COMMON SENSE NEBRASKA

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Re: Docket ID No. EPA-HQ-OW-2021-032: Definition of "Waters of the United States"; Request for Pre-Proposal Recommendations

To Whom It May Concern:

On behalf of the tens of thousands of members our respective organizations represent, our coalition appreciates the opportunity to submit these recommendations to the U.S. Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") (collectively, "the Agencies") in response to the Agencies' August 4, 2021 Notice soliciting pre-proposal feedback on the definition of "waters of the United States" ("WOTUS"). *See* 86 Fed. Reg. 41,911 (Aug. 4, 2021). Since Common Sense Nebraska's founding in 2014, our coalition of organizations which represent farmers, ranchers, large and small businesses, homebuilders, golf courses, etc. has worked to provide meaningful comments to the Agencies as two administrations have worked to alter the definition of WOTUS. In this latest effort, we hope the Agencies will thoroughly review these comments, and reach out to any one of our organizations with questions.

Ultimately, Common Sense Nebraska is disappointed by the Agencies' recent announcement of their intent to revise the definition by first repealing the Navigable Waters Protection Rule ("NWPR") and second refining the pre-2015 definition of WOTUS. Our coalition maintains that the NWPR is a clear, defensible rule that appropriately balances the objective, goals, and policies of the Clean Water Act ("CWA"). We further strongly attest the Agencies should maintain the NWPR in the final rule entirety. Any attempt to, revert to definitions of WOTUS that test the limits of federal authority under the Commerce Clause are not necessary to protect the Nation's water resources and a deviation from the clear and territorial definitions the NWPR importantly established.

In response to the Agencies initiating pre-proposal outreach, Common Sense Nebraska offers the following recommendations regarding (i) key legal and policy guideposts that the Agencies must adhere to in any WOTUS definitional rule; and (ii) how the Agencies should define certain categories of jurisdictional and non-jurisdictional waters while adhering to such key legal and

policy guideposts. We do appreciate the Agencies' efforts to ensure a broad, transparent stakeholder engagement process. We urge the Agencies to consider fully the perspectives offered by the agricultural community and other stakeholders before moving ahead on any rulemaking proposals.

I. The Agencies Should Retain the Navigable Waters Protection Rule.

As was previously stated, Common Sense Nebraska is very supportive of the NWPR. The NWPR provides clear and understandable boundaries that allow our coalition members to better understand what water falls under federal regulatory jurisdiction and follows the true congressional intent of the Clean Water Act. Our coalition members believe the Agencies succeeded in crafting a rule that adheres to the key legal and policy guideposts and is easier to implement than prior definitions of WOTUS. The NWPR goes a long way toward providing clarity for our coalition members, who are better able to identify what features on land may be jurisdictional, thus avoiding significant permitting costs or productivity losses associated with a broader definition of WOTUS.

Rather than expend considerable resources on another rulemaking process—much less two rulemaking processes—the Agencies should leave the NWPR in place and focus their efforts on other regulatory and non-regulatory actions under the CWA to improve and protect water quality. To date, the Agencies' justification for initiating the process of repealing the NWPR lacks both explanation and support. The Agencies rely heavily on anecdotal and often speculative assertions that the NWPR is already causing "significant, actual environmental harms" simply because of an often-quoted number of negative jurisdictional determinations.

The Agencies assume that narrower federal jurisdiction means a complete lack of water quality controls, without any state-level oversight, and that third parties will rush to pollute water features in quantities that will rapidly impair downstream features. This is pure nonsense and not backed by factual evidence. The state of Nebraska has the regulatory authority to protect all water found within the state, including groundwater. Nebraska's regulatory network is substantial and should not be looked at as inadequate simply because it is being conducted by state-level regulators rather than the federal government. Congress provided a major role for the States within the CWA, with a balanced and trusted preservation of the power of the States to regulate land and water resources within their borders. Congress and the Agencies should provide technical and financial support to the States and not overstep authorities with punitive, unilateral and burdensome actions.

The NWPR is capable of being a durable and legally defensible rule that provides regulatory certainty to farmers, ranchers, businesses, and virtually anyone who turns the earth with a shovel. However, because the Agencies have already announced their intent to initiate rulemaking proceedings to repeal the NWPR, Common Sense Nebraska offers the following recommendations for what a defensible, durable definition of WOTUS should look like.

II. The Agencies Must Adhere to All Relevant Supreme Court Precedents.

Congress defined "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The precise scope of the terms "navigable waters" and "waters of the United States"—and hence, the jurisdictional reach of the CWA—is unclear. Not surprisingly, the history of the Agencies' definitions of WOTUS has been marred by regulatory uncertainty, exacerbated by the Agencies' litigation losses. With judicial precedent being determined at every level, including the U.S. Supreme Court, the EPA was ultimately given important limits on where federal jurisdiction fell when determining what qualified for federal protection and what should be left up to the states.

