NEVADA DIVISION OF
ENVIRONMENTAL
PROTECTION

STATE OF NEVADA
Department of Conservation & Natural Resources
Steve Sisolak, *Governor*
Bradley Crowell, *Director*
Greg Lovato, *Administrator*

October 4, 2021

Mr. Michael Regan, Administrator
Environmental Protection Agency
Washington, DC

Mr. Jaime A. Pinkham
Acting Assistant Secretary of the Army (Civil Works)
Washington, DC

Ms. Radhika Fox
Assistant Administrator, Office of Water
Environmental Protection Agency
Washington, DC 20460

Provided to Docket via email:
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Re: EO 13132 Federalism Consultation on Revising the Definition of "Waters of the United States" and EPA Docket #EPA-HQ-OW-2021-0328 and US ACOE Docket #COE-2021-0001-0012

Dear Administrator Regan, Assistant Administrator Fox, and Acting Assistant Secretary Pinkham:

The Nevada Division of Environmental Protection (NDEP) offers the following comments in response to the agencies' federalism consultation initiated for forthcoming rulemaking(s) on the definition of Waters of the United States (WOTUS) as contained in the Clean Water Act (CWA). Nevada has regularly engaged with the agencies as a co-regulator in rulemakings and other activities related to redefining WOTUS for years. Many of our comments from prior rulemaking activities still apply today as the agencies embark on the effort once again. The federal agencies have requested input on various comparisons among the pre-2015 regulation, the 2015 Clean Water Rule and the Navigable Waters Protection Rule (NWPR). Comments herein do not include implementation comparisons related to the 2015 Clean Water Rule due to the stay of that rule in Nevada.

Overall, NDEP would like to convey that for Nevada, the changes resulting from the 2020 NWPR, as compared to the pre-2015 regulation, did not result in any significant loss of protection for Nevada's waters. This is largely due to Nevada's comprehensive definition of Waters of the State.[i] General concerns regarding passage of the NWPR, indicating loss of protection for 85% of Nevada waters, were simply not supportable. As the federal agencies embark on yet another rewrite, Nevada will continue to protect the quality of our water resources using state permitting authority where federal authority may fall away. In actuality, less than a dozen of Nevada's 90 CWA Section 402 permits had the potential to transition to state permits, but the NWPR has not been in place long enough for some of these determinations to have come about.

NWPR Implementation Challenges

There have been implementation challenges due in part to the fact that necessary tools for successful implementation were not available upon promulgation of the NWPR. Likewise, tools that came into use in the past 15 months have not had time to be utilized thoroughly enough to know how well the NWPR would perform. A challenge to implementation of the NWPR in a timely way included the tools for determining flow regime under the "typical year" assessment process. Use of a "typical year" flow regime has its merits when evaluating a waterbody and warrants careful consideration for continued inclusion in a WOTUS re-write. In the interim, use of the tools that have become available should not be put on hold; continued use will build staff capacity and can contribute to effective mapping of waters with varying seasonal status as either intermittent or ephemeral.

The primary implementation challenge for Nevada was related to CWA Section 404 projects wherein the jurisdictional status was in question due to loss of political boundaries (i.e. State lines) as a defining factor to be a WOTUS. In cases where the Nevada state line was the only prior defining factor, the US Army Corps of Engineers (ACOE) would neither "disclaim jurisdiction" nor provide an assessment for project proponents absent a formal jurisdictional determination request or a 404-program permit application. Project proponents were in desperate need of guidance from a "reasonable person's" initial assessment of jurisdiction to know what permits to apply for. Absence of such input to potential permittees caused frustration and time-consuming round-robin communications among state, federal and private entities in attempts to provide a path forward. Several permittees received unofficial input from the ACOE indicating that it is better to simply get a 404 permit in case it is determined later on that the segment is jurisdictional and subjects the project to enforcement. This is inefficient governance for all parties involved.

Going into the NWPR, Nevada commented that there was little historic record regarding what is a Traditionally Navigable Water (TNW). The Walker River, including it's forks, is a major river system that begins in California and ends in a terminal lake in Nevada that was previously a WOTUS due to the presence of the state line. The US ACOE has not "disclaimed jurisdiction" for the Walker River system, so its status remains unclear. During the past 15 months since the NWPR became effective, the US ACOE pursued and obtained a Rivers and Harbors Act Section 10 designation for the Carson River system which does provide some permanence for that waterbody as a WOTUS during future rulemaking.

Regardless of the definition, it is imperative that a national mapping system be established to support knowledge of current status and potential change in the jurisdictional status of waterbodies. Such a mapping system is key to productive discussion about any proposed definition of WOTUS. In the process of re-writing the definition of WOTUS, NDEP would seek to have the federal agencies ensure that all the needed tools for successful implementation are in place prior to finalization.

Nevada's 2019 Comments Retain Relevance

The State of Nevada's April 15, 2019 comment letter on US EPA's Proposed Revised Definition of "Waters of the United States" for Docket #EPA-HQ-OW-2018-0149 (finalized as the NWPR), was

co-signed by the Nevada Department of Conservation and Natural Resources (NDCNR), the Nevada Department of Agriculture (NDA) and the Nevada Department of Transportation (NDOT) and is attached. The NWPR provided needed clarity on many aspects of a WOTUS definition. Given that the federal agencies are starting over, it is prudent to bring Nevada's prior comments back to the forefront of the discussion for agency consideration moving forward in 2021 and beyond. Additional points relevant to current rulemaking activity are found in the attachment and NDEP requests the April 15, 2019 letter be reviewed in full, together with this correspondence, during consideration of comments.

Nevada Key Comments – April 15, 2019 re. Definition of WOTUS and their continued relevance:

- The NWPR groundwater exclusion is a critical issue for the State of Nevada, and we seek to have it continued in future definition development. NDEP continues to request additional clarification for the exclusion by adding the language, "*including diffuse or shallow subsurface flow*."

- Establishment of state lines as a factor in WOTUS determination should be revisited. If not in all cases, at least where "*CWA Section 303(d) impaired waters cross interstate boundaries. Surface water bodies in the arid west that cross interstate boundaries may not [be TNWs] and a co-regulator role for the USEPA in assuring restoration of those waters is warranted."*

- Additional exclusions in the NWPR are also important to Nevada and NDEP will continue to support exclusions for ephemeral features and diffuse stormwater runoff, artificial lakes and ponds constructed in uplands, water filled depressions crated in uplands incidental to mining or construction activity and fill, sand and gravel pits, wastewater recycling structures constructed in uplands, and waste treatment systems.

- NDEP supports exclusions for ditches to be explicit in applying the exclusion to agricultural features.

- For prior converted cropland, the period of non-use, "*should either be extended or tolled for periods of non-use resulting from water right curtailment or inability to call for water right diversion. The extended timeframe should endure the duration of time the agricultural producer is denied water.*"

  NDEP attempted to acquire a list of prior converted cropland areas without success, having been told that the information is protected. Likewise, implementation of this aspect of the NWPR has not been tested.

