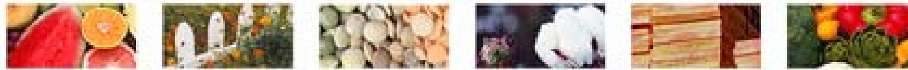

PPC

PESTICIDE POLICY COALITION
A Coalition Working for Sound Pest Management Policies

www.pesticidepolicy.org

November 14, 2014

Environmental Protection Agency
Water Docket
Mail Code 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Comments on the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, Docket ID No. EPA-HQ-OW-2011-0880

Ladies and Gentlemen:

The Pesticide Policy Coalition ("PPC") is pleased to submit comments to the Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers (together, "the agencies") regarding the proposed rule[1] to redefine "Waters of the United States" ("WOTUS") under the Clean Water Act ("CWA").[2] With this document we raise general concerns held by PPC members about a number of facets of the proposed rule.

The PPC represents food, agriculture, forestry, pest management and related organizations that support transparent, fair and science-based regulation of pest management. 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 and applicators; research organizations; and other interested

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[1] 79 Fed. Reg. 22,188 (Apr. 21, 2014)

[2] 33 U.S.C. §§ 1251-1387

parties. PPC serves as a forum for the review, discussion, development and advocacy of pest management policies and issues important to its members.

BACKGROUND

The PPC has numerous concerns with the agencies' proposed WOTUS rule. Principal among these is that the rulemaking would exacerbate policy tensions between the CWA and the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA")[3]; 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 would 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 —

(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 §404 jurisdiction over "adjacent wetlands" to categorically regulate in all CWA programs all "adjacent waters;"
(e) regulate most 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 a great, unwarranted expansion of federal jurisdiction over marginal waters and man-made conveyances that have not previously been defined as WOTUS, and a chaotic encroachment on state authorities and budgets. This will most assuredly result in adverse impacts on public and private pest control efforts and the operators responsible for maintaining (a) the availability of safe, healthy and abundant food; (b) public health; (c) forests

[3] http://www.epa.gov/agriculture/lfra.html

and other natural resources; (d) utility and transportation rights-of-way; and (e) 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, burdens and additional costs would be imposed on public and private land use activities and natural resource management activities adjacent to such waters. State pesticide programs would be adversely affected. Moreover, land owners, farmers, ranchers, foresters, and private and commercial pesticide applicators would face confusion and potential legal uncertainties as they work to control pests on crops, forests and other areas. The PPC joins many states, counties, mayors, governors, attorneys general, members of Congress, private organizations and citizens in opposition to the proposal as written. We urge the agencies to immediately withdraw the rulemaking.

COMMENTS

Widespread criticism and controversy characterize this proposed rule: Since publication of the WOTUS rule, agency officials have unsuccessfully labored to reassure the public, states and Congress that it would (1) not expand the scope of CWA regulation of WOTUS; (2) not usurp state prerogatives; (3) not adversely affect small businesses; and (4) simply clarify and implement the directives of Congress and the Supreme Court. This message was initially expounded last spring as polite testimony from senior agency officials before a series of confrontational Congressional hearings, transforming last summer into an aggressive defense of the proposal before an avalanche of public criticism and strident calls for its withdrawal. In its effort to downplay the thunderous criticism, the agencies published numerous "clarifying documents"[4] and launched a series of meetings, webinars, blogs (e.g., "Setting the Record Straight on Waters of the U.S."[5]), public relations initiatives (e.g., "Thunderclap for Clean Water"[6]), and presentations by senior EPA officials implying that criticisms of the proposed rule are "ludicrous"[7] and only serve to undermine the administrative rulemaking process.

[4] http://www2.epa.gov/sites/production/files/2014-09/documents/q_a_wotus.pdf

[5] http://blog.epa.gov/epaconnect/2014/06/setting-the-record-straight-on-wous/

[6] http://blog.epa.gov/blog/2014/09/do-you-choose-clean-water/.

[7] http://www.beefusa.org/ourviewscolumns.aspx?NewsID=4318

Contrary to the agencies' arguments, we believe the proposed rule would result in the unwarranted federalization of many thousands of miles of ephemeral, intermittent, seasonal and manmade conveyances and other waters generally protected already by state laws. The rule would change the definition of federally protected "waters" under all programs of the CWA— redefining the scope of many different federal rules and, with few exceptions, give the agencies virtually unlimited federal authority over all state and local waters, regardless of how rarely they actually convey water, or how remote or isolated those waters may be from truly navigable waters. 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 agree with criticisms of the many governors, state agencies, counties, municipalities and the Small Business Administration[8,9] 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.

