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Submitted via email:
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RE: Comments on Docket No. EPA-HQ-OW-2021-0328. Submitted through federalism consultation for a rulemaking that restores the WOTUS regulations in place prior to the 2015 Clean Water Rule, with updates to be consistent with relevant Supreme Court decisions.

On behalf of the board of directors and members of the National Water Resources Association (“NWRA”), thank you for the opportunity to provide comment on the Department of the Army, Corps of Engineers and the U.S. Environmental Protection Agency’s (EPA) (collectively, the Agencies) request for recommendations to restore the regulations defining of “waters of the United States” (WOTUS) as well as a rulemaking process that further refines and builds upon that regulatory definition. 86 Fed. Reg. 41911 (Aug. 4, 2021) (Proposed Guidance).

For more than 80 years, the NWRA has been a nonpartisan federation of state water resources associations, agricultural and municipal water providers, and water professionals dedicated to the promotion of the development, conservation, and beneficial use of the water resources of the United States. Our members currently provide water to more than 50 million people west of the 100th meridian. In the fulfillment of this mission, they must undertake activities, including the construction of diversion, conveyance, storage, and treatment facilities in areas that could be considered Waters of the United States.

NWRA has historically been, and will continue to be, a supporter of the goals of the Clean Water Act (CWA). NWRA members want to see an effective, predictable approach to water quality regulation that balances federal and state oversight. To that end, we believe the must recognize the role of states in water quality regulation and land and water use decision making.

In its recent public notice, EPA indicated that it is seeking information which will “inform the rulemaking process”. NWRA provides comment in the hope of assisting the agencies in developing a functional and durable rule.

I. WATER IN THE WEST

The NWRA believes the Agencies must acknowledge and incorporate the geographic and hydrological realities of the West in any proposed rule. West of the 100th meridian, where average annual precipitation is less than 20 inches a year, there are thousands of miles of arroyos, ditches, washes, dry streambeds, and ephemeral or intermittent water bodies. When water is present, it is often in response to large storm events and much of the water that enters these features is absorbed into the ground. As such, the ability to access, store, and transport water through infrastructure is critical to sustainability of western communities and farms.

Large-scale water conveyance systems sustain the West's metropolitan and agricultural areas. The Colorado-Big Thompson Project captures and delivers 200,000 acre-feet of water annually with 12 reservoirs and through 35 miles of tunnels under the Rocky Mountains and 95 miles of canals from the western slope of the Rockies to more than 600,000 acres of irrigated farmland and nearly a million people on the Front Range. The Central Arizona Project delivers Colorado River water to more than 80 percent of Arizona's population through 336 miles of aqueducts, tunnels, pipelines and pumping plants. The 242-mile Colorado River Aqueduct delivers nearly 1.2 million acre-feet of water a year from Lake Havasu on the Colorado River to Southern California.

The construction, operation and maintenance of these projects is essential to sustaining daily lives of families and farmers across the West.

The West's smaller water projects provide critical water supplies to farmers and rural communities. The Greater Wenatchee Irrigation District (GWID) delivers water to 10,000 acres in central Washington. Constructed as part of the U.S. Bureau of Reclamation's Chief Joseph Project 55 years ago, GWID's fully pressurized delivery system facilitates the production of apples, pears, and cherries on lands that receive 12 inches of rain annually. Pioneer Irrigation District, situated on the western end of Idaho's Treasure Valley, has provided water to the region for more than 100 years with storage in three reservoirs, delivery across three canals, including the 34-mile Phyllis Canal, and reuse via miles and miles of drainage ditches. Finally, the Delta Lake Irrigation District in the Rio Grande Valley of Texas delivers water to 83,000 acres of irrigated land that produces everything from cotton to sugar cane, as well as raw water to five municipalities. Running water almost all year long, the district operates more than 280 miles of lined and unlined canals, 165 miles of pipeline, and 53 relay pumps. These water providers ensure that farmers and homeowners receive the water they need to sustain their communities.

To meet water supply and wastewater treatment needs, as well as stormwater control requirements, municipal utilities and irrigation districts must make substantial infrastructure investments, often requiring creative and innovative approaches. These investments include new or expanded storage reservoirs; reuse facilities; desalinization plants; water collection, delivery, and distribution pipelines; pump-back projects; groundwater recharge facilities; and reverse osmosis water treatment plants.

The West, in addition to facing unique water supply challenges, also faces significant challenges posed by natural disasters. In the 2014 National Climate Assessment, the U.S. Global Change

Research Program stated, “Drought conditions present a huge challenge for regional management of water resources and natural hazards such as wildfire.” NWRA’s members agree that drought conditions present a huge challenge to western communities. Drought stresses finite water supplies and generates larger and more frequent wildfires that strip the landscape of vegetation. Those conditions create massive flood events that come in the days and years after a wildfire has burned. These natural disasters affect people, communities, and water providers.

Because of the West’s arid conditions, economic success is predicated upon storing and moving water. Water conveyance, treatment systems, and off stream storage in the West are manmade and should be considered as such for the purposes of CWA jurisdiction.

