Statement of the American Farm Bureau Federation

TO THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS SUBCOMMITTEE ON FISHERIES, WATER AND WILDLIFE

"EROSION OF EXEMPTIONS AND EXPANSION OF FEDERAL CONTROL – IMPLEMENTATION OF THE DEFINITION OF WATERS OF THE UNITED STATES"

MAY 24, 2016

Presented By:
Don Parrish
On behalf of the American Farm Bureau Federation

600 Maryland Ave. SW | Suite 1000W | Washington, DC 20024 | p. 202.406.3600 | f. 202.406.3606 | www.fb.org

Thank you, Mr. Chairman and Ranking Member. My name is Don Parrish and I appreciate the opportunity to share with you what our members have already experienced with the regulation of isolated low spots and ephemeral drainage areas on farmland as "waters of the U.S." (WOTUS). These experiences demonstrate that the so-called normal farming exemption does not protect farmers and ranchers from permit requirements for ordinary agricultural practices, such as plowing. My educational background is in agronomy and I have almost 30 years of Clean Water Act regulatory experience with Farm Bureau. What I will describe to you today are real, on-the-ground experiences from a broad range of our members who are facing the consequences of this regulation. In order to give specific focus, I am going to draw in particular from information provided by a Farm Bureau member, farmer, biologist and senior consultant in northern California, Jody Gallaway. Her experiences are provided to the Committee in more detail in the attachment to my written testimony. But I want to be clear, many of our members are being challenged by this regulation. Ms. Gallaway is being drawn on because of the breadth of her knowledge and to give some specificity.

Since the WOTUS rule was first proposed, Farm Bureau and others have testified before this Committee and others regarding what we believe is the real scope of the WOTUS rule, the impact on agricultural producers and the reality that despite testimony from top Corps and EPA officials to the contrary, the normal farming exemptions will not protect commonplace farming and ranching practices from burdensome federal regulation. Ms. Gallaway's attached testimony brings to light these key facts based on her clients' experiences that are occurring on the ground, now, on some of the nation's most productive and valuable farmland.

Before the rule was finalized in August of 2015 and even now, despite a nationwide stay by the 6th Circuit Court of Appeals, we have heard from our members that the Sacramento Corps District was already implementing some of the rule's most controversial provisions, such as asserting jurisdiction based on features that are not visible to the human eye, presumably established using desktop tools and remote sensing technologies—and it continues to do so. The Corps is making jurisdictional determinations and tracking farming activities based solely on imagery that is not publicly available, such as classified aerial photographs and LIDAR imagery. The Corps also uses historical USDA aerial photographs dating back to unknown periods of time

to determine historical jurisdictional waters and evaluate changes in agricultural activities and farming practices. The Corps does not appear to rely on field data, resulting in clear errors that only trigger the ire of Corps staff, and more delays, when errors are noted by a consultant or landowner.

The relationship between farmers, their consultants and the Corps used to be one of mutual respect and professionalism. Now, the Corps takes farmers' desire for collaboration and cooperation as an opportunity to investigate all activities on the farm, turning this into an adversarial relationship. For example:

- One farmer invested tens of thousands of dollars to map his private property to ensure his farming activity would **avoid WOTUS and any impacts to WOTUS,** only to have the Corps threaten enforcement proceedings for activities related to road building and construction of stock ponds years before the farmer owned the property.

EPA Administrator McCarthy assured Congress that farmers would not need permits for farming activities in and around WOTUS because of the agricultural exemptions. We have been telling Congress that is not true because the Corps' reading of the normal farming exemption is too narrow, and its interpretation of the recapture provision is too broad. Here are just a few examples from our members demonstrating that the agricultural exemptions, as interpreted by the Corps, do not protect farmers from burdensome Section 404 permitting requirements for even for the most routine agricultural practices.

- In the Corps' Sacramento district, *any plowing*, no matter how shallow, in a WOTUS such as a vernal pool or ephemeral drain requires a permit. The Corps issues threatening letters if farmers plow a fire break, change from alfalfa hay farming to cattle grazing and back to alfalfa hay farming or when the agency "thinks" the farmer was plowing too deep or changing land use. The Corps selectively enforces this interpretation and the result is that the Corps now exerts the power to tell farmers where they can and cannot farm, and what they can grow. The case of California farmer John Duarte is just one of many examples.

- The 5-year drought has forced many farmers to temporarily fallow land or change crops based on alterations in irrigation practices and market forces. When there are WOTUS on the farm, the Corps is impeding these changes, requiring permits for ordinary plowing necessary to prepare the ground to change crops.

The Corps' Sacramento District still regulates isolated waters such as puddles, even after the Supreme Court's SWANCC decision. The EPA Administrator mocked Farm Bureau's concerns about regulating puddles, but the Corps still regulates puddles.

