



United Egg Producers

Leadership by Egg Farmers for Egg Farmers

April 15, 2019

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Submitted via www.regulations.gov
U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Attention: Docket ID No. E EPA-HQ-OW-2017-0480

Re: United Egg Producers Comments on Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4,154 (Feb. 14, 2019)

United Egg Producers (“UEP”) welcomes this chance to offer comments on the United States Environmental Protection Agency’s and the United States Army Corps of Engineers’ (collectively “the Agencies”) proposed rule revising the definition of “waters of the United States” (“WOTUS”) under the Clean Water Act (“CWA”). UEP has joined several other organizations in submitting group comments on this proposed WOTUS rule in three instances; those submitted under the auspices of the Agricultural Nutrients Policy Council (“ANPC”), the Waters Advocacy Coalition (“WAC”), and the US Poultry and Egg Industry (“USPEI”). We refer you to those comments for a detailed discussion of many of the matters addressed below.

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UEP is a Capper-Volstead cooperative of U.S. farmers working collaboratively to address legislative, regulatory and advocacy issues impacting egg production. We work through active farmer-member leadership, provide a unified voice on our members’ matters, and work in partnership across the agriculture community.

UEP’s members support the goals and objectives of the CWA, which include restoring and protecting the nation’s waters. Our members also recognize that their efforts to protect water quality start right at their farms. While the remote water and drainage features on or near our members’ farms may not themselves be subject to federal jurisdiction under the CWA, egg producers know that to protect the nation’s waters they must also protect local waters by minimizing the loss of nutrients and sediment into them as well. To this end, our members have and continue to take great care in the design, construction, operation and maintenance of their egg farms. They do this to ensure that their operations can and will contain 100 percent of the manure their hens produce and protect it from rainfall and surface run-off so as to ensure it can be managed and used responsibly while protecting water quality.



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UEP believes the proposed WOTUS rule appropriately reflects the meaning and purpose of the CWA's text and Congress's intent, consistent with our Constitution. Congress provided for a balancing of our critical efforts to protect the environment alongside our nation's efforts to support and pursue numerous, other critical societal objectives. Congress also explicitly sought in the CWA statutory provisions to ensure that the states' retained their primary responsibilities over pollution control and over planning the use of land and water resources. The proposed rule is highly consistent with these considerations.

As noted above, we refer you to the comments on the proposed rule submitted with our support by the ANPC, the WAC, and the USPEI. Below are UEP's additional thoughts and comments.

1. Achieving the goals of the Clean Water Act requires us to work across the land, but it does not require all features that hold or carry water be made jurisdictional and the CWA clearly was never authorized to make all such features jurisdictional.

The CWA does not cover all waters everywhere. Had Congress wanted the CWA to cover all waters everywhere it could have easily and clearly said so. It did not. The Supreme Court, including Justice Kennedy in his discussion of his "significant nexus" test, has made it abundantly clear that under the CWA there is a certain point beyond which waters cannot be subject to federal jurisdiction. That is because they are too distant from, or contribute too little volume to, those that are navigable and therefore reasonably considered subject to the Constitution's Commerce Clause. The question before Agencies since the CWA was passed has been where to draw that line in the landscape. Relying on the areas of agreement in the Supreme Court majority's opinions in the *Rapanos* decision, the Agencies placed that line in a location that gives legitimate and defensible meaning to the language of the CWA, which provides no specific statutory language concerning where this line is drawn. That said, it is clear from the Supreme Court decisions on this matter that jurisdictional waters must be ultimately part of waters that exhibit navigability characteristics and subject to being used to transport commerce.

2. Identifying ephemeral and intermittent features.

UEP recognizes the inherent and unavoidable imprecision that will occur from the use of any indicator of the extent and length of flow of water that needs to be present in a tributary to make it jurisdictional. As noted above the CWA does not offer specific statutory guidance as to how to decide exactly where to draw this boundary. No single indicator or even set of indicators that are practical and reasonable to use by Agency personnel in the field will ever be 100% correct in all circumstances, certainly across regions but even within the same region. UEP believes the proposed rule's use of the boundary between ephemeral and intermittent to determine what are WOTUS is a fair and reasonable application of the Court's concepts around navigability and the need to exclude remote waters from jurisdiction. Furthermore, the proposed rule's effort to fully respect the prominent role the CWA gives to the State land and water use authorities in implementing the CWA can be seen as having an effect in placing this boundary between ephemeral features as non-WOTUS and tributaries with intermittent or more flow as WOTUS. This boundary does not perfectly reflect those water features that are historically (pre-1972 passage of the CWA) subject to exclusive management by States, but it is a reasonable



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approximation of that boundary. UEP supports excluding from CWA jurisdiction naturally formed features in the landscape that have water in them with no or only ephemeral surface outflow (such as isolated wetlands) or drain surface water that is only present after precipitation (ephemeral) events and are otherwise dry during the rest of the year.