II. FEDERALISM

NWRA files these comments through the Federalism Consultation process and appreciates the 30-day extension to the comment period. As the Agencies develop any rule it is critical that said rule strikes the proper balance between the regulatory authority of the federal government and states. It is a policy of the NWRA that section 101(g) of the CWA should be reaffirmed as applying to all sections of the CWA and all programs thereunder, including those under sections 208, 303, 319, 401, 402, 404 and 510(2) and that the CWA not directly or indirectly create a federal water quality law or program which supersedes, abrogates, or impairs state water allocation systems or compacts and rights to water created and managed thereunder.

The CWA sets forth “the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.”

Further, in Section 101(g) of the Act, Congress articulated the cooperative federalism underlying the law, stating “[f]ederal agencies shall cooperate with [s]tate and local agencies to develop comprehensive solutions to prevent, reduce[,] and eliminate pollution in concert with programs for managing water resources.” That is the language of the law itself. And, to that end, states have both the authority and power to protect their waters.

It is critical that the federal government respect the important role of states in water management. Through the application of their respective laws and assent to interstate compacts, states govern the appropriation, distribution, control, and use of water, whether such water originates on federally-owned or -controlled lands or elsewhere. Time and again, Congress has demonstrated a “consistent thread of purposeful and continued deference to state water law.” In fact, “[w]here Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law.”

This is of particular import to the western states, whose climate and geographical features have required substantial investment, construction, and maintenance of water infrastructure, sometimes spanning hundreds of miles, to supply water to residents, businesses, and farmers alike. Governing that use and movement is state law. “In the arid Western States. . . the law has been the water above and beneath the surface of the ground belongs to the public, and the right to

the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof.”

The Clean Water Act itself declares it the policy of Congress:

That the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated[,] or otherwise impaired by [the CWA]. . . [and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State.

Agencies must ensure states’ ability to allocate waters within their jurisdiction and preserve the cooperative federalism underlying the law such that the “[f]ederal agencies shall cooperate with [s]tate and local agencies to develop comprehensive solutions to prevent, reduce[,] and eliminate pollution in concert with programs for managing water resources.”

Although Congress has placed limits upon the scope of federal jurisdiction under the Clean Water Act, there are means of protection for water bodies that lie outside those limits. It is within the prerogative of the individual states, based upon site specific conditions and objectives, to assert their authority over such identified water bodies. The reality is that some state water quality regimes are more stringent than federal requirements, exceeding the protections afforded by the Clean Water Act.

III. EXCLUSIONS -MAINTAIN EXEMPTIONS FOR DITCHES, STORMWATER, AND WATER REUSE AND RECYCLING

The Agencies should clarify in the preamble that they will continue to consider these features exempt from the definition of WOTUS while drafting new rulemakings.

The Agencies plan to revise the WOTUS definition through a two-step rulemaking process. The first rulemaking will propose a return to the pre-2015 regulatory regime, as amended to be consistent with relevant Supreme Court decisions. The second proposed rulemaking will build on that regulatory foundation. During the development of these rules, there may be ambiguity as to what constitutes a WOTUS.

NWRA requests that the Agencies expressly state in the next proposed rule preamble, that they will continue to consider stormwater control features and wastewater recycling features, along with features outlined in RGL 07-02 as excluded from the definition of WOTUS. These types of facilities have previously been excluded and we ask that they remain exempt. Additional information on each of these exemptions is below.

a. Ditches

NWRA supports: (1) defining a ditch as an artificial channel used to convey water; (2) affirming existing exemptions for the construction and maintenance of irrigation ditches, diversion structures, weirs, headgates, and other related facilities that connect irrigation ditches to jurisdictional waters and; (3) acknowledging that “ditches used to drain surface and shallow subsurface water from cropland are a quintessential example of the interconnected relationship between land and water resource management, as is managing water resources in the Western

United States, conveying irrigation water to and from fields, and managing surface water runoff from lands and roads following precipitation events – all activities that rely on ditches.”

The NWRA encourages the agencies to continue to follow the existing guidance set forth by the U.S. Army Corps of Engineers in Regulatory Guidance Letter (RGL) 07-02 as it pertains to construction and maintenance of irrigation ditches and maintenance of drainage ditches. The RGL delineates categories of upland ditches and upland swales that generally are not subject to CWA jurisdiction, such that “discharges of dredge or fill material into those defined categories of upland ditches and upland swales are not subject to either CWA permitting requirements or the subsection 404(f) exemptions.” The RGL defines an irrigation ditch as “a man-made feature and/or an upland swale” that conveys water for irrigation purposes and includes “distribution system or parts thereof, consisting of manmade channels, laterals, ditches, siphons, and/or pipes, or pump systems.”

The RGL has created a framework upon which irrigation districts have relied upon to undertake necessary repair activities. Ultimately, implementation should mean deference to local water providers undertaking an activity pursuant to the RGL. For example, in 2017, a rain on snow event resulted in damage to a ditch in the South Columbia Basin Irrigation District, located on the southern end of the Columbia Basin Project in Washington State. Pursuant to the RGL, the ditch was non jurisdictional.

