Colorado Water Congress
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THE LEADING VOICE OF COLORADO'S WATER COMMUNITY

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Communities Division
U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket, MC 28221T
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Re: Comment on the Proposed Rule on the Revised Definition of "Waters of the United States," 84 Federal Register 4154 (Feb. 14, 2019); Docket ID No. EPA-HQ-OW-2018-0149

The Colorado Water Congress ("CWC") appreciates the opportunity to comment on the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency's (known as "the Agencies") proposed revisions to the definition of the Waters of the United States ("WOTUS"), 84 Fed. Reg. 4154 (Feb. 14, 2019). The CWC is a membership organization consisting of over 400 members, serving as the principal voice of Colorado's water community. CWC's members represent the municipal, agricultural, industrial, commercial, recreation, and environmental sectors.

The CWC is concerned with the predictability and certainty of whether a water body is subject to the Clean Water Act ("CWA") and in reducing costs and delays in obtaining CWA permits. The requirements for issuance of permits under sections 402 and 404 of the CWA are of great significance to CWC members because many of our members build, operate, and maintain reservoirs and other essential water supply-related infrastructure, including long pipelines, as well as recharge and reuse facilities. Others are multi-service utilities providing stormwater and wastewater services. Agricultural members express concern regarding classifications of canals and ditches as water ways subject to the CWA. The changes reflected in the proposed rule are generally welcome, but additional clarification is required in specific areas for the proposed rule to achieve fully the predictability and certainty our members seek.

As the rulemaking progresses, CWC encourages the Agencies to consider how their actions impact the ability of water providers, and users to balance competing needs, especially those located in the arid West. Colorado and the Western United States will be most directly and significantly affected by the outcome of this rulemaking process. It is within this geographic region that one frequently finds dry arroyos and washes that flow only in response to infrequent storm events, isolated ponds, intermittent and ephemeral drainages with inconsistent and tenuous connections to navigable waters, effluent-dominated and -dependent water bodies, and extensive ditch and canal systems designed to meet both agricultural and municipal needs.

Specific Comments

I. Ephemeral Features

The Western U.S. has numerous ephemeral features. By defining WOTUS to include intermittent tributaries but not ephemeral ones, the proposed rule would likely substantially reduce the scope of 404 jurisdiction in the western U.S. This could ease permitting requirements for CWC member projects but may also be a concern in managing watersheds for water supply.

The proposed rule defines tributaries to be jurisdictional if they contribute perennial or intermittent flow to a traditional navigable water or territorial sea in a typical year either directly or indirectly through other jurisdictional waters, such as tributaries, impoundments, and adjacent wetlands so long as those water features convey perennial or intermittent flow downstream. Tributaries do not include surface features that flow only in direct response to precipitation, such as ephemeral flows, dry washes, arroyos, and similar features. The proposed rule would exclude from jurisdiction ephemeral features and diffuse stormwater run-off including directional sheet flow over upland. This exclusion would also include swales, and erosional features, including gullies and rills, as non-jurisdictional features. The reduction in the current scope of section 404 jurisdiction is consistent with how the Agencies are interpreting the need for a surface water connection to a traditional navigable waterway for a tributary to be jurisdictional.

However, CWC's concern is that the definition of jurisdictional tributaries differentiates between jurisdictional intermittent features and non-jurisdictional ones, such as ephemeral features, is an overly complex and time-consuming exercise. The proposed rule defines "typical year" to mean within the normal range of precipitation over a rolling thirty-year period for a particular geographic area. Under this proposed definition, a typical year would exclude years of extreme drought or flooding. In the West, historical data that would be used to determine a "typical year" is unavailable for many features, especially the smaller drainages in arid regions. Accordingly features lacking data should be explicitly exempted in recognition of the fact that we don't measure what's not there.

The Agencies need to localize the definition of ephemeral features so that a State delegate can make the determination as to whether it falls under WOTUS. By accurately defining what an ephemeral feature is and allowing a larger role for states in administering that definition, the CWA would better align with the Agencies' current interpretation of the need for surface water connection to a traditional navigable waterway.

II. Definition of "Intermittent"

Under the proposed rule, distinguishing between intermittent and ephemeral drainages determines what is jurisdictional. There are numerous intermittent and ephemeral drainages in the Western United States.

