



P.O. Box 2995 • Cordova, TN 38088-2995
(901) 274-9030 • FAX (901) 725-0510
www.cotton.org

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April 15, 2019

U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460

RE: Docket ID No. EPA-HQ-OW-2018-0149. Revised Definition of “Waters of the United States”

The National Cotton Council (NCC) is the central organization of the United States cotton industry. Its members include producers, ginner, cottonseed processors and merchandizers, merchants, cooperatives, warehousemen and textile manufacturers. A majority of the industry is concentrated in 17 cotton-producing states stretching from California to Virginia. U.S. cotton producers cultivate between 10 and 14 million acres of cotton with production averaging 15 to 20 million 480-lb bales annually. The downstream manufacturers of cotton apparel and home furnishings are located in virtually every state. Farms and businesses directly involved in the production, distribution and processing of cotton employ more than 125,000 workers and produce direct business revenue of more than \$21 billion. Annual cotton production is valued at more than \$5.6 billion at the farm gate, the point at which the producer markets the crop. Accounting for the ripple effect of cotton through the broader economy, direct and indirect employment surpasses 280,000 workers with economic activity of almost \$75 billion. In addition to the cotton fiber, cottonseed products are used for livestock feed and cottonseed oil is used as an ingredient in food products as well as being a premium cooking oil.

NCC and the other agricultural stakeholder organizations signed below appreciate the opportunity given by the Environmental Protection Agency (EPA) and the Army Corps of Engineers (COE) to comment on this important subject.

AGENCY DEFINITIONS:

The agencies propose as a baseline concept that “waters of the United States” (WOTUS) are waters within the ordinary meaning of the term, such as oceans, rivers, streams, lakes, ponds, and wetlands, and that not all waters are “waters of the U.S.”

Under this proposed rule, a tributary is defined as a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a traditional navigable water or territorial sea in a typical year either directly or indirectly through other tributaries, jurisdictional ditches, jurisdictional lakes and ponds, jurisdictional impoundments, and adjacent wetlands or through water features identified in paragraph (b) of this proposal so long as those water features convey perennial or intermittent flow downstream.

Ditches are generally proposed not to be “waters of the U.S.” unless they meet certain criteria, such as functioning as traditional navigable waters, if they are constructed in a tributary and satisfy the conditions of the proposed “tributary” definition, or if they are constructed in an adjacent wetland and also satisfy the conditions of the proposed “tributary” definition.

The proposal defines “adjacent wetlands” as wetlands that abut or have a direct hydrological surface connection to other “waters of the U.S.” in a typical year. “Abut” is proposed to mean when a wetland touches an otherwise jurisdictional water at either a point or side. A “direct hydrologic surface connection” as proposed occurs as a result of inundation from a jurisdictional water to a wetland or via perennial or intermittent flow between a wetland and jurisdictional water. Wetlands physically separated from other waters of the United States by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent under this proposal.

The proposed definition has exclusions that specifically clarify that “waters of the U.S.” do not include features that flow only in response to precipitation; groundwater, including groundwater drained through subsurface drainage systems; certain ditches; prior converted cropland; artificially irrigated areas that would revert to upland if artificial irrigation ceases; certain artificial lakes and ponds constructed in upland; water-filled depressions created in upland incidental to mining or construction activity; stormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off; wastewater recycling structures constructed in upland; and waste treatment systems. In addition, the Agencies are proposing to clarify and define the terms “prior converted cropland” and “waste treatment system” to improve regulatory predictability and clarity.

COMMENTS:

NCC applauds the agency for listening to stakeholders and revising the 2015 version of WOTUS and we support this proposed effort. The cotton industry supports clean water. We do not want to pollute our farms or send pollution downstream for others to deal with. We believe that this proposal provides needed clarity for the regulated community and government regulators, while still providing for clean water.