- NDEP requests the agencies enhance the co-regulator partnership with states and tribes regarding the Jurisdictional Determination (JD) process. Specifically: (1) The US ACOE should actively solicit state involvement and provide the state a meaningful role when

making JDs; (2) JDs made by one agency (i.e. the US ACOE) should apply to other applications of the CWA (i.e. Section 402); and (3) Case-by-case JDs should remain in place for longer than 5 years, or alternatively, remain in place until disproven and removed. The third suggestion will improve efficiency in maintaining an understanding of jurisdictional waters over time and will work hand in hand with needed improvements in mapping the nation's waters.

US EPA's January 14, 2021 "Maui Guidance"

NDEP appreciated the production of US EPA's January 14, 2021 Guidance Memorandum pertaining to the *County of Maui v. Hawaii Wildlife Fund* Supreme Court decision. This guidance provided some clarity in understanding how that decision would be viewed by the US EPA during decision-making processes in the CWA 402 permitting program. NDEP found inclusion of the "8th element" to be a helpful discussion on how the design of the permitted facility and discharge scenario can affect permitting decisions. Because guidance is not enforceable by nature, NDEP is disappointed that the guidance was rescinded in September 2021 as it provided a good tool for site-specific discussions with US EPA regional program staff; therefore, we support pulling the content of the guidance into the WOTUS definition rulemaking discussion process moving forward. This discussion is directly related to issues identified herein with respect to state jurisdiction over groundwater.

Nevada's 2014 Comments Retain Relevance

Given that the definition will revert to the "pre-2015" rule and will begin again from there with new rulemaking, Nevada's comments are attached from November 14, 2014 which were signed by NDCNR, NDA, and the Colorado River Commission of Nevada. Nevada's 2014 comments were prepared in response to the proposed rule at that time (Docket #EPA-HQ-OW-2011-0880), but several key points are worth noting for agency consideration moving forward in 2021 and beyond. Additional points relevant to current rulemaking activity are highlighted in the attachment and NDEP requests the attachment be reviewed together with this correspondence during consideration of comments.

Nevada Key Comments - November 14, 2014 re. Proposed Definition of WOTUS and their continued relevance:

- Nevada's statutory definition of "Waters of the State" has been in place since 1973 and is broad. *"The State has authority to protect all waters whether or not they are subject to Clean Water Act (CWA) jurisdiction, and has carried out this authority effectively and efficiently for decades."*

- *"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 determination, in particular Rapanos v. United States, 547 U.S. 715 (2006) (Rapanos)."* The 2015 Clean Water Rule did, in fact, result in Nevada

joining the North Dakota case, effectively staying its implementation in our State. NDEP would seek to have EPA and the ACOE revisit the details of the North Dakota case as needed to prevent revisiting history. The 2020 Navigable Waters Protection Rule (NWPR) improved the situation, particularly with respect to the exclusion of groundwater. Nevada would seek any new WOTUS definition to ensure the groundwater exclusion carries forward, at a minimum.

- *"States are the primary protectors of water quality, either through state law or through federal delegation, and the [WOTUS definition] should give as much weight and deference as possible to state needs, priorities and concerns."*

  In 2014, there was clear lack of participation by the Army Corps of Engineers (ACOE) in the US Environmental Protection Agency (US EPA) rulemaking, as well as a lack of engagement by the federal agencies with the states prior to proposing the rule. Nevada is pleased that this situation has improved dramatically and NDEP remains committed to engaging with the federal co-regulators moving forward, both through direct State input and through our various professional associations (ECOS, WSWC, ACWA, ASWM)[ii].

- NDEP cautions against revisiting use of the "the connectivity report". In *Rapanos*, the court determined that a key factor in jurisdictional determinations should be whether there is a significant nexus with a clearly jurisdictional waterway. The 2014 WOTUS proposal *"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 waters 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 determination 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. 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."*

  Nevada applauded the clear exclusion of groundwater from federal jurisdiction in the NWPR and appreciated efforts to exclude ephemeral waterbodies, such as dry washes and other waterbodies unique to the desert southwest. In future rulemaking, the exclusion of groundwater is of paramount importance and work to define and likewise exclude ephemeral waterbodies, floodplains and certain ditches should continue (see also discussion below regarding the need for a regionally-based rule).

- The November 14, 2014 letter discusses, on page 4 of 7 in the 4th and 5th paragraphs, Nevada suggests a "*functional methodology*" to identifying jurisdictional waters and goes on to describe a system for jurisdictional determinations. This system is largely reflected in the 2020 NWPR. Nevada would seek to retain much of the 2020 NWPR that bases initial determinations on waters that are clearly WOTUS (Section 10 and Traditionally Navigable) and builds clearly from there using a common sense approach for identifying perennial and intermittent streams that have a continuous surface connection or consistent seasonal flow.

  As new rulemaking begins, it is important to ensure that the 2020 NWPR's clear exclusion of groundwater does not "*become 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*."

Consideration of Regional Approach

During upcoming revisions to the WOTUS definition, Nevada believes that much of the difficulty in both writing and implementing a WOTUS definition is rooted in attempts to craft a national rule. Nevada is interested in exploring a proposal that is regional in nature and recognizes the vast variability in hydrogeology across the country. As part of the desert southwest with an average of 8 inches of rain a year, or less in some parts of Nevada, it is simply not viable to attempt to craft regulation for this region that fits with precipitation and flow regimes of the East Coast or Northwest United States. This complexity is also illustrated by reference in Nevada's November 14, 2014 letter on page 4 of 7 starting in the 3rd full paragraph related to discussion of attempting to identify the location of an Ordinary High Water Mark.

State Engagement Going Forward

Nevada will continue to actively engage in state-federal co-regulator opportunities provided to individual states and through our professional government associations. As has been done with the US EPA Office of Water in the past, due consideration should be given to allowing a small subset of states to participate closely with the federal agencies in the rule development process as part of a state-EPA-ACOE workgroup. As future implementers of the rule, States are in the unique position to have perspective how implementable the finer points of rule proposals may be and have a vested interest in helping to ensure the new definition has the clarity the federal agencies seek.

In addition, prior rulemaking, and this current effort now, regularly include various areas for input that are provided in the form of questions on rulemaking options or issues. As the federal agencies compile the vast responses to the inquiries set out in Federal Register notices, we encourage active ongoing engagement with state co-regulators regarding the varying input received and how it may guide rule development.

Please do not hesitate to reach out for clarification on these comments, as well as any efforts made while moving forward.

Sincerely,

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Deputy Administrator
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Attachments(2):

1) November 14, 2014 Nevada Letter to EPA Proposed Definition of WOTUS (Docket #EPA-HQ-OW-2011-0880)
2) April 15, 2019 Nevada letter to EPA Proposed Revised Definition of WOTUS (Docket #EPA-HQ-OW-2018-0149)

ec: Bradley Crowell, Director, NDCNR
Greg Lovato, Administrator, NDEP
Elizabeth Kingsland, Chief, NDEP Bureau of Water Pollution Control
Paul Comba, Chief, NDEP Bureau of Water Quality Planning

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[i] **NRS 445A.415 "Waters of the State" defined.** "Waters of the State" means all waters situated wholly or partly within or bordering upon this State, including but not limited to:

1. All streams, lakes, ponds, impounding reservoirs, marshes, water courses, waterways, wells, springs, irrigation systems and drainage systems; and
2. All bodies or accumulations of water, surface and underground, natural or artificial.

