpretation of TNWs encompasses waters found to be navigable “by numerous decisions of the federal courts” in any context. See 84 Fed. Reg. at 4,170. To be clear, the CWA does not contain the term TNW. Nor do any other federal statutes to our knowledge. Further complicating matters, the term “navigable” does not have a fixed meaning across all statutes and can vary with context, as the Supreme Court has recognized. See PPL Montana, LLC v. Montana, 565 U.S. 576, 592–93 (2012); Kaiser Aetna v. United States, 444 U.S. 164, 170 (1979). All of this underscores that any analysis of navigability “must be predicated upon [a] careful appraisal of the purpose for which the concept of ‘navigability’ was invoked in a particular case.” Kaiser Aetna, 444 U.S. at 170. These decisions illustrate why it is improper for the Agencies to interpret TNWs as all waters defined by “numerous decisions of the federal courts.” 84 Fed. Reg. at 4,170. That a water body may qualify as a navigable water under, say, the Federal Power Act, should not be dispositive of whether that water body is a TNW for purposes of the CWA.

Appendix D to the 2008 Rapanos Guidance illustrates the impropriety of relying on decisions of the federal courts to establish whether a water body is a TNW. In that document, the Agencies cite two courts of appeals decisions to try to show when a water is a TNW. See FPL Energy Me. Hydro LLC v. FERC, 287 F.3d 1151 (D.C. Cir. 2002); Alaska v. Ahtna, Inc., 891 F.2d 1401 (9th Cir. 1989). The Agencies should not be relying on those cases to make TNW determinations in the CWA context. Neither of those cases explained why experimental canoe trips or recreational use demonstrate that a water body can meet the two-part test from The Daniel Ball.
For the reasons explained above, the Agencies should limit their interpretation of TNWs to waters that satisfy the traditional test for navigability in *The Daniel Ball*. We therefore recommend the following changes:

- Revise the proposed regulatory text by replacing “use in” with “transport.” Thus, the (a)(1) provision would read, as follows: “waters which are currently used, or were used in the past, or may be susceptible to transport interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide.” This would better align the regulatory text with the statutory text in CWA § 404(g)(1), which refers to the waters the Corps would retain jurisdiction over in the event a state assumes the 404 program.

- Rescind Appendix D to the *Rapanos* Guidance. By revising the regulatory text that corresponds to the TNW category, there is no longer a need for Appendix D.

**B. Interstate Waters**

We support the Agencies’ proposal to eliminate “interstate waters” as a standalone category of jurisdictional waters. *See* 84 Fed. Reg. at 4,171. The CWA provides for federal jurisdiction over “navigable” waters, not “interstate” ones and thus, elimination of this category is consistent with the statutory text. In fact, as the Proposed Rule explains, Congress deliberately removed the term “interstate” from the CWA when it overhauled the Federal Water Pollution Control Act in 1972. *See id.* (tracing the history that led to the replacement of “interstate waters” with “navigable waters”).

There is simply no statutory or constitutional basis for regulating waters merely because they happen cross state lines, regardless of whether the waters are TNWs or connected to TNWs. Regulating waters solely on that basis goes far beyond what Congress had in mind in enacting the CWA: “its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.” *SWANCC*, 531 U.S. at 172 (citing *Appalachian Elec. Power Co.*., 311 U.S. at 407-08). It would allow federal assertions of jurisdiction over isolated ponds or primarily dry channels even though such features are not navigable, cannot be made navigable, have no connection or influence to a navigable water, are not adjacent to a navigable, and contribute no flow to a navigable water. Such an assertion of jurisdiction reads the term “navigable” out of the statute and thus, the Agencies have appropriately proposed to remove this category.

**C. Tributaries**

Under the Proposed Rule, tributaries of TNWs are jurisdictional. The Proposed Rule defines “tributary” as “a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a [TNW] or territorial sea in a typical year either directly or indirectly through other jurisdictional waters ....” *Id.* at 4,173. The Proposed Rule further provides that (i) tributaries do not lose their jurisdictional status if they flow through a natural or artificial break, so long as the break conveys perennial or intermittent flow to a jurisdictional water at the downstream end of the break; and (ii) alteration or modification of a
tributary does not affect its jurisdictional status so long as the other elements of the Proposed Rule’s definition are satisfied. See id.

