Testimony of Mr. Garrett Hawkins on behalf of The American Farm Bureau Federation
President of the Missouri Farm Bureau
Before the House Water Subcommittee
February 8, 2023

Chairman Rouzer and Ranking Member Napolitano, thank you for the opportunity to testify today. My name is Garrett Hawkins and I serve as President of Missouri Farm Bureau (MOFB). I am a fifth-generation farmer from Appleton City, Missouri, and the third generation in my family to own and operate the farm on which we live today. Agriculture runs deep in our extended family and spans livestock, row crop, and dairy production. It is an honor to be here representing the thousands of hard-working farm and ranch families that produce the abundant food, fiber, and renewable fuel that our nation and the world depend on.

The American Farm Bureau Federation® (AFBF) is the Voice of Agriculture® and no one cares more deeply about the health of our environment than our members – the nation's hardworking farm and ranch families. Unlike many other industry sectors, the livelihood of our businesses depends on healthy soils and clean water. We support the objectives of federal environmental statutes such as the Clean Water Act (CWA), however the ambiguity of where the line between federal and state jurisdiction lies has created confusion for landowners. Unfortunately, we have lived in a world of regulatory uncertainty for decades due to everchanging rulemakings that redefine the scope of the CWA. We have seen WOTUS definitions change with each Administration, guidance documents offered and then rescinded and confusing litigation that have provided more questions than answers. Landowners, small businesses, and American families are the ones who suffer the most.

Once again, the Environmental Protection Agency and the U.S. Army Corps of Engineers (the Agencies) have finalized a new regulatory definition of "waters of the United States" (WOTUS) that greatly expands the federal government's role in regulating land use. I am pleased to share my perspective as a farmer on this rule and its potential impact on agricultural producers all across the nation.

The new WOTUS Rule Will Profoundly Affect Everyday Farming and Ranching Activities.

The definition of WOTUS is critically important to farmers and ranchers across the country, which is why AFBF and state Farm Bureaus have participated in numerous rulemakings, legislative proceedings and litigation on this issue for decades. Farming and ranching are water-dependent enterprises. Whether they are growing plants or raising animals, farmers and ranchers need water. For this reason, farming and ranching tends to occur on lands where there is either plentiful rainfall or adequate water available for irrigation. There are many features on those lands that are wet only when it rains and that may be miles from the nearest "navigable" water. Farmers and ranchers regard these features as simply low spots on their land.

Additionally, many farm and ranch operations rely on ponds used for purposes such as livestock watering, providing irrigation water, or settling and filtering farm runoff. Irrigation ditches also carry flowing water to fields throughout the growing season as farmers and ranchers open and close irrigation gates to allow water to reach particular fields. These irrigation ditches are typically close to larger

sources of water, irrigation canals, or actual navigable waters that are the source of irrigation water—and they channel return flows back to these source waters. In short, America's farm and ranch lands are an intricate maze of ditches, ponds, wetlands, and so-called "ephemeral" drainages.

Considering these features as jurisdictional "waters" opens up the potential for regulation of activities on those lands that move dirt or apply products to the land. Everyday activities such as tillage, planting, or fence building in or near ephemeral drainages, ditches, or low spots could trigger the CWA's harsh civil or even criminal penalties unless a permit is obtained. Farmers need to apply weed, insect, and disease control products to protect their crops. Fertilizer application is another necessary and beneficial aspect of many farming operations that is nonetheless swept into the CWA's broad scope (even organic fertilizer, i.e., manure). 40 C.F.R. § 122.2 (defining "pollutant"). On much of our most productive farmlands (i.e., areas with plenty of rain), it would be extremely difficult to avoid entirely the small wetlands, ephemeral drainages, and ditches in and around farm fields when applying crop protection products and fertilizer. And yet, permits could also be required for those activities, and even accidental deposition would be unlawful, even when those features are completely dry and even harder to differentiate from the rest of the fields.

The tens of thousands of dollars in additional costs for federal permitting of ordinary farming activities are beyond the means of many small business farmers and ranchers. And even those farmers and ranchers who can afford it should not be forced to wait months, or even years, for a federal permit to till, plant, fertilize, or carry out any of the other ordinary farming and ranching activities on their lands. For all of these reasons, farmers and ranchers have a keen interest in how WOTUS is defined.

Unfortunately, our members are disappointed by the Agencies' final rule. We feel strongly that the Navigable Waters Protection Rule (NWPR) was a clear, defensible rule that appropriately balanced the objective, goals, and policies of the CWA. The Agencies should have kept the NWPR in place, rather than revert to definitions of WOTUS that test the limits of federal authority under the Commerce Clause and are not necessary to protect the nation's water resources. The agencies can ensure clean water for all Americans through a blend of the CWA's regulatory and non-regulatory approaches, just as Congress intended. It is unnecessary (and unlawful) to define non-navigable, intrastate, mostly dry features that are far removed from navigable waters as "waters of the United States."

