



February 7, 2022

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

Mr. Michael Connor
Assistant Secretary of the Army (Civil Works)
Washington, DC

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

Submitted via the Docket at Regulations.gov

Re: Revised Definition of Waters of the United States (WOTUS Rule 1)
Docket #EPA-HQ-OW-2021-0602

Dear Administrator Regan, Assistant Administrator Fox, and Assistant Secretary Connor:

The Nevada Division of Environmental Protection (NDEP) offers the following comments in response to the US Environmental Protection Agency (EPA) and the US Army Corps of Engineers (ACOE) (herein referred to as the agencies) 2021 Proposed Rule regarding the revised definition of Waters of the United States (WOTUS), a.k.a. Rule 1 under 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. Nevada's two prior letters on the 2014 Proposed Clean Water Rule (2015 CWR) and the 2019 Proposed Navigable Waters Protection Rule (2020 NPWR), along with additional comments, were provided on October 4, 2021, under the Federalism Consultation Docket (#EPA-HW-OW-2021-0328). They are not attached herein again but can be provided upon request.

Given that the status of implementation has already returned to the pre-2015 regulatory regime, NDEP believes the agencies should use whatever time necessary to work with states on an effective approach to a more durable and flexible rule for this Rule 1 proposal *before* work begins on Rule 2. This could include creation of strategies to address the distinct differences in hydrologic regimes through the country. States and the public need a cogent foundational rule that can hold fast while further refinements are debated and proposed.

States are sovereign co-regulators. The Clean Water Act (CWA) is built upon the principle of cooperative federalism, especially as noted under CWA §101(b) and (g). Section 101(b) supports the States' critical role in protecting water quality by stating: "*It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution*" Section 101(g) further provides that the primary and exclusive authority of each State to "*allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act.*" Efforts to redefine or clarify CWA jurisdiction have numerous federalism implications, with the potential to

significantly impact States, and the potential to alter the distribution of power and responsibilities among the states and federal government.

The agencies must work in partnership with states who understand their unique hydrology, geology, and legal frameworks. Nevada can broadly protect all “Waters of the State”¹, which extends beyond the limits of federal jurisdiction.

NDEP strongly encourages the agencies to continuously reach out to the States as co-regulators in the development and implementation of these rules. This can be accomplished through various national associations or (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 on how implementable the finer points of rule proposals may be and have a vested interest in helping to ensure the new definition incorporates the clarity the federal agencies, States and the public seek.

A one-size-fits-all national approach does not recognize specific conditions and needs in the West, where water can be scarce, and a variety of unique waterbodies exist. As co-regulators, the States would like to work together with the agencies to develop and implement a rule that strikes a balance between the critical importance of protecting the quality of the nation’s waters and preserving the sovereignty of states over their land and water resources.

NDEP is interested in further discussion on possible ways to implement a regional approach that would recognize unique hydrology, geology, and legal frameworks in the West. There is a need to balance the desire for certainty and clear, bright-line rules on the one hand, with a process that would provide greater regional flexibility on the other. Because the agencies cannot “regulate by guidance” NDEP prefers regional regulations rather than guidance, or at least a regulatory framework that sets up implementation strategies that are then regionalized.

The Proposed Rule solicits comments regarding specific topics, including Section V.D. *Implementation of the Proposed Rule*. Initially, the agencies seek input on many elements but include the statement early on that the agencies intend to create an updated jurisdictional determination form and instruction manual to aid the public and staff, and “[t]he agencies may provide additional guidance in the final rule based on public input received on this proposal” (p. 69433²). As the federal agencies compile the vast responses to the inquiries set out in Federal Register notice, we encourage active ongoing engagement with state co-regulators regarding the varying input received and how it may guide Final Rule 1 development. The NDEP further encourages guidance for the Final Rule to be promulgated in the rule itself. Should future guidance be deemed necessary after promulgation, based on implementation challenges or the need for clarity, such guidance should be made publicly available for review and comment prior to finalization.

¹ NRS 445A.415 “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.”