The proposed definition of “tributary” contains several terms that are further defined to help distinguish between waters subject to federal regulatory authority and those subject to state authority. Specifically, “perennial” is defined to mean “surface water flowing continuously year-round during a typical year,” whereas “intermittent” is defined to mean “surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).” 84 Fed. Reg. at 4,173. “Snowpack” in turn is defined to mean “layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes.” Id. Finally, “typical year” means “within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.” Id.

We support the Agencies’ proposal to define tributary as a stream, river, or “similar naturally occurring surface water channel” contributing more than just ephemeral flow to a downstream (a)(1) water. We also support defining “tributary” in a way that avoids the need for “case-specific determinations of a “significant nexus.” And we support omitting from the definition the concepts of “ordinary high water mark” and “bed and banks.” Indeed, we strongly urge the Agencies not to add the terms to the definition of “tributary.” Because occasional storm events are enough to establish a bed, banks, and ordinary high water mark, countless features on otherwise dry land without any significant nexus to a TNW would become jurisdictional. For too long, regulators have overreached when applying the ordinary high water mark concept and consequently, reliance on its use has proven to be disastrous for landowners. It is easy to see why both the plurality and Justice Kennedy criticized the Agencies’ heavy reliance on the ordinary high water mark concept in Rapanos. See, e.g., 547 U.S. at 725 (plurality) (describing how the Corps has used this concept to extend jurisdiction “to virtually any land features over which rainwater or drainage passes and leaves a visible mark—even if only the presence of litter and debris”); id. at 780-81 (Kennedy, J., concurring) (noting that the ordinary high water mark provides “no such assurance” of a reliable standard for determining significant nexus). Put simply, “ordinary high water mark” is not a reliable means of distinguishing jurisdictional streams from non-jurisdictional erosion features, and reincorporating it into the Final Rule would only exacerbate the vagueness and uncertainty the Agencies seek to eliminate.

Furthermore, the Agencies’ discussion of the Connectivity Report appropriately recognizes that the line-drawing that the Agencies must engage in with respect to tributaries is inherently a policy choice. Id. at 4187. We agree with the Agencies that the choice should be “informed by, though not dictated by, science.” Id. The Connectivity Report suggests that all waters are connected, but that report at least acknowledged that those connections occur along a gradient. Where to draw the line between federal and state waters within that gradient should not strictly be a matter of the extent of the impacts to downstream waters. Ecological considerations must also be balanced with other legal and policy considerations, such as the states’ traditional authority over land and water resources and the need for a clear rule that provides fair notice to landowners concerning whether their conduct is legal. The Agencies therefore have rightly drawn the line in the Proposed Rule in a way that should avoid raising difficult constitutional questions.
While the undersigned organizations generally support the Proposed Rule’s approach to tributaries, we are concerned that the definition of “tributary” leaves some important terms undefined and thus, we offer some recommendations to provide additional clarity. For instance, the Proposed Rule does not say how often a tributary must flow to meet the “certain times of a typical year” threshold. “Certain times of a typical year” is a phrase that, according to the Agencies, is “intended to include extended periods of predictable, continuous seasonal surface flow occurring in the same geographic feature year after year.” Id. The Agencies should provide further clarification about how those terms will be applied. We recommend including some sort of quantitative measure of what qualifies as intermittent or an extended period—e.g., at least 90 days of continuous surface flow in a typical year.

Our recommended bright-line approach would be consistent with the statutory text. The term “waters” must be given effect, and it would be permissible for the Agencies to interpret it in a way that encompasses only rivers, streams, and other hydrographic features conventionally identifiable as waters, as opposed to ordinarily dry channels that are only episodically wet following precipitation events. See Riverside Bayview, 474 U.S. at 131. Requiring 90 days of continuous flow would also help avoid the difficult constitutional questions that would arise from asserting federal jurisdiction over ephemeral features. Finally, such an approach would be consistent with prior practice. In the Rapanos Guidance, the Agencies asserted jurisdiction over non-navigable tributaries that typically flow year-round or have at least seasonal flow, with seasonal defined as “typically three months.” The Agencies have implemented that guidance since December 2008, and it continues to apply in 28 states.

