WUWC

WESTERN URBAN WATER COALITION

September 3, 2021

Submitted via //www.regulations.gov/
(Docket No. EPA–HQ–OW–2021–0328)

U.S. Environmental Protection Agency
Office of Water (4504–T)
1200 Pennsylvania Avenue NW
Washington, DC 20460

Department of the Army
Office of the Assistant Secretary of the Army for Civil Works
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RE: Comments on Notice and Public Announcement, "Notice of Public Meetings Regarding ''Waters of the United States''; Establishment of a Public Docket; Request for Recommendations," 86 Fed. Reg. 41911 (Aug. 4, 2021), Docket No. EPA–HQ–OW–2021–0328

The Western Urban Water Coalition (WUWC) [1] appreciates this opportunity to 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).

Introduction

WUWC was established in 1992 to address the West's unique water supply and water quality challenges that threaten the economic sustainability and growth of the western population centers. WUWC consists of the largest urban water utilities in the West, which together serve more than 40 million urban water consumers in 18 major metropolitan areas across seven states.

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[1] WUWC consists of the following members: **Arizona** (Central Arizona Project, City of Phoenix and Salt River Project); **California** (Eastern Municipal Water District, City of Los Angeles Department of Water and Power, The Metropolitan Water District of Southern California, San Diego County Water Authority, Santa Clara Valley Water District, and 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); **New Mexico** (Albuquerque Bernalillo County Water Utility Authority); **Utah** (Salt Lake City Public Utilities); and **Washington** (Seattle Public Utilities). Seattle Public Utilities is not participating in the submission of these comments on behalf of WUWC.

Some of these utilities also operate wastewater, stormwater, natural gas, and electric, including hydroelectric, facilities for their customers.

WUWC members are nonprofit public utilities dedicated to providing a reliable, high-quality urban water supply for present and future generations. As operators of urban water supply systems, WUWC members serve the health, environmental, and economic needs of their communities around the clock, every day of the year. WUWC advocates for effective and practicable approaches to the implementation of environmental protection programs in a time when water supplies are becoming increasingly scarce and the development of sustainable supplies is vital.

WUWC has historically been, and will continue to be, a 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. WUWC members are advocates for predictability and certainty in the determination of federal jurisdiction over waterbodies and the reduction of unnecessary costs and delays in the permitting process. Whether section 402 and/or section 404 of the CWA apply in a given circumstance is of great significance to WUWC members because, as municipal water providers, they build and operate 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 who also provide stormwater and wastewater services to our customers that trigger regulatory oversight. For these reasons, WUWC supports the Agencies' proposal to restore the pre-2015 regulations that define the areas qualifying as WOTUS on an interim basis. We also have recommendations on certain implementing provisions of those regulations and corresponding guidance, as well as recommendations on the second step in the Agencies' proposed process.

As rulemaking progresses, WUWC encourages the Agencies to take into account how their actions impact the ability of water providers to balance competing water supply and environmental protection needs, especially in the West. This includes challenges associated with rapid population growth, 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. By way of example, 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 the regulatory initiatives to define what constitutes a jurisdictional water under the Clean Water Act and administrative efforts to implement a WOTUS definition. 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, and here again provides, 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"). TWUWC met with EPA and other agency staff on numerous occasions over the past six years to discuss the technical aspects of a WOTUS definition as it may impact the arid west. These meetings have consistently focused on the technical implementation issues associated with any definition and have avoided the legal debate. Our previously submitted comments include the following:

- Comments on the Proposed Rule to Clarify the Definition of "Waters of the United States" under the Clean Water Act, Docket ID No. EPA-HQ-OW-2011-0880 (Comments dated November 14, 2014)

- Clarification Sought on Final Rule to Clarify the Definition of "Waters of the United States" under the Clean Water Act (Letter to EPA seeking clarification dated August 7, 2015)

- Comments on the Proposed Rule to Re-Codify the Pre-Existing Definition of Waters of the United States," Docket ID No. EPA–HQ–OW–2017–0203 (Comments dated September 27, 2017)

- Comments on the Proposed Rule to Add Applicability Date to 2015 Clean Water Rule, Docket ID No. EPA–HQ–OW–2017–0644 (Comments dated December 13, 2017)

- Comments on the Proposed Rule on the Revised Definition of "Waters of the United States," Docket ID No. EPA–HQ–OW–2018-0149 (Comments dated April 15, 2019)

Specific Comments

In its recent public notice, EPA indicated that it is seeking information which will "inform the rulemaking process" and that it is "particularly interested in getting feedback" on a list of eight identified topics. In the comments that follow, WUWC offers its thoughts and insights on many of these listed topics. It also provides comments on closely related issues that are of particular interest and concern in the arid west region of the country. As EPA has indicated, identifying successful and appropriate approaches to WOTUS regulation may need to account for regional variability.

