Waters of the United States/Clean Water Act: National Agricultural Aviation Association Comments on U.S. EPA Supplemental Proposed Rule

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The National Agricultural Aviation Association ("NAAA") submitted October 9th comments addressing the United States Environmental Protection Agency's:

Supplemental Notice of Proposed Rulemaking, Updated Definition of "Waters of the United States ("Supplemental Proposed Rule").

See Docket No. EPA-HQ-OW-2025-0322; 91 Fed. Reg. 57,284 (Sept. 9, 2026).

EPA and the U.S. Army Corps of Engineers (collectively, "EPA") describe the Supplemental Proposed Rule as:

… collecting input on additional regulatory language for defining "waters of the United States" ("WOTUS") to be considered alongside the 2025 proposed rule.

The Supplemental Proposed Rule would supplement the regulatory text in the November 20, 2025 Notice of Proposed Rulemaking, which proposes to revise the regulations defining the scope of waters federally covered under the Clean Water Act. See 90 Fed. Reg. 52498 (Nov. 20, 2025) ("2025 Proposed Rule").

The definition of WOTUS is arguably one of the most critical jurisdictional terms in the Clean Water Act. Its importance is magnified since it is relevant to both National Pollutant Discharge Elimination System ("NPDES") permitting and non-NPDES programs such as:

- Section 404 of the Clean Water Act wetland permits.
- Section 311 oil/hazardous substance release requirements.
- Clean Water Act Spill Prevention Control and Countermeasure regulations.

As a result, the definition of WOTUS has been and continues to be the subject of frequent litigation, legislative oversight, rulemakings, and public policy debates since the enactment of the modern version of the Clean Water Act in 1972.

EPA states that in regard to the 2025 Proposed Rule that it received approximately 220,000 public comments. The federal agencies state that they are now seeking additional input on the regulatory text for the following definitions:

- Relatively permanent.
- Continuous surface connection.

- Perennial.

NAAA describes the organization as representing the interests of the 1,560 aerial application industry owner/operators and 2,028 non-operator agricultural pilots throughout the United States licensed as commercial applicators that use aircraft to enhance the production of food, fiber and bio-energy; protect forestry; protect waterways and ranchland from invasive species; and provide services to agencies and homeowner groups for the control of mosquitoes and other health-threatening pests.

The organization notes that within agriculture and other pest control situations manned aerial application is an important method for applying pesticides, because it:

- Permits large areas to be covered rapidly.
- Is the fastest application method of crop inputs.
- Capitalizes on the often-limited windows of suitable spraying weather.
- Allows for timely treatment of pests while they are in critical developmental stages.
- Treats above the crop canopy - thereby not disrupting the crop and damaging it.
- Has greater productivity, accuracy, speed, and is unobtrusive to the crop compared to ground application.

The NAAA comments initially note the 2009 federal appellate court decision which drastically expanded the enforcement reach of the Clean Water Act in *National Cotton Council, et al., v. EPA, et al.* The decision held that pesticide applications require NPDES permits wherever they occur "into, over or near" one of the many types of WOTUS.

EPA subsequently implemented its NPDES Pesticide General Permit ("PGP") for aquatic pesticide applications. The organization argues that PGPs impose unnecessary performance and recordkeeping requirements on aerial applicators without providing any additional environmental benefit.

The Federal Insecticide Fungicide and Rodenticide Act is cited as a statute that requires extensive demonstration that registered pesticides can be safely applied according to product labels in a manner that poses no unreasonable risk to humans or the environment. As a result, the organization continues to ask Congress to eliminate what it describes as duplicative and costly permits.

In commenting on the 2025 Proposed Rule, NAAA argues:

- Whether a water feature is a WOTUS significantly impacts NAAA members' operations.
- In the past, EPA regulations and guidance steadily expanded the definition of WOTUS well beyond constitutional and statutory boundaries.
- The 2025 Proposed Rule ensures that the regulatory definition of WOTUS aligns with Congress's intended scope of federal regulatory authority under the Clean Water Act and Supreme Court precedent.
- It clearly defines "navigable" and preserves the states' traditional and primary authority over land and water use.
- It clearly defines key terms that are central to determining the scope of the CWA's scope.

NAAA states that the proposed new definitions are clear and understandable. The organization further states that the supplemental definitions are focused on perennial waterbodies - water that is standing or continuously flowing every day of the year during ordinary conditions - with narrow, well-defined exceptions for anomalous events (e.g., drought) and non-anomalous temporary interruptions (e.g., low tide or a regularly occurring dry spell lasting no more than 30 consecutive days in any given year). It concludes that the definitions will:

- Enhance national consistency.
- Promote transparency.
- Reduce the need for NAAA members and landowners to retain expert consultants to assess jurisdiction.

A copy of the NAAA comments can be found here.