



# PPC

**PESTICIDE POLICY COALITION**  
A Coalition Working for Sound Pest Management Policies

April 15, 2019

U.S. Environmental Protection Agency  
EPA Docket Center  
Office of Water  
Mail Code 4504-T  
1200 Pennsylvania Ave. NW  
Washington, D.C. 20460-0001

***Submitted electronically via Federal eRulemaking Portal***

**Re: Comments on Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4,154 (Feb. 14, 2019), Docket ID No. EPA–HQ–OW–2018–0149**

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) (collectively, “the Agencies”) regarding the proposed revised definition of “waters of the United States” (WOTUS) under the federal Clean Water Act (CWA) (hereinafter “Proposed Rule”).

The 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; equipment manufacturers; and other interested stakeholders. PPC serves as a forum for the review, discussion, development and advocacy around pest management regulation and policy, including 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

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permitting scheme for pesticide applications into, over, or near federally jurisdictional waters as defined under the CWA to be WOTUS notwithstanding the fact that such use may only occur in accordance with a label that has undergone a rigorous analysis before being approved by EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The PPC continues to advocate for legislation that will eliminate the dual regulation of pesticide applications under the CWA and FIFRA, which is unnecessary, burdensome, and can delay the timely use of EPA-registered pesticide products. This regulatory overreach was further compounded by the Agencies attempt to clarify the WOTUS definition with the 2015 Clean Water Rule (2015 Rule). Lack of clarity surrounding key concepts in the 2015 Rule only served to create more confusion, regulatory uncertainty, and inconsistent application of federal jurisdiction.

The PPC applauds the Agencies for initiating the two-step rulemaking effort in 2017 to rescind and replace the 2015 Rule with a revised WOTUS definition that will address longstanding ambiguities and improve clarity and consistency in the application of CWA jurisdiction. The PPC has previously commented on the “Step One” rescission proposal,<sup>1</sup> and now provides comments on “Step Two” replacement definition, the Proposed Rule.

The PPC also encourages EPA and the Corps to consider any comments filed separately by the Coalition’s member organizations and their members, which may provide more detail on the statutory and judicial precedent supporting the revised WOTUS definition, and may raise additional issues and/or expand on points made in the comments below. A complete list of the Coalition’s member organizations is available at [www.pesticidepolicycoalition.org](http://www.pesticidepolicycoalition.org).

## COMMENTS

### **I. Recommendations related to additional clarity and improvements to key definitions and concepts in the Proposed Rule**

The Coalition wishes to highlight the below requests for additional clarity and recommended improvements to key terms, definitions, and concepts within the Proposed Rule identified by PPC members. The following feedback is not intended to reflect all of the individual input the Agencies may receive from individual PPC member organizations, but rather represents a subset of shared requests and recommendations:

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<sup>1</sup> PPC, Comments on the Proposed Repeal of 2015 Clean Water Rule and Recodification of Pre-Existing Rules (Sept. 27, 2017), Doc. ID No. EPA-HQ-OW-2017-0203-11701.

- Recommended revision to Traditionally Navigable Waters definition: The scope of WOTUS has its foundation in traditionally navigable waters (TNWs) as the other categories of jurisdictional waters all tie back to their connections to a TNW (e.g., “contributing perennial or intermittent flow to a TNW”). Over time, the Agencies’ interpretations of the WOTUS definition have strayed far from Congressional intent in enacting the CWA by giving less weight and meaning to the term “navigable” while expanding the jurisdictional reach of virtually every category from TNW to ditch. For this reason, the Coalition recommends that the Agencies revise the TNW definition in the Proposed Rule to substitute the phrase “use in” with “transport.” With this substitution, the regulatory text of the final rule would read as follows: “waters which are currently used, or were used in the past, or may be susceptible to transport interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide.”
- Request for added clarity on “intermittent” and related concepts: The PPC is generally supportive of the revised definition for jurisdictional tributaries in the Proposed Rule. However, the Agencies should clarify some of the terminology underpinning the proposed tributary definition in the final rule. The term “intermittent” includes the phrase “certain times of a typical year,” which is vague and may be subject to varying interpretations. The Coalition recommends that the Agencies include clarity in the final rule on how they will implement this definition. For example, additional clarity could include information on reliable metrics, measurements, and sources of data that may be used as the basis for a “typical year.” Further clarity surrounding the definition of “intermittent” also increases clarity of the other jurisdictional waters categories where this term appears directly or has relevance, including “lakes and ponds,” and the adjacent wetlands jurisdictional category.
- Support for inclusion of wetlands delineation criteria in the regulatory text: The Agencies requested comment on whether the regulatory text of the final rule should emphasize that wetlands must exhibit all three wetlands delineation criteria (hydrology, hydrophytic vegetation, and hydric soils) under normal circumstances to qualify as wetlands. The Coalition strongly supports emphasizing the need for all three wetlands delineation criteria to be present within the regulatory text (i.e., as opposed to relying on preamble language alone for this important context). This addition will improve overall clarity and support consistent application of the WOTUS definition.

## II. Categorical Exclusions

The Coalition supports the Agencies’ proposal to include express exclusions from the WOTUS definition, several of which are longstanding exclusions recognized in

previous WOTUS regulations and guidance. Some categorical exclusions, however, would benefit from additional clarity and contextual references in the final rule.

One example identified by PPC member organizations is the proposed exclusion for “artificial lakes and ponds,” such as farm and stock watering ponds. The regulatory text refers to “artificial lakes and ponds constructed in upland . . .” However, in the preamble to the Proposed Rule, the Agencies make clear that this exclusion applies where artificial lakes and ponds are created as a result of impounding non-jurisdictional waters or features, as well as conveyances in upland that are physically connected to and are part of the proposed excluded feature. The Coalition recommends that the Agencies expand the regulatory text in the final rule to incorporate this important clarity from the preamble language.

Additionally, and as emphasized above, individual PPC member organizations may submit comments with further detail and recommendations on how the Agencies’ could improve clarity on specific categorical exclusions from the WOTUS definition in the Proposed Rule.

## CONCLUSION

The Coalition applauds the Agencies in taking this important step 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. Overall, the PPC supports the Proposed Rule and appreciates the Agencies consideration of the above recommendations on revisions and key rule concepts where additional clarity will increase regulatory certainty and consistent implementation of federal CWA jurisdiction.

Sincerely,



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Chair, Pesticide Policy Coalition



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Vice Chair, Pesticide Policy Coalition