<u>Implementation</u>. The significant nexus analysis under the pre-2015 regulatory regime was often challenging, time consuming, and expensive for project proponents, permit applicants and regulatory agencies 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.

This case-by-case decision-making complicated the jurisdictional determination process and heightened the level of uncertainty accompanying necessary project permitting activities. The situation was only exacerbated by the concurrent utilization of the "similarly situated waterbodies" concept. Decisions would need to be made regarding what waterbodies were to be included in the similarly situated analysis (geographic area), and what physical, chemical, or biological/ecological characteristics of those waterbodies would need to be examined. The entire exercise would often stray from the foundational principle of "water quality" protection underlying the CWA and venture into areas of ecological integrity more closely aligned with other environmental statutes.

If the Agencies retain the significant nexus test as part of the "foundational rule," WUWC requests that special consideration be given to its application in ephemeral drainages, with specific reference to those frequently found in the arid west. As WUWC has explained in its previous comments and hopes to address in technical meetings with the Agencies, 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.

<u>Climate Implications</u>. The arid west is becoming increasingly arid. Dry ephemeral drainages that have historically flowed infrequently in response to precipitation will, in the future, flow even less frequently, with an increasingly tenuous connection to downgradient intermittent or perennial waters. However, the features that historically formed these ephemeral drainages will persist for decades in such an arid environment even though they are unlikely to reliably indicate current conditions. Thus, care must be exercised in relying on the physical characteristics of a WOTUS as was required under the pre-2015 regulatory regime, e.g., ordinary high water mark (OHWM) and bed and banks, in determining the existence of a WOTUS in arid environments. This is particularly true when evaluating ephemeral drainages.

A simple relationship between a morphologic variable and discharge is successful only for streams with definable regular flows or some definable steady state; this is not the case for dryland streams (Graf 1988, p. 104). The OHWM for streams in regions outside of the arid west is associated with a bankfull flow typically considered to have a return interval of one to two years. In more humid regions of the country, streams will equal or exceed the mean annual flood once every 2.33 years. However, metrics like the mean annual flood and the return interval of bankfull flow have almost no practical or theoretical significance in dryland streams because of the extreme variability of flow in such streams (Graf 1988, p. 103). In arid areas, channels may not have any flow for several years. In addition, bankfull flows are difficult to determine in the field in dryland channels that are frequently incised, very broad or braided, or developed on bedrock. Bankfull flow in dry areas is not even the same within a single drainage basin. Extensive data collection demonstrates that the range of frequency of bankfull flows in dryland channels is from 1 to 32 years, a breadth too great to inspire confidence in the reliability of the measure (Graf 1988, p. 104).

WUWC desires to establish a dialogue with the agencies on this complex issue in an effort to identify a regional approach to the treatment of ephemeral streams such that appropriate water quality protections can remain in place, including for source water supplies, while avoiding jurisdictional determinations where such are neither needed nor warranted.

Recommendations

In additional to the specific comments above, WUWC appreciates this opportunity to make the following recommendations, including additional comments beyond the narrow foundational rule question.

A Proposed Approach for Addressing Ephemeral Drainages in the Arid West

Dry ephemeral drainages are common throughout the arid west. As discussed above, the use in the arid West of certain physical indicators alone, such as OHWM and bed and banks, is not always a reliable approach to jurisdictional determinations and may become even less so in the future given the forecast for increased aridity associated with climate change. For these reasons, ephemeral drainages, as that term is currently defined by the Agencies, should be given regional consideration in the arid west in the forthcoming "foundational rule." In addition to the foundational rule, we offer the following approaches that can be taken to improve the 404 process:

- If the Agencies retain the long-time use of the physical indicators of WOTUS in the revisions to the forthcoming "foundational rule," ephemeral drainages that lack consistent physical indicators of a WOTUS, e.g., OHWM and bed and banks should not be considered a WOTUS.

