

**Written Testimony Of
National Pork Producers Council**

On

**U.S. Environmental Protection Agency's Proposed
Rulemaking On Defining "Waters of the U.S."**

**United States Senate
Committee On
Agriculture, Nutrition and Forestry**

March 26, 2015

Introduction

The National Pork Producers Council (NPPC) is an association of 43 state pork producer organizations that serves as the global voice for the nation's pork producers. The U.S. pork industry represents a significant value-added activity in the agriculture economy and the overall U.S. economy. Nationwide, more than 68,000 pork producers marketed more than 111 million hogs in 2013, and those animals provided total gross receipts of more than \$20 billion. Overall, an estimated \$21.8 billion of personal income and \$35 billion of gross national product are supported by the U.S. hog industry. Economists Daniel Otto, Lee Schulz and Mark Imerman at Iowa State University estimate that the U.S. pork industry is directly responsible for the creation of nearly 35,000 full-time equivalent pork producing jobs and generates about 128,000 jobs in the rest of agriculture. It is responsible for approximately 111,000 jobs in the manufacturing sector, mostly in the packing industry, and 65,000 jobs in professional services such as veterinarians, real estate agents and bankers. All told, the U.S. pork industry is responsible for more than 550,000 mostly rural jobs in the United States.

U.S. Pork Producers Work To Protect Water Resources

NPPC is proud to represent and work on behalf of pork producers committed to protecting water, air and other environmental resources that are in their care or potentially affected by their operations. NPPC has previously submitted detailed comments on the proposed "Waters of the United States" rule. (A copy of those comments are attached to this statement.)

In recent remarks, U.S. EPA Administrator Gina McCarthy told a group of farmers that she wishes EPA had named the WOTUS rule the "Clean Water Rule" and that from this point forward that is what she is going to call it. NPPC welcomes this thinking and agrees with the Administrator, not because merely renaming the WOTUS rule will solve its numerous fundamental flaws that have caused so much concern for pork producers and all of agriculture. We don't think the Administrator means this either, for she understands nearly as well as the nation's hog farmers the folly of trying to make a silk purse out of a sow's ear. Instead, we agree with the Administrator because we sincerely believe that changing its name to the Clean Water Rule is an important first step toward finding our collective way out of today's jurisdictional policy maze that has trapped us all. Rather, focusing on the underlying concrete objectives of a newly-named Clean Water Rule is the way out. To pork producers, and anyone else with a deep understanding and appreciation of what it means to be a good steward of the lands and waters that feed and hydrate us, this means we should be talking about what it means to restore and protect water quality and water resources in both the aspirational and practical manners provided for in the Clean Water Act.

Congress has set the structure and authorities of the Clean Water Act, and much of the law about this is quite clear. Within this system, we believe the point and nonpoint source tools that EPA currently has for working with the states, counties, cities and people such as pork producers are more than adequate for them to continue to maintain and improve water quality. There are, undoubtedly, vexing Clean Water Act jurisdictional questions under the law and applicable court decisions. We all need and want more jurisdictional clarity, and we understand the need for a rule that addresses this. But starting from the question "what is jurisdictional" is functionally backward. The goal is clean water, not the forever-expansive growth of federal jurisdiction over every drop of water and all land features and activities that affect that water, merely for the sake of jurisdiction.

For the previous six years, pork producers and others in agriculture have wanted the opportunity to participate in a serious discussion about the state of the nation's water quality and what farmers can do to help improve it. Unfortunately, under former Administrator Lisa Jackson, EPA often sought to hold those conversations without any representative voices from agriculture. Since becoming Administrator, Gina McCarthy has worked hard to change that dynamic and repair the relationship with agriculture. Hopefully, her desire to rename the proposed rule and change its focus will continue to further that progress and enable all stakeholders to engage in a meaningful discussion about the concrete goals of the CWA and allow us to focus on what water features merit designation as WOTUS subject to direct federal controls under the Clean Water Act. The CWA has an aspirational goal of making federally jurisdictional waters suitable for fishing and swimming, or other forms of recreation and habitat that involve relatively higher quality water conditions. For pork producers, these are the rivers and tributaries with substantial flows of water most of the time, lakes and the wetlands that are directly associated with them. We look at these and see the potential for broad agreement on the goals of the Clean Water Act applying.

The same is not true, however, for a large proportion of the water features that are upstream from these aspirational waters. Either because of a lack of water flow, or their construction and use in industry and agriculture, such upstream features are not and will never be part of that set of waters that could be fishable and swimmable or otherwise capable of supporting the more high quality uses aspired to under the Clean Water Act. Farmers look at these upstream features, such as the ephemeral drainage ways in their fields, the former ephemeral streams next to their fields that now serve a drainage functions and low lying wetter portions of the fields that lay next to these other features, and ask why the federal government would want to make these things subject to the full federal force and control that comes with the Clean Water Act? To them, it makes no sense.

See, for example, the erosional feature captured in the photo in Figure A on page 9 of our attached comments. This is a photo from a farm field in Tennessee. We can show you photos in other farm fields with comparable erosional features. In these instances, public officials have told farmers these are now jurisdictional tributaries under the Clean Water Act. Given the proposed rule's definition of tributary, we agree. We wholeheartedly welcome Administrator McCarthy's commitment that EPA has heard loud and clear this problem and that the agency will amend the definition of tributary to exclude such features. We want her to know that farmers' concerns about calling many other upstream features WOTUS doesn't end with this type of erosional feature.