- The Sacramento Corps District requires wetlands delineations to include *puddles in dirt roads*, *tire ruts* and *depressions in gravel parking lots*, claiming they provide habitat for endangered species. Consultants know this is illegal, yet any objections result in serious delays in processing permits and jurisdictional determinations. Despite the exemption for "puddles" in the new WOTUS rule, these low lying areas on roads and in farm fields can still be characterized as historical wetlands or even ephemeral pools.

The ordinary high water mark (OHWM) has always been an inconsistent and problematic indicator of flow, and the rule's provision allowing the Corps to assert jurisdiction based merely on indicators of an OHWM (and bed and bank and a minimal hydrological connection) will only make things worse. Ms. Gallaway tells us that she has seen Corps regulators on the same project make OHWM determinations that differed by more than 50 feet. This discrepancy has huge project implications.

Permit red tape and delays are an enormous problem and getting worse. Permits are supposed to be completed in a short period of time. The problem is that the Corps' requests for information by multiple (and often changing) staff never end, delaying final approval for years. The Corps has told Congress that it has a very low permit denial rate. The denial rate is low because many applicants give up and withdraw their applications.

I will conclude with this example. A farmer requested an official jurisdiction determination and the Corps just sat on the request. After the farmer expressed frustration, a new regulator was

assigned, but he promptly rejected the delineation prepared by the farmer's consultant and asked for more information. The staff requested that the farmer have his consultant complete an OHWM data sheet, at significant cost. The staff eventually, **without collecting ANY field data**, summarily rejected the data collected by the consultant in the field—instead identifying the OHWM at a different elevation on the map **based on interpretation of an aerial photograph**. When the farmer and his consultant asked to review the photograph, the Corps told them that the photograph was **classified and proprietary information** (LIDAR) and they were not allowed to view it. In the end, the farmer and his consultant were required to delineate the feature at whatever elevation the Corps wanted.

Based on what we see in California, it is clear that the expansions in jurisdiction over land and water features on the farm are already happening. And importantly, the normal farming exemption has been interpreted in such a way that the most ordinary farming activities conducted in jurisdictional features will require permits if and when the Corps chooses to demand them. And when they demand permits, delays and costs will mount until most farmers simply give up. Congress needs to step in and give farmers some real certainty so they can plan their farming operations and protect the environment at the same time.

Don R. Parrish

Senior Director, Regulatory Relations
American Farm Bureau Federation

Don Parrish is the Senior Director, Regulatory Relations, for the American Farm Bureau Federation's Public Policy team in Washington, D.C.

His primary area of responsibility at the American Farm Bureau is the Clean Water Act, which encompasses a wide range of issues affecting farmers and ranchers. These include federal authority over waters of the U.S., wetlands, concentrated animal feeding operations (CAFOs), water quality standards, and conservation issues related to the farm bill (such as swampbuster). Don supports state Farm Bureaus in their legislative and regulatory efforts and works with numerous agricultural organizations, as well as a diverse group of industry and trade associations in Washington D.C.

His expertise on these issues has placed him in leadership roles. He currently chairs the Waters Advocacy Coalition (WAC), whose purpose is to prevent the expansion of the regulatory definition of "waters of the United States." The WAC is made up of diverse organizations representing virtually every aspect of the nation's economy. Don also chairs the Agricultural Nutrient Policy council. ANPC is made up of agricultural organizations that want to strengthen their ability to work effectively on nutrient related policy and regulatory issues important to the agricultural community.

Before joining the AFBF staff, Don was an economist at Auburn University. Prior to his working at Auburn, he was employed by the Farm Credit System as a Research Analyst.

Don received a Bachelor of Science Degree in Agronomy from Auburn University and a Master of Science Degree in Agricultural Economics from Auburn University.

Originally from a farm in Alabama, Don now resides in the Washington, D.C. area with his wife, Dee Dee. His daughter Leslie Anne is working on a MBA at Vanderbilt and his son Austin is a rising senior majoring in business at the University of Alabama.