- Place the responsibility on the Agencies for demonstrating a significant nexus for ephemeral drainages that exhibit physical indicators of a WOTUS, e.g., OHWM and bed and banks, with the opportunity for the project proponent or applicant to provide information to demonstrate the lack of a significant nexus.

- Develop a regional general permit for commonly occurring activities with minimal adverse effects to ephemeral drainages. Exclude any compensatory mitigation requirement provided the activity provides a means for ephemeral flows to be conveyed around or through the proposed activity or project.

- Develop Agency guidance designed to distinguish between ephemeral and intermittent drainages. See Appendix A hereto.

- Continue to recognize post-*SWANCC* guidance to the effect that discontinuous physical features can sever a jurisdictional tie such that upstream channel segments are considered isolated and nonjurisdictional. See Appendix A.

The Scope of Jurisdictional Ditches

Many western municipalities and water districts utilize ditches and canals as a part of their water delivery systems. Many of these canals and ditches convey water seasonally, while others will have flows on a perennial basis. Many are lined with concrete or riprap, and vegetation along them is frequently controlled, e.g., mowed and burned. Further, these conveyances are often shared by agricultural and municipal interests, making it challenging to label them as solely for irrigation or municipal or industrial use. As such, most canals and ditches are very different from natural tributaries, and these differences should be recognized when determining jurisdiction.

In addition, western municipal water providers may cross ditches in the construction of their water collection and delivery infrastructure, triggering a potential "dredge and fill" situation if all such ditches are considered jurisdictional. Finally, some municipal entities may utilize ditches in conjunction with their stormwater collection and conveyance systems. Therefore, whether the ditches are themselves WOTUS can significantly impact municipal operations.

WUWC requests that in the forthcoming "foundational rule," the Agencies should exclude from jurisdiction ditches and canals that were constructed in uplands and not within a drainage that would qualify as a WOTUS and that are used to convey water for agricultural and municipal water supply uses. Further, simply crossing a drainage that is a WOTUS or diverting water from a WOTUS, which is done on a regular basis, would not render the ditch or canal a WOTUS provided the canal or ditch, other than the intake structure, is constructed in uplands.

Finally, though it is appropriate to exclude such ditches from treatment as WOTUS, it should also be clarified that the status of such features as point sources is an individual state determination. Any blanket statement to the effect that the ditches constitute point sources leaves the door open to unintended consequences. For example, many western municipal and irrigation ditches discharge back to a river and, in fact, may be obligated to do so as a matter of state water law. Pollutants could have been inadvertently added to the ditch water over its length or the natural water quality at the point of discharge may differ from that at the point of diversion. It would be impractical and cost prohibitive to always treat such water before discharge.

Treatment of Effluent Dependent Waterbodies

It is not uncommon in the arid west for waterbodies to be dependent upon flows originating from wastewater discharges as the basis for being considered tributary or intermittent waters and hence WOTUS. Treating an arguably "artificial" discharge dependent waterbody as a WOTUS presents certain difficulties and challenges. For example, it may create an incentive for the discharger to adopt zero discharge technology rather than face the cost of installing and operating expensive new treatment equipment. This would deprive the downstream ecosystem of needed flows. In addition, to the extent that the waterbody would be treated under state regulations as if it were "natural," it would be subject to the same suite of water quality standards and other regulatory requirements as any other waterbody despite its being a manmade and supported system.

This topic is worthy of further discussion. We recommend a middle ground approach for purposes of the foundational rule: treat these waters as a WOTUS for now, but have EPA endorse, and seek support for, state establishment of requirements, including subcategories of designated uses, site specific water quality standards, and novel approaches to anti-backsliding that recognize the unique nature of such effluent dependent systems.

Treatment of Impoundments

While there does not appear to be any reason to eliminate the treatment of impoundments of traditional navigable waters (TNWs) as a WOTUS category, there is a basis to question the waterbody's continued treatment as a WOTUS if the hydrologic connection is lost. That said, WUWC does not want to encourage the destruction of natural hydrologic systems. However, "off-channel" impoundments or reservoirs constructed in uplands, with no hydrologic connection to a TNW, i.e., where water is pumped in and out, should be considered artificial lakes and therefore excluded from federal jurisdiction.

