WESTERN URBAN WATER COALITION
"For the Future of the West"

November 14, 2014

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Water Docket
Environmental Protection Agency, Docket Center
EPA West, Room 3334
1301 Constitution Avenue NW
Washington, DC 20460

Attention: Docket ID No. EPA-HQ-OW-2011-0880

Re: Comments on the Proposed Rule to Clarify the Definition of ''Waters of the United States'' under the Clean Water Act

Dear Docket Administrator:

This letter provides comments on behalf of the Western Urban Water Coalition (WUWC) on the proposed rule (Proposed Rule) issued by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) defining the scope of waters protected under the Clean Water Act (CWA). (See 79 Fed. Reg. 22187, April 21, 2014).

Created in June 1992 to address the West's unique water issues, WUWC consists of the largest urban water utilities in the West, serving over 35 million western water consumers in 15 metropolitan areas in five states. The membership of WUWC includes the following urban water utilities: Arizona – Central Arizona Project and City of Phoenix; California – East Bay Municipal Utility District, Eastern Municipal Water District, Los Angeles Department of Water and Power, The Metropolitan Water District of Southern California, San Diego County Water Authority, San Francisco Public Utilities Commission, and Santa Clara Valley Water District; Colorado – Aurora Water, Colorado Springs Utilities, and Denver Water; Nevada – Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority; and Washington – Seattle Public Utilities.

WUWC members have a strong interest in clean water for municipal water supplies and in the regulatory processes protecting water quality. In particular, WUWC members are concerned with the predictability and certainty of whether a water body is subject to the CWA and in reducing costs and delays in obtaining permits. The requirements for issuance of permits under sections 402 and 404 of the CWA are of great significance to WUWC members because, as

municipal water providers, WUWC members build reservoirs and other essential water supply related infrastructure, including long pipelines, as well as recharge and reuse facilities. In addition, many of our members are multi-service utilities and also provide stormwater and wastewater services to our customers. We have historically been, and will continue to be, ardent supporters of the goals of the CWA. We are the on-the-ground partners with EPA and the states in the implementation of both the CWA and the Safe Drinking Water Act (SDWA).

In difficult economic times, public monies are in short supply, yet infrastructure demands are high for a variety of reasons, including aging systems, climate variability and population growth. All levels of government, but especially regulatory agencies, must understand how their actions impact the ability of water providers to balance competing needs. It is important that the agencies consider the scope of the Proposed Rule in the context of the full panoply of environmental and water supply challenges being faced by local communities in the West. This includes those challenges associated with climate change, most notably drought, forest fires, post fire floods, and the overall health of forested watersheds.

The West is, in fact, the region which will be the 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 streams with a tenuous connection to downstream navigable waters, effluent dominated and dependent water bodies, and extensive ditch and canal systems designed to meet both agricultural and municipal needs.

For these reasons, WUWC has been very active in legislative and regulatory initiatives to define jurisdictional waters. We have appeared before congressional committees and Members of Congress, met with federal agencies, and commented on guidance documents. Within the past twelve months, we submitted comments on November 6, 2013 on the draft *Connectivity Report;* on December 31, 2013, sent a letter to heads of EPA, the Corps and the Office of Management and Budget objecting to issuance of this Proposed Rule before scientific review is completed on the *Connectivity Report*; and on November 4, 2014, wrote the heads of EPA and the Corps seeking an extension of time to comment on the Proposed Rule until after the *Connectivity Report* is finalized in light of the peer review of EPA's Scientific Advisory Board dated October 17, 2014. Based on this extensive background, WUWC is greatly concerned not only with the expansion of CWA jurisdiction in the Proposed Rule but also the agencies' own recognition of the scientific uncertainty associated with the proposal.

BACKGROUND

The CWA provides federal jurisdiction over "waters of the United States" but does not define this term. Starting in the 1970s, EPA and the Corps adopted a broad interpretation covering any water body the use, degradation or destruction of which could affect interstate commerce. In 2001, the Supreme Court reined in this expansive view, holding that "isolated" waters are not subject to CWA jurisdiction solely on the grounds that they are used by migratory birds. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001)(*SWANCC*). In 2006, the Supreme Court issued its split decision in *Rapanos v. United States*, 547 U.S. 715 (2006), which held that a stream or wetland is subject to the CWA only when there is a "significant nexus" to a navigable water.

Following the *Rapanos* decision, there has been a great deal of uncertainty regarding the scope of federal permitting authority under the CWA. Landowners, developers, public agencies, and federal regulators have all struggled to determine what constitutes a "significant nexus," especially in cases involving isolated wetlands, ephemeral streams and other small water bodies where the connection to a navigable water is far from apparent.

