



NATIONAL CATTLEMEN'S BEEF ASSOCIATION
CENTER FOR PUBLIC POLICY



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**Comments of the National Cattlemen's Beef Association
on the Environmental Protection Agency and U.S. Army Corps of Engineers'
Proposed Updated Definition of Waters of the U.S. 90 F.R. 52498.**

The National Cattlemen's Beef Association (NCBA), Public Lands Council (PLC), and undersigned affiliates appreciate the opportunity to comment on the Environmental Protection Agency's (EPA) and U.S. Army Corps of Engineers' (Army Corps) proposed rule to revise the definition of "Waters of the United States", as applied under the Clean Water Act (the Updated Definition). NCBA is the nation's largest and oldest trade association representing American cattle producers, with over 175,000 cattle producers represented through both direct membership and 44 state affiliate associations. PLC is the only national trade association that represents the over 22,000 western ranchers who hold federal grazing permits and operate on federal public lands. America's cattlemen need an easy-to-understand "Waters of the United States" (WOTUS) definition that allows for straightforward implementation, and the Agencies have taken significant strides toward achieving this goal.

The Clean Water Act (CWA or the Act) impacts all segments of the beef supply chain. Ranchers across the country send their cattle to graze on pastures or rangeland with ephemeral streambeds and water their cattle using stock ponds. Animal feeding operations are frequently permitted under the CWA as point sources and integrate waste treatment systems to effectively manage manure. Most American cattle producers are multi-generational, having dealt with every iteration of CWA jurisdiction since its passage in 1972. After over 50 years of jurisdictional tug-of-war between the Supreme Court and the Agencies, regulated stakeholders want nothing more than consistency in the Act's application. In the final rule, cattle producers need a practical and interpretable WOTUS definition.

Impact of WOTUS on American Cattle Producers

In the United States, cattle graze on nearly 815 million acres – over one-third of the nation’s continental landmass. As the country’s largest collective land manager, America’s cattle producers stand to lose the most from either a vague regulatory scheme or a WOTUS definition that attempts to combat clarity issues with overbroad categorical jurisdiction. An expansive WOTUS definition impacts America’s cattle-raising population disproportionately, potentially leaving less grazable land available for productive and sustainable use.

Cattle ranchers and feeders need a clear definition of WOTUS that will allow them to assess whether they have a federally jurisdictional water on their property without spending limited resources to hire outside consultants and hydrologists. The Updated Definition, as proposed by the Agencies, carries considerable risks for stakeholders who want nothing more than a rule that can be easily understood and implemented.

Previous Engagement in the WOTUS Rulemakings and Litigation

NCBA and PLC vigorously defend the property rights of cattle producers in all areas of government and has been heavily engaged to ensure that the CWA’s WOTUS definition is not illegally expanded. NCBA and PLC engaged in the Agencies’ previous attempt to define WOTUS, submitting comments and engaging in stakeholder outreach opportunities. NCBA and PLC filed comments in support of the Agencies’ 2015, 2017, 2018, 2021, and 2023 notices. Additionally, NCBA, PLC, and their state affiliates have participated in listening sessions, both in DC and throughout the country, to convey the importance of this standard to America’s cattle producers. Beyond regulatory engagement, NCBA and PLC have both defended and fought final definitions in courts across the country, including filing an amicus brief to the Supreme Court in defense of the Sackett family in *Sackett v. EPA*.

NCBA and PLC support finalization of the Updated Definition and provide specific comments below.

Proposed Categories of Jurisdictional Waters

(a)(1) Traditional Navigable Waters and Territorial Seas

The foundation of the Updated Definition is the traditional navigable waters (TNW) definition, constituting the (a)(1) category. Every other jurisdictional category depends on connection to an (a)(1) water, thus the impact of the jurisdictional definition can be multiplied, or curbed, by the breadth of the (a)(1) waters definition. The proposed revisions to the (a)(1) category align with Congressional intent, constitutionally rooted in the Commerce Clause. The Supreme Court considered the extent to which the Commerce Clause applies to federal waters in *The Daniel Ball v. United States* and held that waters are jurisdictional when they are (1) navigable-in-fact and (2) together with other waters, form waterborne highways used to transport commercial goods in interstate or foreign commerce. A waterbody is navigable-in-fact when it is used or susceptible to use in its ordinary condition as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