The Rule Thrusts Farmers and Ranchers Back Into a World of Costly Uncertainty and Inconsistency.

The 2015 WOTUS Rule dramatically expanded the scope of CWA jurisdiction over land used for normal farming and ranching activities. The 2022 Rule is different only in degree and timing, not kind. The Agencies aggregation policy potentially allows them to assert jurisdiction over any sometimes-wet feature which, taken together with other sometimes-wet features in the region (broadly defined), have what the Agencies consider to be a "significant nexus" on a "foundational water." But the term "significant nexus" generated significant confusion and inconsistent results under the pre-2015 regime, and this rule is likely to only make things worse. Furthermore, the process to arrive at a jurisdictional determination is tortuous and costly. A jurisdictional determination could take between six months and a year to receive, and in the meantime a farmer or rancher is stuck in limbo. Adding insult to injury, the use of case-by-case determinations threatens to create a seriously unequal playing field, where identical features may be viewed as jurisdictional or not depending upon where the property is located. This is

not a dependable, durable, or clear rule. Rather, the Agencies have set up a system that is based in arbitrary, interpretation-based decision-making. Furthermore, it is unclear whether or not the Agencies are equipped to respond to these determinations in a timely manner, increasing the potential for long wait times as farmers and ranchers are forced to comply.

Perversely, the Agencies' broad assertion of jurisdiction can make it more difficult for farmers and ranchers to engage in soil conservation activities. Farmers and ranchers have more incentive than most to preserve topsoil on their land; as such, where land is at risk of erosion, they may want to engage in mitigation activities. Farmers and ranchers also often take on projects that provide stormwater management, wildlife habitat, flood control, and nutrient processing and improve overall water quality in uplands and ephemeral features. But, if they cannot do this without applying for a federal permit, it may be cost-prohibitive, resulting in environmental degradation, not protection.

This rule threatens to impede farmers' and ranchers' ability to provide safe, affordable, and abundant food, fuel, and fiber to the citizens of this nation and the world. Their concerns are not hyperbole, nor are they isolated occurrences. They are lived experiences illustrating the pitfalls of returning to an overly expansive definition of "waters of the United States" and, specifically, an outsized view of what it means for a water to have a "significant nexus."

The Significant Nexus Standard May Lead To Potentially Unlimited Jurisdiction.

While the Agencies have resisted the urge to categorically regulate all tributaries and adjacent waters like they did in the 2015 Rule, the case-by-case approach that they use in this WOTUS rule is no less of an overreach. The Agencies once again resurrect the same broad and confusing significant nexus standard that was the foundation for the 2015 Rule. It is clear the Agencies will just expand their jurisdiction one watershed at a time, instead of by general fiat—but it is only a matter of time until the Agencies will find a significant nexus. This domino effect illustrates the almost limitless jurisdiction that the Agencies have over private property.

The significant nexus test can be used to assert jurisdiction over tributaries, adjacent wetlands, and basically any "other water" because the rule uses undefined, amorphous terms like "similarly situated," "in the region" and "material influence" that will leave farmers and ranchers guessing about whether waters on their lands are WOTUS. This suggests that regulators can manipulate the standard to reach whatever outcomes they please and that farmers and ranchers may not know the outcomes until they are already exposed to civil and criminal liability, including devastating penalties. As an example, in Missouri, under the pre-2015 regulatory regime, EPA sent a threatening letter to a landowner, which included fines and mitigation requirements, because he was simply trying to save his property from eroding by placing rock along his streambank. This is a classic case of heavy-handed, punitive action against a landowner as EPA claimed jurisdiction on the small creek that ran through his property, as it asserted the creek had a "significant nexus" to the Mississippi River via two other connecting rivers.

Because of the subjective nature of the significant nexus test, it all but guarantees that regulators' assessments are bound to vary from field-office to field-office and case to case. This approach does not give ordinary farmers and ranchers fair notice of when the CWA actually applies to their lands or

conduct, nor does it provide any assurance against arbitrary or discriminatory enforcement. For these reasons, this rulemaking is unconstitutionally vague.

The Case-By-Case Regulation of Ephemeral Drainages Is Unnecessary.