The NWRA believes that the clarity of the definitions of non-jurisdictional canals and ditches set forth in the RGL is sufficient for irrigation districts to make day-to day jurisdictional determinations when making needed repairs, For water providers, time is often of the essence to making repairs. It is unreasonable to expect day-to-day determinations to be made by the U.S. Army Corps of Engineers.

We would also like to highlight that many ditches in the West are used for both irrigation and are also utilized to convey “municipal” water. Recognizing this, we believe it would be helpful to revisit, and find a basis for, the expansion of the RGL to encompass municipal ditches as well.

For example, the Gila Gravity Main Canal conveys Colorado River water from Imperial Dam to five irrigation districts. The Gila Gravity Main Canal also conveys Colorado River water to the Town of Wellton, Arizona (through Wellton-Mohawk Irrigation and Drainage District) and directly to the City of Yuma’s Aqua Viva Municipal Water Treatment Plant; it also delivers Colorado River water to the Far West Water Treatment Plant (through Yuma Mesa Irrigation and Drainage District) which serves 30,000 people in the unincorporated foothills area of Yuma County, Arizona. The same issues of maintenance and repair that arise for districts that supply and convey irrigation water, arise for districts that supply municipal water in this manner. The NWRA supports an efforts incorporate municipal ditches into the framework of the RGL.

The RGL, however, only addresses dredge and fill, not discharges subject to section 402 permitting requirements. To that end, it is the position of the NWRA that such ditches should not be considered point sources. In the West, ditches are often used to move water to fields for irrigation purposes or to municipal intakes. They commence at a ditch headgate onstream—not in an upland. In addition, those same ditches may provide return flows back to the stream after

use in accordance and under the requirements of state law.

b. Stormwater Features

Water providers, oftentimes in conjunction with MS4 permit compliance activities, construct and operate stormwater control facilities.

Exempt features should include: stormwater control features excavated or constructed for purposes of collecting, conveying, treating, infiltrating, or storing stormwater run-off in a manner consistent with state or EPA established MS4 permit requirements.

c. Water Reuse and Recycling

The NWRA also supports the exemption of wastewater recycling structures, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins. NWRA also contends that there should be an exemption for water transport, reclamation, and reuse facilities. These manmade features are not the “‘geographic features’ that are described in ordinary parlance as ‘streams [,] . . . oceans, rivers, [and] lakes’”, but rather are part and parcel of the tools of water conveyance or treatment. The NWRA believes that these facilities, which are critical to drought resiliency in the West, must be explicitly exempted from CWA jurisdiction.

Exempt features should include: water reuse and recycling structures, including recharge, conveyance, storage and treatment facilities constructed for the purpose of supporting the recycling and reuse of municipal or industrial water supplies.

IV. CLIMATE CHANGE AND DISASTER RELIEF

Disaster response requires the ability to act quickly. As cycles of catastrophic fire and flood continue to ravage the arid West, it is essential to remediate quickly, including sediment and debris detention, to protect health, infrastructure, property, and environmental values. A prolonged regulatory approval process triggered by a jurisdictional determination is not in the best interests of either involved parties or the environment.

The NWRA fully supports the exemption of stormwater runoff control facilities, which are necessary to hold back debris and sediment. The NWRA would support the exploration of: (i) an exemption for the installation and maintenance of such facilities, similar to RGL07-02, (ii) adoption of a nationwide permit for such installation and maintenance activities, or (iii) allowance of “regional” determinations of jurisdictional status for the waterbodies subject to such activities. Another approach to address this concern could be for the entire remediation area to be considered exempted waste treatment systems during remediation activities.

V. IMPLEMENTATION

The significant nexus analysis was often challenging, time consuming, and expensive to implement. Under the agency guidance developed after the U.S. Supreme Court’s decision in *Rapanos v. United States*, a significant nexus to a traditionally navigable water (TNW) for

intermittent and ephemeral drainages (not relatively permanent waters) was typically assumed, and it was the responsibility of the project proponent and applicant to provide information to rebut this assumption.

If the Agencies retain the significant nexus test as part of the “foundational rule,” we request that special consideration be given to its application in ephemeral drainages, with specific reference to those frequently found in the arid west. Areas that qualify as ephemeral drainages typically will not meet the requirements to be considered jurisdictional. As a result, it is desirable to develop efficient methods for processing applications that cover such areas. We look forward to follow-up discussions with the Agencies to discuss this issue in more detail.

VI. CONCLUSION

The NWRA is the voice of both agricultural and municipal water providers in the West. We look forward to continuing to work the Agencies as they work to develop a durable and functional rule. Thank you for the opportunity to provide these comments. If you have any questions regarding these comments, please contact NWRA Executive Vice President Ian Lyle at 202-698-0693 or ilyle@nwra.org.

Sincerely,

A handwritten signature in black ink, appearing to read 'I Lyle', is positioned above the typed name.

Ian Lyle
National Water Resources Association