NCBA and PLC applaud the removal of “interstate waters” from standalone jurisdiction. The livestock associations oppose the assertion of federal authority over interstate waters that do not fall into other categories of jurisdictional waters. Simply put, the commerce clause in no way provides the federal government authority to regulate non-navigable interstate features. In *Georgia v. Wheeler*, the court found that the categorical regulation of all interstate waters “reads the term navigability out of the CWA.” In 1972, Congress replaced the term “navigable or interstate waters” with “navigable waters.” Because the TNW category must be grounded in interstate commerce, the waters regulated as such must be limited to that purpose. The Commerce Clause considers the function of waters as a tool, not their mere existence. Simply because a water or wetland crosses state boundaries does not instantly qualify it for federal jurisdiction. Only if a feature can support the transportation of interstate commerce should it be regulated as (a)(1) waters. The “interstate waters” category, in short, seeks to expand jurisdiction to these features – features that would not otherwise be subject to federal jurisdiction based on navigability alone.

These features do not impact interstate commerce or downstream water quality. If they did, they could be regulated as “other waters” with a significant nexus to traditionally navigable waters. Such a stretch of authority runs counter to congressional intent and the constitutional foundation of the CWA. The legislative history of the CWA indicates Congress’ intent to expand federal jurisdiction beyond interstate waters to all navigable waters. However, this action does not change which interstate waters are subject to federal regulation. Waters that are not traditionally navigable, their tributaries, impoundments, or adjacent wetlands, or waters directly contemplated by the Supreme Court are not subject to federal regulation due solely to their geographic location.

NCBA and PLC support the Updated Definition’s elimination of the “interstate waters” category. Because the TNW category must be grounded in interstate commerce, the waters regulated as such must be limited to that purpose. The Commerce Clause considers the function of waters as a tool, not their mere existence. Simply because a water or wetland crosses state boundaries does not instantly qualify it for federal jurisdiction. Only if a water can support the transportation of interstate commerce should it be regulated as an (a)(1) water.

In considering which waters fall into the (a)(1) category, NCBA and PLC recognize that the Agencies look to precedent beyond *The Daniel Ball*. However, this precedent in no way provides a rationale for waters used only for recreation to reach the threshold of an (a)(1) water. In considering the extent to which navigability-in-fact extends, groups and individuals seeking to expand (a)(1) jurisdiction often look to two cases: *U.S. v. Appalachian Electric Power Company* and *U.S. v. Utah*. However, neither case provides legal justification for the Agencies to extend the (a)(1) category to waters used solely for recreational purposes. The Supreme Court in *U.S. v. Appalachian Electric Power Company* held that lack of commercial traffic does not bar a conclusion of navigability “where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation.” In reaching this conclusion, the Court cited its previous decision in *U.S. v. Utah*, referencing back to a case where the Court did not find the waterbody in question federally jurisdictional. In holding that personal traffic may be used as a proxy for commercial traffic, the Court misinterpreted the *Utah* holding entirely. Rather than find recreational use of a waterbody sufficient grounds for a navigability holding, the Court only stated that navigability is proven by capability. The *Appalachian Electric* court made an assumption that stretched the *Utah* court’s holding beyond its original intent. The *Utah* court never stated, nor alluded to the concept that capability could be proven by the use of recreational vehicles.

Later, in 1971, the Supreme Court considered another Utah-based navigability question. *Utah v. United States* was a battle between the state of Utah and the federal government over the jurisdictional navigability of the Great Salt Lake. Ultimately, the Court held that the Lake was navigable, because a cattle producer used a small boat to haul cattle from an island in the middle of the Lake to the mainland. In expanding the jurisdiction of navigable-in-fact waters beyond those that carry commercial traffic, the Supreme Court did not ignore the foundation of federal water regulation – whether it be the Rivers and Harbors Act or the Clean Water Act. The Commerce Clause was still at play and allowed the Court to expand jurisdiction to the Great Salt Lake because the cattle producer was transporting products for use in interstate commerce. Courts and agencies alike must distinguish the transportation of commercial products from noncommercial activities. By reading the *Appalachian Power* decision as permitting recreational vehicles to satisfy the standards of the Commerce Clause, the Agencies drastically misinterpret the *Utah* 1 Court’s holding.

While NCBA and PLC generally support the Agencies’ efforts, the (a)(1) waters definition reaches beyond Supreme Court precedent: “waters which are currently used, or were used in the past, or may be susceptible to use *in* interstate or foreign commerce.” While use *in* commerce conveys only a passive use of the waterbody for interstate commerce, Supreme Court precedential language conveys that waters are navigable-in-fact when they are used *for* interstate commerce, implying that the water must be a tool for transportation. NCBA and PLC believe this can be remedied with a small change to the (a)(1) definition. By substituting “use in” with “use for” so that the phrase reads “susceptible to use for interstate or foreign commerce,” the Agencies will ensure that the Updated Definition aligns with Supreme Court precedent.