TESTIMONY SUBMITTED FOR THE RECORD

TO THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS SUBCOMMITTEE ON FISHERIES, WATER AND WILDLIFE

"EROSION OF EXEMPTIONS AND EXPANSION OF FEDERAL CONTROL – IMPLEMENTATION OF THE DEFINITION OF WATERS OF THE UNITED STATES"

MAY 24, 2016

Prepared By:
Jody Gallaway
California Farm Bureau Member and
President and Senior Regulatory Biologist
Gallaway Enterprises

INTRODUCTION

I appreciate the opportunity to provide testimony for the record about the problems my clients are facing with agency interpretations of farming exemptions and how the final Clean Water Rule (WOTUS) will exacerbate a serious challenge facing farmers. I am Jody Gallaway, President and Senior Regulatory Biologist at Gallaway Enterprises, an environmental consulting firm I founded in 1998 to navigate the Clean Water Act (CWA) permitting process for private citizens, farmers, builders, and local, federal, and state agencies throughout California. I am here as a California Farm Bureau member. I was raised on an olive and hay ranch in northern California and raise a commodity myself, which is a unique background among environmental consultants who provide CWA services. Our company's guiding philosophy is to let science make decisions and not allow ourselves to be advocates for our clients. We take very seriously our obligation to base environmental analysis on science, effectively balancing both environmental ethics with practical development solutions. I work directly with the U.S. Army Corps of Engineers (Corps) on CWA permits and have taken a serious interest in both Corps' and the Environmental Protection Agency's (EPA) proposed final Clean Water Rule, also known as the waters of the United States rule (WOTUS).

I will explain how the CWA is being abused by regulators to thwart, interrupt, and challenge existing farming operations. I will share my expert opinion on how the new WOTUS rule could be used to further these assaults. I will offer suggestions to alleviate the attack on agriculture.

It was a difficult decision for me to provide testimony to this committee. I hesitated to put my name, company, and twelve employees at risk because our work depends on maintaining a professional relationship with California-based Corps staff in the Sacramento, Redding, and San Francisco offices. I am concerned that my decision to provide testimony could result in retribution from Corps regulators resulting in even greater delays on our permitting and delineation review projects.

However, the encouragement of my employees and clients empowered me to provide this testimony today. Our collective frustration, concern, and the challenges we face are at the highest I can remember at any time over the last 15 years.

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While the WOTUS rule was created by two agencies, I believe the EPA is completely disconnected from the Corps' implementation on-the-ground. EPA claims that the rule helps agriculture by creating certainty, improving the permitting process. It also claims the regulations do not create an economic burden but the practical implications are that the new rule gives both EPA and the Corps broad latitude and seemingly limitless discretion to regulate. In many cases, Corps regulators are literally a law unto themselves with no accountability. As I will discuss further, many have varying, arbitrary interpretations of the congressionally authorized "normal farming exemptions." These exemptions include plowing, changing from one crop type to another, what constitutes a ditch and a puddle, and "indirect" flows to a tributary. Perhaps most frustrating is the regulators' unbounded discretion to regulate based on their interpretation of the term the ordinary high water mark.

The EPA requires farmers to obtain a CWA permit when farming practices fail to meet the narrowly defined exemptions. From my firsthand experience, the complexity and high cost make

it nearly impossible for a farm to secure a CWA permit in California.

For all permits, the applicant needs to conduct a formal delineation of WOTUS... Using the draft delineation, the applicant would determine the level of impact associated with the agricultural project. From here, the applicant must seek a jurisdictional determination (JD) or apply for a permit. The level of impact dictates the type of permit for which the farmer may apply. I will explain this process in more detail later in this testimony.

Historically, when I and other consultants had a different interpretation of a regulator's site specific WOTUS jurisdictional determination, we worked out differences in a professional, respectful manner to arrive at science-based solutions. Over the last few years, the atmosphere of professionalism, collaboration, and compromise has deteriorated. I have great appreciation for the Corps' role and there are many great, passionate regulators working for the Corps. However, individual personalities can sometime make it extremely difficult to maintain professional working relationships when individual regulator interpretations lead to disagreement over implementation of agency guidance and protocol. Such disagreements often result in substantial and very costly project delays.

Early last year, it became apparent that regulators in our area were jumping the gun and implementing the proposed WOTUS rule before it became final in August 2015. One of the first impacts was a significant expansion of jurisdiction. I saw it when the Corps started automatically regulating additional features not historically hydrologically connected. Specifically, for the first time, Corps regulators expanded jurisdiction to features that could not be seen on the ground with the human eye. Our clients, who were in various planning stages of agricultural, development, and infrastructure projects, were concerned, confused, and deeply frustrated. In one case a regulator required that we indicate hydrological connections by drawing arrows on a delineation map and indicating that sheet flow connected waters. The Corps does not regulate sheet flow or subsurface flow. When we refused the result was two months delay and eventually the applicant withdrew his JD request.

My clients typically experience a delay of 3-4 months before a Corps regulator will even acknowledge receipt of a permit application or request for a jurisdictional determination (JD). It is common practice for a JD request to take more than twelve months to complete. More often than not, our clients are so discouraged by the Corps' lack of progress and inconsistencies that they withdraw their JD requests.

Recently, many of our projects were delayed because Corps staff said they were waiting on implementation guidance from the EPA and others told us it was "too dry" and that our project should wait until it rained again. Needless to say, some of our projects are still delayed.