The Proposed Rule attempts to clarify how the agencies will identify waters protected by the CWA and implement the Supreme Court's decisions concerning the extent of waters covered by the Act. The Proposed Rule sets forth the EPA's and the Corps' understanding of existing requirements of the CWA in light of *SWANCC* and *Rapanos.* Despite the agencies' claims to the contrary, the Proposed Rule would expand federal jurisdiction beyond existing law and guidance.

GENERAL COMMENTS

1. The Proposed Rule Significantly Increases the Burden on the Regulated Community

The Proposed Rule represents a significant expansion of the historical scope of federal jurisdiction. Under the proposal, all tributary and adjacent waters would now be "jurisdictional by rule," the definition of "tributary" and the scope of what is "adjacent" would both expand, a new concept of "neighboring waters" would be incorporated, and the significant nexus test would allow for a watershed scale determination of jurisdiction. Many of the dry arroyos, washes, ditches and ephemeral or intermittent water bodies so common in the arid West would become the subject of federal oversight.

This expansion of jurisdiction will significantly increase the burden on the regulated community, especially in the western U.S., as compared to the current rules and agency guidance for identifying waters subject to CWA protection. In the arid portions of the West, numerous ephemeral and intermittent drainages and wetlands exist that under the current agency guidance have been determined to be isolated or lacking a significant nexus to traditional navigable waters and thus are not subject to jurisdiction under Section 404 and other provisions of the CWA. The Proposed Rule is a marked departure from past practice because it would make ephemeral and intermittent tributaries jurisdictional and eliminate the concept of an isolated water or wetland, a concept that has been part of the agencies' approach to determining geographic jurisdiction since the 2003 agency guidance following the *SWANCC* decision.

The importance of this change to municipal utilities lies primarily in its relationship to sections 404 and 402 of the CWA. If a water feature is determined, either per se or on a case-by-case basis, to be a "water of the U.S.", the dredge and fill permit provisions of section 404 and the point source permit provisions of section 402 are potentially triggered by a variety of municipal undertakings. Invoking these provisions can, in turn, implicate the need for a section 401 water quality certification from the state and, more importantly, may necessitate a costly and time consuming review of the local initiative under the National Environmental Policy Act. Finally, the need for the issuance of federal approvals may, in turn, also trigger consultation requirements under the federal Endangered Species Act.

To meet water supply and wastewater treatment needs, as well as stormwater control requirements, Western municipal utilities must make substantial infrastructure investments, often requiring creative and innovative approaches. These investments will 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. Many of these facilities will, of necessity, be in somewhat close proximity to the types of "waters" discussed in the current rule proposal. It is essential that these critical activities, many of which may be 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.

In addition, the Proposed Rule may result in new, indirect costs to municipal utilities through additional fees that may be assessed by state and federal agencies required to carry out the proposed revisions of the regulation. These indirect costs could include application fees, additional environmental compliance costs, wetlands mitigation and possible project redesign and relocation expenses.

2. Lack of Studies Focusing on Special Conditions in the Arid Western United States

The Proposed Rule states that it was written in reliance upon the scientific findings of the report entitled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (September 2013 External Review Draft) (Draft *Connectivity Report)*. We note that most of the studies used in the Draft *Connectivity Report* are based in the Midwest or the East Coast. There is very little discussion about the special conditions that characterize wetlands and ephemeral or intermittent streams in the arid Western United States.

On October 16, 2014, WUWC representatives met with EPA officials to discuss several of the issues of interest to WUWC regarding the Proposed Rule and the Draft *Connectivity Report*. In the meeting, EPA officials again made clear their reliance on the Draft *Connectivity Report* for the scientific information and conclusions needed to support the Proposed Rule's assumption that ephemeral and intermittent tributaries are jurisdictional by rule. This issue is very important to WUWC and on which we strongly disagree with the Proposed Rule. After much discussion with the EPA officials, WUWC agreed to provide more information as to why ephemeral and intermittent drainages in the arid West should not be considered jurisdictional by rule and how the Proposed Rule's assumption is not supported by the Draft *Connectivity Report*. WUWC has done additional work on this issue and now provides its own critique of the Proposed Rule and the Draft *Connectivity Report* in the attached comment paper prepared by ERO Resources Corporation for Perkins Coie, LLP, legal counsel to WUWC (Attachment 1). We request strong consideration of the attached study and its recommended changes for the Final Rule language that takes into account the special hydrogeological conditions that characterize the arid Western United States. In support of this Attachment, WUWC also submits a study prepared by SWCA Environmental Consultants dated November 12, 2014, critiquing the Draft *Connectivity Report* and analyzing past Corps' jurisdictional determinations in the arid West that found no significant nexus with TNWs (Attachment 2).