Much of where we disagree comes down to one classification of "waters": ephemeral drainage features. As previously mentioned, ephemeral drainages are dry land—they are not flowing rivers or streams. It is simply shocking to property owners to hear that a "tributary" can be interpreted to reach ephemerals and sweep in many features that look just like land. The NWPR provided important clarification regarding the status of ephemeral streams that flowed only in response to precipitation by correctly concluding that they were not WOTUS. The Agencies' rapid about-face in this rulemaking is disappointing, to say the least.

The Agencies set off on the wrong foot by failing to define tributary in the first place. The lack of a definition of tributary with measurable criteria results in significant vagueness and fairness concerns, especially where the application of "tributary" could substantially expand or limit the scope of jurisdiction under the CWA.

By failing to provide clarity, the Agencies are forcing farmers to either: (1) presume that an ephemeral drainage that carries water only when it rains will be deemed a jurisdictional tributary, (2) seek a jurisdictional determination from the Corps, or (3) take a chance that their activities near or in such features may result in unlawful discharges carrying civil penalties of nearly $60,000 a day.[1] Even worse, a farmer could face criminal liability with jail time and up to $100,000 a day in fines. With such stiff statutory penalties at stake—including the loss of one's own personal liberty—farmers and ranchers deserve more clarity.

Ultimately, the question is not whether tributaries or ephemeral streams are "important" or may as a scientific matter have some connection with downstream navigable waters; rather, the question is whether they should be considered as falling within the bounds of federal jurisdiction. As with so many other categories in the rulemaking, the agencies collapse that distinction. The NWPR was correct to exclude ephemeral streams categorically, and the Agencies are wrong to dismiss that approach.

The Adjacency Category Should Be Limited to Wetlands that Directly Abut Other WOTUS.

The adjacency category is also rife with confusion. First, the rule's approach to "relatively permanent" is not consistent with the plurality's opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), because the Agencies deprive the Court's requirement for a "continuous" connection of all meaning by turning it into a mere "physical connection or ecological connection" test. Further, the criteria for establishing whether a wetland is "adjacent"—such as whether a "shallow" subsurface connection exists or whether wetlands are in reasonably close proximity to a jurisdictional water—stray too far from the plurality's test in *Rapanos* and raise vagueness and fair notice concerns.

[1] See 87 Fed. Reg. 1,676, 1,678 (Jan. 12, 2022).

We also oppose the significant nexus approach to adjacent wetlands used in this rule. The Agencies' approach of aggregating wetlands is flatly contrary to Justice Kennedy's requirement that each wetland be judged in its own right to determine whether it (and it alone) bears a significant nexus to traditional navigable waters. This approach expands the reach of the significant nexus test even farther and is even less clearly implementable.

We believe that the Agencies should assert jurisdiction over only those wetlands that are directly abutting "waters of the United States;" which would provide much needed clarity that is capable of easy application in the field. Only those wetlands that directly touch "waters of the United States" should be considered "adjacent."

The Broad Sweep of the "Other Waters" Category is Problematic

The most obvious example of the rule's expansion of regulatory reach lies in the "other waters" category. This new category would reach many intrastate, non-navigable water features that would be considered "isolated."

Worse still is the rule's application of the significant nexus standard to "other waters," not least because, if that standard is ever to be applied, it should be to wetlands, and wetlands only. Applying the significant nexus standard elsewhere allows the Agencies to aggregate all similarly situated "other waters" (e.g., prairie potholes or ponds that are not part of a tributary system) across an entire watershed and claim jurisdiction over all such features based on a finding that they collectively perform a single important function for a downstream "foundational" water. This is plainly not what Congress intended, and not what the Supreme Court would allow. Through this rule, countless small wetlands or other small waters that are far removed from traditional navigable waters (including ephemeral tributaries and ditches) or coast nevertheless will be potentially within the scope of federal jurisdiction.

The Agencies should have withdrawn the "other waters" category. Their ability to aggregate waters together will greatly expand the federal reach and it will be absolutely impossible for any farmer or rancher to know if a jurisdictional "other water" is located on their property.

The Exemptions Are Challenging to Use

Ditch Exclusion:

Ditches and similar water features commonly found on farms that are used to collect, convey, or retain water should be excluded from the definition of "waters of the United States." Without adequate drainage, farmlands could remain saturated after rain events and unable to provide adequate aeration for crop root development. Drainage ditches and other water management structures can help increase crop yields and ensure better field conditions for timely planting and harvesting. In areas without sufficient rainfall, irrigation ditches and canals are needed to connect fields to water supplies and to collect and convey water that leaves fields after irrigation. Put simply, ditches are vitally important to support American agriculture and ultimately, to feed the growing population.

While this rule does provide a ditch exclusion, unfortunately, it is not particularly meaningful because it is limited to features constructed on dry land or upland. Because these features are constructed to store water, it would not typically be useful for them to be constructed along the tops of ridges, for example. Rather, often the only rational place to construct a ditch or 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, ditch or pond construction may be infeasible without some excavation in a natural ephemeral drainage or a low area with wetland characteristics.