(Added to NRS by 1973, 1709)

[ii] ECOS = Environmental Council of the States
WSWC = Western States Water Council
ACWA = Association of Clean Water Administrators
ASWM = Association of State Wetland Managers

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Division of Water Resources
Conservation Districts Program
Natural Heritage Program
State Historic Preservation Office

STATE OF NEVADA
Department of Conservation and Natural Resources

November 14, 2014

Gina McCarthy
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Jo Ellen Darcy
Assistant Secretary of the Army (Civil Works)
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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.

THE NEVADA DEPARTMENT OF CONSERVATION AND NATURAL RESOUCRES

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Nevada Department of Conservation and Natural Resources

April 15, 2019

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R.D. James
Assistant Secretary, U.S. Army Corps of Engineers
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Re.: Comment from the Nevada Department of Conservation and Natural Resources, Nevada Department of Agriculture and Nevada Department of Transportation, to the Proposed Revised Definition of "Waters of the United States" (Docket ID# EPA-HQ-OW-2018-0149)

Dear Administrator Wheeler and Assistant Secretary James:

The Nevada Department of Conservation and Natural Resources (NDCNR)[1] appreciates the opportunity to offer comments on the US Environmental Protection Agency (USEPA) and the Army Corps of Engineers (Corps) (the agencies) Proposed Revised Definition of "Waters of the United States" (WOTUS) (84 Fed. Reg. 4154, Feb. 14, 2019). NDCNR further appreciates the agencies' commitment to cooperative federalism through its engagement with state co-regulators prior to and after publication of the proposed rule. Protecting water quality is of high importance to the environmental and economic vitality of the State of Nevada. NDCNR's efforts in safeguarding these interests will be advanced if the agencies achieve their stated goal of developing a final WOTUS rule that is "clear, understandable and implementable."

NDCNR finds that the proposed WOTUS definition offers significant progress toward achieving this goal. Notably, NDCNR finds that incorporating additional clarity as to the agencies' explicit intent to *not* regulate certain types of waters within the WOTUS definition and offering sub-definitions and explanations of the scope of specific terms within the WOTUS definition will be helpful to NDCNR in understanding and implementing the final rule.

DCNR provides in this cover letter the following summary of its more significant comments with additional specific comments, explanation and supporting information in Attachment A, which accompanies this letter.

1. The proposed definition of Traditional Navigable Waters (TNW) is generally satisfactory. NDCNR requests that the agencies consider including in the TNW definition non-ephemeral CWA Section

[1] NDCNR includes the Nevada Division of Water Resources (NDWR) and the Nevada Division of Environmental Protection (NDEP). This response has also been coordinated with and co-signed by the Nevada Department of Transportation (NDOT) and the Nevada Department of Agriculture (NDA). During development, NDEP also engaged in discussion with a group of Nevada Tribal representatives and the Nevada Association of Counties.

303(d) impaired waters that cross interstate boundaries. Surface water bodies in the arid west that cross interstate boundaries may not fall within the proposed TNW definition and a co-regulator role for USEPA in assuring restoration of those waters is warranted.

Additionally, to meet the express purpose of providing predictability and clarity on the impact of the proposed rule, NDCNR needs additional information from the Corps on the identification of existing TNW in Nevada. Because the new definitions depend on a firm understanding of what is and is not a TNW, concerns expressed by NDCNR on the definition of TNW in Appendix A apply equally to the remaining defined inclusions and exclusions.

2. NDCNR generally supports the definition of included tributaries, and ditches that merely alter or relocate a tributary, but provides discussion on the new terms "typical year" and "intermittent" within these definitions.

3. NDCNR supports the proposed impoundment and adjacent wetland inclusion definitions.

4. Because existing Nevada water pollution control law and programs provide robust water quality protection, NDCNR supports the proposed exclusions for: groundwater, ephemeral features and diffuse stormwater runoff, artificial lakes and ponds constructed in uplands included in definition section (b)(7), water-filled depressions created in uplands incidental to mining or construction activity and fill, sand and gravel pits, wastewater recycling structures constructed in uplands, and waste treatment systems. NDCNR requests that the groundwater exclusion include the language, "including diffuse or shallow subsurface flow," consistent with prior comment to the agencies.

   Nevada's definition of waters of the State is broad and includes "all waters situated wholly or partly within or bordering upon [the] State, including but not limited to: (1) [a]ll streams, lakes, ponds, impounding reservoirs, marshes, water courses, waterways, wells, springs, irrigation systems and drainage systems; and (2) [a]ll bodies or accumulations of water, surface and underground, natural or artificial." NRS 445A.415. Further, NRS 445A.465 specifically prohibits the discharge of a pollutant without a permit. NDEP has a long history of successfully overseeing this program. Nevada Water Pollution Control Law and programs are protective of all waters of the State, including those within the scope of the proposed exclusions.

   If the proposed definition and exclusions become final, as part of its duty to meet general statutory obligations to protect waters of the state, NDCNR will evaluate the potential effects of changes in WOTUS definitions on protection of state waters. NDCNR may evaluate additional appropriate actions to protect waters under existing or new state authority.

5. NDCNR requests the exclusion definition for ditches be revised to explicitly exclude agricultural features from the definition of WOTUS. Additional clarity on excluding certain ditches and other stormwater features is sought as well.

6. NDCNR also requests the exclusion definition for prior converted cropland be revised to include traditional agricultural uses where lands have been drained (prior to 1985) to facilitate agricultural production, including grazing and haying. Furthermore, the 5 year time period of non-use, should either be extended or tolled for periods of non-use resulting from water right

curtailment or inability to call for water right diversion. The extended timeframe should endure the duration of time the agricultural producer is denied water.

7. Due to the potential impacts on affected federal programs, NDCNR requests an extended time frame of two years for full WOTUS definition implementation following the publication of the final rule. Work between NDEP and the Corps should begin immediately with respect to identifying historic documentation related to establishing waters that are navigable-in-fact or otherwise determined to be fundamentally jurisdictional.

8. NDCNR requests the agencies enhance the co-regulator partnership with states and tribes regarding the Jurisdictional Determination (JD) process. The requests are responsive to the current docket, as well as a reiteration of prior requests made by Nevada in 2014 and 2017[2]. These requests are for a change in the agencies' business practices or implementation policies and are not expected to require a change in Rule. NDCNR requests that the following occur: (1) The Corps needs to actively solicit state involvement and provide the state a meaningful role when making JDs; (2) JDs made by one of the agencies (i.e. the Corps) should apply to other applications of the CWA; and (3) Case-by-case JDs should remain in place for longer than 5 years.

   The proposed rule suggests that one way to enhance state and tribal involvement could be through development of a geospatial data-sharing effort that would permit the state or tribe to submit maps of jurisdictional waters to the Corps for review and approval. While NDCNR agrees that further discussion and development of transparent tools is a step in the right direction, there is a current fundamental disconnect in documentation of WOTUS as discussed herein that rests on the shoulders of the agencies. The degree of effort expended by NDEP during this comment period in trying to determine Nevada's basic list of federally designated TNWs points to an existing problem with transparency (assuming a complete and accurate historic record exists). Removal of interstate boundaries from the proposed revised definition reveals a critical need for the Corps to research their historic records and establish a transparent baseline understanding of what will be a WOTUS. In telephone conversations, Corps employees indicated their understanding that jurisdiction for several waters is related to historic navigable-in-fact status. However, initial verbal feedback from the Corps' records center related to an NDEP Freedom of Information Act request indicates that the Corp does not have historic records to support this understanding.