(a)(3) Tributaries

Above all else, the Agencies’ top priority must be to ensure that any final WOTUS definition is in line with Congress’ intent in passing the Clean Water Act. While all engaged parties agree that the term “waters of the United States” is inescapably vague, the Act contains other guiding principles that cannot be ignored. Congress states that the intent of the Act is to maintain the chemical, physical, and biological integrity of the nation’s waters. To ensure that the Agencies follow this direction, the Agencies consider the best available science, as informed by Supreme Court precedent.

NCBA and PLC support the determination of a tributary’s jurisdictional status based on a two-part test. To find an (a)(3) water jurisdictional, regulators must show both (1) the existence of visible indicators *and* (2) satisfaction of the regulatory flow metric. Without distinct consideration of both visible indicators and flow, EPA will establish federal regulatory authority over areas like the one captured in Attachment (1), a drainage feature in the Rocky Mountain region.¹⁵ NCBA and PLC suggest that the Agencies include the presence of a bed, banks, and an ordinary high water mark as required visible indicators for jurisdictional tributaries, making clear that without these visible indicators, a jurisdictional tributary is not present.

If visible indicators exist, regulators move on to determining whether the tributary meets the necessary flow metric (at least seasonal flow). The flow metric is a standalone requirement, separate from physical indicators. A tributary should only be jurisdictional if it satisfies both the physical indicator and flow metric requirement. Both the flow metric and physical indicators are necessary to ensure that the federal government is regulating those water bodies that are contributing to downstream water quality and are more than “the merest trickle.”

(a)(4) Adjacent Wetlands

NCBA and PLC commend the Agencies' diligent work in defining adjacent wetlands to jurisdictional waters ((a)(6)). By limiting jurisdictional adjacent wetlands to those that (1) abut or (2) have a direct hydrological surface connection to a jurisdictional water, the Agencies follow Supreme Court precedent while ensuring that wetlands vital to downstream water quality are protected. This standard is in line with the precedent set by *Riverside Bayview*, *SWANCC*, and *Rapanos*. NCBA and PLC provide one recommendation for the Agencies to further clarify the (a)(6) definition.

i. The (a)(4) category aligns with Supreme Court precedent.

As the Agencies look to the Supreme Court for guidance, they perhaps receive the most pointed direction when it comes to wetlands jurisdiction. Every seminal CWA case that has come before the Supreme Court dealt with wetland jurisdiction in some form. *Riverside Bayview* first required the Court to consider the breadth of the Act's jurisdiction, ultimately leading to affirmation of the Army Corps' position that wetlands which are "inseparably bound up" in navigable waters are also subject to federal protection under the CWA. However, this federal protection was narrowed by the Court's holding in *SWANCC*, when it determined that use of a waterbody or wetland by migratory birds was insufficient for CWA regulation. The Migratory Bird Rule expanded the Agencies' jurisdiction to wetlands and waterbodies far beyond those that were merely adjacent, to isolated ponds and wetlands. The *Riverside Bayview* and *SWANCC* courts provided an answer, yet courts across the nation continued to grapple with the question – where does the CWA draw the jurisdictional line for wetlands? The answer was finally made clear by *Sackett*: only those wetlands with a continuous surface connection to jurisdictional surface waters may be regulated under the CWA. The 2015 Rule included numeric distance limitations that allowed the Agencies to potentially regulate wetlands within 4,000 feet of TNWs and their tributaries. Such a standard would have gone far beyond the *Riverside Bayview* or *Rapanos* precedents. This standard was rolled back by the Biden-era WOTUS definition, opting for a less clear definition that relied almost wholly on case-by-case determinations. NCBA and PLC support the Agencies' work to apply a jurisdictional test for tributaries that complies with the full body of Supreme Court precedent, including *Sackett*.

(a)(5) Certain Lakes and Ponds

NCBA and PLC question the value of the Lakes and Ponds ((a)(5)) category, specifically whether such a category aligns with Congressional intent. Any (a)(5) waterbody which Congress intended to protect under the CWA will be jurisdictional as an (a)(1) water. NCBA and PLC particularly struggle with the Agencies' assertion of jurisdiction over lakes or ponds that are flooded by an (a)(1)-(4) water and posits that this directly conflicts with the intent of the CWA.

i. Only lakes and ponds that qualify as or flow into (a)(1) waters should be deemed federally jurisdictional.