In the arid West, the question of jurisdiction under the CWA typically does not focus on larger, higher-order drainages. The issue of questionable jurisdiction resides with the commonly occurring smaller lower-order dry ephemeral and intermittent drainages. No specific research has been conducted in support of the Proposed Rule's assumption that ephemeral and intermittent tributaries in the arid West should be jurisdictional by rule. Only a few of the 1,016 references in the Draft *Connectivity Report* include research with any applicability to low order headwater streams in the arid West. Of these studies, none make any specific attempt to view headwaters in the context of their importance, let alone relative importance, to downstream surface waters. Information applicable to smaller lower-order dry ephemeral and intermittent drainages such as that found in Fluvial Processes in Dryland Rivers (Graff 1988) were not presented and discussed in the Draft *Connectivity Report*. The *Graff* reference, focused specifically on dryland drainages, demonstrates that the use of an ordinary high water mark (OHWM) to determine that an ephemeral or intermittent channel in the arid West is a "tributary" and therefore has a significant nexus to a TNW, is not supported by observation, studies or the literature. Inclusion of this information could have provided the basis for the Draft *Connectivity Report* to disclose the differences for such systems in the arid West. This, in turn, could have informed the Proposed Rule and led to a regional approach for addressing ephemeral and intermittent channels in the arid West. As demonstrated in the attached reports, there is no scientific information presented in the Draft *Connectivity Report* that supports treating ephemeral and intermittent channels in the arid West as jurisdictional by rule. In fact, there are references (not included in the Draft *Connectivity Report*) that demonstrate the opposite. Ephemeral and intermittent channels in the arid West are so variable that a simple relationship between a morphologic variable such as an OHWM and significant nexus to a TNW is not reliable.

3. Insufficient Time Between the Final SAB Peer Review and the Close of the Comment Period on the Proposed Rule

While notice of the Draft *Connectivity Report* was published in the Federal Register on September 13, 2013 (78 Fed. Reg. 58536), the Peer Review was issued just a few weeks ago on October 17, 2014. EPA has not yet published its Final *Connectivity Report* in light of the Peer Review. Until the public understands how EPA will incorporate the Peer Review into the Final *Connectivity Report*, and how it impacts the agency proposal, it is difficult to comment on the Proposed Rule completely and effectively.

As a member of the SAB panel reviewing the Draft *Connectivity Report* commented:

> The usual protocol in science is not to release a report before the review is complete, the purpose being to allow a frank and honest appraisal of the work before positions are 'hardened' and reputations are placed in jeopardy. The sequence employed by EPA suggests to the public that there is no critical input needed by the SAB - - just a few minor additions. If I believed this to be the case, I would be very dismayed.

Attachment to Letter to Dr. David Allen, Chair, EPA, Scientific Advisory Board from Dr. Amanda D. Rodewald, Chair, SAB Panel for Review of EPA Water Body Connectivity Report, dated September 2, 2014, at page 89.

On November 5, 2014, WUWC requested an extension of the public comment period on the Proposed Rule until at least 60 days after the issuance of the Final *Connectivity Report* in order to give stakeholders adequate time to consider and address the 58-page Peer Review *and* EPA's finalization of the *Connectivity Report* in public comments on the Proposed Rule.

Moreover, the Draft *Connectivity Report* does not necessarily correlate science with the legislative language, legislative intent, Supreme Court precedent or agency objectives under the CWA. To support the finding that all "tributaries," all "adjacent waters," and certain "other waters" have a "significant nexus" the Draft *Connectivity Report* evaluated scientific studies, many of which examined biological connections between bodies of water, or water retention, without examining impacts on the quality of navigable water.

4. Impacts on Western Water Rights

Western municipalities have acquired most, if not all, of their water portfolios under the prior appropriation system administered by their respective states. However, in order to put those waters to beneficial use, they must divert or store that water and subsequently deliver it through a complex set of collection and distribution infrastructure. Congress, through sections 101(g) and 510(2) of the CWA, has afforded an appropriate measure of deference to state water allocation decisions. Given the expansive reach of the Proposed Rule, including its determination as to what constitutes waters that are "jurisdictional by rule," infrastructure related activities of the municipal water providers could become subject to federal oversight. If the proposal had this outcome, it would effectively remove the concept of "navigable" from the Act contrary to the Supreme Court's admonition in *SWANCC* that this term must be accorded some effect. *SWANCC*, 531 U.S. at 172 ("We cannot agree that Congress' separate definitional use of the phrase 'waters of the United States' constitutes a basis for reading the term 'navigable waters' out of the statute.") Certainly in an area of traditional state primacy, such as the allocation and distribution of essential water supplies, the federal agencies should be reluctant to expand federal jurisdiction in the absence of a clear Congressional directive to do so. No such directive exists here.