Exclusions for Stormwater Treatment Facilities and Water Reuse Facilities

Municipalities across the country, but especially those located in the arid west where water is such a scarce and precious resource, must be able to efficiently and effectively manage this resource without facing costly and unnecessary regulatory obstacles. In this regard, WUWC certainly supports EPA's "one water" concept. WUWC has, in the past, submitted detailed comments on the need for certain WOTUS exclusions encompassing stormwater conveyance and treatment facilities and water reuse facilities. It will not repeat all of those here. However, in an effort to start the dialogue, we note the following:

- Stormwater structures are currently excluded only if "constructed in uplands." Many stormwater control facilities, including post-fire remediation structures are, of necessity, constructed in low lying drainage areas. Thought should be given to: (1) a determination that such areas are considered to be nonjurisdictional ephemeral features; or (2) making a finding of inclusion or exclusion based upon the "function" of the feature; or (3) explicitly excluding all MS4 permitted stormwater control facilities.

- Many western entities rely upon recycling and reuse facilities, e.g., collection and settling ponds, recharge ponds, etc., that are a part of their water conveyance and treatment processes. However, these are currently not clearly excluded from treatment as WOTUS. We recommend an exclusion covering such reuse facilities, similar to the exclusion covering wastewater treatment facilities.

Based on this extensive background, and our members' experience being on-the-ground partners with EPA, the Corps and the states in the implementation of the CWA, WUWC is prepared to assist the Agencies in this regulatory process, most specifically on how any new definition of WOTUS will impact water providers in the West.

Thank you for the opportunity to provide these comments. If you have any questions regarding these comments, please contact me at 702-258-7166 or greg.walch@lvvwd.com, or the WUWC national counsel, Don Baur at 202-654-6234 or dbaur@perkinscoie.com.

Very truly yours,

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Appendix A

Distinguishing Between Intermittent and Ephemeral Drainages

WUWC believes that any forthcoming WOTUS Rule will need to clearly provide criteria and guidance to determine whether a feature is an intermittent or an ephemeral drainage. There are numerous intermittent and ephemeral drainages in the Western U.S., and it is critical that there be guidance that will facilitate readily distinguishing between the two. Criteria and guidance will be needed to avoid requiring lengthy and expensive studies to determine if a drainage is intermittent or ephemeral. In the arid Western U.S., the need for straight-forward guidance is particularly important given the large number of intermittent and ephemeral drainages and the lack of recorded historical flow data for these drainages.

An "intermittent stream" is currently defined as having flowing water during certain times of the year when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. An "ephemeral drainage" is currently defined as an having flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow

WUWC is concerned that distinguishing between intermittent and ephemeral drainages could become a time consuming and expensive endeavor. Options for identifying whether groundwater is providing a source of water to the tributary may require the installation of monitoring wells or staff gauges to identify the presence of the water table and/or to estimate the base flow using a hydrograph. Even identifying the appropriate depth of installation for a monitoring well can be challenging, especially in the case of intermittent streams that have seasonally fluctuating water tables.

WUWC requests that the Agencies develop straight forward regional guidance for readily distinguishing between intermittent and ephemeral drainages. In the arid portions of the Western U.S., distinguishing between intermittent and ephemeral drainages can be relatively straight forward. Drainages that lack perennial flow and support vegetation typically associated with seasonally shallow ground water levels, e.g., cottonwoods, willows, salt cedar, and other phreatophytes would typically meet the proposed rule's definition of an intermittent drainage. The vegetation serves as an indicator that can be readily identified and documented as evidence of seasonally shallow ground water levels. Conversely, drainages that lack vegetation typically associated with seasonally shallow ground water levels (i.e., xerophytes) would be considered ephemeral drainages. These drainages are commonly observed throughout the West and typically have the same upland vegetation in the surrounding area bordering the drainage because the hydrology necessary to support vegetation different than the surrounding dry uplands is absent. The relationship between vegetation and groundwater and the use of phreatophytes as indicators of groundwater has been documented in the arid West for many years (Meinzer 1927).