We further recommend that the Agencies provide a more definite means of identifying what constitutes a “typical year.” For instance, the Agencies could specify particular sources of data and methodologies for determining what a “typical year” is. Although the preamble explains that the Agencies currently compare observed rainfall amounts and tables that the Corps develops using data from the National Oceanic and Atmospheric Administration (NOAA), it is not clear, for instance, how observed rainfall amounts are determined, how the Corps develops its tables, or how reliable the NOAA data sources are. See 84 Fed. Reg. at 4,177. The Agencies further state that they consider a year to be “typical” if observed rainfall from the previous three months falls within the 30th and 70th percentiles established by a 30-year rainfall average generated at NOAA weather stations, but the Agencies do not explain, for instance, how the 30-year averages are calculated or why it is reasonable to use percentiles that exclude over half of the data points.

Finally, in defining what qualifies as a tributary, the Proposed Rule refers to a litany of different tools that regulators might use, ranging from visual observations, to trapezoidal flumes and pressure transducers. See id. at 4176–77. We remain concerned about the Agencies’ ability to make crucial jurisdictional determinations based on an array of desktop analyses. Vesting the Agencies with that authority invites more uncertainty and confusion in a process that carries life-changing consequences for regulated parties.

D. Ditches

The Proposed Rule adds a new category of jurisdictional ditches. Id. at 4,179. The rule defines ditch as “an artificial channel used to convey water,” but the Proposed Rule only asserts
jurisdiction over three classes of ditches: (1) those that would also fall within the category of TNWs; (2) those that are constructed in or that relocate or alter a tributary; and (3) those that are constructed in an adjacent wetland, so long as they also satisfy the definition of tributary. Id. The preamble to the Proposed Rule clarifies that a ditch is constructed in a tributary “when at least a portion of the tributary’s original channel has been physically moved.” Id. at 4,193.

We agree with the Agencies’ goal to exclude most ditches and artificial channels from federal jurisdiction, such as the various types of ditches that are commonplace on agricultural lands. But we recommend that the Agencies accomplish this goal through different regulatory text. Rather than define WOTUS in a way that includes a separate category of jurisdictional ditches, the Agencies should remove the standalone ditches category and instead address the question of which ditches are jurisdictional through language in the tributary definition and in the ditches exclusion.

- To the extent the Agencies intend to assert jurisdiction over ditches that are constructed in tributaries, they should revise the “tributary” definition to clarify that the definition encompasses man-altered tributaries.

- For ditches that are constructed in jurisdictional adjacent wetlands, the ditch exclusion can indicate that such ditches would not be excluded.

- Finally, there is no need for a standalone ditch category to clarify that features like the Erie Canal are jurisdictional. To the extent a man-made or man-altered channel such as the Erie Canal is a TNW, the (a)(1) category already covers such channels, and it would be redundant to specify, in a standalone ditch category, that ditches that satisfy the (a)(1) requirements would be jurisdictional.

The undersigned organizations have a significant interest in ensuring that this rule provides as much clarity as possible over the regulatory status of ditches. As background, farmers rely on ditches for a broad variety of purposes, which is why they are found everywhere on farmlands. To assert jurisdiction over most agricultural ditches would be a significant departure from longstanding practice and would seriously alter the federal-state balance that Congress struck in the CWA. We appreciate the Agencies’ recognition in the preamble that, since the 1970s, the Agencies have generally excluded non-tidal ditches from CWA jurisdiction.

Although we agree that it would be appropriate to assert jurisdiction over some ditches because they are man-altered tributaries, we strongly feel it would be better for the Agencies to do so by clarifying the tributary category and/or the ditch exclusion, rather than to establish a standalone category of jurisdictional ditches. A standalone category of ditches risks creating the wrong impression that the default status of ditches is that they are jurisdictional. By eliminating the category and instead addressing which ditches would be jurisdictional elsewhere in the rule,
the rule would better align with the statutory text, which generally distinguishes between “point sources” and “navigable waters.” E.g., 33 U.S.C. § 1362(12); see also 84 Fed. Reg. at 4,179-80.1

As noted in the preamble, whether a ditch is jurisdictional turns essentially on whether it was constructed in a jurisdictional tributary or adjacent wetland or whether it relocates or alters a jurisdictional tributary. On this point, the Proposed Rule properly puts the burden of proof on the Agencies to demonstrate whether a ditch was constructed in a jurisdictional tributary or wetland. Id. at 4181. The preamble thus appropriately states that “[i]f the evidence does not demonstrate that the ditch was located in a natural waterway, the agencies would consider the ditch non-jurisdictional.” Id. The undersigned organizations request that the Agencies consider codifying this burden of proof requirement in the regulatory text. We further request that the Agencies provide additional preamble discussion as to what types of “evidence” the Agencies will rely on to try to carry their burden, e.g., aerial photos or historic documentation. These changes will help provide additional clarity and certainty for farmers and ranchers.