***Prior Converted Cropland Exclusion*:**

America's farmers and ranchers support the 2023 Rule's maintaining of the decades-old exclusion for prior converted croplands ("PCC"), of which there are approximately 53 million acres in the United States. Farmers and ranchers across the country rely on this critical exclusion which establishes that PCC may be used for any purposes, so long as wetland conditions have not returned. In practice, however, numerous issues have arisen regarding the interpretation and application of the PCC exclusion. For this reason, we have long advocated for a clear, commonsense definition and clarification of PCC in the Agencies' regulations. We welcomed the NWPR's approach to PCC and are disappointed to see that this rule fails to carry forward the NWPR's definition of PCC, which was designed to improve clarity and consistency. For example, the lack of a clear definition of PCC has presented problems in the past regarding when PCC can be "recaptured" and treated as jurisdictional.

The Agencies failed to acknowledge our strong opposition to the application of USDA's "change in use" principle. Additionally, they have failed to clearly convey if PCC that is shifted to non-agricultural use becomes subject to CWA jurisdiction. We have presented these questions to both EPA and Corps officials and have received completely different answers. Incorporating a "change in use" policy into the PCC exclusion would upend nearly 30 years of largely consistent implementation in accordance with the 1993 Rule. While we acknowledge that the Agencies have attempted to make constructive changes, the result fell well short of that goal.

Real World Impacts of An Expansive WOTUS Rule

The Agencies claim that the costs associated with this rule are de minimis. This conclusion can only be reached by failing to consider the entire gamut of costs that landowners will incur. One must consider not only the cost of the permit, but also the expenses for experts needed to navigate the permitting process—such as environmental consultants, attorneys and engineers. You must also consider the cost of mitigation and project delays, which can be exorbitant and makes the process simply untenable for many. These costs can amount to a $500/acre or greater decrease in value of the land. Mitigation costs to proceed with development could reach thousands of dollars per linear foot. Additionally, CWA compliance may also trigger review under other federal environmental statutes, such as the Endangered Species Act and the National Historic Preservation Act. Many small businesses are unable to take on these additional costs and they have no choice but to pass it on to their customers. Expansive regulatory actions like this new WOTUS definition will exacerbate the affordability challenges that plague many

American families. This rule puts us further away from the goal of providing affordable and accessible food, housing and energy.

The Rule Fails to Respect the States' Role in Protecting Waters

Additionally, the rule completely usurps the states' role in protecting our nation's waters. While many aspects of the CWA are unclear, one area of certainty is that Congress intended for the states to play an important role in regulating land within their borders. The objective of the CWA detailed in section 101B explains that environmental protections are a shared responsibility between the federal government and state governments. This language only solidifies the notion that there is a point where federal jurisdiction ends and state jurisdiction begins. However, this newly finalized WOTUS rule would greatly expand the federal government's role, effectively cutting against Congressional intent under the CWA. It is our belief that the states should retain the authority to protect ephemeral features, not the federal government.

No WOTUS Before SCOTUS

One of the most important factors in the WOTUS debate centers around a highly consequential legal case that is currently being considered before the Supreme Court: *Sackett v. EPA*. It is undeniable that this case has the potential to inject great certainty into the new WOTUS definition. The question before the High Court is whether the Army Corps can use the significant nexus test to assert jurisdiction. Given all of the legitimate legal concerns associated with this regulatory test, there is a strong likelihood that the Court will prevent the Agencies from using it. It defies logic that the Agencies would go ahead with the development of this rule, knowing that a directive from the Supreme Court will be handed down imminently. Considerable government resources have been expended to craft this rule, which will only be wasted when the Agencies have to return to the drawing board after a decision is handed down. Additionally, introducing a new regulatory definition, to an already convoluted compliance process, is harmful to the regulated community. We must now adapt to these new and confusing rules and our ability to plan any future business development will be hindered. Simply put, the Agencies should have waited until a decision was handed down before finalizing this rule.

Conclusion

Our nation's farmers and ranchers are very frustrated that our concerns were not recognized in the finalized rule. Retaining the NWPR would have been a far preferable alternative, given the certainty and predictability it provided. This new rule will only create more confusion for landowners and will inevitably slow down many of the important economic drivers that benefit our communities. This unnecessary regulatory red-tape places a burden on our nation's farmers and ranchers while stripping the states of their historic regulatory role. Farmers and ranchers want clean water and clear rules, so they can remain focused on what they do best - providing food, fiber and renewable fuel for our nation and the world.