



PPC

PESTICIDE POLICY COALITION
A Coalition Working for Sound Pest Management Policies

February 7, 2022

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Oceans, Wetlands, and Communities Division
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U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW Washington, DC 20460

Stacey Jensen
Office of the Assistant Secretary of the Army for Civil Works
Department of the Army
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RE: PPC Comments on EPA and Army Corps' Revised Definition of "Waters of the United States" Proposed Rulemaking, Docket ID No. EPA-HQ-OW-2021-0602

Dear Ms. Christensen and Ms. Jensen:

The Pesticide Policy Coalition (PPC) is pleased to submit comments to the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (together, "the Agencies") regarding the proposed rule to redefine "Waters of the United States" (WOTUS) under the Clean Water Act (CWA).

The Pesticide Policy Coalition (PPC) represents food, agriculture, fiber, pest management and related organizations that support transparent, fair, and science-based regulation of pest management. Our members include national and regional farm, commodity, specialty crop, and silviculture organizations; cooperatives; food processors and marketers; pesticide manufacturers, formulators, and distributors; pest and vector-control applicators and operators; research organizations; equipment manufacturers and other interested stakeholders. PPC serves as a forum for the review, discussion, development and advocacy around pest management regulation and policy.

PPC members confront changing pest and disease threats introduced into the United States via weather, trade, and other factors. Pesticide manufacturers work diligently to make pest control products available through, among other entities, a web of seed, fertilizer, and pesticide distributors, transportation networks, and pesticide application services. These efforts help ensure farmers, ranchers, public health officials, and other pesticide applicators have the tools they need to continue to produce America's food, fiber, and biofuel and to protect our public health and infrastructure. Many of these participants are small businesses reliant on annual, time-sensitive sales and labor to support American agricultural production and small businesses.

The PPC has serious concerns with the Agencies' proposed WOTUS rule. Similar to the 2015 WOTUS rule, principal among these concerns is that the rulemaking would exacerbate policy tensions between the CWA and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA); adversely affect the timely use of EPA-registered pesticides; expose pesticide users to unwarranted legal uncertainties; and interfere with well-established state pesticide and water programs and policies. The effects on pesticide use policies are directly linked to the Agencies' intended expansion of federal CWA jurisdiction over marginal waters and manmade conveyances. The rulemaking also could improperly wrest from the states the jurisdictional control of many thousands of such waters across the country with a series of categorical determinations and vague, self-reinforcing definitions.

We are particularly concerned that the Agencies intend to once again: (a) regulate ephemeral and intermittent conveyances regardless of the frequency, intensity, and duration of their flow, or remoteness from traditionally navigable waters; (b) rely on vague and self-reinforcing definitions for justifying federal jurisdiction over features such as "floodplain," "riparian area," "neighboring," and "tributary;" (c) omit biological and chemical metrics necessary to determine if a "significant nexus" might exist when evaluating individual or aggregated "other waters;" (d) expand current jurisdiction over "adjacent wetlands" to categorically regulate in all CWA programs all "adjacent waters;" (e) regulate many manmade canals and drainage ditches; and (f) apply the proposed new categories of WOTUS indiscriminately across all land uses, climatic zones, ecoregions, and topographies.

We believe the net result would be an expansion of federal jurisdiction over marginal waters and man-made conveyances that have not previously been defined as WOTUS, and an encroachment on state authorities and budgets. This would result in adverse impacts on public and private pest control efforts and the operators responsible for maintaining the availability of safe, healthy, and abundant food; public health; forests and other natural resources; utility and transportation rights-of-way; and parks and public recreation areas.

If the proposal were to be implemented as drafted, many state waters that have been adequately regulated, monitored, and protected for years would become federalized. Federal agency policies and additional costs would be imposed on public and private land use activities and natural resource management activities adjacent to such waters. This leaves landowners, farmers, ranchers, foresters, and private and commercial pesticide applicators with a lack of clarity surrounding jurisdiction and possible legal implications as they work to control pests on crops, forests, and other areas.

Contrary to the Agencies' arguments, we believe the proposed rule would result in the federalization of many thousands of miles of ephemeral, intermittent, seasonal, and manmade conveyances and other waters generally protected already by state laws. The Agencies intend to apply the proposal nationwide, regardless of regional differences in patterns of rainfall or snow melt, geography, hydrogeology, topography, or the current status of those conveyances under state or municipal laws. We believe that the consequences of this proposal for state policies and budgets, the U.S. economy, small businesses, property rights, and pest control activities have not been adequately considered.

As drafted, the WOTUS proposal would interfere with the timely use of EPA-registered pesticides. Not considered by the Agencies in their proposal are the likely adverse effects on food, feed and fiber production, maintenance of public health, and protection of natural resources that would result from the delays in timely control of pests on farms and in forests, parks, neighborhoods, and other areas on public and private lands where WOTUS, newly-defined under the proposed rule, may occur.

Full interpretation of the WOTUS rule across the landscape of America could take many years, and time-consuming expensive litigation, causing ongoing delays in pest control that will threaten the health of

the public, crops, forests, and natural resources. Narrow windows of time generally exist for effective pest control, many of which will be missed due to delays encountered by pesticide users struggling to interpret the intersection of the WOTUS rule with their work.