9. Our review of the Economic Analysis and the Resource and Programmatic Assessment (RPA) supporting the proposed rulemaking, in particular the Nevada Program Description in Appendix B identified numerous errors that warrant correction to ensure an adequate economic analysis.

Nevada supports the comments of the Association of Clean Water Administrators, the Western States Water Council and the Nevada Association of Counties.

[2] November 14, 2014 NDCNR response to Docket ID No. EPA-HQ-OW-2011-0880 and June 19, 2017 Office of the Governor response to the EPA request for pre-proposal input on revision the definition of WOTUS.

NCDNR could not respond to all the inquiries posed by the agencies in the proposed rule, due in part to the lack of clarity of Nevada's official base TNWs. The proposal is a considerable improvement over the 2015 rule, but presents new scenarios for making JDs that may only become clear during the implementation phase. As the agencies compile the vast responses and answers to the inquiries set out in the proposed WOTUS revision rule, we encourage active ongoing engagement with state co-regulators. This could be conducted with states directly or through the Association of Clean Water Administrators or the Western States Water Council. As future implementers of the final rule, the states have a vested interest in ensuring that there is the clarity that the agencies seek at the end of the day. Because the answers to the inquiries could result in modifications between the proposed and final rule, it is critical that states (and tribes with Treatment as a State) be included in the process of moving toward the final rule. We take the role of co-regulator seriously and will continue to engage with the agencies. As expressed at the co-regulator's meeting in Albuquerque, NM in March 2019, Nevada stands ready to assist.

Please do not hesitate to reach out to Nevada representatives for any clarifications on these comments, as well as any efforts made while moving forward. As a point of contact for the undersigned, please contact Jennifer Carr, Nevada Division of Environmental Protection (NDEP) Deputy Administrator, at (775) 687-9302 or jcarr@ndep.nv.gov.

Sincerely,

Bradley Crowell
Director, NDCNR

Jennifer Ott
Director, NDA

Kristina L. Swallow, P.E.
Director, NDOT

Att (1): Attachment A – Nevada Detailed Comments

ec w/: Greg Lovato, NDEP Administrator
Jennifer Carr, NDEP Deputy Administrator
Timothy Wilson, NDWR Acting State Engineer
Micheline Fairbank, NDWR Deputy Administrator
Clifford Lawson, NDOT Administrator - Stormwater Program

ATTACHMENT A

Nevada Detailed Comments to the Proposed Rule for a

Revised Definition of Waters of the United States

The Nevada Department of Conservation and Natural Resources (NDCNR), in cooperation with the Nevada Department of Transportation and the Nevada Department of Agriculture (NDA), offer the following comments to assist the agencies in finalizing the WOTUS definition with the hope that the comments offer information that assists the agencies in meeting their stated objective for this rule. For purposes of this response, NDCNR has adopted the numbering system as it first appears in the Federal Register associated with 33 CFR Part 328.3. Comments follow the structure of the six inclusions and eleven exclusions in the proposed rule. Additional areas of comment follow the proposed revised WOTUS definition, covering jurisdictional determinations, the basis of WOTUS in Law and Science, affected federal programs, the Resource and Programmatic Assessment, geospatial datasets, and next steps.

Proposed Revised Definition of Waters of the United States

INCLUSIONS:

(a)(1) Traditional Navigable Waters (TNW):

NDCNR generally finds the TNW definition satisfactory; however, because TNWs form the basis for the rule, it is important for the reader to be clear that commenting on the proposal is at times difficult because the official "list" of Nevada's TNWs remains elusive. More specifically, the agencies have jurisdiction to make judgments as to what bodies of water are and are not TNW, but this has traditionally been a role solely exercised by the Corps. Likewise, the Corps has been relied upon to maintain the knowledge base of jurisdictional waters and compiling that knowledge at the State level for purposes of evaluating this proposal has been very difficult. NDEP submitted a Freedom of Information Act (FOIA) request to the Corps on April 3, 2019, to research the official federal status of numerous Nevada waters, and in the case of rivers and streams, the specific stretches to which they pertain. Initial verbal feedback from the Corps' records researcher indicated that waters which NDEP anticipated would have been officially determined as "Navigable in Fact" do not actually have historic documentation. While the process of finalizing the revised WOTUS definition unfolds, **it is imperative for the Corp to actively engage with their State co-regulators to convey the identification of waters to which this definition will apply**.

The proposal discusses several ways the agencies are interpreting TNWs, including "[Section 10] of the Rivers and Harbors Act, by numerous decisions of the federal courts, as well as all other waters that are navigable-in-fact." Despite being one of the largest states in the nation, Nevada only has two "Section 10 Waters": Lake Tahoe and the Colorado River (including Lake Mead & Lake Mohave). There is at least one navigable-in-fact determination for a stretch of the Carson River, and NDEP has heard anecdotally that Pyramid Lake has also been determined to be navigable-in-fact. NDEP awaits the FOIA response from the Corps to identify other navigable-in-fact waters. The proposed rule also includes "waters later identified by the agencies [i.e. the Corps] while relying on *Rapanos* Guidance, Appendix D." As part of the proposed rule, the agencies requested comment on, and requested specific examples of, the application of the *Rapanos Guidance* to waters within the State. (84 Fed. Reg. at 4170). Based on the lack of historic documentation for Nevada waters, it is very difficult to know whether and how the

agencies have applied the *Rapanos Guidance* to jurisdictional determinations made within Nevada. NDCNR cannot provide assistance with this and the ensuing related questions solicited by the agencies in the proposed rule unless and until NDCNR has clarity on what the official federally jurisdictional TNWs are in Nevada.

The agencies seek comment on the proposed change to TNWs by removing interstate waters as a separate jurisdictional category. On the one hand, the stated goal of simplifying the rule would dictate that interstate waters be WOTUS; as it is the most simple to interpret by the common person. However, the agencies begin to discuss the legal challenges related to this issue beginning in Section II.B.1 (84 Fed. Reg. at 4156) with the Water Pollution Control Act of 1948; in which regulation of interstate water pollution was created by act of Congress. Congress' 1972 "total restructuring" of the regulatory framework shifted the wording to "the Nation's waters generally, and to regulate the discharge of pollutants into navigable waters specifically." (*Id.* at 4156). Section III.B further discusses that the intent to regulate interstate waters was lost in 1972 through the principles of regulatory construction wherein Congress' silence on including interstate waters, and the use of "navigable waters" was intentional. (*Id.* at 4171). As further stated in this portion of the preamble, "the agencies are concerned about continuing to rely on congressional acquiescence to their regulatory definitions." The agencies' intent to base its proposed WOTUS definition in current language of law is understandable based on this history; however, NDCNR requests reconsideration of re-inclusion of interstate waters.