Regarding projects that were moving forward, jurisdictional interpretations were inconsistent. We have seen individual regulators on the same project make ordinary high water mark determinations that vary by more than 50 feet which can significantly impact a project.[1] As a professional wetland delineator with over 15 years' experience it is challenging, if not down-right scary, to give my clients advice on the nature, location, and extent of jurisdictional features, given the wide disparity of individual regulator interpretations of CWA jurisdiction.

The evolving, inconsistent, and unreasonable positions Corps regulators take on many issues has drastically reduced collaboration and coordination. Several years ago, the Corps would be consulted on projects, methodology, and process. Now, many consultants, professionals, agencies, farmers, and developers view the Corps with a sense of fear and are unwilling to discuss projects with them or seek clarification or advice since it's common for Corps staff to launch investigations into applicants, especially farmers, when they approach the Corps for assistance.

The Corps uses classified aerial photography, LIDAR images, and other resources that are not publicly available to track farming activities and interpret the potential for Waters to occur. In one recent situation, we needed to have aerial photos de-classified in order to understand what the Corps was claiming to be Waters. The WOTUS rule allows regulators broad authority to

[1] Inconsistent ordinary high water mark findings by regulators is nothing new. See "Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction," GAO Report, February 2004, available at: http://www.gao.gov/new.items/d04297.pdf.

make Waters determinations based on aerial photo interpretation rather than with field data. On one recent project a Corps regulator insisted that we map a large feature as a wetland because, based on her interpretation of an aerial photo, the feature looked like a wetland. It was in fact exposed lava rock, we refused, resulting in additional field reviews and delays.

On two projects in 2015, applicants spent tens of thousands of dollars to identify and map waters of the U.S. for the express purpose of developing an agriculture project to avoid any impacts. Both applicants submitted the delineation to the Corps seeking a jurisdictional determination. They stated their intent to develop portions of their properties into agricultural operations in such a manner as to completely avoid waters of the U.S. In both cases, the Corps threatened to pursue violations for activities that occurred on their farms related to road building and construction of stock ponds, even when those activities took place years before the farmer owned the property.

The new WOTUS rule will be worse. It provides the Corps with the ability to use historical aerial photographs dating back to an undetermined period of time to determine jurisdictional waters and evaluate agricultural activities and farming practices. This is happening now during the murky pre-rule phase even as 6th Circuit Court of Appeals has a stay on the rule. Regardless, the final WOTUS rule legitimizes this approach. The WOTUS rule uses previously undefined terminology, adds malleable terms like "floodplain", and lays out methods for individual regulators to determine jurisdiction over features that can't be seen on the ground or that may have existed in a historic context. The WOTUS rule contains significant internal inconsistencies with regards to Corps jurisdiction of subsurface flows, on page 37090 it claims that subsurface flows are not WOTUS and on page 37081 subsurface flows can be used to assert jurisdiction. The following is an excerpt taken from the WOTUS rule that demonstrates the lack of clarity, and provides amble opportunities for vast interpretation.

"When determining the outer distance threshold for an "adjacent water" the line is drawn perpendicular to the ordinary highwater mark or hightide line of the traditional navigable water, interstate water, territorial seas, impoundment, or cover tributary and extended landward from that point. If there are breaks in the ordinary highwater mark, the line should be extrapolated from the point where the ordinary high water mark is observed on the downstream side to the point where the ordinary

> *high water mark is lost on the upstream side. Therefore, waters may meet the definition of neighboring even where, for example, a tributary temporarily flows underground." [37081]*

Given the incredible variation and interpretation of existing protocol, manuals, and guidance documents, I can only imagine how landowners, consultants, and regulators will map these invisible points on the landscape and where they will draw the lines that define jurisdictional features.

EXEMPTIONS AND EXCEPTIONS TO NORMAL FARMING PRACTICES

A Corps district office Clean Water Act Exemptions page[2] shows the very confusing "exceptions to the exemptions," which outlines some of the exceptions to the normal farming exemption. Some of these exceptions are extremely difficult to understand for the layman.

With vague definitions of, for example, what triggers the recapture provision, coupled with the uncertainty of what is an exempt farming practice; it is difficult even for me as a scientist to provide advice to landowners. My answer may be correct today but wrong tomorrow depending on which regulator is reviewing the information.