Several Supreme Court cases reinforced these limits ruling that Congress limited the scope of federal jurisdiction under the CWA by using the term "navigable" and by explicitly recognizing, preserving, and protecting the primary responsibilities and rights of States over land and water use and development. Any definition of WOTUS must be guided by these cases, rather than repeat the mistakes of the past. The Agencies need look no further than the poor track record of the 2015 WOTUS Rule in the courts to recognize this.

III. Congress's CWA Section 101(b) Policy Is a Fundamental Guidepost in Any Rulemaking to Define "Waters of the United States."

Although the Agencies' pre-proposal Notice refers to the CWA's Section 101(a) objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and various policy priorities in E.O. 13990, it conspicuously neglects to mention the express policy in CWA Section 101(b) "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." 33 U.S.C. § 1251(b). The Agencies cannot ignore Section 101(b) when defining WOTUS. The Section 101(a) objective of maintaining the integrity of waters is to be accomplished while implementing the Section 101(b) policy of preserving and protecting states' rights and responsibilities.

State and local regulators have a long history of working with landowners to improve water quality. Under the CWA's cooperative federalism structure, state programs have been, and can continue to be, very effective in protecting water resources. Put simply, the protection of navigable waters does not require federal control over every feature that can conceivably be characterized as "water." Not only is stretching the definition of "waters of the United States" unnecessary to achieve the CWA's goal of protecting water quality, it also directly contradicts clear congressional intent and upsets the balance between state and federal jurisdictions.

IV. The Definition of "Waters of the United States" Should Include Clear Terms that are Easy to Apply and Understand.

Clarity and predictability are paramount. All who are affected by these rules, terms and definitions demand there be a clear line of jurisdiction that is commonly known, understood and transparent, without the necessity of consultants and lawyers. The CWA is a strict liability statute that can trigger substantial civil fines as well as criminal penalties for persons who violate

the Act's prohibitions. Prior regulatory interpretations of "waters of the United States" were unclear, opaque, and confusing on their face, which allowed the Agencies to continue unilateral broadening their interpretation of the scope of the CWA over the years.

To ensure landowners understand and comply with the CWA, any definition of "waters of the United States" must provide clarity and certainty. The Agencies should avoid including vague terminology that landowners and regulators will be unable to apply without having to undertake burdensome scientific determinations. This coalition supports the clear and determinable definitions contained in the NWPR and strongly recommends the Agencies adhere to these terms, definitions, and guidelines.

V. Jurisdiction Over Non-Navigable Tributaries Should Be Limited to Those Tributaries with at Least Seasonal Surface Flow to Traditional Navigable Waters.

The U.S. Supreme Court has repeatedly stated that the CWA's jurisdictional reach extends to some waters outside of the "navigable" category. None of those decisions, however, stand for the proposition that CWA jurisdiction *must* extend to a particular point beyond traditional navigable waters. The Agencies must take care not to reach too far beyond traditional navigable waters in defining "waters of the United States." Federal regulation of isolated features, *e.g.*, ephemeral streams and wetlands adjacent to those streams, would encroach upon the states' traditional authority over land and water use in a manner that is directly contrary to Congress's stated policy in CWA Section 101(b). Equally important, when federal regulation hinges upon subjective, case-by-case determinations such as what constitutes a "significant nexus" or when it opens the door to asserting jurisdiction based on desktop analyses of historical aerial photos or other remote imagery, the average landowner lacks fair notice and clarity about what conduct is lawful versus what might trigger the harsh penalties in the CWA. For these reasons, our coalition supports a definition of "tributary" that encompasses only those rivers and streams that carry seasonal surface flow directly into a traditional navigable water.

We urge the Agencies to avoid relying on problematic concepts such as "ordinary high water mark" in defining which non-navigable water features are jurisdictional. That term captures virtually any physical sign of water flow, such as changes in the soil, vegetation, or debris. When rainwater flows through any path on the land, it tends to leave some sort of mark, even if flows are infrequent. For too long, regulators reached too far in applying the ordinary high water mark concept and consequently, reliance on its use has proven to be disastrous for landowners.

The Agencies should avoid explicitly calling out ditches and canals in defining those tributaries that are "waters of the United States." The CWA defines ditches and canals as "point sources," which suggests that these sorts of water features "are, by and large, *not* 'waters of the United States.'" *Rapanos*, 574 U.S. at 735-36. As we will discuss in more detail below, ditches, canals, and other features commonly found on farmlands should *not* be jurisdictional *unless* they are constructed in a jurisdictional water.