Due to the fact that the official list of waters that will be subject to the base definition of TNW is generally unknown, **NDCNR seeks political boundaries as part of the definition, at least on a case-by-case basis wherein an interstate water is impaired under the Clean Water Act (CWA) Section 303(d).** The agencies have a responsibility to oversee and resolve overarching state-to-state water quality issues if conflict exists between states over implementation activities to restore waterbodies. **It may have been assumed by the agencies that any interstate water would be naturally caught up by the definition of TNW or would be a tributary to a TNW. In Nevada specifically, and the arid west generally, this assumption is not necessarily true.** An example may be the Walker River system that is a critical resource to a region in west central Nevada and east central California. Two forks of the river flow from California to Nevada, subsequently converge into one river in Nevada, which then flows through the Walker River Paiute Tribe Reservation and eventually ends in Walker Lake – a terminal water body. A navigable-in-fact, or other WOTUS jurisdictional determination, has not yet been made by the Corps or otherwise yet located for Walker Lake. Because the lake may not be designated as a TNW, the Walker River upstream of the lake would not be a future WOTUS tributary. Yet, EPA regulatory oversight would be helpful since the East Fork is impaired for phosphorous due (at least in part) to upstream activities which Nevada's sister state is working to address, but are out of Nevada's regulatory jurisdiction. In instances such as this, **Nevada values EPA oversight and partnership as a co-regulator in restoration of waterbodies that cross state lines** and believes issues would be resolved more readily if federal jurisdiction over these waters is maintained. **Nevada also has examples of waters that are not impaired as they flow into or out of Nevada, and, as a result, the State would not propose that these bodies of water be regulated as WOTUS.** In another example, the Amargosa River in Nye County is a dry riverbed that crosses the Nevada-California border and has been regulated as a WOTUS. Since the channel is dry at the surface and therefore inherently not impaired, that channel does not appear to

necessitate federal oversight merely because it crosses the state line; recognizing that under the proposed WOTUS definition it would no longer be WOTUS due to its status as an ephemeral feature.

(a)(2) Tributaries to a TNW:

Similar to the definition of TNW, NDCNR finds the definition of tributaries to a TNW generally satisfactory and supports inclusion of tributaries of a perennial or intermittent nature where a direct surface hydrologic connection exists. However, since the new definition depends on a firm understanding of what is and is not a TNW, the concerns expressed by NDCNR to the definition of TNW apply equally to this definition and the ability to understand the potential scope of change that will result from the proposal overall.

The proposed revised definition includes additional sub-definitions such as (c)(11)

> *"Tributary means a river, stream or similar naturally occurring surface water channel that contributes perennial [defined term] or intermittent [defined term] flow to a TNW in a typical year [new defined term] either directly to the TNW or indirectly through a water in section (a)(2)-(a)(6) or through an excluded water in (b) so long as those water features convey perennial or intermittent flow downstream."*

"Typical year" is new sub-definition and the effects of its implementation are difficult to assess in the abstract. Typical year is defined at (c)(12) in the rule as "the normal range precipitation over a rolling 30-year period for a particular geographic area, excluding times of drought or extreme flooding." The agencies propose to consider a year to be "typical" when "observed rainfall from the previous three months falls within the 30th and 70th percentiles established by a 30-year rainfall average." (84 Fed. Reg. at 4177) Looking at flow regimes over a 30-year rolling period seems like a good start as it may help to address changing climate and environmental conditions over time. NDCNR questions whether or not use of the "30th - 70th percentile of precipitation" is the correct range; it seems narrow and somewhat arbitrary. Furthermore, it is not clear how applying a look at "the last three months of precipitation" would show that a year's precipitation, contributing to the watershed's flow regime results in a "typical" precipitation scenario. Careful consideration of the tools and resources used to determine a "typical year" is critical to ensure they are representative of all areas of the Nation. Given "typical" weather patterns in the West, the idea that one can base "typical" precipitation on the previous 3 months does not appear to work in Nevada and the rest of the arid west where there may be 300 days of sunshine a year. Another area for discussion is the availability of data from the resources identified by the agencies (i.e. National Oceanic and Atmospheric Administration, National Weather Service, and others), and whether or not the Nation is well covered by such datasets and gaps do not exist. These topics all warrant further discussion among the co-regulators as the agencies compile feedback to this docket and begin to formulate plans for the final rule. The NDCNR concurs with comments of the Association of Clean Water Administrators (ACWA) on the creation of the new term "typical year", as well as other states who may be providing detailed technical discussion.

The sub-definition for intermittent waters also introduced another modifier, describing intermittent waters in section (c)(5) as "surface water flowing continuously during certain times of a typical year and

more than in direct response to precipitation (e.g. seasonally when the groundwater table is elevated or when snowpack melts)." The agencies solicit comment on an alternate definition that would change the focus of the proposed definition from that occurring during certain times of the year to "seasonal flow". (84 Fed. Reg. at 4178). Shifting to a seasonal flow scenario better aligns with prior Nevada comments seeking that tributaries have, "continuous surface connection to core waters and demonstrate perennial or consistent seasonal flow"[3], and "routinely flow for at least 3 months out of the year"[4]. NDCNR recognizes the challenge the agencies face in determining if "3 months out of the year" is representative, and Nevada would support further discussion on how to best define seasonality, such as that proposed by the agencies to potentially read as "seasonal flow is predicable, continuous surface flow that generally occurs at the same time in a typical year."

(a)(3) Ditches that are a TNW or are a Tributary or are constructed in an adjacent wetland:
NDCNR finds this definition of ditches for inclusion to be generally satisfactory. However, since the new definition depends on a firm understanding of what is and is not a TNW, the concerns expressed by NDCNR to the definition of TNW apply equally to this definition.

Definitional conflict may exist between the sub-definition language identifying tributaries as natural channels [(c)(11)] and that which defines ditches as constructed channels [(c)(2)]. Nevada has examples of existing WOTUS tributaries that are: channelized entirely; sometimes re-routed in whole or in part; or are confined (i.e. surface channel or underground) for portions to ensure protection of property at the surface. Regardless of whether (a)(3) survives the final rule development process, or if it gets rolled into (a)(2), in these instances NDCNR agrees that the tributary "ditch" that flows perennially or intermittently and merely alters or relocates a tributary should not lose WOTUS jurisdiction as a result of channelization.

Nevada does not anticipate having any very large ditches that are TNW, and may or may not have ditches in an adjacent wetland. NDCNR welcomes the agencies' statement that the ditch *exclusion* is expected to "address the majority of irrigation and drainage ditches, including most roadside ditches and other transportation ditches, as well as agricultural ditches". (84 Fed. Reg. at 4193). NDCNR comments and concerns regarding excluded ditches are discussed further herein.

(a)(4) Lakes and Ponds that are TNW, are tributary to a TNW or are flooded by a TNW:
NDCNR finds this definition generally satisfactory. However, since the new definition depends on a firm understanding of what is and is not a TNW, the concerns expressed by NDCNR to the definition of TNW apply equally to this definition. In addition, it is not clear how this inclusion specifically creates simplicity within the proposed revised definition of WOTUS, but Nevada recognizes that this inclusion is important to some States, and does not object to its existence in the final rule.

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[3] November 14, 2014 NDCNR comment to Docket ID No. EPA-HQ-OW-2011-0880
[4] June 19, 2017 NDEP attachment to the Office of the Governor's pre-proposal comment letter

(a)(5) Impoundments:
NDCNR finds this definition generally satisfactory and agrees that the existence of a dam, thus creating an impoundment, should not be a determining factor in whether federal jurisdiction exists for a waterbody that is otherwise a WOTUS.