² Page references pertain to Federal Register Vol. 86, No. 232, pages 69372-69450 – the Proposed Rule

Nevada's landscape is predominantly covered by the Great Basin and is the most mountainous state in the nation³. As shown in the figure below, a small portion of northeast Nevada flows to the Snake River basin and a portion of the southeast flows to the Colorado River, the remainder never reaches an ocean. The Great Basin covers about 190,000 square miles⁴. Nevada has several interstate waterways that are Section 10 waters under the Rivers and Harbors Act or are traditionally navigable. The Humboldt River watershed is one of Nevada's major systems and is wholly intrastate and jurisdictional based on interstate commerce at Rye Patch Reservoir near the downstream end. The Great Basin is hydrologically unique and cannot be compared to other parts of the nation in a one-size-fits-all approach to defining WOTUS. The Great Basin roughly aligns with an EPA Ecoregion at Level III, but not perfectly.

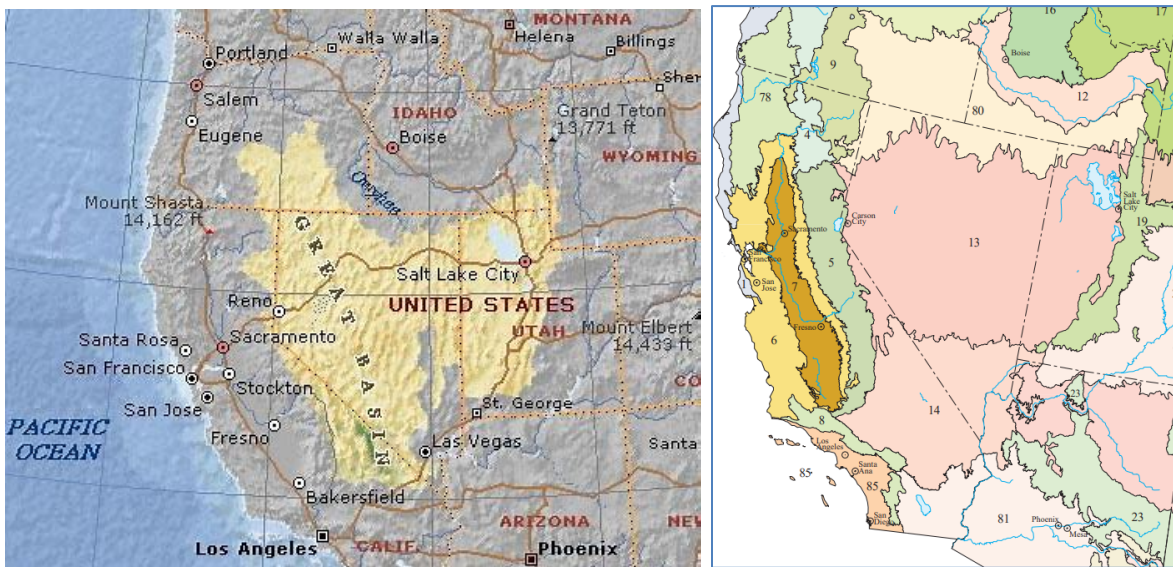


Photo credit greatbasinseeds.com

www.epa.gov/eco-research/ecoregions

The NDEP seeks further evaluation of the following parts of the Proposed Rule based on the comments provided further herein, and withholds concurrence contingent on improvements made to the Final Rule

For portions of the proposed definition of WOTUS listed below, some comments are included within the list where the discussion is brief. Follow-on discussion is included in separate sections related to the concepts of “similarly situated” waters, “significantly affect” language, the Science Report, and ephemeral streams.

