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STATE OF NEVADA
Department of Conservation and Natural Resources

November 14, 2014

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Jo Ellen Darcy
Assistant Secretary of the Army (Civil Works)
U.S. Army Corps of Engineers
108 Army Pentagon
Washington, DC 20310-0108

Dear Administrator McCarthy and Assistant Secretary Darcy:

Re: Definition of "Waters of the United States" Under the Clean Water Act Proposed Rule: Docket ID No. EPA-HQ-OW-2011-0880

The State of Nevada (State) appreciates the opportunity to provide the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) with comments on the proposed national rulemaking Definition of "Waters of the United States" Under the Clean Water Act (79 Fed. Reg. 22188, April 21, 2014) (Proposed Rule). We write to express our comments on the Proposed Rule, our concerns regarding its potential impacts on our citizens, businesses and water quality protection programs, and to provide suggested revisions for consideration by EPA and the Corps.

The State has carefully followed the progress of the Proposed Rule and has participated in many presentations and discussions with EPA, both individually and as a member of organizations including the Environmental Council of States and the Association of Clean Water Administrators. While we appreciate the efforts made by EPA to explain the Proposed Rule and its ramifications, we retain a number of fundamental concerns and take this opportunity to present them formally. Although the Proposed Rule was presented by EPA as an attempt to add clarity, if passed in its present form it would result in inappropriate expansion of jurisdiction in

direct contradiction to Supreme Court determinations, in particular *Rapanos v. United States*, 547 U.S. 715 (2006) (Rapanos).

I. Participation by the Corps

We are concerned about the lack of participation by the Corps, a critical partner in Clean Water Act implementation. Because the Corps makes the jurisdictional determinations under section 404, we believe it is crucial for the Corps to be involved in any discussions of the proposed rule so that they can hear our concerns, we can hear how they propose to implement the rule, and we can work together to improve the process.

II. Lack of Consultation with States

States are the primary protectors of water quality, either through state law or through federal delegation, and the Proposed Rule should give as much weight and deference as possible to state needs, priorities and concerns. States should have been consulted early on during development of the Proposed Rule to provide input on how it would impact their current activities under the various CWA programs, and how the extent of jurisdiction may change dependent on their current authority under state laws and regulations. Meaningful dialogue with states would have helped create a more workable and effective rule. Instead, EPA has attempted to collaborate with the states and other affected parties after the fact to address issues and concerns with an already released Proposed Rule. Without further evaluation and substantive revision, the Proposed Rule would unnecessarily burden development projects, intrude into water appropriation decisions made under State water law, and adversely affect State water quality protection programs.

According to EPA, one of the reasons for the Proposed Rule was that many states are unable to protect waters not under CWA jurisdiction. EPA based this conclusion on a faulty study published by the Environmental Law Institute, which surveyed legal constraints on state regulatory programs. However, many of the "constraints" listed in the report are merely administrative procedural conditions that do not actually prevent state protection of waters. EPA's reliance on this study to demonstrate need for the proposed rule is defective and they should work more closely with states to determine more accurately where the needs truly lie.

Nevada has very strong laws and regulations to preserve and protect Waters of the State, which are defined as all waters situated wholly or partly within or bordering upon this State, including but not limited to all streams, lakes, ponds, impounding reservoirs, marshes, water courses, waterways, wells, springs, irrigation systems and drainage systems and all bodies or accumulations of water, surface and underground, natural and artificial. The State has authority to protect all waters whether or not they are subject to CWA jurisdiction, and has carried out this authority effectively and efficiently for decades.

Any proposed revision to the CWA should serve to support and assist states in their implementation of water protection programs, both state and federal. In its current form, the Proposed Rule does not meet this test.

III. The Connectivity Report

EPA has stated that new waters are not added to CWA jurisdiction by the Proposed Rule. Although new categories of waters are not added by the Proposed Rule, the definitions result in dramatic increases in scope for already included types. Where previously many questionable waters were evaluated for jurisdiction on a case-by case basis, the Proposed Rule increases the inclusion of many waters on an automatic, per se basis.

EPA's proposed treatment of tributaries is a prime example. In Rapanos, the court determined that a key factor in whether or not a tributary stream was declared jurisdictional should be whether the stream has a significant connection (or "nexus") with a clearly jurisdictional waterway. While this is a sensible concept, it is complicated by lack of agreement on what is "significant."

In an attempt to resolve this situation, the Proposed Rule was accompanied by a connectivity report: a compilation of scientific studies which purported to show that all waters are connected physically, chemically or biologically, no matter how speculative or insubstantial the connection might be. EPA used the report to conclude that all water are connected, so every tributary has a significant connection and is therefore jurisdictional, regardless of size or frequency of flow.