The Sacramento District handout offers the following disclaimer:

> *"A permit would NOT be required under Section 404 of the Clean Water Act if the activity would NOT result in the discharge of fill material into waters of the US. Please contact your local district office for a determination on whether your activity is exempt under Section 404(f) of the Clean Water Act."*

[2] http://www.spk.usace.army.mil/Missions/Regulatory/Permitting/Section404Exemptions.aspx

The disclaimer above is both hilarious and terrifying. The Corps suggests that landowners and farmers contact the Corps so that they can determine if their farming activities are exempt, that the activities meet their definition of "normal and on-going". However, most regulators have no experience in evaluating farm practices, activities, and crop rotation decisions based on market conditions. The Corps has developed so many exceptions to the exemptions that it is difficult to determine what individual regulators consider discharge or what activities are exempt. I will review some of those here:

Plowing

Corps regulations provide that "plowing" (defined as "all forms of primary tillage . . . for the breaking up, cutting, turning over, or stirring of the soil to prepare it for the planting of crops") "will never involve a discharge of dredged or fill material." (33 C.F.R. 323.4 (a).)

Yet, notwithstanding the regulations stating otherwise, senior wetland specialists at the Sacramento and Redding District have informed our staff that all plowing, even disking for the purpose of creating firebreaks, results in a discharge into waters of the U.S. and that the Corps selectively enforces this interpretation.

The Corps selectively enforces this interpretation but with varying enforcement mechanisms. In one case, the Corps ordered a farmer to cease and desist farming property. In another case, the Corps issued the landowner a Letter of Inquiry. Here the Corps suspected that the landowner's activities violated the CWA. The letter informed the landowner that the Corps has initiated an investigation into their activities and demands that the landowner answer a variety of questions within 30 days or face legal proceedings.

I have another client that plowed his fields in the same manner as he had over the last fifteen years and planted a cover crop to improve range forage for cattle. He received a letter from the Corps informing him that the Corps had issued an investigation into his activities. I had another client who plowed and planted a wheat crop. The physical manipulation to the land was identical on both farms. Both properties contained vernal pools, swales, and seasonal wetlands and both

were plowed and planted with a crop. In the ongoing case, the Corps took the position that plowing and planting a wheat crop resulted in a discharge into waters of the U.S. In the other example the Corps determined:

> *"The discharges of dredged or fill material were associated with disking and replanting pasture grasses and are part of an established and on-going normal ranching operation conducted in acceptance with Conservation Practice standard number 512. As such, in accordance the March 25, 2014 Interpretive Rule, the discharges do not require a permit under Section 404 of the Clean Water Act (CWA), provided they do not convert an area of waters of the US to a new use and impair the flow or circulation of waters of the US or reduce the reach of the waters of the US. As recently explained in the Interpretive Rule, activities that are planned, designed, and constructed in accordance with one or more of the 56 specific Natural Resource Conservation Service (NRCS) national conservation practice standards are considered exempt under CWA section 404(f)(1)(A) and a section 404 permit is not required." (August 27, 2014, SPK-2014-00183)*

It's interesting to note that in one instance, the Corps viewed plowing and planting as a discharge into waters of the U.S., but determined the same activity was exempt in another. This is despite the plain language in the CWA regulations that state "plowing" "will never involve a discharge of dredged or fill material" (33 C.F.R. 323.4 (a)), many regulators in the Sacramento and Redding office act otherwise.

Puddles

Across much of northern California, the Corps still asserts jurisdiction over isolated waters. Regulators in our region have required delineators to map puddles in dirt roads, tire ruts, and depressions in gravel parking lots as waters of the U.S., claiming they provide habitat for endangered species. Any objections based on protocol and regulations results in serious delays in

processing permits and jurisdictional determinations. There is nothing in the final WOTUS rule that limits regulators from continuing to take jurisdiction of small impressions occurring in roads, fields, and parking areas if they can demonstrate that they might have historically been present at some undetermined time in the past, are hydrologically linked, or in northern California are "vernal pools." This is despite the EPA's claims that puddles are now exempt. Without a definition of a puddle, which the final rule fails to adequately define, the Corps will continue to take this rigid interpretation of what is and what is not jurisdictional under the CWA.

Changes in Crop Types

There was a time not long ago when the Corps did not view changing crop types as changes in "land use." Additionally, the agency recognized that fallowing fields for various time intervals was considered a normal farming practice. However, that is no longer the case. My office has recently experienced the Sacramento and Redding Districts eroding the longstanding normal farming exemption, leading to legitimate concern among members of the agricultural community that exemptions as clearly written in CWA § 404(f) are no longer applicable in our region.

During the now five-year long Western drought, farmers have needed to use their land to change from one commodity to another. As farmers seek guidance from the Corps, I have had experiences where the Sacramento District senior staff have informed us and our clients that when a crop is changed from alfalfa hay farming to cattle grazing and back to alfalfa hay farming, this change constitutes a change in "land use" therefore, the landowner should seek a permit from the Corps for any activities that constitute a discharge of fill into wetlands that may have formed during the cattle grazing operation or for any wetlands that may have been present before the original alfalfa operation. In another case, we have a client who changed from rice farming to walnut orchards and was issued a letter by the Corps informing him that the Corps had opened an investigation into his activities to determine if his farming operation required CWA § 404 authorization.