5. Lack of a Proper Definition of "Significant"

The *Connectivity Report* did not expressly discuss the notion of significance, it being a legal term and not a scientific one in this context. Moreover, the definition provided in the Proposed Rule does not help as it equates "*significant*" with "*significantly affects"* the chemical, physical, or biological integrity of a jurisdictional water, never explaining what the root term "significant" means. The Proposed Rule goes on to say that "*for an effect to be significant, it must be more than speculative or insubstantial*", but it does not put forward any threshold for deciding what is *not* speculative or insubstantial. As the SAB Peer Review recommends, "EPA should recognize that there is a gradient of connectivity" in the context of how tributaries (perennial, intermittent, and ephemeral) affect downstream waters. EPA should identify how it will determine where along this gradient connectivity moves from insignificant to significant.

The definition of "significant nexus" is especially problematic when it comes to the "other waters" and the case-specific analyses needed to determine jurisdiction. The Proposed Rule would be less subject to litigation if the definition of "significant nexus" included a tangible

methodology to make the job of the Corps Districts more straightforward and transparent when it comes to deciding what is *not* speculative or insubstantial.

6. Unintended Consequences of the Proposed Rule

The "jurisdictional by rule" presumption for all tributaries will have substantial unintended consequences, particularly in the arid West. This will result in greater adverse effects on the resources associated with perennial drainages. The current regulations, policies, and practices provide incentives to project proponents to develop alternatives that avoid impacts on waters and wetlands with greater potential to provide significant resources and functions (i.e., those with perennial water sources).

In the arid West, current policy and practices steer many projects away from rivers and perennial streams toward non-jurisdictional ephemeral and intermittent drainages resulting in fewer projects in jurisdictional waters and wetlands and fewer impacts on the resources and functions associated with such jurisdictional waters and wetlands. As proposed, the rule would eliminate this incentive because all drainages that meet the definition of "tributary" would be jurisdictional by rule (including normally dry ephemeral drainages). In other words, under the proposed rule, there would no longer be an incentive for a project proponent to avoid perennial drainages because all tributaries would be jurisdictional by rule.

Before finalization of any final rule that eliminates the existing incentive to protect perennial drainages, EPA and the Corps should prepare the appropriate environmental analysis.

6. Improper Interpretation of the *Rapanos* Plurality Decision

The Proposed Rule fails to adopt a narrow interpretation of *Rapanos* as is warranted where no opinion garners a majority of the Supreme Court, see *Marks v. United States*, 430 U.S 188 (1977), and instead heads in the opposite direction, expanding the scope of federal oversight. Under *Marks*, when no opinion of the Court garners a majority, "the holding of the Court may be viewed as that position taken by those Members who *concurred in the judgments on the narrowest grounds*." 430 U.S. at 193 (emphasis added). The Proposed Rule allows the agencies to assert jurisdiction over more water bodies than are covered by the *Rapanos* plurality, more than are covered by the Kennedy concurrence in *Rapanos*, and more than are covered by the existing regulations defining waters of the United States. This can hardly be said to be a "narrow" interpretation.

7. EPA's Water Transfers Rule

The statement that "[t]he agencies propose . . . no change to the regulatory status of water transfers" appears multiple times in the Preamble. 79 Fed. Reg. at 22189; *see also id*. at 22193, 22199 and 22217. EPA's Water Transfers Rule excludes any "activity that conveys or connects *waters of the United States* without subjecting the transferred water to intervening industrial, municipal, or commercial use" from the National Pollutant Discharge Elimination System ("NPDES") created by CWA. 40 C.F.R. § 122.3(i) ("Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use . . ."). The Water Transfers Rule does not

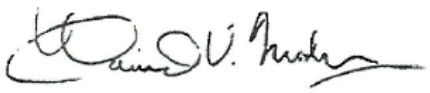
define "waters of the United States," although EPA relied on one of the definitions the agencies propose to change in the Proposed Rule. *See* 40 C.F.R § 122.2. 73 Fed. Reg. 33,697, at 33,699, note 2 (June 13, 2008). In addition to the statements in the preamble, the final rule should expressly state in regulatory text that it does not change the regulatory status of water transfers.

8. Status of Previously Issued Jurisdictional Guidance

The Proposed Rule does not indicate whether it applies to approved jurisdictional determinations under existing rules and agency guidance. The Final Rule should grandfather existing jurisdictional determinations and state that the new regulation applies only to permit applications received after the effective date of the Proposed Rule. There is a strong reliance interest in the water industry on existing determinations that should not be upset by the Final Rule.

Thank you for the opportunity to comment on the Proposed Rule. If you have any questions regarding the comments in this letter, please contact our counsel, Donald C. Baur or Paul B. Smyth of Perkins Coie, LLP at (202) 654-6200.

Sincerely,



David Modeer
Chair Western Urban Water Coalition

Attachment

cc: Perkins Coie LLP
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