Such a conclusion directly contradicts the Supreme Court's determinations and represents an inappropriate and unreasonable expansion of federal regulation to include insignificant streams and even dry channels which may not see water for years at a time. This overly simplistic position is unacceptable and illogical: insignificant streams cannot have significant impacts.

Additional concerns exist regarding wetlands, ditches or tributaries "adjacent" to jurisdictional waters or even within a flood plain. The Proposed Rule contains many examples of water features pulled into jurisdiction despite a lack of obvious connection. Sweeping jurisdiction of large features such as flood plains and wetlands provides unwarranted authority over extensive tracts of waters and lands that were not previously regulated under the CWA.

The principal question in the rulemaking is not one of science, but of legal authority. The connectivity report should not be used to support a rule that is unlimited in scope.

IV. Jurisdictional Determination

Disagreement about CWA jurisdiction has been ongoing since the inception of the Act. Over the years EPA guidance, policy and court cases expanded the scope of CWA coverage. It took multiple actions by the Supreme Court to reign in CWA jurisdiction to be more consistent with

original intent. It is apparent that the Proposed Rule attempts to undo those constraints and once again continue the expansion of jurisdiction.

The original intent of the Clean Water Act was to protect interstate commerce though federal regulation of navigable waters. We appreciate that EPA is attempting to add clarity. While the sweeping inclusion of all waters does reduce uncertainty, the CWA was not intended to federalize all state waters. The redefinition of Waters of the United States in the Proposed Rule expands jurisdiction over sweeping areas of water and land that have no clear link to interstate commerce or navigation, including flood plains, wetlands, intermittent streams, and even ephemeral channels which are dry except during infrequent storm events.

The categorical definitions presented in the Proposed Rule are problematic because they do not capture the intent of the CWA. Application of the proposed definitions under varied environmental conditions leads to inappropriate results, such as the inclusion of marginal waters or dry channels which obviously have no significant connection to jurisdictional waters.

The complexity involved in hydrologic definitions is highlighted by a recent attempt by the Corps to explain how to identify the location of an Ordinary High Water Mark (Occurrence and Distribution of Ordinary High Water Mark (OHWM) Indicators in Non-Perennial Streams in the Western Mountains, Valleys and Coast Region of the United States, August 2014). The document is 26 pages long and only applies to discrete portions scattered throughout the West, none however within the boundaries of Nevada. It demonstrates the complex dependence of a simple definition upon specific environmental conditions, which vary greatly from region to region. This can result in one definition having a number of interpretations even within a single state, which is confusing and counterproductive.

To classify tributaries and other waters as jurisdictional on a per se basis, we suggest that EPA consider a different approach. Instead of trying to determine jurisdiction using categorical definitions of waters, EPA should utilize a more functional methodology.

The core waters, major interstate waterways, are easily determined and accepted as jurisdictional. Other waters considered per se jurisdictional should have a continuous surface connection to a core water, with perennial flow or at least consistent seasonal flow. The Corps has interpreted consistent seasonal flow as flowing at least three months each year. *Deerfield Plantation Phase II-B Property Owners Ass'n, Inc.v. U.S. Army Corps of Engineers*, 501 Fed. Appx. 268, 271 n.1 (4th Cir. 2012). This functional definition would ensure that only waters with significant impacts on core waters would be per se jurisdictional. Other waters could be evaluated on a case-by-case basis.

Waters that are not per se jurisdictional should have a rebuttable presumption that they are non-jurisdictional until proven otherwise. The burden should be on EPA and the Corps to determine jurisdiction in a timely manner after requests for jurisdictional determinations are made, and the agencies should work with states to develop appropriate time frames.

Another current source of confusion is that jurisdictional determinations made by the Corps under section 404 include a disclaimer that the decision applies only to section 404, and not to the many other sections of the CWA. To provide certainty and clarity, waters should either be jurisdictional or not. EPA and the Corps should unify the process so there are no incomplete or conflicting determinations.

A very beneficial tool to add clarity would be a map of Waters of the United States in each state. This would go a long ways toward reducing uncertainty, which is a common goal of all parties, and would ease resistance against the Proposed Rule.

It would improve cooperation and acceptability if states were provided a role in the process as well. State regulators maintain a critical balance between broad federal requirements and specific regional conditions. Without some flexibility in the CWA, one-size-fits-all national requirements can complicate existing regulatory programs by not accounting for local climatic, hydrologic and legal factors. Unnecessary federal jurisdiction brings a host of problems for farmers, land developers and homeowners, since CWA permitting is time consuming, very expensive and legally complicated. Input from states during the jurisdictional determination process would provide valuable information and help avoid misinterpretations, delays and unintended consequences.