Most landowners possess detailed historical records indicating participation in U.S. Department of Agriculture (USDA) benefit programs, historic Natural Resource Conservation Service (NRCS) wheat allotments, and wetland determinations performed by NRCS staff. My

experience is the Corps demands CWA permits when the farmer switches crops. Unbeknownst to landowners, the Corps views a change from one crop type (such as an irrigated row crop, rice, wheat field, or grazing, etc.) to an orchard as a "land use" change going from temporary to permanent crops. Our reality is the Corps now demands permits for exempt actions. Through their regulatory authority Corps regulators can tell farmers which crops can be grown and where. California's current drought conditions, advancements in irrigation techniques, and market conditions have led many landowners to change from one agriculture crop type to another.

Sadly, landowners who trust their government to work for them often proceed with normal agricultural practices with guidance and advice from USDA, only to find themselves under investigation by the Corps for activities that the Corps feels may have violated the CWA. Often these landowners are completely unaware and thought that they had completed due diligence by seeking advice and guidance from another federal agency. They often seek our services to assist them with demonstrating that their activities did not result in unauthorized fills in order to prevent incurring significant fees and delays in farming operations. In some cases, landowners have lost the ability to utilize their land because the Corps merely suspects that a violation has occurred. This comes at great financial and even emotional cost to landowners.

With the final rule, the only thing certain is how uncertain it is.

COMPLEX PERMITTING AND DELINEATION

Many landowners in California are spending significant resources to try to determine the extent of waters of the U.S. on their land and are very concerned about the ability to continue farming and ranching activities. In these cases, as mentioned previously, we are retained to perform a delineation of waters of the U.S.

There are two types of jurisdictional determinations: approved and preliminary. The Corps should attempt to process a JD request in 60 days[3]. In reality, it often takes 12 months or longer

[3] US Army Corps of Engineers, Regulatory Guidance Letter, No. 08-02, June 26, 2008: Jurisdictional Determinations

for the Corps to process a JD request and may take more than 18 months if the applicant requests an approved JD. In many situations, we perform delineations in spring months and submit it to the Corps. After receipt of the delineation, the delineation typically sits at the Corps office for months waiting to be assigned to a regulator. Frequently the Corps staff informs us that they want to wait for the rainy season before they go out into the field to verify a delineation, which typically results in a year-long process to receive a JD. It is routine for Corps staff to request clarification or have questions, but depending on the staff regulator assigned to the project, it could be minor remapping or unreasonable requests for remapping based on no field data, just a regulator's interpretation of an aerial photograph.

While the focus of the hearing is on the new WOTUS rule, it is important to highlight how the Corps has evolved over recent years, even during pre-rule times, as it can provide a strong indication of where things are headed under the current rule.

In one case, we submitted a delineation of Waters of the US to the Corps in 2013 and requested a JD. The regulator acknowledged receipt of the delineation and then proceeded to do nothing on the project for two years. When we expressed frustration, the regulator was reassigned. A new regulator informed us that he could not accept our delineation because we did not include an ordinary high water mark (OHWM) data sheet. There is no requirement to supply this data when requesting a JD. The Chief of the Sacramento office acknowledged that acceptance of delineation is not predicated on receipt of ordinary high water mark data sheets, but even this acknowledgment was not able to move the regulator. Individual regulators are given the ability and authority to request almost anything they want and landowners have no recourse. At significant cost we went back to the project site and collected the ordinary high water mark data and submitted it to the Corps. The Corps regulator, without having collected any field data, summarily informed us that we were wrong and he wanted the OHWM reflected at a different elevation on the map based on his interpretation of an aerial photograph. When we asked to review the photograph he was using to make this determination we were told that the photograph was classified/proprietary information and we were not able to view it, but were required to map the feature at whatever elevation he wanted or risk significant processing delays. The following week the regulator was reassigned and a new regulator wanted additional data. We finally

resolved all issues on this thirteen acre site, but it took more than 2 years at a $18,000 additional cost to the project (cost includes consulting fees and additional mitigation).

Unfortunately, this is all-too common. Most applicants cannot wait 12 months or 2 years for the Corps to give their blessing on delineation so they conduct the studies and file the report hoping that the conclusions of their consultant are correct. Unfortunately, given the Corps' inconsistent application of the CWA and protocols, their authority to demand almost anything, and make findings that are incompatible with field data – it's almost a forgone conclusion that delineations will be considered wrong in some way. Again this is very unsettling for landowners who are trying to comply with the plethora of rules that affect their ability to conduct traditionally lawful farming activities on their land.