E. Lakes and Ponds

The Proposed Rule establishes a new category of jurisdictional lakes and ponds. See 84 Fed. Reg. at 4,182. These waters are jurisdictional if they fall under one of three categories: (1) they are TNWs; (2) they contribute perennial or intermittent flow to a TNW in a typical year, either directly or indirectly; or (3) they are flooded by a TNW, tributary, ditch, lake, pond, or impoundment in a typical year. See id.

The undersigned organizations believe this is a reasonable definition, particularly to the extent it focuses on a lake’s or pond’s contribution of flow to and connection with TNWs. We especially support the Agencies’ elimination of case-specific “significant nexus” determinations as the basis for asserting jurisdiction over lakes and ponds. As already noted, nothing in the CWA compels the use of that test, nor is it required under relevant Supreme Court precedent.

We also appreciate that the preamble to the Proposed Rule appropriately ties the lakes and ponds category back to the CWA’s text and Congress’s intent, particularly to terms like “navigable” and Congress’s commerce power over navigation. See, e.g., id. at 4,183. Thus, the Agencies correctly point out that isolated, intrastate lakes and ponds cannot be deemed jurisdictional based on ecological connections for the reasons discussed in SWANCC. Id. An alternative interpretation would effectively read the term “navigable” out of the statute and would raise serious constitutional issues. See Hibbs v. Winn, 542 U.S. 88, 101 (2004) (cautioning against statutory constructions that render any part of the statutory language “inoperative, superfluous, void or insignificant”).

1 We emphasize, however, that the regulation of ditches as point sources must not occur in a way that limits the statutory exclusions for “return flows from irrigated agriculture” or “agricultural stormwater.” See 33 U.S.C. § 1342(l) (exempting the discharge of irrigation return flows into WOTUS from the CWA Section 402 permit program); 33 U.S.C. § 1362(14) (excluding agricultural stormwater discharges and irrigation return flows from the definition of point source).
Our principal remaining concern with this category relates to the meaning of “intermittent” and “typical year,” terms that are relevant to this category in essentially the same ways they are relevant to the category for tributaries. As explained above in our comments on the proposed tributary definition, the Agencies should be more clear about how those terms will be defined and implemented.

F. Impoundments

The Proposed Rule continues to assert jurisdiction over impoundments of other jurisdictional waters, which the Agencies explain reflects their longstanding view that impounding a WOTUS does not change the jurisdictional status of the WOTUS. See 84 Fed. Reg. at 4,172. In the Agencies’ view, retaining this category is “consistent with longstanding agency practice unless jurisdiction has been affirmatively relinquished,” e.g., “when an applicant receives a permit to impound a water of the United States in order to construct a waste treatment system (as excluded under (b)(11)).” Id. at 4,172 & 4,192.

The undersigned organizations recommend that the Agencies eliminate impoundments as a standalone category of WOTUS. If the Agencies remove this category, there should not be a gap in jurisdiction because impoundments should still be covered under one of the other categories of WOTUS. For example, if an impounded water satisfies the requirements of the lakes and ponds category, it would be jurisdictional under that category. By contrast, if impounding an intermittent tributary means that there will be less than intermittent flow from the tributary to a downstream navigable water, then the impounded water would essentially be a non-jurisdictional, isolated pond. Eliminating jurisdiction over impounded waters under these circumstances would be consistent with the Agencies’ practice of relinquishing jurisdiction over certain WOTUS after issuance of a valid 404 permit. Similarly, if a farm or stock watering pond was created before the enactment of the CWA by impounding a historic tributary, but the pond is now isolated, historic conditions should not form a basis to assert jurisdiction over the pond (as an “impoundment”) because the tributary that was originally impounded is no longer a jurisdictional “tributary” within the meaning of this rule.