For example, see Figures C & D (pages 14-15) and Figure E (page 17) in our attached comments to the proposed WOTUS rulemaking. Figure C is an aerial view of farm land in northeastern Iowa with tributary features mapped using the National Hydrography Database (NHD) that EPA developed with USGS for use in part in EPA's online "MyWaters" mapper program. Figure D is a closer view of one of the "streams" that the NHD identifies at this location. Visible in this image is what appears to be a distinct channel in a portion of the NHD's ephemeral stream. Figure E is a comparable image, from the same data source, of such streams in a prominent agricultural area of Michigan. It is fair to believe that the features in both Figures D and E are jurisdictional tributaries under the proposed rule. As NPPC has discussed in its comments, analysis by EPA and others of the NHD data set indicate that there are millions of miles of such ephemeral features in the country.

Regulations Already Exist To Control Nutrient Runoff

We want the committee, EPA and the public to know that pork producers wholeheartedly embrace their responsibility to make sure they are properly managing their manure to protect the water quality of the downstream water features that might be impaired because of nutrients moving through these upstream features. Not only are they committed to this, but they are required to do so as “point sources” under the Clean Water Act. The Clean Water Act is directly involved in pork operations through the Concentrated Animal Feeding Operation (CAFO) rule, which regulates how pork producers store, manage, handle and use manure in crop production. The standards they must meet are clear and unequivocal, spelled out in black and white in the CAFO rule.

This means that even if remote water features would not themselves be jurisdictional, producers have obligations under the law to address pollutant losses that might move through them into downstream jurisdictional waters. The U.S. pork industry is committed to managing manure to prevent direct spills into drainage ditches or ephemeral drainage features or small streams that may not be jurisdictional. Producers are committed, in the rare case of such a spill happening, to stopping the movement of that spill downstream so as to protect downstream water quality. And they are committed to using sound agronomic and conservation practices and keeping the associated records when land applying manure so that the applicable CAFO rule standard is met.

There is no need to make those remote or intermediate water features subject to federal jurisdiction to have producers work on the movement of manure nutrients through them. The Clean Water Act already does that.

These same protections from point source discharges that may reach jurisdictional waters indirectly, through non-jurisdictional waters, reach far beyond the U.S. pork industry; they encompass every point source discharger, as defined in the Clean Water Act. The Clean Water Act is unequivocal in providing that discharges are still point source discharges subject to NPDES permitting even if they reach a jurisdictional water indirectly, through a non-jurisdictional feature. Making those remote features WOTUS will not create any new or different permitting controls to impose on all of these other point sources, industrial, municipal or otherwise that may be discharging into the remote features.

Similar considerations and circumstances apply to row crop agriculture and its non-point source discharges that might reach downstream jurisdictional waters through upstream water features. Farmers everywhere are adopting and updating practices to prevent or minimize stormwater discharges. Not only are farmers doing this on their own as part of caring for their fields and seeking to conduct efficient operations, the Clean Water Act has a program expressly for this purpose – Section 319. Furthermore, this committee has jurisdiction over several USDA conservation programs that spend billions of dollars every year to reduce sediment and nutrient losses from farm and ranch lands. Lastly, under “Swampbuster,” farmers are subject to severe penalties in the form of loss of crop insurance subsidies or other farm program payments if they drain, dredge, fill or level an agricultural wetland for the purpose of producing a commodity.

Upstream Features Shouldn't Be 'Jurisdictional'

Administrator McCarthy, in the aforementioned speech to farmers, firmly reiterated what the agency has said many times before: They do not intend to impose through this rulemaking any new restrictions on activities that now qualify for the Clean Water Act's exemptions from permitting as agricultural non-point source discharges. We take them at their word. Our question is: If that is the case, what is gained by making these upstream features jurisdictional when they have no real place, in and of themselves, in the Clean Water Act's aspirational scheme?

If this rule will not impose new regulatory measures on row crop agriculture, the work to reduce or minimize sediment and nutrient losses to surface water will continue to be voluntary, under our voluntary Clean Water Act and Farm Bill programs and through Swampbuster. Making upstream features with little or no resemblance to the types of waters that fit with the Clean Water Act's aspirational goals adds no water quality value to the downstream waters that we all want to protect.

EPA has basically argued through this rulemaking process that it wants to protect these upstream, more remote waters because of their importance to downstream waters. Our point is, all the protections and tools EPA needs to achieve this goal are in place under the Clean Water Act, without making these remote water features categorically jurisdictional. Yes, upstream drainage features have hydrological connections to downstream waters. Water does move with gravity. We agree. But if, as EPA has said, the goal is to protect those downstream waters, let's do that. Let's not make the upstream water features, which never will be fishable or swimmable, jurisdictional. At least, let's not do it categorically for the millions of miles of such features in the agricultural landscape across the country. If there are high quality upstream features that fit within the Clean Water Act's aspirational goals, EPA can make that call on a case-by-case basis. Otherwise, pork producers want to focus their time and effort on the work of managing sediments and nutrients to keep them out of waterways.