PPC

PESTICIDE POLICY COALITION

A Coalition Working for Sound Pest Management Policies

September 27, 2017

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Submitted electronically via Federal eRulemaking Portal

Re: Comments on Definition of "Waters of the United States"- Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899 (July 27, 2017); Docket ID No. EPA–HQ–OW–2017–0203

The Pesticide Policy Coalition (PPC or "the Coalition") is pleased to submit comments to the U.S. Environmental Protection Agency (EPA) and U.S. Army Corp of Engineers (Corps) regarding the proposed rescission of the 2015 Clean Water Rule (CWR) and subsequent "re-codification" of the pre-existing "Water of the United States" (WOTUS) definition, which is simply a ministerial and interim measure to temporarily restore the pre-CWR regulatory text in the Code of Federal Regulations (C.F.R) pending a future rulemaking to improve the WOTUS definition. ("proposed rule").

PPC is an organization of food, agriculture, forestry, pest management and related industries, including small businesses/entities, which support transparent, fair and science-based regulation of pest management products. PPC members include: nationwide and regional farm, commodity, specialty crop, and silviculture organizations; cooperatives; food processors and marketers; pesticide manufacturers, formulators and distributors; pest-and vector-control operators; research organizations; and other interested stakeholders. PPC serves as a forum for the review, discussion, development and advocacy around pest management regulation and policy, including Clean Water Act (CWA) jurisdiction and pesticide

permitting under the CWA's National Pollutant Discharge Elimination System (NPDES) program.

The Sixth Circuit Court of Appeals' 2009 ruling in *National Cotton Council et al. v. EPA* swept pesticide applications into the NPDES universe, creating a new permitting scheme for pesticide applications into, over, or near WOTUS, or federally jurisdictional waters as defined under the CWA. The PPC continues to advocate for legislation that will eliminate the dual regulation of pesticide applications under the CWA and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), which is unnecessary, burdensome, and can delay the timely use of EPA-registered pesticide products. This regulatory overreach was further compounded by the 2015 CWR. For these stakeholders, the unlawful expansion of CWA federal jurisdiction would expand the universe of waters requiring NPDES permitting, and in turn increase overhead expenses and create costly delays of pesticide applications vital to public health and crop protection relied on by all Americans.

As the Agencies acknowledge in their rationale for the proposed rule, the CWR fails to adhere to a core tenet of the CWA, which Congress expressed in CWA section 101(b): to recognize, preserve, and protect the primary responsibilities and rights of States to control water pollution and plan the development and use of land and water resources. This fatal flaw alone is a sufficient basis for rescinding the CWR. Additionally, the rulemaking process was procedurally deficient, and the lack of clarity surrounding key CWR concepts would exacerbate regulatory uncertainty and lead to inconsistent application of the CWR nationwide. For these reasons discussed in more detail below, the PPC supports the Agencies' proposed rescission of the CWR and restoration of the pre-existing regulatory text as a first step toward revising the WOTUS definition in a future, separate notice-and-comment rulemaking process.

COMMENTS

The following comments highlight some of the key deficiencies with the final CWR and the rulemaking process which serve as grounds for rescission of the final rule and restoration of the pre-existing regulatory language in the C.F.R. until the Agencies promulgate a new WOTUS rule as part of a separate notice-and-comment rulemaking process.

I. The rule infringes on the states' role in protecting water resources

As the Agencies recognize in the proposed rule, Congress enshrined the principles of cooperative federalism in CWA Section 101(b), which recognizes, preserves, and protects "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration,

preservation, and enhancement) land and water resources . . . ." The vast majority of states have delegated authority to administer the CWA NPDES permitting program in their states, including pesticide permitting, and many states regulate some waters beyond WOTUS based on state-specific priorities, needs, and available resources. In the preamble to the CWR, however, the Agencies merely described their engagement with the states during the rulemaking and comment process. The Agencies failed to make any reference to the policy articulated in CWA section 101(b). Based on this fatal flaw, and the unlawful intrusion on state's authority that flows from disregarding this guiding principle, it came as no surprise that more than thirty states challenged the CWR as an illegal overreach of federal authority.

The CWR creates confusion as to where federal jurisdiction ends and a states' jurisdiction begins, and would expand federal jurisdiction to waters that traditionally were solely under state authority. The CWR creates uncertainty for both state regulators and the regulated community, which undermines a fundamental principle of the CWA, and thereby goes against Congressional intent. Moreover, bringing more waters under federal control, and forcing state authorities to treat a remote channel containing infrequent, ephemeral flow the same as a regularly flowing creek running through an urban center, could diminish overall environmental protection and impede progress toward water quality goals. Simply put, if everything is a priority, then nothing is a priority.

II. The rulemaking process was procedurally and legally deficient

In addition to legal challenges to the CWR brought by the majority of states, dozens of stakeholder groups and organizations, including several of the Coalition's member organizations, joined in petitions challenging the final CWR on several grounds, including violations of the Administrative Procedure Act (APA). These procedural defects violated notice requirements inherent in due process, and prevented stakeholders from engaging meaningfully in the process. As the Agencies acknowledge in the proposed rule, two federal courts found that numerous groups of petitioners demonstrated a likelihood of succeeding on the merits of their substantive and procedural claims challenging the legality of the CWR. The U.S. District Court for the District of North Dakota, in issuing its injunction to stay the CWR in the thirteen states within its jurisdiction, held that the petitioners were likely to succeed on the merits of their claims that the rule exceeds the Agencies' statutory authority, that it is arbitrary and capricious and unsupported by the record, and that it is procedurally flawed because the final rule is not a "logical outgrowth" of the proposed rule. Subsequently, the Sixth Circuit followed suit, and issued an injunction staying the rule nationwide on similar procedural grounds, as well as the CWR's incongruence with judicial precedent, and other substantive claims raised by petitioners. The Agencies should emphasize and rely on those additional defects as further grounds to rescind the CWR.