If the Agencies insist on retaining the impoundment category, we recommend that the Agencies provide some clarifications in the final rule. For instance, the Agencies should clearly define what constitutes an impoundment, e.g., that it is a standing body of water created by blocking or restricting the flow of a WOTUS. Similarly, the Agencies should clarify that they would be asserting jurisdiction over the water feature that results from impounding a WOTUS, as opposed to the actual impoundment, whether it is a dam or some other structure.

G. Adjacent Wetlands

Under the Proposed Rule, “adjacent wetlands” would be jurisdictional, and the rule defines that term to mean “wetlands that abut or have a direct hydrologic surface connection to a [jurisdictional water] in a typical year.” The Proposed Rule further defines “abut” as “to touch at least at one point or side of a [jurisdictional] water,” and clarifies that a “[d]irect hydrologic surface connection occurs as a result of inundation from a [jurisdictional water] to a wetland or via perennial or intermittent flow between a wetland and a [jurisdictional] water.” 84 Fed. Reg. at 4,186–87. The Proposed Rule also clarifies that wetlands that are physically separated from a
WOTUS—for instance, by dikes, barriers, or similar structures—and also lacking a direct hydrologic surface connection would not be jurisdictional as adjacent wetlands. Id. at 4,189. This of course means that natural or man-made breaks do not sever jurisdiction so long as the “direct hydrologic surface connection” requirement is satisfied.

The Proposed Rule's definition of “wetlands” remains unchanged from the longstanding regulatory definition. See id. at 4,184. To complement that definition, the Agencies have proposed a new definition for “upland” which means “any land area that under normal circumstances does not satisfy all three wetland delineation criteria (i.e., hydrology, hyd rophytic vegetation, hydric soils) . . . and does not lie below the ordinary high water mark or the high tide line of a [jurisdictional water or wetland].” Id. at 4,189.

Here, again, the Agencies rightly point out that their interpretation is informed but not dictated by science. See id. at 4,187. As explained above, the Agencies have ample authority to define “adjacent wetlands” in the manner they propose based on important policy and legal considerations.

The undersigned organizations support the Agencies’ approach to adjacent wetlands. We agree with the Agencies that the proposed definition of “adjacent wetlands” is superior to the current definition (“bordering, contiguous, or neighboring”), which the Agencies note has led to considerable confusion in the field. See 84 Fed. Reg. at 4,187. Apart from causing confusion, the current definition of “adjacent” has allowed regulators to assert jurisdiction over isolated wet patches of land. See Rapanos, 547 U.S. at 728 (detailing how both the Corps and lower courts have determined that wetlands were “adjacent” based on hydrological connections “through directional sheet flow during storm events” or on location within the 100-year floodplain or within 200 feet of a tributary). Such an expansive view of adjacency improperly goes far beyond the “point at which water ends and land begins,” see Riverside Bayview, 474 U.S. at 132, and raises the very statutory and constitutional concerns discussed in SWANCC. See 541 U.S. at 172–74. It also improperly reads the term “navigable” out of the statute and alters the federal-state balance that Congress struck in the CWA. Id. By contrast, we believe the Proposed Rule is consistent with the statutory text, Congress’s intent, and applicable Supreme Court precedent.

We also support the Agencies’ attempts to clarify that wetlands must satisfy all three wetland delineation criteria under normal circumstances, but we urge the Agencies to go further. To complement the new definition of “upland,” the definition of “wetland” should be revised to clearly state that an area that does not satisfy all three wetland delineation criteria under normal circumstances is not a jurisdictional wetland. See 84 Fed. Reg. at 4,184. This clarification is necessary to ensure consistent implementation across Corps districts and EPA regions. We also recommend that the Agencies provide additional clarity regarding the terms “intermittent” and “typical year,” as discussed in our comments to the tributary category above.

IV. Comments and Recommendations on Proposed Exclusions

The Proposed Rule also identifies certain features that are expressly excluded from the definition of WOTUS. The undersigned organizations support the Agencies’ decision to expressly exclude certain categories of waters from WOTUS. We also support the proposal to exclude features from jurisdiction even if the excluded features develop wetland characteristics
within the confines of the features. See 84 Fed. Reg. at 4,192. More specifically, we offer the following comments on some of the exclusions of particular interest to our members to help the Agencies clarify and improve them where appropriate.