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

Congress plainly envisioned that "navigable waters" would include at least some wetlands, such as those that are adjacent to waters that are currently used as a means to transport interstate or foreign commerce. Neither the statutory text nor relevant U.S. Supreme Court precedents, however, provides clear direction over which wetlands *must* be subject to CWA jurisdiction, in part because Congress never defined what it means for a wetland to be "adjacent." It is our opinion the Agencies assert jurisdiction over only *wetlands* that are directly abutting other "waters of the United States."

Common Sense Nebraska's recommended approach to adjacency is designed to further the Congressional policy in CWA Section 101(b) and to minimize uncertainty, complex factual disputes, and the improper expansion of federal jurisdiction through informal interpretations. For too long, the Agencies' definition of "adjacent" as "bordering, contiguous, or neighboring" left the door open to federal overreach. In doing so, they distorted the federal-state balance that Congress struck and encroached upon the states' traditional power over land and water use.

By asserting jurisdiction over only those wetlands that are directly abutting "waters of the United States," the Agencies would provide much needed clarity that is capable of easy application. Thus, only those wetlands that directly touch "waters of the United States" would meet the definition of "adjacent." The Agencies can clarify that otherwise "adjacent" (*i.e.*, directly abutting) wetlands would not lose their jurisdictional status due to the creation of a natural or man-made berm.

Finally, any definition of "waters of the United States" should include the longstanding Corps' regulatory definition of "wetlands" and make it clear that all three wetlands criteria—prevalence of hydrophytic vegetation, hydric soils, and permanently or periodically inundated soils saturated to the surface at some time during the growing season—must be present for a wetland to be jurisdictional. Despite this seemingly clear definition, Corps Districts did not consistently implement that definition. Some did not require that all three elements be satisfied when determining whether a particular feature constitutes jurisdictional wetlands or non-jurisdictional uplands. The NWPR sought to clarify this issue by reinforcing that "presence and boundaries of wetlands are determined based upon an area satisfying all three of the definition's factors (*i.e.*, hydrology, hydrophytic vegetation, and hydric soils) under normal circumstances." *See* 85 Fed. Reg. at 22,315. The Agencies should maintain this clarification and ensure that only wetlands that meet all three criteria can be considered jurisdictional.

VII. Our Coalition Strongly Supports the Longstanding Exclusion for Prior Converted Cropland and the NWPR's Definition of Prior Converted Cropland.

Prior converted croplands ("PCC") are one of two longstanding exclusions codified in the regulations defining "waters of the United States," but until the NWPR, the text of the regulations did not expressly define what constitutes PCC. PCC no longer exhibits defining characteristics of a wetland (hydrology or vegetation) and no longer performs wetland functions and thus, such lands should not be considered WOTUS. Farmers and ranchers nationwide have

relied on the PCC exclusion for decades, and it is of paramount importance that the exclusion be retained in any definition of WOTUS.

The new definition in the NWPR brought an end to decades of uncertainty by expressly rejecting prior attempts to narrow the PCC exclusion. The rule also provides important guidance on how to assess "abandonment" by providing a non-exhaustive illustration of what constitutes agricultural purposes, *e.g.*, grazing; haying; idling land for conservation purposes. Finally, the NWPR's preamble helps give farmers and ranchers additional clarity and certainty by affirming that various types of documentation—*e.g.*, aerial photographs, topographical maps, cultivation maps, crop expense or receipt records, field- or tract-specific grain elevator records, and other records generated and maintained in the normal course of doing business—can be used to establish "agricultural purposes," as can documentation from USDA or other Federal or State agencies.

In conclusion, the PCC exclusion is a critical component of any WOTUS definition, as all prior administrations have all agreed since the Agencies first codified the exclusion in 1993. Common Sense Nebraska supports the helpful clarifications in the NWPR's definition of PCC that help ensure the exclusion is implemented consistently with the Agencies' original intent. Common Sense Nebraska further supports the NWPR final rule proposed the Corps to withdraw the 2005 Memorandum simultaneous with the effective date of the rule and recommends this recommendation remain.

VIII. The Agencies Should Retain Additional Exclusions in the NWPR.

Waters that do not fit into any of the jurisdictional categories set forth in the Agencies' regulations should not be considered jurisdictional. The codification of a well-defined, clear exclusions provide regulatory certainty and lessens the threat of misapplication under the CWA provisions. The 2015 WOTUS rule and the NWPR codified a number of exclusions. While the 2015 WOTUS rule was too limited in scope, the NWPR adequately set forth exclusions that Common Sense Nebraska supports the retention. These are as follows:

Groundwater: In the 2015 WOTUS Rule, the Agencies explained that they "have never interpreted 'waters of the United States' to include groundwater." Nevertheless, regulations defining "waters of the United States" did not include an express exclusion for groundwater until 2015. Just like the 2015 WOTUS Rule, the NWPR excluded "[g]roundwater, including groundwater drained through subsurface drainage systems" from the definition of WOTUS.