<u>The proposal would interfere with the timely use of EPA-registered pesticides.</u> Not considered at all 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 no small amount of litigation], causing ongoing delays in pest control

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[8] *See* Governors of Iowa, Kansas, Mississippi, Nebraska, North Carolina, South Carolina, and the Attorneys General of West Virginia, Nebraska, Oklahoma, Alabama, Alaska, Georgia, Kansas, Louisiana, North Dakota, South Carolina and South Dakota, Comments on WOTUS Proposed Rule (Oct. 8, 2014); Kansas Governor, Secretary of Health and Environment, Secretary of Transportation, Director Water Office, Secretary of Agriculture, Secretary of Wildlife, Parks and Tourism, Comments on WOTUS Proposed Rule (Oct. 23, 2014); Pennsylvania Deputy Secretary of Department of Environmental Protection, Office of Water, Comments on WOTUS Proposed Rule (Oct. 8, 2014); Idaho Governor and Attorney General, Comments on WOTUS Proposed Rule (Oct. 24, 2014); Texas Attorney General, Comments on WOTUS Proposed Rule (Sept. 26, 2014).

[9] http://www.sba.gov/advocacy/1012014-definition-waters-united-states-under-clean-water-act

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. EPA has stated its intention to finalize the proposed rule next spring – in an extremely busy period for pesticide applicators, farmers, ranchers, foresters, natural resource managers, and mosquito control officials. Confusion and hesitation over potential legal vulnerability could paralyze pest-control decision making, as operators and landowners struggle to: (1) determine if the manmade ditches on millions of acres of land they maintain are regulated or exempt as "wholly in uplands;" (2) locate and map ephemeral and intermittent flows potentially subject to jurisdiction of this rule; and (3) 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.

<u>The proposed rule does not provide adequate certainty or predictability for those that would be subject to federal regulation and vulnerable to citizen lawsuits as a result.</u> 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 surely 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 forests at speeds of 100 to 150 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 will 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*,[10], 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. In 2011 EPA implemented a pesticide NPDES general permit for covered pesticide applications in six states, and 44 other states also developed versions of EPA's permit. These permits establish CWA performance requirements that also link through guidance or in some states by rule to satisfaction of FIFRA requirements on product labels.[11] It is this linkage of statutory performance requirements of FIFRA and CWA that is obfuscated by the agencies' expansive definition of jurisdictional "waters," producing confusion and new legal uncertainties.

Although CWA pesticide NPDES general permits authorize FIFRA-labeled aquatic pesticide product applications into, over or near waters of the U.S.[12] for control of mosquitoes and certain other insects, weeds and algae, invasive animals and forest canopy pests, such CWA coverage is generally not included under the NPDES permit provisions for misplaced applications of terrestrial pesticides. In communications following implementation of its pesticide NPDES general permit, however, EPA clarified that its NPDES permit coverage could be extended to applications of terrestrial pesticide products if (a) such pesticide applications were consciously made to treated "waters" that were completely dry at the time of application, (b) the dosage used did not exceed the maximum rate authorized by the FIFRA product label for terrestrial applications, and (c) *applicators obtain and fully comply with all other requirements of the CWA NPDES general permit.*

[10] http://www.ca6.uscourts.gov/opinions.pdf/09a0004p-06.pdf

[11] Some pesticide NPDES general permits (e.g., WI, KS, IA, IN) explicitly require compliance with FIFRA product label provisions as a CWA permit component.

[12] Some state pesticide NPDES general permits are directed to "waters of the state."

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 considered FIFRA and CWA policy differences relative to "waters." The agencies have not considered the policy differences we describe here, or the serious challenges the proposed rule would pose to compliance by pesticide users. Nor have the agencies consulted adequately with private stakeholders or state and local governments before proposing the rule. This rule will become a litigated, "win/lose" situation for all involved, including state and local agencies responsible for pesticide and water quality regulations, agricultural interests represented by the PPC, municipalities, special districts for mosquito control and irrigation water delivery, transportation interests, environmental interests, and energy and utility groups. After considering these risks, the National Association of State Departments of Agriculture, empowered as state lead pesticide agencies in almost all states, unanimously urged the agencies to withdraw the proposed rule and work with state and local agencies to resolve WOTUS policy issues.[13] The PPC agrees with NASDA's determination.

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[13] http://nvfb.org/nasda-calls-for-epa-and-army-corps-to-withdraw-waters-of-the-u-s-rule/

The PPC urges EPA and the Corps to immediately withdraw the proposed rule. Our comments have focused primarily on the major adverse impacts of the proposed rule on timely pest control and those stakeholders most likely to be affected. Many of those stakeholders are represented by the members of the PPC. We share the concerns also but have left to others to comment on the failure of the agencies to meet—

- legal, statutory and Supreme Court limitations on CWA jurisdiction;
- federal requirements for assessment of impacts on small businesses;
- federalism requirements for consultation with co-regulators; and
- proper assessment of the economic or scientific basis for the proposed rule.

The PPC echoes the criticisms of so many others, and urges the immediate withdrawal of the proposed rule.

Sincerely,

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Beau Greenwood
Vice Chair, Pesticide Policy Coalition