III. Key rule concepts and definitions lack clarity and create regulatory uncertainty

Several CWR provisions lack clarity and would create confusion for both regulators implementing the CWA and permitees trying to maintain compliance. The following are some examples of key terms that are vague and leave room for inconsistent interpretation and application:

- *Tributary*: The tributary definition rests on the presence of physical indicators of a bed, bank, and ordinary high water mark (OHWM). In public comments on the draft CWR, several commenters raised concern that many areas in the arid, western portions of the U.S. contain features that may exhibit these physical characteristics, but the Agencies claim are excluded from the WOTUS definition (*e.g.,* desert washes, gullies, rills). EPA and the Corps did not respond to this valid concern in its Response to Comments document or the preamble to the rule. Many agricultural stakeholders also raised concern that the "tributary" definition would erode traditional statutory exemptions from CWA permitting applicable to agricultural activities. The Agencies merely responded that traditional statutory exemptions were not affected and that the CWR would not create additional permitting requirements for agriculture
- *Ordinary High Water Mark (OHWM):* The presence of an OHWM is central to the CWR's definition of "tributary." The definition of OHWM is vague and ultimately vests the Agencies with authority to rely on any "appropriate means" to determine if an OWHM is present.[1]
- *Floodplain*: The CWR would capture waters that are within the 100-year flood-plain of a category (a)(1)-(3) water (*i.e.*, traditionally navigable waters, interstate waters, and territorial seas) that have a significant nexus. The rule, however, does not define "floodplain." The preamble to the CWR states that when available Federal Emergency Management Agency (FEMA) Flood Zone maps will be used, but also acknowledges that much of the U.S. remains unmapped by FEMA, or maps may be out of date, or inaccurate.
- *Significant nexus*: The CWR allows for a case-by-case significant nexus analysis of specific water features (*e.g.*, prairie potholes, pocosins, Texas coastal prairie wetlands, and western vernal pools) that are within 4,000 feet of a jurisdictional water, and alone, or in combination with *similarly situated* waters, significantly affects the chemical, physical, or biological integrity of a category (a)(1)-(3) jurisdictional water. The CWR allows for a significant nexus finding where one of nine ecological functions exists (*e.g.,* sediment trapping, contribution of flow). The rule does not define "similarly situated."

[1] 33 C.F.R. 328.3(c)(6).

Additionally, the nine ecological functions are overly broad categories, and no guidance is provided on how each variable should be weighed, nor does it specify what measure should be used to assess influence on receiving waters.

- *"in dry land":* Several categorical exemptions and exclusions from the WOTUS definition (*e.g.,* "constructed ponds" (including those used for irrigation and stock watering)), are predicated upon being "created in or occurring in 'dry land'." The CWR does not clarify what "dry land" means.

Anyone trying to ascertain whether a feature has OHWM indicators, or what waters may be "similarly situated" to the water in question, will likely need to seek an expert's jurisdictional determination, which is time-consuming and could result in costly delays. Furthermore, these ambiguities would make it challenging for even federal and state water authorities, hydrologists, or wetlands experts to consistently apply the WOTUS definition, let alone for a lay person to assure compliance with the law. The lack of clarity with the rule's key concepts justifies rescission of the CWR and should be corrected in a future WOTUS rulemaking.

IV. Restoration of Pre-Existing Definition Will Bridge Gap With Future WOTUS Rule Proposal

While the PPC has concerns with the pre-CWR WOTUS definition, we agree that the Agencies properly recognized that the temporary restoration of the regulatory definition for WOTUS which appeared in the C.F.R prior to the 2015 CWR would occur as a ministerial action upon repeal of the CWR. As stated in the proposed rule, the Agencies and state co-regulators have continued implementing the pre-existing definition, as informed by Agency guidance documents and applicable U.S. Supreme Court decisions, since the Sixth Circuit Court of Appeals issued a nationwide stay of the CWR in October 2015. Temporary restoration of the previous definition will maintain the status quo while the Agencies work in the near-term to propose a new rule in a separate notice-and-comment rulemaking.

Although any future rulemaking will provide an opportunity for public comments, the Coalition wishes to emphasize the importance of promulgating a new WOTUS rule. The CWR, and preceding Agency guidance, were prompted by the desire for greater clarity on federal CWA jurisdiction. Though the CWR fell short, the Agencies should not abandon this critical endeavor to promulgate a new WOTUS rule that is legally defensible, improves clarity and regulatory certainty, and preserve's states' authority to preserve and protect their water resources.

CONCLUSION

The PPC supports the proposed rescission of the CWR and restoration of the pre-existing WOTUS definition as a short-term regulatory placeholder. Rescission is

justified based on numerous procedural and substantive flaws, several of which are highlighted in the Coalition's comments. The PPC encourages EPA and the Corps to also consider any comments filed separately by the Coalition's member organizations and their members, which may raise additional issues or expand on points made in the above comments. A complete list of the Coalition's member organizations is available at www.pesticidepolicycoalition.org. The PPC looks forward to meaningful and robust engagement with the Agencies during a future WOTUS rulemaking.

Sincerely,

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