It is recognized that there is discussion regarding whether or not the downstream water remains a WOTUS if it becomes ephemeral (and thereby excluded) based on the frequency of release of water from the dam. This topic warrants further discussion among the co-regulators as the agencies compile feedback to this docket and begin to formulate plans for the final rule.

(a)(6) Adjacent wetlands:
Nevada supports this portion of the definition. It agrees with the State's position expressed on November 14, 2014 related to the proposed WOTUS definition (Docket ID# EPA-HQ-OW-2011-0880) which became final in 2015.

Certain exclusions to this definition are warranted for adjacent wetlands that exist because they are intentionally constructed as green infrastructure for stormwater quality improvement or wastewater treatment. Maintenance or removal of these features should be specifically excluded from the 404 program in section (b)(9) for stormwater control features and section (b)(11) for waste treatment systems.

EXCLUSIONS:

(b) The following are not "waters of the United States":

(b)(1) Waters or water features that are not identified in paragraphs (a)(1) through (6) of this section.

(b)(2) Groundwater:
NDCNR expressly supports this portion of the revised definition, including the exclusion of subsurface drainage systems from becoming WOTUS in and of themselves. As inquired by the agencies in the proposed rule (84 Fed. Reg. at 4195), NDCNR requests that the groundwater exclusion include the language, "including diffuse or shallow subsurface flow". Addition of this phrase will be responsive to the State's request expressed on November 14, 2014 related to the proposed WOTUS definition (Docket ID# EPA-HQ-OW-2011-0880) which became final in 2015.

It is recognized that where groundwater is pumped and discharged as a point source (e.g. dewatering wells) directly to a WOTUS as defined in (a)(1) to (a)(6), the National Pollutant Discharge Elimination System (NPDES) discharge permitting program will continue to apply. This is consistent with Nevada's implementation of the overall protection program for waters of the state, for which WOTUS is a subset.

Waters excluded through section (b) of this proposal will continue to be protected through the comprehensive program Nevada has which specifically prohibits the discharge of a pollutant without a permit (NRS 445A.465). NDEP has a long history of successfully overseeing this program. Nevada Water Pollution Control Law and programs are protective of all waters of the State, including those within the scope of the proposed exclusions.

(b)(3) Ephemeral features and diffuse stormwater runoff:

NDCNR supports this portion of the definition. It agrees with the State's position expressed on November 14, 2014 related to the proposed WOTUS definition (Docket ID# EPA-HQ-OW-2011-0880) which became final in 2015.

Nevada also supports the proposed revised definition that excludes, "diffuse stormwater run-off, including directional sheet flow over upland." Based on conversation with the agencies at the March 26, 2019 co-regulator's meeting in Albuquerque, NM, attended by NDEP, NDCNR supports efforts of the agencies to ensure that this exclusion will not adversely affect federal grant funding for non-point source pollution under the 319(H) program. This also reinforces the CWA's non-regulatory statutory framework to provide technical and financial assistance to States to prevent, reduce, and eliminate pollution in the nation's waters generally.

Nevada does have concern over how this proposal, coupled with other exclusions herein, potentially complicates perceptions related to the stormwater control program. Discussion on this item is in the Affected Federal Programs section.

(b)(4) Ditches that are not included in (a)(3):

NDCNR's position on this exclusion is dependent on conclusions drawn related to the ditches included in the proposed revised definition of ditches in (a)(3). Generally, NDCNR supports this exclusion, but additional clarity is necessary in certain areas.

First, it appears that this exclusion intends to address agricultural ditches as WOTUS for the purposes of the 404 program. To this point, the proposed rule states, "Congress exempted the discharge of dredged or fill material into 'waters of the united states' when that discharge occurs as a result of the construction or maintenance of irrigation ditches, the maintenance of drainage ditches or minor drainage associated with normal farming activities." 33 U.S.C. 1344(f)(1)(A)(C)" (84 Fed. Reg. at 4180). Further statement that the ditch *exclusion* is expected to "address the majority of irrigation and drainage ditches, including most roadside ditches and other transportation ditches, as well as agricultural ditches" is beneficial. (84 Fed. Reg. at 4193). NDCNR does not find that this exclusion is sufficiently clear in this regard and respectfully requests that the agencies revise the definition so it explicitly excludes agricultural return flow as a WOTUS. The agencies request input on whether the exclusion should discuss a particular flow regime or a particular ditch use. (84 Fed. Reg. at 4195). Since the intent is to exclude agricultural features (which would include both irrigation and return flow), as well as others, it would seem appropriate to address them explicitly in the final rule to enhance clarity. For agriculture as related to Part 404, NDCNR prior comment to the 2015 proposed rule requested the agencies 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"[5]

[5] November 14, 2014 NDCNR comment to Docket ID No. EPA-HQ-OW-2011-0880

Second, Nevada has concern over how this proposal, coupled with other exclusions herein, potentially complicates perceptions related to implementation of the NPDES (Part 402) program, of which stormwater quality control is a component. Further discussion on this item is included in the Affected Federal Programs section, below.

(b)(5) Prior converted cropland:

The sub-definition to this section in (c)(8) states, in relevant part, that

> *"Prior converted cropland means any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered prior converted cropland for purposes of the Clean Water Act when the area is abandoned and has reverted to wetland, as defined in paragraph (c)(15) of this section. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years."*

The NDEP is coordinating with other state agencies and resources to determine if the Secretary of Agriculture made any determinations of prior converted cropland (PCC) in Nevada. Regardless of formal designation, traditional agricultural uses near TNWs exist in Nevada where lands have been drained (Prior to 1985) to facilitate agricultural production, including grazing and haying. **The exclusion language should be revised to make clear that all such lands are afforded PCC status.** Furthermore, **the 5 year time period of non-use, which counts toward abandonment of PCC status, should either be extended or tolled for periods of non-use resulting from water right curtailment or inability to call for water right diversion due to drought or due to other agreements with the state agency charged with the allocation and administration of state water rights.** The timeframe to set aside this inactive period, and retention of PCC status should endure the duration of time the agricultural producer is denied water when the prior converted cropland has reverted to a condition in which it exhibits wetland characteristics and would otherwise be jurisdictional as a WOTUS under (a)(6)

According to Section (c)(8) final decision making authority on the issue of abandonment of PCC under the CWA is proposed to rest with the EPA Administrator. Presumably, the agencies propose to untether this decision-making from the Secretary of Agriculture for ease of implementation; however, it is imperative that the EPA use all available resources in making this determination in addition to consultation with the US Department of Agriculture as noted in the proposed rule; and including each state's Department of Agriculture, state agencies charged with the allocation and administration of state water resources, and the agricultural producer affected by the decision since non-use alone may not be indicative of abandonment.

(b)(6) Artificially irrigated areas, including fields flooded for rice or cranberry growing

NDCNR has no comment on this exclusion related to these types of flooded crops, or an opinion on whether or not these areas should remain in the exclusion for artificial lakes and ponds as currently practiced by the agencies. Coordination with NDA revealed that there are no agricultural producer certificates issued for this type of activity. **Presumably, this exclusion also applies to the practice of flood irrigation** wherein irrigation water flows overland, floods the surface and percolates into the soil. This practice does not typically create an area that meets the wetland delineation criteria (hydrology, hydrophytic vegetation and hydric soils).