In 1931, the Supreme Court considered federal jurisdiction over the Great Salt Lake.²³ It struggled with this question, and ultimately found that the Lake was subject to federal jurisdiction because a rancher transported cattle from a small island in the middle of the Lake to the mainland. The Great Salt Lake was subject to federal jurisdiction because of the role it played in interstate commerce. While NCBA and PLC acknowledge that *U.S. v. Utah* was decided prior to the CWA's enactment, it does not change the Act's constitutional grounding in the Commerce Clause, nor does it alter Congress' intent to protect and improve downstream water quality. Unless a waterbody

is traditionally navigable in its own right, an isolated lake or pond is not susceptible to use for interstate commerce, and thus should not receive the protections of the CWA.

ii. The Agencies have no grounding to assert jurisdiction over lakes and ponds flooded by (a)(1)-(4) waters.

NCBA and PLC are specifically concerned about the Agencies' assertion of jurisdiction over lakes and ponds flooded by (a)(1)-(4) waters. In addition to regulating lakes and ponds that satisfy the (a)(1) category and contribute perennial or intermittent flow to an (a)(1) water, the Updated Definition claims jurisdiction over lake and ponds that are flooded by an (a)(1)-(5). The Agencies' definition of "tributary" comports with Supreme Court's unanimous decision in *Sackett* because it falls within Justice Alito's requirement of continuous flow for at least "some months" out of the year. Requiring streams to have continuous flow for approximately half of the year, satisfies this requirement while allowing jurisdiction over waters that flow during wet seasons. Further, it establishes the much-needed line between intermittent streams from purely ephemeral streams. The Agencies have no grounding to assert jurisdiction over lakes and ponds flooded by (a)(1)-(4) waters.

The term "flooding" suggests that the areas potentially subject to federal jurisdiction are isolated, but for a precipitation event. This inclusion differs from the jurisdictional line drawn for tributaries (ephemeral features, fed only by precipitation, are excluded from regulation). The Connectivity Report specifically considers oxbow lakes. An oxbow lake forms due to (1) a flood or (2) change in the stream course, creating a free-standing body of water. These isolated waterbodies have a hydrologic connection to an (a)(1) or (a)(2) water only when they flood. Otherwise, these lakes and ponds stand unconnected to the stream network in question. The Agencies provide no rationale to assert jurisdiction over such features, while rightly excluding other features that flow in response to flooding (namely, ephemeral features). Indeed, the Updated Definition's exclusion of ephemerals strongly suggests that lakes and ponds connected only during times of flooding should also be excluded. Therefore, the NCBA and PLC recommend that EPA eliminate jurisdiction over lakes and ponds that do not satisfy the (a)(1) standard.

Proposed Exclusions

NCBA and PLC support the Agencies' effort to provide a list of exclusions in addition to the above jurisdictional categories. The list is well-formulated and continues to implement long-standing agency policy. However, NCBA and PLC are concerned that, rather than exclusions taking precedence over the rule, the rule supersedes the exclusions list. The exclusion provision in the 2015 Rule contained a disclaimer, stating that features expressly excluded under (b) "are not [WOTUS] even where they otherwise meet the terms of" the WOTUS definition in (a). This is necessary to ensure that exclusions have the full force of law, rather than becoming mere suggestions. However, the Agencies have not included similar language in the exclusions list of the Updated Definition, leaving the exclusions list vulnerable. Because there are certain exclusions that have exceptions (artificial lakes and ponds), the Agencies barred themselves from fully securing defensibility of the entire list. NCBA and PLC encourage the Agencies to revise the exclusions list to include this necessary language. Further specific recommendations are provided below.

(b)(1) Waste treatment systems

Cattle feeding operations and dairies implement waste management systems to store and effectively recycle animal waste. NCBA and PLC support the Agencies' definition of "waste treatment systems, as well as the exclusion of waste treatment systems from federal jurisdiction. These systems are point sources under the Clean Water Act and are managed as such.

(b)(2) Prior converted cropland

While the Prior Converted Cropland (PCC) exclusion has existed since 1993, producers have dealt with a moving target for over twenty-five years. This is the first time the Agencies' have provided stakeholders with a regulatory definition and concrete standards. The PCC exclusion is integral in allowing agricultural producers to effectively implement voluntary conservation practices through USDA-NRCS. Thank you for providing much needed clarity.