The proposed definition of "intermittent" is surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation, for example seasonally when the groundwater table is elevated, or when snowpack melts. Continuous surface flow may occur seasonally such as in the spring when evapotranspiration is low, and the groundwater table is elevated. This is how the Agencies have defined intermittent in the past except for the addition of "during certain times of a

typical year" and "or when snowpack melts." The concept of seasonally high groundwater to identify intermittent drainages and precipitation-driven flow to identify ephemeral drainages remains the same. To clarify this distinction between intermittent drainages and ephemeral drainages in the Western United States, we propose a practicable and quantifiable approach that can be applied using development of regional guidance that addresses seasonality and the duration of flow.

III. Isolated Wetlands

There are numerous isolated waters and wetlands in the Western U.S. that are only potentially connected to traditional navigable waterways via an ecological connection (e.g. use by migratory birds, amphibians, and other wildlife). These ecological connections are case specific and can be either tenuous or tortured depending on the personal bias of the person making the evaluation.

The rule will need to be clearer as to what features define a connection between wetlands and a WOTUS. As proposed, wetlands physically separated from other waters of the United States by upland or by dikes, barriers, or similar structures and lacking a direct hydrologic surface connection to WOTUS are not adjacent and would not be jurisdictional. The proposed rule does not assess wetland jurisdiction using ecological connections. The CWC supports this proposal.

In *SWANCC*, the Supreme Court held that the Agencies do not have authority to regulate non-navigable, isolated, intrastate waters that lack a sufficient connection to a traditional navigable waterway, as regulation of those waters would raise constitutional questions regarding the scope of CWA authority (i.e., the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited). The proposed rule is grounded in defining jurisdiction over waters and wetlands based on the Commerce Clause and three major Supreme Court opinions (*Riverside Bayview*, *SWANCC*, and *Rapanos*). The proposed elimination of ecological connections as criteria to determine jurisdiction, and its replacement with the rule that requires a water to abut or to have a direct hydrological connection to a jurisdictional water, seems consistent with these opinions. As proposed, the rule can provide clarity and predictability for regulators and the regulated community by eliminating ecological connections and focusing on surface hydrological connections when determining if a water or wetland is isolated or connected to a traditional navigable waterway. The CWC supports these changes reflected in the proposed rule.

IV. Treatment of Ditches

The treatment of ditches is a significant issue for many Western water users utilizing these structures to divert and transport water supplies. The proposed rule provides that "ditches are generally not to be 'waters of the United States' unless they meet certain criteria, such as functioning as traditional navigable waters [or] if they are constructed in a tributary and satisfy the conditions of the proposed 'tributary' definition…." Under the proposal, a ditch is jurisdictional if it is used in interstate commerce (canals) or is constructed in a tributary so long as it also satisfies the conditions of the tributary definition (or constructed in an adjacent wetland and satisfies the tributary definition). In other words, for it to be jurisdictional, a ditch must provide perennial or intermittent flow in a typical year to a traditional navigable waterway.

The CWC supports the general statement in the proposed rule that ditches are generally not to be WOTUS. The proposal's treatment of ditches is, however, at times, unclear and could be read to encompass, as WOTUS, most ditches. This is contrary to the stated intent to exclude most western ditches. As noted above, the proposal defines WOTUS as including ditches that are "constructed in a

tributary." Naturally, most western ditches not only go to the stream for their points of diversion, but often (sometimes of legal necessity) return water back to a perennial or intermittent stream. Though it is indicated that ditches constructed in uplands are not to be treated as WOTUS, there is no specific guidance as to what "in" means in this context. Can a ditch's diversion structure located, of necessity, in a tributary be considered as being constructed "in a tributary"? We acknowledge the proposal states that "the mere interface between the excluded feature [the ditch] constructed wholly in upland and a jurisdictional water would not make the feature jurisdictional. For example, a ditch constructed wholly in upland that connects to a tributary would not be considered a jurisdictional ditch." While comforting, later in the proposal the Agencies "solicit comment on whether certain ditches excavated in upland but with perennial or intermittent flow" to a traditional navigable waterway or tributary "should be treated as jurisdictional …."

Agricultural and municipal ditches should not be jurisdictional. Water diversions for multiple uses should be protected, particularly in the West as non-jurisdictional. The proposed rule's lack of clarity on what ditches are jurisdictional fails to afford these protections.