Confusion and hesitation over potential legal vulnerability could paralyze pest-control decision making, as operators and landowners struggle to: determine if the manmade ditches on millions of acres of land they maintain are regulated or exempt; locate and map ephemeral and intermittent flows potentially subject to jurisdiction of this rule; and locate and map any indirect or adjacent connections that could occur during a growing season. Pesticide users in all sectors likely will have to wait months for the agencies to apply their “best professional judgment” to determinations of if potential “significant nexus” may influence their pest control plans or where the jurisdictional boundaries of encountered floodplains may be.

This confusion and indecision will produce massive, ongoing economic turmoil for the pest control efforts of agriculture, forestry, and other critically important economic sectors, because year-to-year changes in climate, hydrogeology, and land use patterns will alter the occurrence and significance of ephemeral and intermittent flows, setting up a repeating pattern of annual delays and burdens. For example, under the proposed WOTUS Rule, waste treatment systems and prior converted cropland (PCC) may be excluded from the scope of WOTUS, but the PCC exclusion is reduced back to the ineffective approach as envisioned in the 1986 WOTUS rule, after the 2009 change-in-use guidance. By comparison, the 2020 WOTUS rule, the Navigable Waters Protection Rule (NWPR), included 12 categories of excluded waters, including waste treatment systems and PCC, but also specific exclusions for artificial waterbodies constructed in dryland, storm water facilities, and most ditches.

The proposed rule does not provide certainty or predictability for those that would be subject to federal regulation and therefore vulnerable to citizen lawsuits. The agencies have not considered the added costs and legal risks to pesticide applicators, or the extent to which the proposed additional regulatory requirements are already addressed by EPA under FIFRA or by state pesticide regulations. The likely confusion and additional burdens associated with the proposed rule would interfere with planning, decision making, and the timely control of weeds, insects, diseases, invasive species and mosquitoes by states, municipalities, and private entities. This will translate to increased compliance and financial burdens, and increased legal uncertainty for all involved, factors the agencies have not considered in their WOTUS proposal.

Such uncertainties and burdens will be particularly onerous for commercial applicators, who apply pesticides under contract and generally have no first-hand knowledge of the features on the ground prior to the day of application. It would be especially difficult for pilots to recognize newly-jurisdictional “waters” from aircraft flying over farm fields or growing forests at speeds of 100 to 160 mph, and completely impossible when such pesticide applications must be made before dawn or after dark for protection of pollinators. Even ground-rig pesticide applicators would be challenged to recognize jurisdictional conveyances that are covered by vegetation or are dry at the time of application.

The WOTUS proposal could exacerbate policy and legal tensions between the pesticide CWA NPDES permits and FIFRA labels. Since the 2009 ruling of the Sixth Circuit Court of Appeals in *National Cotton Council, et al. v. EPA*, tension has grown between FIFRA and CWA. That ruling established a national requirement for operators and applicators of FIFRA-registered pesticides, who fully meet all requirements of product labels for pesticide applications into, over or near “waters of the U.S.”, to comply also with duplicative requirements of CWA general National Pollution Discharge Elimination System (NPDES) permits.

If the WOTUS proposed definition is to be promulgated, applicators using terrestrial pesticides may not be aware that treatment areas may for the first time contain newly-jurisdictional “waters,” and that in addition to FIFRA label requirements they might now also need to comply with NPDES performance requirements for “aquatic” pesticide applications. It seems unreasonable that routine seasonal treatment of, for example, noxious weeds in dry ephemeral “waters” or manmade ditches would, following promulgation of the proposed WOTUS rule, now require compliance with NPDES permit requirements such as submission of pre-application Notices of Intent; use and documentation of integrated pest management procedures; record keeping of post-application monitoring; or other “aquatic” pest control requirements.

The associated burden and legal uncertainty would be especially problematic for aerial or ground-based applicators if such newly-jurisdictional marginal “waters” are unknown, dry, or covered by vegetation. Even if landowners and applicators were to suspect that the new rule might extend federal jurisdiction to routinely encountered ditches or ephemeral conveyances in the areas where they intend to apply terrestrial pesticides, the time it would take to verify the precise locations and WOTUS status of such conveyances, and then also satisfy applicable NPDES permit compliance steps, would be an unwarranted burden and source of ongoing legal uncertainty.

The agencies have not fully considered FIFRA and CWA policy differences relative to “waters,” as we describe here, or the serious challenges the proposed rule would pose to compliance by pesticide users. The agencies engagement with private stakeholders or state and local governments before proposing the rule, was not substantial. This rule will become a litigated, “win/lose” situation for all involved, including state and local agencies responsible for pesticide and water quality regulations, , municipalities, special districts for mosquito control and irrigation water delivery, transportation interests, environmental interests, the agriculture community, and energy and utility groups.

Lastly, but of critical importance, on January 24, 2022, the U.S. Supreme Court announced that it will hear arguments in *Sackett, et ux., v. EPA, et al.* (Case 19-35469). This case has the potential to considerably impact the regulatory landscape on WOTUS. For this reason, we encourage the Agencies to not finalize a new WOTUS definition until after an opinion has been issued on this case and the Agencies have had sufficient time to analyze it and incorporate it into a new proposal. Although this may impact the regulatory timeline, it is likely to greatly reduce wasted and duplicated effort on the part of the Agencies and the entire stakeholder community, reduce regulatory uncertainty, and to greatly increase the chances of the final definition being durable.

Thank you for considering our views. If PPC members can be of assistance in any way, please do not hesitate to contact us.

Sincerely,



Steve Hensley
Chair, Pesticide Policy Coalition



Beau Greenwood
Vice Chair, Pesticide Policy Coalition