1. Exclusions - NCC fully supports the exclusions listed above and recommends that they be incorporated into the regulatory text.
2. Traditional Navigable Waters (TNWs) – Over the decades since the enactment of the Clean Water Act (CWA) the EPA and the COE (the agencies) have expanded what they consider to be “navigable waters”. The term has become less than meaningless with each regulatory overreach to assert jurisdiction over every ditch and dry, hillside runnel. NCC believes that the agencies must turn back to the original, Congressional intent of TNWs being waters used in interstate commerce. Only then can the Agencies regain the respect of the regulated community that looks askance every time a regulator calls a dry ditch a ‘navigable water of the U.S.’.
3. Prior Converted Croplands (PCCs) – Since 1993, the Agencies’ regulations have excluded PCCs from the definition of waters of the U.S., and thus from CWA regulation as well. This is a long-standing regulatory exclusion that was maintained by the prior

Administration in the 2015 WOTUS Rule. The preamble to the 1993 regulations confirms that farmers can use PCCs as they so choose, for any purposes, including non-agricultural ones, so long as it is farmed once in a five-year period and wetlands conditions have not returned. However, through a 2005 joint COE/Natural Resources Conservation Service (NRCS) guidance, the Agencies unlawfully claimed jurisdiction over PCCs based on a “change in use” theory, where if the land changes to a non-agricultural use, a PCC determination is no longer applicable. This theory was carried to extremes in some cases such as switching a field from a row crop to grazing, or fallowing.

The 1993 preamble¹ to the WOTUS regulations defines PCCs as areas that were drained or manipulated for agricultural purposes prior to December 23, 1985 and have a certain amount of inundation during the growing season. In adopting the exclusion, the Agencies recognized that PCCs have been significantly modified and no longer exhibit their natural hydrology or vegetation. Due to this permanent alteration/modification, PCCs no longer perform the functions or values the areas did in their natural condition. The agencies stated, “PC cropland has been significantly modified so that it no longer exhibits its natural hydrology or vegetation. Due to this manipulation, PC cropland no longer performs the functions or has values that the area did in its natural condition. . . . [I]n light of the degraded nature of these areas, we do not believe that they should be treated as wetlands for the purposes of the CWA.”²

NCC believes the agencies should adopt a definition of PCCs consistent with the 1993 regulations and confirm that the PCCs exclusion encompasses areas that were drained or manipulated for the purpose, or having the effect, of making production of agricultural products possible; and agricultural drainage features, including ditches and conveyances, are part of the PCCs. Within this definition, agricultural products must include annual crops, tree fruit and nut crops, forages, hay, as well as fallow and grazing uses. In the preamble the agencies can list relevant documents/evidence that establish PCCs including aerial photographs, cultivation maps, crop expense or receipt records. Producers should not have to use or rely on an NRCS or COE PCC determination. In addition, any jurisdictional tributary running through a PCC should not be used as a loophole to nullify a PCC exclusion.

The agencies should also reaffirm key principles from the 1993 preamble. First, that PCCs are excluded from jurisdiction regardless of the type of activity occurring and regardless of use. Second, PCCs only become eligible for regulation under the CWA if agricultural production ceases for five years and all three wetland criteria return. Third, for the agencies to determine whether there are any jurisdictional features on the site, they must apply the 1987 Wetlands Delineation Manual³, looking at the area’s characteristics and use at present, not hypothetical or past conditions.

4. Tributaries – NCC agrees with the proposed definition that limits it to streams carrying perennial or intermittent flows to a TNW. We agree that ephemeral features should not

¹ 58 Fed. Reg. at 45,031.

² 58 Fed. Reg. at 45,032

³ Corps of Engineers Wetlands Delineation Manual; Wetlands Research Program Technical Report Y-87-1 (on-line edition) by Environmental Laboratory. January 1987 - Final Report. US Army Corps of Engineers.

be included. To that end, NCC recommends that ephemeral features, as defined in the proposal as flowing or pooling only in direct response to rainfall, be listed in the final regulatory text as not jurisdictional. NCC agrees that jurisdictional determinations should not rely solely on the presence of bed and banks and ordinary high-water marks (OHWMs). These features can be present in drainages that do not ordinarily have flow. We appreciate the agencies moving away from those concepts.

While the agencies will use a "typical year" from a 30-year rolling average (excepting drought and flood years) to provide distinction between intermittent/perennial flows and ephemeral flows, there needs to be clarity on the data sources that will be used. There are different sources and different federal agencies don't all use the same one (e.g. EPA uses WETS and USDA has UCAN). It's important for producers and other agencies to know what data is being used. The agencies also need to acknowledge that the data will vary between geographic regions, weather stations and federal collection reports.

In evaluating tributaries, the agencies need to clarify how they will distinguish between a contribution of a snowpack (layers of snow) and melting snow from one or more recent snowstorms. NCC does not believe that a melt from snowstorms should be given equal weight as perennial flows from snow packs.