(b)(7) Artificial lakes and ponds constructed in upland that are not (a)(4) or (a)(5):

Nevada supports this exclusion and expects it to apply when an upland artificial lake or pond does not contribute perennial or intermittent tributary surface flow to a TNW, as such lakes and ponds are included by way of (a)(4). Protection of water quality in these waterbodies falls within Nevada's overall authority to protect waters of the state.

(b)(8) Water-filled depressions created in upland incidental to mining or construction activity and fill, sand, or gravel pits.

NDCNR supports this exclusion, particularly for the purposes of ensuring that mining pit lakes are not WOTUS. The scope of the exclusion applicable to "construction" is vague. Further discussion is warranted related to current coverage of construction activities and gravel pits as they are related to, or included in, the stormwater program as discussed herein.

(b)(9) Stormwater control features.

Generally, NDCNR supports this exclusion for a wide variety of stormwater control structures such as retention and detention facilities (as volume control and/or treatment facilities) and green infrastructure. The agencies' stated intent to, "avoid disincentives to this environmentally beneficial trend in stormwater management practices", is appropriate. (84 Fed. Reg. at 4192). NDCNR also agrees that "certain features such as curbs and gutters" should remain excluded from WOTUS as has been agency practice. However, additional clarity is necessary related to the stormwater program discussed further herein, and as requested by the agencies related to the proposal's effects on the MS4 program (84 Fed. Reg. at 4195)

(b)(10) Wastewater recycling structures constructed in upland.

NDCNR supports this exclusion. Overall recognition of the importance of these structures and recycling practices in the arid West is appreciated. Furthermore, NDCNR supports the agencies' discussion within the exclusion which expressly recognizes that, "Though these features are often created in upland, they are also often located in close proximity to tributaries or other larger bodies of water", which ties this exclusion to the groundwater exclusion in (b)(2). (84 Fed. Reg. at 4193). This exclusion is aligned with Nevada's groundwater protection and permitting program. As discussed in the (b)(11) exclusion for

waste treatment systems, NDCNR would expect to apply the NPDES discharge permitting program when an upland wastewater recycling structure discharges directly to a WOTUS as defined in (a)(1) to (a)(6).

(b)(11) Waste treatment systems.
NDCNR supports this exclusion and agrees that the NPDES discharge permitting program will continue to apply when a waste treatment system discharges directly to a WOTUS as defined in (a)(1) to (a)(6). This exclusion is aligned with Nevada's groundwater protection and permitting program.

Jurisdictional Determinations

The proposed rule discusses input the agencies received on prior proposals and during the pre-proposal process regarding the need for an increase in state and tribal involvement during a jurisdictional determination (JD). (84 Fed. Reg. at 4198). The proposed rule offers to embark on mapping efforts among the co-regulators to improve transparency in the agencies' decisions on waterbodies that have been determined to be jurisdictional. NDCNR support for mapping is discussed further herein, but the discussion on state involvement in the JD process is deeper than establishing and sharing geospatial data. Assuming the final rule is substantially similar to the proposed rule, including its numerous and lengthy clarifiers, the preamble to the final rule published in the FR will have to be heavily relied on for the agencies' regulatory intent in future implementation of the revised definition. **It will be critical for the Corps to actively involve the states while making JDs.** Nevada continues to seek a meaningful role in the jurisdictional determination process and looks forward to a enhancing our co-regulator partnership with the agencies. The following items reiterate requests made by Nevada on November 14, 2014 and/or June 19, 2017. Additional items for consideration regarding jurisdictional determinations include:

- **JDs made by one of the agencies (i.e. the Corps) should apply to other applications of the CWA**. Currently, a JD made by the Corps under the 404 program includes a disclaimer that it can only be used for purposes of the 404 program. This creates confusion and potential inefficiency of government if another agency has to review the same material to come to a new determination for another program in the CWA.
- **Case-by-case JDs should remain in place for longer than 5 years**. The expiration and extension process results in unnecessary regulatory burden as watercourses do not typically change character in a 5-year timeframe. JDs should stand until a new application revisits the waterbody and a different determination is made.
- **The co-regulator partnership would be enhanced by providing states with a role in the process of making a JD**. State regulators maintain a critical balance between broad federal requirements and specific regional conditions using local knowledge of climatic, hydrologic and legal land and water use factors. Input from states during the JD process, including establishment of procedural steps for involvement, would provide valuable information and help avoid misinterpretations, delays and unintended consequences. An example of this is provided in NDCNR's comment on the Prior Converted Cropland exclusion.

Affected Federal Programs

This section identifies the CFR Parts included in the proposed rule that are affected by addition of this revised definition. For the agencies' perspective, Nevada has included discussion on programs that Nevada will need to develop in order to fill potential future gaps left behind by the final rule. **The examples provided below show the need for a phased approach or extended timeframe of a year or two for full WOTUS definition implementation following publication of the final rule.**

NPDES Pretreatment Program: Nevada is not currently delegated the NPDES Pretreatment Program or the Biosolids Program, but has certain statutes and regulations that will be evaluated for the ability to fill a potential regulatory gap resulting from implementation of the proposed revised WOTUS definition. In the event that implementation of the proposal results in a wastewater treatment plant (WWTP) transitioning out of the NPDES program, and the WWTP has a required Pretreatment Program regulated by US EPA Region 9, NDEP will need to confer with USEPA on Pretreatment Program documentation that exists for the facility. In the event that NDEP program enhancement is deemed warranted to absorb this element of the current USEPA program, a phased or extended timeframe for implementation will be necessary to review the program, and its effects on Nevada's delegation of CWA programs, generally.

NPDES Stormwater and MS4 Permits and Programs: The NPDES stormwater and MS4 permitting programs in Nevada are solely a NPDES/WOTUS program. While Nevada does not envision a significant change in MS4 scope or protection as a result of the proposed definition of WOTUS, if further evaluation indicates a major change in water quality protection afforded by the stormwater program, a phased or extended implementation time period will be needed to explore and consider development of a parallel State-based program to fill a gap with respect to sensitive surface waters.

The reason for this overall concern is because several aspects of this proposed revised definition of WOTUS touch on the Municipal Separate Storm Sewer Systems (MS4) Stormwater Program. Ditch exclusions, ephemeral water exclusions, stormwater control feature exclusions, construction and gravel pits, all relate to implementation of the stormwater program. The development and implementation of stormwater programs under the CWA was necessary to implement practices and approaches to protect WOTUS waters from potential degradation. The scope of exclusions are broad enough to potentially result in disputes and **Nevada seeks the agencies to include clarity in the final rule regarding the intent to preserve the protectiveness of the stormwater/MS4 programs even if certain physical features are excluded from the definition of WOTUS.**

While the preamble does state, "Ditches not covered by this proposed category [(a)(3)] could still be regulated by States and Tribes and would be subject to CWA permitting if they meet the definition of "point sources" in CWA section 502(14)" (84 Fed. Reg. at4179), application of this concept warrants further discussion related to stormwater program implementation.