PERMIT OPTIONS

If a landowner needs a Corps permit for an agricultural project or any activity there are several types of permits and/or permitting processes that may apply. The type of permit needed largely depends on the amount of discharge or fill material anticipated by the activity. Here is where the new WOTUS rule's expansion of federal jurisdiction affects landowners and will cause a significant financial burden. Slight increases in the amount of waters of the US at the project level can trigger the need for a general permit or a very rigorous individual permit, which can cost hundreds of thousands of dollars and effectively stop an agricultural project. To illustrate the difficulty to secure a permit, I offer the process below:

There are 3 types of permits applicable for agricultural projects. For all permits the applicant needs to conduct a formal delineation or JD of waters of the U.S. pursuant to Corps criteria. The applicant must then determine the level of impact or the size of the waters of the US associated with the agricultural project. The amount of waters of the US impacted dictates what type of permit the applicant can apply for. In all permitting scenarios the applicant must include a mitigation proposal demonstrating where and how mitigation will occur. Mitigation involves the use of an agency approved mitigation bank or applicant sponsored mitigation project, or use of an in-lieu fund. Mitigation costs depending on the type of resource impacted varies widely. If a

project site is not serviced by a mitigation bank then the applicant must propose an applicant sponsored mitigation project or participate in an in-lieu program. Mitigation ratios when participating in these types of mitigation projects are increased and can be anywhere from two to five acres for each acre[4] affected by the proposed project. The permittee must comply with all other federal laws before they can be issued a permit. In most instances, those laws are Section 106 of the National Historic Preservation Act (NHPA) and Section 7 of the federal Endangered Species Act (ESA).

For ESA compliance, the applicant needs to submit with their CWA application biological reports or an evaluation that discusses the presence or absence of species listed under the federal ESA. If species are present and will be directly or indirectly impacted then the applicant is required to submit a Biological Assessment for the purposes of assisting the Corps with ESA Section 7 consultation. The applicant must determine how and where they will mitigate for all impacts to federal listed species or critical habitat.

The applicant also needs to submit a NHPA Section 106 compliant Cultural and Historic Properties Report to demonstrate that no cultural or historic properties would be impacted by the agricultural project. Part of this process involves consultation with Native American tribes. A concern for agricultural projects is that buildings, bridges, and water conveyance structures over 50 years old can often become eligible for listing as a historical resource. Areas or structures within a project site that are listed or are eligible for listing must be avoided or mitigated.

The Corps Chief in the Sacramento Regulatory office informed us that for an agricultural project that involves conversion of land for agricultural operations that require a Corps permit and compliance with CWA § 404(b)(1), the range of potential off-site alternatives could include anywhere in the State that the crop grows. Therefore, if someone was purchasing land to expand their agricultural operations the EPA/Corps could require that the applicant evaluate all possible lands that are currently under cultivation or range lands suitable for the proposed agricultural operation across the entire State of California. The applicant must demonstrate that the proposed project is the Least Environmentally Damaging Practicable Alternative (LEDPA) by answering

[4] Mitigation ratios can be much higher in other parts of the nation.

the following question, "Is, or was there, an alternative site that could be acquired to accommodate the project and achieve the basic project purpose that would result in fewer impacts to waters of the US? When the entire State is the back-drop for an off-site alternatives analysis, the answer, by design, is almost always yes. Given this almost insurmountable hurdle for an agricultural project, to my knowledge, there have been no individual permits issued for an agricultural project in California, (excluding those affecting two acres or less, issued under RGL 95-01[5]).

For quick reference the following table includes a summary of the permit thresholds for an agricultural permit process and the associated average cost for each.

Type of Permit	Impact Threshold		404(b)(1) Alternatives Analysis Required	Costs (national average based on Sunding 2011, not including mitigation, project designs, entitlement)
	Acres	Linear		
Nationwide (NWP 40)	½ or less	300 feet or less		$35,940
Letter of Permission (LOP)	1 or less	500 or less	yes	$337,577
Individual Permit (IP) under RGL 95-01	2 or less		yes	Only applies when building a barn, home, or agricultural building. $150,000
IP	1.1 or more	501 or more	yes	$337,577

In our field work, we have applied the WOTUS rule definitions and found that the new definition will increase the number and extent of jurisdictional waters on most projects. The increase in

[5] U.S. Army Corps of Engineers. Regulatory Guidance Letter 95-01. Guidance on Individual Permit Flexibility for Small Landowners. March 31, 1995.

jurisdictional waters generally comes from the inclusion of tributaries, as well as those features not hydrologically connected. Small changes in the amount of jurisdictional features at the project level do and will have significant implications on cost and processing timelines. In my view, this is the primary disconnect between government regulators and the regulated public. Many EPA and Corps officials agree that federal jurisdiction will increase, but both fail to honestly acknowledge the impacts that this increase will have in the ability of property owners to remain compliant. In 2011[6] dollars, the nationwide average to prepare a nationwide permit application was $35,940. The nationwide permit, as demonstrated in the graph above, only applies to very small projects. For individual permits that are large enough to accommodate even small farms, the cost average is $337,577. Costs would remain the same for an LOP IP as the only difference is that the federal noticing process is eliminated, which does not affect costs.