Additionally, WUWC requests that the guidance require a minimum time in which there is continuous flow in an intermittent drainage in a typical year. A minimum length of time for continuous flow is reasonable because the test for jurisdiction is that flows from the intermittent drainage contribute flow to a TNW. The minimum length of time for continuous surface flow from the *Rapanos* Guidance, e.g., typically three months, could be used. WUWC also requests clarifications in the rule and implementing guidance that the mere presence of elevated ground water levels in a drainage, e.g., scattered seasonal seeps or pools, does not equate to continuous flow contributing to a downgradient TNW and would not render the drainage intermittent. The elevated ground water levels need to be expressed to the degree that they result in continuous flow during certain times of a typical year. Requiring a minimum time in which there is continuous flow in an intermittent drainage in a typical year could also further assist in the differentiation of intermittent and ephemeral drainages. In most areas of the western U.S., three months of continuous flow from groundwater intercepting the surface of a drainage provides enough hydrological support to develop vegetation communities along the drainage that are different than the surrounding uplands and could be used to distinguish the drainage as intermittent as opposed to ephemeral. Finally, one could include in a revised rule or guidance, if deemed necessary and appropriate, some discretionary language allowing a determination of "intermittent" without the three month minimum if there is credible evidence of annual observed flow in a minimum amount that reaches a TNW.

Discontinuous Physical Features Can Sever the Jurisdictional Tie

Many ephemeral and intermittent drainages in the arid Western U.S. have a discontinuous bed and banks and/or OHWMs (discontinuous features). These discontinuous features are the result of infrequent flow events and are an indicator that such drainages may not have sufficient or consistent flow to connect to a WOTUS or physically, chemically, or biologically affect the integrity of a WOTUS. The Corps recognizes this common situation in Section III.B of the Approved JD Form that states: "[W]here there is a break in the OHWM that is unrelated to the waterbody's flow regime" i.e., the Corps considers how flow regime relates to jurisdictional features in determining isolation. In many situations under current guidance and policy, the discontinuous nature of these features is substantial enough to "isolate" and render the drainages nonjurisdictional above these substantial breaks in jurisdictional features. The Corps currently considers isolation when determining the jurisdictional status of "other waters," including ephemeral and intermittent drainages. The process and information considered when determining isolation was informed by the *SWANCC* opinion. The determination of isolated waters can significantly affect the jurisdictional status of ephemeral and intermittent drainages in the arid Western United States.

WUWC requests that in any revisions to the forthcoming "foundational rule" the Agencies recognize guidance from the *SWANCC* opinion and preserve the current ability to determine that a water or wetland is nonjurisdictional because it is isolated. As discussed below, determinations of nonjurisdiction for ephemeral and intermittent drainages based on isolation have occurred in practice in the arid Western U.S. These nonjurisdictional determinations include:

- Ephemeral and intermittent drainages with substantial breaks in jurisdictional features where the break in jurisdictional features makes it unlikely that flows reach a TNW.
- Ephemeral and intermittent drainages with no breaks in jurisdictional features that contain no surface flow during most years due to dry conditions and/or human surface and shallow ground water diversions that reduce streamflow to zero.
- Erosional gullies that do not have jurisdictional features except where they transport irrigation runoff.
- Ephemeral and intermittent drainages where the channel ends in a fan or sheet flows over the landscape and makes it unlikely that surface flows reach a TNW.

- Ephemeral and intermittent drainages where the channel loses definition due to agricultural or other activities that make it unlikely that surface flows reach a TNW.
- Ephemeral and intermittent drainages where the channel loses surface or subsurface flow that make it unlikely that surface flows reach a TNW.
- Ephemeral and intermittent drainages where the channel ends in a closed basin and it is unlikely that flows reach a TNW.

Under the *SWANCC* and *Rapanos* guidance, the channel above these breaks in jurisdiction has been traditionally considered isolated and/or lack a significant nexus to a WOTUS, even if portions of the channel above the breaks in jurisdiction had a bed and banks or an OHWM. These situations occur with enough frequency in the arid Western U.S. that elimination of the criteria for isolation associated with breaks in jurisdiction or making ephemeral and intermittent drainages jurisdictional by rule would substantially and negatively affect the construction and operation of necessary municipal facilities.