The importance of groundwater to the state and residents of Nebraska cannot be understated, as is the need to ensure regulatory control of that water stays within our border. Even as the state of Nebraska sits above roughly 68 percent of the Ogallala Aquifer, the lack of problems seen in many other states demonstrates the success of our system of state and local control. For all of the reasons set forth in previous rules, the Agencies should continue to exclude groundwater in the text of the regulation.

Farm ditches, canals, ponds, and similar features: 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," provided that the construction of such features in a WOTUS does not

eliminate CWA jurisdiction. The definition of WOTUS should retain standalone exclusions for ditches and artificial ponds. The former should encompass features including, but not limited to, drainage ditches and irrigation ditches. The latter should encompass features including, but not limited to, stock watering ponds, irrigation ponds, and sediment basins. For these two exclusions to be meaningful, it is important that they not be limited to features constructed on dry land or upland. The very purpose of all of these features 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 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.

The NWPR appropriately recognizes these practical realities by excluding ditches so long as they are not constructed in WOTUS and by excluding other water features found on agricultural lands (*e.g.*, farm, irrigation, and stock watering ponds) so long as they were "constructed or excavated in upland or in non-jurisdictional waters." Our coalition also strongly supports the NWPR's clarification that the Agencies bear the burden of proof "to demonstrate that a ditch relocated a tributary or was constructed in a tributary or an adjacent wetland." To the extent there is uncertainty about the historical status of the ditch, the NWPR appropriately places the burden of proof on the government to prove its jurisdictional status. This clarification provides much needed certainty as to how the Agencies will implement the ditch exclusion. Relatedly, the Agencies should make it equally clear the Agencies bear the burden of proving that a farm pond or sediment basin—or any other feature that would qualify for the artificial lakes and ponds exclusion—was constructed or excavated in a WOTUS, as opposed to upland or a non-jurisdictional water.

Common Sense Nebraska does *not* advocate that construction of features such as ditches or farm ponds in "waters of the United States" should eliminate jurisdiction over that particular WOTUS. Thus, consistent with the NWPR, a ditch, canal, or pond constructed in a stream that is a "water of the United States" would still be jurisdictional. The text of CWA Section 404(f) reflects that Congress understood that some farm ponds and ditches would be constructed in navigable waters, which is precisely why Congress exempted such construction (as well as maintenance of farm or stock ponds and irrigation or drainage ditches) from the Section 404 permitting program. Although Congress intended to exclude these activities from Section 404 permitting, there is no indication in the statutory text that Congress contemplated that construction of farm ponds and ditches in "waters of the United States" would somehow remove those WOTUS from CWA jurisdiction. But when ditches, canals, farm ponds, and similar features are jurisdictional, it is important to remember that discharges to those features may still be exempt from permit requirements, *e.g.*, under Section 404(f).

IV. Summary

The members of the Common Sense Nebraska coalition appreciate the opportunity to offer these comments as the Agencies consider their approach moving forward. Within the regulatory process, we implore you to respect cooperative federalism, congressional intent, states rights as well as all relevant legal precedence. As this process moves forward, it is our hope the Agencies

continue to proceed with openness and transparency. We welcome any opportunity to provide our perspective as this process moves forward.

Sincerely,

Association of General Contractors - NE Chapter
Farm Credit Services of America
Iowa-Nebraska Equipment Dealers Association
National Federation of Independent Businesses/Nebraska
Nebraska Agribusiness Association
Nebraska Association of County Officials
Nebraska Association of Resource Districts
Nebraska Bankers Association
Nebraska Cattlemen
NE Chamber
Nebraska Club Managers Association
Nebraska Cooperative Council
Nebraska Corn Growers Association
Nebraska Farm Bureau Federation
Nebraska Golf Course Managers Association
Nebraska Grain Sorghum Association
Nebraska Pork Producers Association
Nebraska Poultry Industries
Nebraska REALTORS Association
Nebraska Rural Electric Association
Nebraska Sorghum Producers Association
Nebraska Soybean Association
Nebraska State Dairy Association
Nebraska State Home Builders Association
Nebraska State Irrigation Association
Nebraska Water Resources Association
Nebraska Wheat Growers Association
Nemaha Natural Resources District
Pawnee County Rural Water District #1