A. Prior Converted Cropland

The Agencies propose revised regulatory text on the longstanding exclusion for prior converted cropland ("PCC"). This revision would continue to exclude PCC from CWA jurisdiction but would ensure that the exclusion applies as the Agencies envisioned when they originally codified it in 1993. See 58 Fed. Reg. 45,008 (Aug. 25, 1993). Among other things, the Agencies clarified at the time that "[a]n area remains prior converted cropland even if it is no longer used in agricultural production or is put to a non-agricultural use." Id. at 45,032. The lack of a clear definition of PCC in the regulatory text, however, has given rise to some problems in the past, and we appreciate the Agencies’ efforts to clarify their intent in the Proposed Rule.

The proposed revised text defines PCC as “any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible.” See id. at 4,204 (proposed 33 C.F.R. § 328.3(a)(8)). The regulatory text expressly states that “EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture." Id. The regulatory text also discusses the concept of abandonment, stating that, “An area is no longer considered prior converted cropland for purposes of the Clean Water Act when the area is abandoned and has reverted to wetland…. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years.” Id. Finally, the regulation continues to state that EPA has final authority to determine when PCC has been abandoned for CWA purposes. Id.

The preamble to the Proposed Rule recounts the history of the PCC exclusion, which dates back to the 1993 regulation. Id. at 4,191. That history unfortunately includes the Corps’ attempts to narrow the scope of the PCC exclusion through a guidance memo, which was eventually declared unlawful by a federal court due to lack of notice-and-comment rulemaking. Id. (citing New Hope Power Co. v. U.S. Army Corps of Eng’rs, 746 F. Supp. 2d 1272, 1282 (S.D. Fla. 2010)). The preamble adds that the Corps will only apply abandonment principles consistent with the 1993 rule preamble and will no longer apply the change in use analysis that the Corps tried to introduce unsuccessfully and without notice-and-comment. See id.

We support the proposed regulatory text and the preamble text clarifying how the Agencies interpret the PCC exclusion. However, the Agencies should clarify—either in the text or the preamble—that there is a broad array of uses of PCC “in support of” agricultural purposes, such as idling land for conservation purposes; idling land to protect wildlife; and allowing land to lie fallow following natural disasters such as hurricanes (for example, to offset saltwater intrusion). 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. We also urge the Agencies to clarify in the final rule that PCC includes ditches, canals, and other features within PCC.

In connection with this rulemaking, the Agencies should also formally rescind the 2009 Issue Paper from the Corps’ Jacksonville Field Office that was set aside by the court in the New
Hope Power case. Corps districts should not be implementing this guidance, or any other guidance that purports to incorporate change-in-use principles, and trying to recapture lands based on broad interpretations of abandonment. As the Agencies originally explained in 1993, PCC are abandoned (and thus, the exclusion no longer applies) only if land is abandoned and the area has reverted to wetland.

B. Groundwater

The Proposed Rule excludes groundwater, “including groundwater drained through subsurface drainage mechanisms.” Id. at 4,190. We support that exclusion. The text, structure, and history of the CWA make it clear that Congress did not intend for groundwater to be WOTUS. There are numerous instances in the text where Congress plainly distinguished between “ground waters” and “navigable waters” and those distinctions must be given effect. E.g., 33 U.S.C. § 1252(a)(referring to “pollution of the navigable waters and ground waters”); id. § 1256(e)(1) (referring to “the quality of navigable waters and to the extent practicable, ground waters”); id. § 1314(a)(2) (“all navigable waters, ground waters, waters of the contiguous zone, and the oceans”). Likewise, the legislative history confirms that Congress deliberately distinguished between navigable waters and ground waters and did not intend to subject groundwater to federal regulatory authority under the CWA. See S. Rep. No. 92-414, at 73 (1971) (explaining that a number of bills were introduced to establish federal standards for groundwaters, but that Congress did not adopt any of those proposals). Not surprisingly then, courts have uniformly agreed that groundwater is not WOTUS. E.g., Rice v. Harken Exploration Co., 250 F.3d 264, 269 (5th Cir. 2001) (“The law in this Circuit is clear that ground waters are not protected waters under the CWA.”); Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 964–66 (7th Cir. 1994) (tracing legislative history and concluding that groundwaters “are a logical candidate” for exclusion from the CWA’s scope).