The proposal further clouds the issue by implying that the existing section 404(f) ditch exemption in the CWA is an exemption from WOTUS when, in fact, it is an exemption from section 404 dredge and fill requirements applicable to a WOTUS. Application of the exemption would still leave any discharge from the ditch subject to section 402 discharge permit requirements, another point upon which the proposal seeks comment, i.e., can a ditch be both a WOTUS and a point source? If the current preamble to the proposal is memorialized, all non-jurisdictional natural features and most Western ditches, though not WOTUS, could nonetheless be treated as section 402-point sources. Such a blanket statement creates the specter of future problems associated with obtaining, and complying with, permits for such points of discharge. This raises another potential problem, as it is impractical and cost prohibitive to construct treatment facilities at the end of such ditches. Although these ditches are appropriately excluded in the proposed rule from treatment as WOTUS, it should be clarified that the determination of their status as point sources is an individual State determination.

V. End of the Significant Nexus Rule

The significant nexus test was laid out in Justice Kennedy's concurring opinion in the *Rapanos* case, the third of three major Supreme Court cases interpreting the definition of WOTUS. The significant nexus test meant that there would be federal jurisdiction over any water/wetland with a significant biological, chemical, or physical nexus to a downstream traditional navigable waterway. But the Proposed Rule does away with this test (and accompanying watershed "aggregation" concept), in part because it had to be applied by the Corps on a wholly fact-specific case-by-case basis. The new Rule eliminates case-by-case determinations and argues that Kennedy's opinion doesn't require such case-specific analysis. In effect, this narrows federal jurisdiction to the waters specifically defined in the Proposed Rule. This is a major change from the 2015 Rule, which itself expanded the scope of "significant nexus" contemplated in the 2008 *Rapanos* guidance by stating that any water, including wetlands, that either alone or in combination with other similarly situated waters in the region (i.e., the watershed), significantly affected the chemical, physical, or biological integrity of a primary water, was jurisdictional. And it added that for an effect to be significant, it had to be more than speculative or insubstantial. In CWC's view, doing away with the case specific "significant nexus" test provides more clarity and predictability.

VI. Exemption for Emergency Post-Fire Remediation Projects from 404 Permit Requirements

Wildfires are a fact of life in the West. Post fire remediation activities must be undertaken immediately in order to preclude or minimize erosion, sediment transport and deposition and protect downstream water quality. If section 404 permits are required due to the presence of WOTUS, it may be difficult or nearly impossible to timely and cost effectively undertake the activities necessary to protect municipal water supplies. Post fire remediation activities should be addressed by specifically acknowledging the need to rapidly undertake prevention and remediation activities.

VII. Categorical Exclusion for NPDES Permitted Municipal Separate Storm Sewer Systems (MS4)

All constructed municipal stormwater facilities, including green infrastructure residing within an already permitted MS4, should not be WOTUS. Jurisdictions are permitted per the CWA to discharge to WOTUS. Therefore, permitted storm-sewer infrastructure should not be jurisdictional. NPDES permittees routinely maintain and install stormwater facilities within their MS4. The definition of MS4 is found in 40 C.F.R. 122.26:

"An MS4 is a conveyance or system of conveyances that is: owned by a state, city, town, village, or other public entity that discharges to waters of the U.S., designed or used to collect or convey stormwater (e.g., storm drains, roads, pipes, ditches), not a combined sewer, and not part of a sewage treatment plant, or publicly owned treatment works (POTW)."

The regulatory definitions of "MS4" and "outfall" plainly distinguish between an MS4, which is not a WOTUS, and the water into which the MS4 discharges. An MS4 discharges "to" a WOTUS. 40 C.F.R. § 122.26(b)(8). An "outfall" exists only where an MS4 discharges "to" a WOTUS. 40 C.F.R. § 122.26(b)(9). There is no "outfall" and no discharge where one portion of an MS4 connects to another.

Applying WOTUS status to parts of the permitted MS4 would create regulatory confusion without any benefits to water quality or the NPDES programs that protect the WOTUS that the MS4 discharges to. Under the proposed rule, MS4 permittees might be required to obtain CWA Section 404 permits and Section 401 certifications for maintenance work on storm-sewer infrastructure. All constructed stormwater conveyances and facilities within the MS4 should receive a categorical exclusion.

VIII. The Proposed Rule Should be Expressly Prospective

If adopted, the proposed rule should expressly state that if an applicant for a CWA permit has previously received a jurisdictional determination, then the project is not subject to a redetermination under the new rule unless the project applicant requests a redetermination.

Based on this extensive background and our members' experiences being on-the-ground partners with the Agencies and the states in the implementation of the CWA, CWC is prepared to assist the Agencies and its state partners in implementation.

The CWC thanks you for the opportunity to provide comments.

Sincerely,

Douglas Kemper Executive Director