Though times have changed, even back in 2002, the Corps asserted that it takes 127 days for a decision on an individual permit and 16 days to receive a decision on a nationwide permit. When recording permit decision times, the Corps only counts the time from the date that it deems an application complete. For a nationwide permit the majority of time is spent responding to the Corps' requests for additional information regarding the impacts assessment, delineation, and making changes to the delineation map. For an individual permit, Corps regulators have broad authority to request redesigns of the project, the site plans, demand the additional review of on-site and off-site alternatives, require additional technical studies, and require additional cost evaluations; almost anything they feel might assist them with a permit decision. As a result, Sunding and Zilberman in 2002[7] determined that nationwide permits took an average of 313 days to obtain. Individual permits took an average of 788 days of which 405 days elapsed after the application was submitted to the Corps office. It's my experience that in California the cost and timeframes are much longer.

[6] Sunding, David. July 26, 2011. Review of EPA's Preliminary Economic Analysis of Guidance Clarifying the Scope of CWA Jurisdiction. Exhibit 11. Comments submitted by Waters Advocacy Coalition, et. al in Response to

[7] Sunding, D. and Zilberman D., "The Economics of the Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process," Natural Resources Journal, vol. 42, Winter 202, pp. 59-74.

Depending on the type of project, costs of delay can be significant. Sunding and Zilberman (2011) estimated that, assuming a 20 percent discount rate, delays lasting 6 months could result in a loss of $47,000 per acre and a delay of a year could result in loss of over $90,000 per acre.

CLOSING STATEMENT

I have shared several examples of how the Corps is severely limiting farming and ranching in California. I could have shared many more. Most of my clients wish to remain unnamed because there is an overriding fear of the Corps. A few have come out publicly, facing the risk that the Corps could end their business, simply because they have sensed the injustice and don't want others to suffer a similar fate. Similarly, I have put my name and company on the line, which I hope will not affect my day-to-day work with regulators.

I work with landowners on a daily basis to help them remain compliant with the CWA. As I have described, the permitting process is expensive, lengthy, and lacks predictability. Nationwide Permit number 40 (NWP 40) is established for agricultural activities; however the impact thresholds are too narrow to provide much utilitarian function for farmers[8].The nationwide permits are currently being reissued and I urge Congress to allow NWP 40 to increase allowable discharge to 5 acres and have no linear threshold for impacts to drainages, ditches, and ephemeral streams (similar to the threshold standards giving to linear transportation projects, NWP 14). Removing the linear threshold would provide significant relief to farmers especially given the vague and confusing language in the WOTUS rule regarding the potential jurisdiction of features that no longer exist, man-made ditches, and ditches that convey water for meniscal amounts of time.

The EPA's claim that the new rule will not create an economic burden and will streamline the permitting process is not true. There is no question that the permitting process for agricultural projects should be streamlined. It seems logically contrary to expand federal jurisdiction of

[8] NWP 40 discharge and fill limitations: The discharge must not cause the loss of greater than ½ acre of non-tidal waters of the US, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse impacts.

waters of the U.S., as I have demonstrated this rule does, while maintaining or continuing to erode narrow permit thresholds and then have the EPA claim that *"it will not add an economic burden on agriculture."* It's my experience that the EPA can make such a claim because they are disconnected from how things actually work on the ground at the project and individual regulator level.

Additionally, the EPA's claim that the new rule brings certainty is blatantly false. There is extreme uncertainty in the new definitions. And unfortunately, there is no fallback position because the previous definitions were unclear and, as demonstrated, interpreted in vastly different ways by different regulators within the same regulatory agency.

The agencies and the courts have so far tried and failed to bring certainty to America's farmers and ranchers. What needs to happen is for the Congress to step in and help create that certainty. There should be clearer definitions, an easier permitting process, minimal cost to the farmer, and better interagency communication between EPA, Corps, and USDA. Farmers and ranchers shouldn't feel that the U.S. Army has militarized farming and ranching, treating them as an enemy of the United States. I hope for a day when the agency can be trusted again and work in good faith with farmers and ranchers who produce the food and fiber upon which our nation and the globe depends.

I hope I have shed some light on this issue. I appreciate the opportunity to testify and look forward to your questions.

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