The proposed revised WOTUS definition identifies specifically that roadside ditches are excluded from the definition of WOTUS (b)(4) and other ditches that convey stormwater would also be excluded where they do not meet the definition of an included ditch in (a)(3). While the NDCNR is in general agreement with the exclusion of certain ditches, and certainly does not want every street, gutter, drop inlet, and culvert that conveys water within an MS4 to become jurisdictional as a WOTUS, it must be made clear that the scope and protection of the MS4 program is intended to be maintained.

Exclusion of stormwater control features excavated or constructed in the upland to convey, treat, infiltrate or store stormwater are excluded from the definition of WOTUS (b)(9). NDCNR agrees that these upland features are disconnected from the WOTUS and should not be federally jurisdictional, but they serve a vital role in treatment of stormwater, or prevention of stormwater from reaching a WOTUS, and must remain as strategies for water quality protection under an NPDES stormwater permit program.

The proposed revised WOTUS definition identifies specifically that ephemeral features are excluded from the definition of WOTUS (b)(3). The sub-definition of "ephemeral" states that the term means, "surface water flowing or pooling only in direct response to precipitation (e.g. rain or snow fall)." Stormwater is inherently ephemeral, but still needs to be managed in areas to which the MS4 program applies.

With new provisions and definitions outlined in the proposal, fewer waters of the state (including some wetlands regulated under Section 404 of the CWA) will be considered WOTUS and therefore a reduction in NPDES permits may result as well. Under today's practice in Nevada, pollutant discharges (excepting stormwater managed in an approved MS4 program) which are carried directly or indirectly to a WOTUS require a NPDES Permit; this requirement would carry forward in the new rule. Continued success in protecting these waters is reliant upon maintaining the scope and protective nature of the existing MS4 programs through permitting programs initiated from federal and state regulations. As this process moves forward, NDEP will continue to work with its partners to identify programmatic and regulatory needs to ensure protection of its waters.

Corps 404 Program: As discussed herein, the new definition depends on a firm understanding of what is and is not a TNW, the concerns expressed by NDCNR to the definition of TNW apply equally to this discussion on the potential effects of the revised WOTUS definition on the scope of this federal program. Nevada state law defines "dredged soil", "wrecked or discarded equipment", "rock", and "sand" as pollutants (NRS 445A.400) and discharge of a pollutant cannot occur without a permit (NRS 445A.465). The NDEP has a "Working in Waterways" permit that has limited scope and works in concert with Corps 404 permit actions. In the event that certain surface waters are no longer federally regulated, the State of Nevada may need to carefully examine and potentially expand existing permitting systems to include a "404-like" dredge and fill permitting program to fill this gap.

For these reasons, Nevada respectfully requests the agencies consider a phased or extended implementation approach in the final rule.

Part 401: The 401 State Certification is only applicable where a federal permit (i.e. a 404 dredge and fill permit) is being issued and the State (or Tribe with "Treatment as a State" status) then has the opportunity to evaluate the project for potential for water quality impacts, and can add additional protection measures as incorporated permit requirements. In the event that certain surface waters are no longer federally regulated, and assuming the State of Nevada expands existing permitting systems to include a "404-like" dredge and fill program, concerns from Nevada Tribal governments was voiced during a State-Tribal discussion on WOTUS in April 2019. The federal government currently has tribal trust responsibility that define the roles and responsibilities of the agencies with respect to those tribal trust responsibilities. In a post-WOTUS-revision environment, the State of Nevada will need time to assess this shift in responsibility and develop and implement methods for communication and coordination for permitting actions on waters affecting tribal resources, in order to fill this gap. **For this reason, Nevada respectfully requests the agencies consider a phased or extended implementation approach in the final rule.**

Resource and Programmatic Assessment

The agencies also published two companion documents, an Economic Analysis and the Resource and Programmatic Assessment (RPA) that informed the Economic Analysis. Upon review of the RPA, in particular the Nevada Program Description in Appendix B (pgs. 128-129), NDEP identified numerous errors that will warrant revision. **Since errors were made in assessing Nevada's current resources and programs in place to address any waters that may no longer be federally jurisdictional, the agency's reliance on those inaccuracies is likely resulting in a flawed economic analysis.** NDEP will be providing comment on the RPA under separate cover and will include a redline markup of the Nevada-specific Program Description in Appendix B.

An example of one of these errors is as follows: the RPA correctly states that Nevada relies on the federal 404 permitting authority, but then also states that Nevada issues state permits for dredged and fill activities in waters, potentially implying a "404-like" program is also being implemented. The citations included in the document refer to statutes related to permit requirements for conducting activities on State-owned lands (NRS 322.100 *et seq.*) and a statute under the Division of Wildlife (NRS 503.425) regarding vacuum or suction dredging related to fishing, neither of which are the same as the 404 program. If Nevada has to develop and implement a "404-like" dredge and fill permitting program for State wetlands, the resources and time needed for program development and implementation will have an impact on both the NDEP and the regulated community.

Nevada encourages the agencies to check back in with each state represented in the document to ensure that the information presented therein is accurate. **Likewise, after there is a greater assurance of accuracy, any conclusions drawn from the flawed information should be re-assessed by the agencies.**

Geospatial Datasets

The proposed rule offers to embark on mapping efforts among the co-regulators to improve transparency in the agencies' decisions on waterbodies that have been determined to be jurisdictional. NDCNR supports mapping and envisions that initial efforts can be used as an informational tool that would complement programmatic implementation and public transparency. Visual aids greatly benefit discussion on the status of an individual waterbody and NDCNR supports the need for such tools. As a word of caution, and warranting further discussion among co-regulators, maps should be used as a resource, include disclaimers that they are a visual aid, and should not replace or act independently as a basis for "regulation" unless and until proper safeguards are in place to ensure that geospatial datasets are accurately portrayed and kept current. Maps should always point the user to contact the appropriate state or federal permitting authority for site-specific project requirements.

The proposed rule suggests that one way to enhance state and tribal involvement in JDs could be through development of a geospatial data-sharing effort that would permit the state or tribe to submit maps of jurisdictional waters to the Corps for review and approval. While NDCNR agrees that further discussion and development of transparent tools is a step in the right direction, there is a current fundamental disconnect in documentation of WOTUS waters as discussed herein that rests on the shoulders of the agencies. The degree of effort expended by NDEP during this comment period in trying to determine Nevada's basic list of federally designated TNWs points to an existing problem with transparency (assuming a complete and accurate historic record exists). Removal of interstate boundaries from the proposed revised definition reveals a critical need for the Corps to research their historic records and establish a transparent baseline understanding of what will be a WOTUS. In telephone conversations, Corps employees indicated their understanding that jurisdiction for several waters is related to historic navigable-in-fact status. However, initial verbal feedback from the Corps' records center related to an NDEP Freedom of Information Act request indicates that the Corps does not have historic records to support this understanding. **Future efforts by the Corps to develop geospatial datasets that can tie the presentation of their historic documents to stretches of waterbodies would be highly beneficial.**

Additional future reliance on mapping will also need to factor into consideration project-specific JDs which expire after 5 years, as well as changing climate which could impact the status of waters ephemeral/intermittent/perennial flow regime. NDEP is interested in continued engagement with the agencies on this item.