The Agencies have invited comment on whether the groundwater exclusion could instead read “groundwater, including diffuse or shallow subsurface flow and groundwater drained through subsurface drainage systems.” The undersigned organizations believe there is considerable confusion about whether groundwater encompasses shallow subsurface flow or whether and how those categories of water are distinct. Regardless of whether there is scientific consensus on that subject, neither groundwater nor shallow subsurface flow should be WOTUS and thus, we support an exclusion that would expressly exempt both from federal jurisdiction.

C. Ephemeral Features and Diffuse Runoff

The Agencies propose to exclude “ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland.” 84 Fed. Reg. at 4,190. “Ephemeral” is defined to mean “surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).” Id. at 4,204 (proposed 33 C.F.R. § 328.3(c)(3)).

We support this exclusion. Interpreting the CWA to exclude ephemeral features is in line with the CWA’s text. Navigable waters must be “waters,” and it is reasonable to interpret that term to mean rivers, streams, oceans, and other hydrographic features more conventionally identifiable as “waters.” See Riverside Bayview, 474 U.S. at 131. Moreover, the term “navigable” retains independent significance and, it reflects Congress’s intent to exercise its
traditional commerce power over navigation. See SWANCC, 531 U.S. at 172 & 168 n.3. The exclusion also respects the CWA section 101(b) policy and avoids significantly altering the federal-state framework by avoiding the assertion of jurisdiction over primarily dry features.

Our only recommendation regarding the proposed exclusion of ephemeral features is that the Agencies should make it clear that if a feature falls within the ephemeral exclusion, it is per se excluded and cannot be deemed jurisdictional under any of the six categories of jurisdictional waters. For instance, if water that flows through or pools in an ephemeral channel as a direct result of precipitation happens to flow or pool for an extended period of time (without intersecting the groundwater table), it should still be excluded as “ephemeral” and cannot be deemed to be intermittent.

D. Ditches

The Agencies propose to exclude all ditches that are not identified as jurisdictional in paragraph (a)(3) of the definition. See id. at 4,190; see also Part III.D supra. The Agencies state that this exclusion should address the majority of irrigation and drainage ditches, including most agricultural ditches, but they clarify that the exclusion does not affect the possible status of a ditch as a point source. See id. at 4,193.

We support the Agencies’ general approach to ditches, but as discussed above, we believe the Agencies should eliminate the standalone category of jurisdictional ditches and make revisions to the “tributary” definition and the proposed ditches exclusion to accomplish their intent to assert jurisdiction over only ditches that are constructed in jurisdictional tributaries or adjacent wetlands or that alter or relocate a jurisdictional tributary.

Moreover, it is important that, in the Final Rule, the Agencies acknowledge that many ditches on agricultural lands are often constructed in low areas that have wetland characteristics or are ephemeral drainages (and hence, are not dry land). The Proposed Rule seems to reflect that understanding by not requiring that ditches be constructed on dry land. We also agree that irrigation ditches would and should remain excluded even if they draw water from a jurisdictional tributary and move that water to another jurisdictional tributary. See 84 Fed. Reg. at 4,195.

E. Artificially Irrigated Areas

The Agencies propose to exclude “artificially irrigated areas,” “including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease.” See id. at 4,191. The Agencies have historically considered these areas to be non-jurisdictional, although they have previously considered them under the exclusion for artificial lakes and ponds. See id. at 4,194.

The Agencies invite comment on whether this exclusion should be “expanded” to cover areas flooded to support aquaculture or fields flooded to support the production of wetland crop species in addition to rice and cranberries. Id. at 4,195. We find this request for comment puzzling because nothing in the proposed regulatory text suggests that the exclusion is limited to fields flooded for rice or cranberry growing. Under the plain terms of the regulatory text—which we support—any artificially irrigated areas, not just those fields flooded for rice or cranberry.
growing, should be excluded. See id. at 4,204 (proposed 33 C.F.R. § 328.3(a)(6) (defining
“Artificially irrigated areas” to include—but not be limited to—“fields flooded for rice or
cranberry growing ...”)). The Agencies might wish to consider clarifying this point in the Final
Rule, to eliminate any confusion caused by the request for comment on the subject.