3. Comments regarding ditches.

UEP recommends that the final rule not include a WOTUS category for “ditches.” Including a WOTUS category for “ditches” can easily leave the impression in the minds of regulators, landowners, and the general public that “ditches” by default are WOTUS with some ditches being excluded. The proposed rules treatment of those ditches does in fact not create a default condition of ditches as WOTUS. The proposed rule only treats ditches as WOTUS that are man-altered or created channels located in tributaries, or that relocate a tributary, or are in adjacent wetlands. As a result, we suggest as an alternative to creating a WOTUS category for ditches that the Agencies amend the tributary and adjacent wetland categories to reflect that their status as WOTUS does not change when man-made ditches are installed in or relocate them, and that those ditches are themselves WOTUS.

The proposed rule excludes ditches constructed wholly in uplands (not in a tributary or adjacent wetland). This language should be retained in the final rule but clarified to state explicitly that such ditches are excluded no matter whether they carry ephemeral, intermittent, or perennial flow.

4. Lakes and Ponds

Lakes and ponds that have an intermittent or perennial connection to downstream jurisdictional waters are themselves proposed as jurisdictional. Lakes and ponds that are constructed in uplands and have, at most, an ephemeral connection to downstream waters, are excluded from WOTUS.

While UEP supports this exclusion for ephemerally connected lakes and ponds, we believe this exclusion should include lakes and ponds that may not have been constructed in uplands. Please see the ANPC comments for an extensive discussion of this matter.

We also note that it is common for agricultural ponds to be constructed in uplands (i.e., in an ephemeral drainage feature), and yet to accumulate enough ephemeral water in the storage pool to create intermittent or perennial outflow. The final rule’s exclusion of lakes or ponds should make clear that any lake or pond constructed in upland (ie, in an area characterized by ephemeral flow) is always excluded from WOTUS, no matter the length of the outflow from the constructed lake or pond.



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5. Burden of Evidence

We agree with the Agencies that, when it comes to implementing the final rule, the landowner should have the benefit of the doubt with respect to determining jurisdiction. In other words, waters should not be WOTUS unless the agency can point to evidence solidly backing that designation. Keeping the burden of proof on the agency is especially important when it comes to making determinations about things like whether a ditch was constructed in a jurisdictional tributary or wetland after 1972. Many farmers simply lack the means or opportunity to conclusively establish the answer. Similarly, farmers should not have to prove that farm ponds were constructed in upland, as opposed to a jurisdictional wetland. Burdens like those properly fall on the agency because, as between the agency and the regulated party, the agency is in a much better position to make a conclusive showing.

6. Exclusions

In addition to those matters discussed above involving certain exclusions from WOTUS, we offer these comments on the other exclusions included in the proposed rule.

A. Waste Treatment Systems

UEP supports the continued exclusion of waste treatment systems, which has been part of the regulatory text for decades. The proposed rule's regulatory text defining what constitutes a "waste treatment system" is consistent with longstanding agency practice. We also support the Agencies' proposed definition of waste treatment system, particularly the clarifications that such systems need not perform active treatment and that the system includes not just ponds and lagoons, but also conveyances to and from those ponds and lagoons.

B. Prior Converted Cropland

We support the proposed rules treatment of prior converted cropland ("PCC") excluding it from WOTUS. The Agencies should clarify that there are multiple uses of PCC that constitute being "in support of" agricultural purposes. These include such practices as idling or treating land for conservation purposes; idling land to protect wildlife; and allowing land to lie fallow following natural disasters such as hurricanes. While these uses may look like the land has been abandoned, they are "in support of" agricultural purposes and should be expressly recognized as such. Furthermore, any features within PCC should be treated as upland features and the final rule should state as such in regard to ditches, canals, ponds, and other features that can be found within PCC.



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C. Groundwater

We support the exclusion of groundwater from consideration as WOTUS. Furthermore, neither groundwater nor shallow subsurface flow should be WOTUS and we support an exclusion that would expressly exempt both from federal jurisdiction. We note that tile drainage water is not groundwater as it is agricultural storm water that has moved through the soil profile until it hits the tile layer, and then moves laterally out of the field; this tile layer is above the soil's groundwater table and does not intersect it.

D. Artificially Irrigated Areas

We support the proposed rule's exclusion for artificially excluded areas. The final rule should make it clear in plain text that any artificially irrigated areas, not just those fields flooded for rice or cranberry growing, are excluded.

E. Stormwater Control Features

We support the proposed rule's exclusion for stormwater control features but note that it should be expanded. Stormwater control features should not be limited to urban and suburban settings and features used in those settings. The Agencies should either clarify that this exclusion encompasses conservation infrastructure found on agricultural lands—such as grassed waterways, treatment wetlands, and sediment basins—or that such infrastructure falls under another exclusion. Farmers rely on a variety of conservation infrastructure to support their operations, including grassed waterways, terraces, sediment basins, biofilters, and treatment wetlands. These features serve important functions such as slowing stormwater runoff, increasing holding time before water enters a stream, sediment trapping, increasing soil infiltration, and pollutant filtering. To avoid creating disincentives to water quality conservation practices and infrastructure, the Agencies should make it clear that these conservation features are not jurisdictional so long as they were not constructed in WOTUS.

In conclusion, we wish to repeat that UEP supports much of the proposed rule and believes it is grounded in a sound reading of the law and represents sound policy. We want clear, practical, effective rules that respect the role of State governments in land use and water management decisions.

Sincerely,



Chad Gregory, President & Chief Executive Officer, United Egg Producers



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