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Ms. Donna Downing,
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U.S. Environmental Protection Agency
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Re: Comments on the Proposed Rule to Add Applicability Date to 2015 Clean Water Rule, Docket ID No. EPA-HQ-OW-2017-0644; FRL-9970-57-OW

Dear Ms. Downing and Ms. Jensen:

This letter provides comments on behalf of the Western Urban Water Coalition (“WUWC”) on the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency (collectively, the “Agencies”) Proposed Rule, “Definition of ‘Waters of the United States’ — Addition of an Applicability Date to 2015 Clean Water Rule,” 82 Fed. Reg. 55,542 (November 22, 2017) (“Proposed Rule”). WUWC appreciates the opportunity to comment on the Proposed Rule.

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 major metropolitan areas in the western states. The membership of WUWC includes the following urban water utilities: *Arizona* – Central Arizona Project, City of Phoenix and Salt River Project; *California* – Eastern Municipal Water District, Los Angeles Department of Water and Power, The Metropolitan Water District of Southern California, San Diego County Water Authority, City and County of San Francisco Public Utilities Commission; *Colorado* – Aurora Water, Colorado Springs Utilities, and Denver Water; *Nevada* – Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority.

BACKGROUND

The CWA provides federal jurisdiction over “waters of the United States” but does not define this term. The Agencies adopted regulations defining the term in 1977 (42 Fed. Reg. 37,122, July 19, 1977), 1986 (51 Fed. Reg. 41,206, Nov. 13, 1986, amending 33 CFR 328.3) and 1988 (53 Fed. Reg. 20,764, June 6, 1988, amending 40 CFR 232.2) (collectively the “Prior Rule”).

In the 2000s, a series of federal court cases tried to clarify the contours of federal jurisdiction. In 2001, the U.S. Supreme Court held 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 U.S. Supreme Court issued its split decision in *Rapanos v. United States*, 547 U.S. 715 (2006), in which Justice Kennedy reasoned that a stream or wetland is subject to the CWA only when there is a “significant nexus” to a navigable water. Justice Scalia, writing for the plurality, stated that CWA jurisdiction was limited to relatively permanent, standing or continuous bodies of water connected to traditional navigable waters, and wetlands with a continuous surface connection to these waterbodies.

Following the *Rapanos* decision, there was a great deal of uncertainty regarding the scope of the federal permitting authority under the CWA. In 2015, in an attempt to resolve this uncertainty, the Agencies published a new definition of “waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015) (the “2015 Rule”). Following numerous challenges, the 2015 Rule was stayed by the U.S. Court of Appeals for the Sixth Circuit on October 9, 2015. The U.S. Supreme Court is currently considering the question of whether federal district courts or the federal court of appeals has original jurisdiction to review challenges to the 2015 Rule.

In this Proposed Rule, the Agencies are adding an applicability date to the 2015 Rule of two years after the date of final action on this Proposed Rule. According to the Agencies, the addition of an applicability date will “provide continuity and certainty for regulated entities, the States and Tribes, agency staff, and the public” while the Agencies re-evaluate the definition of “waters of the United States.”

WUWC understands that the Agencies are only seeking comment on whether to add an applicability date to the 2015 Rule at this time. WUWC further understands that the Agencies will seek substantive comments on the scope of the definition of “waters of the United States” at a later date.

GENERAL COMMENTS

WUWC has historically been, and will continue to be, an ardent supporter of the goals of the CWA. 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. For these reasons, WUWC supports the Agencies’ proposal to add an applicability date to the 2015 Rule so that it will be implemented two years from the date of final action on this Proposed Rule. This will provide the regulatory community necessary certainty and eliminate the possibility of inconsistencies in the regulatory framework nationwide. Further, it will enable both the Agencies and the regulated community to commit their limited resources to engaging in the second step of the new rulemaking process—re-evaluating the scope of the definition of “waters of the United States.”

As rulemaking progresses, WUWC encourages the Agencies to take into account how their actions impact the ability of water providers to balance competing needs, especially in the West. It is important that the Agencies consider the scope of a new rule in the context of the full panoply of environmental and water supply challenges being faced by local communities in the West. This includes challenges such as 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 what constitutes a jurisdictional water under the Clean Water Act. We have appeared before congressional committees and Members of Congress, met with federal agencies and commented on guidance documents. Prior to the publication of the 2015 Clean Water Rule, WUWC provided extensive legal and technical feedback to the Agencies on both the 2015 Rule and the Connectivity Report (“Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence”).

Based on this extensive background and our members’ experiences being on-the-ground partners with EPA and the states in the implementation of the CWA, WUWC is prepared to assist the Agencies in this new rulemaking effort. Specifically, WUWC looks forward to providing guidance on how a new rule will impact water providers in the West.

Thank you for your consideration of these comments. If you have any questions, please contact our counsel Donald C. Baur and Laura Kerr of Perkins Coie, LLP at (202) 654-6200.

Sincerely,



Michael P. Carlin
Chairman

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