V. Categorical Exclusions

We appreciate EPA's attempt to clarify the categorical exclusion of certain types of waters. Of fundamental importance are exclusions for ground water and exemptions for agricultural activities.

The CWA was not intended to be applied to the management of ground water. While we applaud the Proposed Rule's exclusion of ground water, the issue becomes blurred when shallow subsurface hydrologic connections are used to establish jurisdiction between surface waters. This opens the door to interpretation and argument for extension of CWA jurisdiction to groundwater resources.
Ground water should not be part of the CWA, and EPA should follow a more legally defensible path as described in the last section, where a clear surface connection is required rather than a link through ground water.

The State agrees with Western States Water Council (WSWC) that the groundwater exclusion in paragraph (t)(5)(vi) of the Proposed Rule should be amended to state as follows:

"Groundwater, including *but not limited to* groundwater drained through subsurface drainage systems *and shallow subsurface hydrologic connections used to establish jurisdiction between surface waters under this section*" (changes in italics).

The State also agrees with WSWC on agricultural exemptions. While we appreciate the intent of the Interpretive Rule to clarify exemptions, it resulted in confusion and uncertainty about the

scope and applicability of the CWA's agricultural exemptions and their interactions with state water quality programs. Therefore the Proposed Rule should include language stating that:

"Nothing in this section shall be interpreted to limit or otherwise conflict with the exemptions set forth in 33 U.S.C. 1344(f) and in 33 C.F.R. 323.4 and 40 C.F.R. 232.3."

A particular area of confusion is the treatment of ditches. As an example, the Executive Summary of the Proposed Rule states: "Those waters and features that would not be "waters of the United States" are:...Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow." However, section F.2. of the preamble says: "Non-jurisdictional geographic features (e.g. non-wetland swales, ephemeral upland ditches) may still serve as a confined surface hydrologic connection between an adjacent wetland or water and a traditional navigable water, interstate water or territorial sea…In addition, these geographic features may function as "point sources," such that discharges of pollutants to waters through these features could be subject to other CWA authorities (e.g. CWA section 402 and its implementing regulations)." Such conflicting language erodes confidence in EPA's stated exemptions and should be corrected.

VI. Conclusion

Although EPA has, since issuing the Proposed Rule, participated in numerous meetings, webinars and conference calls to try to clarify what the rule actually means and what its impacts might be, the sheer magnitude of effort needed to explain the Proposed Rule is a clear indication that the stated goal of providing clarity has not been achieved. The complexity of issues and potential consequences require much more review and assessment. While we appreciate EPA's efforts and their willingness to listen to input from many parties, discussions to date have not been sufficient to address a rule of this magnitude and significance, particularly without the participation of the Corps.

Considering the significant adverse impacts, legal concerns, lack of clarity and lack of need, the Proposed Rule should not move forward as it stands. Ideally, the State recommends that the Proposed Rule be withdrawn to allow EPA and the Corps to work more closely with states and affected parties to develop a more cooperative and reasonable path forward, consistent with case law and respectful of states' responsibilities and needs to improve the clarity and effectiveness of the Clean Water Act.

In addition, we believe that the following recommendations (as discussed in more detail above) should be incorporated into any future rulemaking, and that doing so would help to provide the clarity EPA, the States and the Stakeholders desire, while ensuring the rule is consistent with current case law:

1. Only tributaries that have a continuous surface connection to core waters and demonstrate perennial or consistent seasonal flow should be considered per se jurisdictional.

2. There should be a rebuttable presumption that all other waters are non-jurisdictional until determined otherwise.

3. Jurisdictional determinations should be completed in a timely manner in accordance with time frames developed with states.

4. EPA and the Corps should unify the jurisdictional determination process to prevent incomplete or conflicting determinations.

5. States should have a meaningful role in the jurisdictional determination process.

6. Specific language should be added to the rule to preserve existing agricultural exemptions.

7. Specific language should be added to the rule to ensure that ground water, including shallow subsurface flow, is clearly exempted from CWA jurisdiction.

8. The treatment of ditches should be clarified to remove contradictions.

We appreciate this opportunity to comment and look forward to working with EPA and the Corps in the future.

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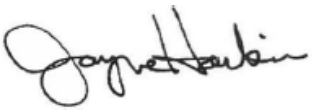
By: 

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cc: Colleen Cripps, Ph.D., Administrator, DCNR/Division of Environmental Protection