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**Submitted via email to:**

Donna Downing – [CWAwotus@epa.gov](mailto:CWAwotus@epa.gov)

Andrew Hanson – [Hanson.Andrew@epa.gov](mailto:Hanson.Andrew@epa.gov)

Dear Ms. Downing and Mr. Hanson:

Thank you for the opportunity to provide some initial comments on the potential approaches for defining “Waters of the U.S.” as discussed at the April 19, 2017 E.O. 13132 Federalism Consultation Meeting. We have been asked by Aurora City Council member Brad Pierce, a member of the Local Government Advisory Committee Water workgroup, to specifically provide comments on the Potential Approaches to “Relatively Permanent” Waters and Potential Approaches to Wetlands with a “Continuous Surface Connection.” Aurora has previously offered comments directly, and through various organizations in which we are active members, to the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) on a number of occasions as the Waters of the U.S. (WOTUS) rule was being developed. In particular, our comments submitted through the Western Urban Water Coalition are specific to issues of concern for western U.S. water providers, and are reflected in the comments below. The West is one of the regions that will be the most directly and significantly affected by implementation of a new rule because of its unique geology and hydrology, which includes dry arroyos, washes, ditches, isolated ponds, vernal pools, and ephemeral or intermittent water bodies. To meet water supply and wastewater treatment needs, as well as storm water control requirements, western water agencies must make substantial infrastructure investments, often requiring creative and innovative approaches. It is essential that these critical activities, including those undertaken in direct response to emergency conditions related to drought, fire, or post-fire damage, do not unnecessarily trigger a federal nexus and its concomitant lengthy and costly permitting procedures.

The West is typified by intermittent and ephemeral streams, rather than the perennial streams typical of the Eastern U.S. Ephemeral streams are defined by the Corps as having flowing water only during, and for a short duration after, precipitation events – groundwater is not a source of water for the stream. Intermittent streams flow during certain times of the year, when groundwater and precipitation combined provide water for streamflow. The contribution of flows from these streams to a traditionally navigable water (TNW) is negligible, and in many cases, nonexistent, and such streams do not provide a significant nexus to a TNW. Ephemeral and intermittent streams may not have sufficient or consistent-enough flow to connect to a TNW or physically, chemically, or biologically affect the integrity of a TNW.

### **Potential Approaches to “Relatively Permanent” Waters**

The potential approaches to include *streams with seasonal flows* or *streams with another measure of flow* will capture ephemeral and intermittent streams into the definition of “relatively permanent” waters, which we believe is inappropriate. Each of these approaches would need to define metrics and thresholds at which a stream is considered “relatively permanent,” and such metrics will vary geographically on a case-by-case basis and the definition of thresholds will be subjective.

Including perennial streams only as “relatively permanent waters” is the appropriate approach. EPA should ensure that ephemeral and intermittent streams and erosional features in the arid West, such as arroyos and dry washes, are non-jurisdictional. Ditches and canals that only carry intermittent flows of water and that are not a relocated tributary or excavated in a tributary, as well as stormwater control features that periodically flow in response to significant precipitation events, should also be exempted.

### **Potential Approaches to Wetlands with a “Continuous Surface Connection”**

The potential approach to develop metrics to identify “some degree of connectivity” should not be utilized. This will require subjectively defining thresholds for what constitutes a significant degree of connectivity, which should be avoided. While including as jurisdictional those wetlands that directly touch jurisdictional waters is appropriate, there may also be circumstances where the current practice of considering wetlands with a continuous surface connection, regardless of distance, to be jurisdictional is not appropriate. Such connections should be perennial and should not include ephemeral and intermittent connections.

Wetlands with permanent, continuously flowing, surface connections should be included. Where such connections do not exist, the wetlands should be exempted. EPA should ensure that where there are overland flows through dryland breaks to a WOTUS, this type of break renders a tributary up gradient of the dryland break to be non-jurisdictional. EPA should explicitly recognize that features where water may be present (for instance, in residual ponds resulting from placer or other mining efforts) are not jurisdictional where a continuous physical channel is absent, a bed-and-bank is not discernible, an ordinary high water mark is not observable, and/or there are no flow characteristics.

### **Other Comments**

Project proponents consider the ramifications of federal permitting as part of their project planning and alternatives evaluation and carefully weigh alternatives that do not require a federal action. Project proponents choose to avoid federal actions when they can because of the expense and time to process the reviews by multiple federal agencies triggered by a single federal nexus. The federal approval process also provides a forum for litigation and frequently undermines the predictability of the planning process. In the arid West, many project proponents steer away from alternatives that involve rivers and perennial streams and toward alternatives that involve dry ephemeral and intermittent drainages that are isolated from and/or lack a significant nexus to a TNW because such drainages have been traditionally considered non-jurisdictional and thereby avoid a federal action, particularly a Section 404 permit through the Corps. Steering projects away from rivers and perennial streams toward nonjurisdictional ephemeral and intermittent drainages results in fewer projects in jurisdictional waters and wetlands and fewer impacts on the resources and functions associated with such jurisdictional waters and wetlands. This provides incentives to project proponents to develop alternatives that avoid impacts on jurisdictional waters and wetlands that have greater potential to provide significant resources and functions (i.e., those with perennial water sources). Projects can thus be permitted much more quickly and mitigation efforts, which add significantly to the financial burdens associated with these beneficial water and wastewater initiatives, can be minimized. This will also result in lesser adverse effects on the resources associated with perennial

drainages. Limiting the approaches as recommended above will maintain the incentive for a project proponent to avoid perennial drainages and avoid adverse impacts to jurisdictional waters and wetlands. Thank you again for this opportunity to provide comments. If you have any questions, please don't hesitate to contact me by phone at (303) 739-7378 or by email at [mbrown@auroragov.org](mailto:mbrown@auroragov.org).

Sincerely,



Marshall P. Brown

cc: Brad Pierce, Aurora City Council