5. Impoundments - The proposed rule states, “[i]mpoundments have historically been determined by the agencies to be jurisdictional because impounding a ‘water of the United States’ generally does not change the water body’s status”⁴. If that is the case, it seems confusing to have an "Impoundments" category at all. In addition, many industries and agencies have different definitions or concepts for the word "impoundment". Since the WOTUS status of the water is not changed due to impounding, there seems to be no need for this separate classification.
6. Ditches - The agencies propose to add a new “ditches” category to the WOTUS definition, “to provide regulatory clarity and predictability regarding the regulation of ditches and similar artificial features.”⁵ Under the proposal, ditches would be included as WOTUS if they: (1) are TNWs; (2) are constructed in, or relocate or alter, a tributary and meet the tributary definition; or (3) are constructed in adjacent wetlands and meet the tributary definition.⁶ All other ditches would be expressly excluded from the WOTUS definition.⁷ The agencies also propose to define the term “ditch” as “an artificial channel used to convey water.”⁸

NCC appreciates that the agencies were trying to clarify an issue that has caused great distress over the years, but NCC believes this category may add more confusion. We recommend eliminating the ditch category and place ditches in the WOTUS exclusion provision. The agencies can make an exception for ditches constructed in a tributary or adjacent wetland. This would reduce the confusion that has reigned over many roadside

⁴ 84 Fed. Reg. at 4172

⁵ 84 Fed. Reg. at 4179

⁶ *Id.* at 4179; 4180

⁷ *Id.* at 4204

⁸ *Id.*

and farm-field ditches for years. The issue of ditches is one that has brought many producers in conflict with state and federal agencies. Even ditches created by government agencies, such as roadside ditches, have caused conflict for adjacent farmers, therefore we strongly suggest you simplify this issue as much as possible.

7. Adjacent Wetlands - NCC supports the proposed changes to the definition that includes wetlands that abut or have a direct hydrologic surface connection to other WOTUS in a typical year. We thank the agencies for removing the concepts of- "bordering, contiguous, neighboring" which were introduced in the 2015 WOTUS and caused confusion when trying to identify adjacency. Furthermore, we support the agencies in keeping the current definition of a wetland but recommend that the regulatory text of the final rule include the language that wetland areas must satisfy all three wetland delineation criteria (hydrology, hydrophytic vegetation and hydric soils). We also support the agencies' position that 'uplands' do not meet wetland delineation criteria.
8. Lakes & Ponds - The agencies have added this as a new category. A lake or pond will be a WOTUS if it: (1) is a TNW; (2) contributes perennial or intermittent flow to a TNW in a typical year either directly or indirectly through a WOTUS or through an excluded feature that conveys perennial or intermittent flow downstream; or (3) is flooded by a jurisdictional TNW, tributary, ditch, lake/pond, or impoundment in a typical year.⁹ We recommend that the agencies further clarify what it means to be "flooded by" and to specify that it is natural flooding, not manmade flooding for a purpose such as irrigation. Furthermore, the agencies will need to specify more details on flooding, such as frequency or magnitude and justify those decisions.

CONCLUSION:

NCC appreciates the opportunity to comment on this proposal. Overall, this proposal is a vast improvement from the 2015 rule. At this juncture in history, the agencies have a chance to clarify and add transparency to a regulation that has caused decades of confusion, lawsuits, and lost resources. We respectfully submit the above comments in support of a final rule that will be even more clear to the regulated community.

Respectfully submitted,

National Cotton Council
American Cotton Producers of the National Cotton Council
Alabama Cotton Commission
Alabama Farmers Federation
Agricultural Council of Arkansas
Arizona Cotton Growers Association
Blackland Cotton and Grain Association
California Cotton Ginners and Growers Association
Cotton Producers of Missouri
Delta Council

⁹ 84 Fed. Reg. 4182.

Georgia Farm Bureau
Georgia Cotton Commission
Kansas Cotton Association
Louisiana Cotton and Grain Association
Louisiana Independent Warehouse Association
Louisiana Farm Bureau Federation
National Cotton Ginners Association
New Mexico Pecos Valley Farmers Association
North Carolina Cotton Producers Association
Oklahoma Cotton Council
Plains Cotton Growers, Inc.
Rolling Plains Cotton Growers Association
St. Lawrence Cotton Growers Association
Southern Cotton Growers Association
Southern Rolling Plains Cotton Growers Association
Virginia Cotton Growers Association