F. Artificial Lakes and Ponds

Under the exclusion for “artificial lakes and ponds,” the Agencies propose to exclude
features like farm and stock watering ponds, but only if they are constructed in upland and do not
meet the criteria for jurisdictional lakes or impoundments. See id. at 4,191. The preamble
clarifies that this exclusion applies to artificial lakes and ponds created as a result of impounding
non-jurisdictional waters or features, as well as conveyances in upland that are physically
connected to and are part of the proposed excluded feature. Id. at 4,194.

We generally support this exclusion, but recommend that the Agencies codify the
preamble clarifications in the text of the Final Rule. In particular, the Final Rule should explicitly
exclude lakes and ponds “constructed in upland or constructed by impounding non-jurisdictional
waters or features.” See id. The Final Rule should also include a sentence stating that
“Conveyances created in upland that are physically connected to and are a part of the excluded
artificial lake or pond are also excluded.” See id. As currently drafted, the proposed regulatory
text suggests that the exclusion is quite narrow, because the text refers only to those features
constructed in upland. Although the preamble shows that is not the Agencies’ intent, we urge the
Agencies to provide additional clarity in the regulatory text itself to avoid any risk that the
exclusion would be narrowly interpreted or applied in the future.

For this exclusion to be meaningful to farmers and ranchers, it is important that it not be
limited to features be constructed on dry land. The very purpose of ponds is to carry or store
water, which means that they are not typically constructed along the tops of ridges. Often, the
only rational place to construct a farm or stock pond is in a naturally low area to capture
stormwater that enters the ditch or pond through sheet flow and ephemeral drainages.
Depending on the topography of a given patch of land, pond construction may be infeasible
without some excavation in a natural ephemeral drainage or a low area with wetland
characteristics.

G. Stormwater Control Features

The Agencies also propose to exclude features that are “excavated or constructed in
upland to convey, treat, infiltrate, or store stormwater runoff.” See id. at 4,190. The preamble
states that this exclusion does not cover ditches, which the Proposed Rule addresses in a separate
exclusion. See id. at 4,194.

In discussing this exclusion, the preamble focuses on urban and suburban settings such as
curbs, gutters, sewers, retention and detention ponds, and urban green infrastructure. Id. at 4,192.
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.

H. Waste Treatment Systems

The undersigned organizations support the continued exclusion of waste treatment systems, which has been part of the regulatory text for decades. The Agencies propose to more clearly define what constitutes a “waste treatment system” in the regulatory text: “all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey, retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).” 84 Fed. Reg. at 4,205. This regulatory text is consistent with longstanding agency practice. We support the Agencies’ proposed definition of waste treatment system, particularly the clarifications that such systems need not perform active treatment and that the system includes not just ponds and lagoons, but also conveyances to and from those ponds and lagoons.

V. Implementation and Burden of Proof

In implementing any final definition of WOTUS, we believe that field evaluations should be the presumptive approach. We see no reason to limit such evaluations to certain circumstances. Use of desktop tools, by contrast, should be carefully scrutinized because they threaten to complicate and obscure the operation of any Final Rule the Agencies issue in ways that will impose potentially significant burdens on our members.

We agree with the Agencies that, when it comes to implementing any Final Rule, the landowner should have the benefit of the doubt with respect to determining jurisdiction. In other words, 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, at some point in the distant past, constructed in a jurisdictional tributary or wetland. Many farmers and ranchers simply lack the means or opportunity to conclusively establish the answer. Similarly, farmers should not have to prove that farm and stock watering 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.

VI. Conclusion

We appreciate the opportunity to provide these comments to the Agencies. Overall, we are very supportive of the Proposed Rule, and we believe the proposed definitions will go a long way to providing much needed clarity and certainty for farmers and ranchers. Furthermore, we applaud the Agencies for conducting an inclusive and transparent rulemaking process, and we
look forward to the culmination of the Agencies’ attempts to revise the definition of “waters of the United States.” Thank you for your time and consideration.

On behalf of:

American Farm Bureau Federation
Agricultural Retailers Associations
National Corn Growers Association
National Council of Farmer Cooperatives
National Pork Producers Council
The Fertilizer Institute