(b)(5) Artificial lakes and ponds constructed in upland (including farm and stock ponds)

The artificial lake and ponds (b)(7) exclusion is unique in that it includes exceptions to the exclusion. The construction of this text not only puts the (b)(7) exclusion at risk, but Section (b) in its entirety. The proposed structure not only renders the exclusion meaningless, but additionally prevents the Agencies from adding protective language to Section (b) which will clarify its precedence over the base jurisdictional definition. Exceptions to exclusions are only effective when they are narrower than the exclusion itself (in this case, (b)(7) waters). Above, NCBA and PLC state concerns regarding Section (b)'s vulnerability – the rule language potentially has precedence over exclusions, as opposed to exclusions having precedence over the rule. As a result, every (b)(7) water will be lost to the exception – even those in upland. Protective language, suggested above, cannot be inserted at present because it directly contradicts Section (b)'s cross-reference to Section (a).

The 2015 Rule's numeric distance limitations put many cattle producers on edge, wondering if their isolated stock ponds would become subject to federal jurisdiction. NCBA and PLC appreciate not only the Agencies' general exclusion of artificial lakes and ponds, but the stated exclusion of farm and stock watering ponds. However, as currently drafted, the proposed regulatory text suggests that the exclusion is incredibly narrow, because the text refers only to those features constructed in upland. For this exclusion to be meaningful to cattle producers, it is important that it not be limited to features constructed on dry land. The very purpose of ponds is to carry or store water, which means that they are not typically constructed in upland. Often, the only rational place to construct a farm or stock pond is in a naturally low area, capturing 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.

The preamble also 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. NCBA and PLC support the Agencies' intent to exclude farm and stock watering ponds created with non-jurisdictional impoundments. These features are heavily relied upon by cattle producers across the country. However, NCBA and PLC recommend that the Agencies revise the exclusion to explicitly exclude lakes and ponds "constructed by impounding non-jurisdictional waters or features."

(b)(9) Groundwater

The Agencies' have long taken the position that groundwater is not a medium subject to federal regulation. Rather, it is an intrastate resource left to the states to manage, either alone or regionally. NCBA and PLC appreciate the Agencies' continued commitment to the CWA's cooperative federalism approach. This sentiment extends to subsurface drainage, including tile drains.

Conclusion

NCBA and PLC appreciate the opportunity to provide comments to the docket on behalf of America's cattle producers. This issue is of the utmost importance to the cattle industry and has the potential to detrimentally impact the day-to-day functions of ranches and cattle feeding operations across the country. NCBA and PLC generally support efforts made by the Agencies to propose a WOTUS definition that contemplates Congressional intent, Supreme Court precedent, and scientific data. The Associations look forward to a final rule that furthers these goals, while ensuring on-the-ground implementability. Thank you for your time and consideration.

Sincerely,

National Cattlemen's Beef Association

Public Lands Council

American Quarter Horse Association

Alabama Cattlemen's Association

Arkansas Cattlemen's Association

Arizona Cattle Feeders' Association

Arizona Cattle Growers' Association

California Cattlemen's Association

Colorado Cattlemen's Association

Colorado Livestock Association

Florida Cattlemen's Association

Georgia Cattlemen's Association

Hawaii Cattlemen's Council

Idaho Cattle Association

Illinois Beef Association

Indiana Beef Cattle Association

Iowa Cattlemen's Association
Kansas Livestock Association
Kentucky Cattlemen's Association
Louisiana Cattlemen's Association
Michigan Cattlemen's Association
Minnesota State Cattlemen's Association
Mississippi Cattlemen's Association
Missouri Cattlemen's Association
Montana Stockgrowers Association
Nebraska Cattlemen
Nevada Cattlemen's Association
New Mexico Cattle Growers Association
New York Beef Producers Association
North Carolina Cattlemen's Association
North Dakota Stockmens Association
Ohio Cattlemen's Association
Oklahoma Cattlemen's Association
Oregon Cattlemen's Association
Pennsylvania Cattlemen's Association
South Carolina Cattlemen's Association
South Dakota Cattlemen's Association
Tennessee Cattlemen's Association
Texas Cattle Feeders Association
Texas & Southwestern Cattle Raisers' Association
Utah Cattlemen's Association
Virginia Cattlemen's Association
Washington Cattlemen's Association

Washington Cattle Feeders Association

West Virginia Cattlemen's Association

Wisconsin Cattlemen's Association

Wyoming Stock Growers Association

Attachments (2):

- (1) Photos: Hydrologic Feature – Rocky Mountain Region
- (2) NRCS WI Companion Document 580-5, Stream Classification Using the Rosgen System

Attachment (1): Hydrologic Feature – Rocky Mountain Region (Photo 1)



Attachment (1): Hydrologic Feature – Rocky Mountain Region (Photo 2)