- §120.2 (a)(3) All other waters such as intrastate lakes, rivers, streams, (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds:

³ www.nevada150.org

⁴ www.britannica.com/place/Great-Basin

- *(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1), (2), or (6) of this section;*
 - NDEP is wary of this phrase because there are there are no boundaries on “significant”. This was a problem with the 2015 CWR and is a returning issue with the Proposed Rule.
 - Please also see discussion on “similarly situated” waters, the Science Report, and ephemeral streams.
- §120.2 (a)(5) Tributaries of waters identified in paragraph (a)(1) [foundational waters], (2) [interstate waters], (4) [impoundments of WOTUS], or (6) [territorial seas] of this section:
 - *(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1), (2), or (6) of this section;*
 - NDEP is wary of this phrase because there are there are no boundaries on “significant”. This was a problem with the 2015 CWR and is a returning issue with the Proposed Rule.
 - Please also see discussion on “similarly situated” waters, the Science Report, and ephemeral streams.
- §120.2 (a)(7) Wetlands adjacent to the following waters (other than waters that are themselves wetlands): (i) ... identified in paragraph (a)(1), (2), or (6) of this section;
 - *(ii) Waters identified in paragraph (a)(4) or (a)(5)(ii) of this section when the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1), (2), or (6) of this section.*
 - NDEP is wary of this phrase because there are there are no boundaries on “significant”. This was a problem with the 2015 CWR and is a returning issue with the Proposed Rule.
 - A determination of adjacency that is not based on a continuous surface connection, at least seasonally, but rather based on shallow subsurface flow **must** be better defined by the agencies. The agencies define adjacent at §120.2 (c) “*Adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent wetlands.”*” There is no clear indication of the distance that could be evaluated when a decision is to be based on shallow subsurface flow, it should be reasonable for the Final Rule to assign a range of values for adjacency on the scale of feet or yards, not hundred(s) of yard(s), and certainly not miles.
 - Please also see discussion on “similarly situated” waters, the Science Report, and ephemeral streams.
- §120.2 (a)(9) Exclusion of prior converted cropland (PCC). It can be noted that NDEP has been unable to ascertain whether there are PCCs in Nevada, having been told that it is confidential information under the US Department of Agriculture Food Security Act; but NDEP agrees with this exclusion. Regardless of formal designation, traditional agricultural uses near foundational waters 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. It is also important to recognize the tie between PCCs and water rights. If a PCC cannot be in production 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, then the PCC should still retain its exclusion for 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. Future agricultural use should remain unencumbered by federal jurisdiction.

- While recognizing that the agencies are working to return largely to the 1986 codification and *Rapanos* Guidance language, the NDEP encourages the agencies to seriously reconsider including the following topics conspicuously absent from the definition:
 - The groundwater exemption included in the NWPR needs to be reinstated as one of the sideboards on federal overreach into state’s rights as discussed at length below.
 - Agricultural exclusions are no longer clearly defined. The 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.” Further clarity can be provided in the Rule that emphasizes the points made in the preamble related to §402 such as, “*The Clean Water Act exempts a number of activities from permitting or from the definition of ‘point source,’ including agricultural storm water and irrigation return flows.*”
 - Preamble Section V.D.1.a discusses certain ditches as generally not considered WOTUS, but they are not discussed at all in the language of the definition. It appears that each ditch must be evaluated on a case-by-case basis using the *Rapanos* Guidance as a tributary which certainly lacks clarity for landowners and could become onerous and time consuming for the agencies to make jurisdictional determinations. Exclusion has a basis in the preamble to the 1986 regulations as stated in the Proposed Rule, “[c]onsistent with previous practice [1986 Rule and *Rapanos* Guidance], ditches constructed wholly in uplands and draining only uplands with ephemeral flow would generally not be considered ‘waters of the United States.’” Paired with the need for appropriate agricultural exclusion identified above, the status of ditches warrants more attention by the agencies in crafting the Final Rule.

“Similarly Situated” waters in the region

Language of the Proposed Rule related to Other Waters, Tributaries, and Adjacent Wetlands repeatedly uses the phrase, “*either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters...*”. Furthermore, the agencies seek input on what should be considered a “region”, including whether EPA Ecoregions might be useful in this context. As depicted in the figures at the top of page 3, Nevada is nearly one giant ecoregion at Level III which is likely not useful for this discussion. Level IV ecoregions may be more useful as they provide more granularity and appear to align better with mountain ranges, valley bottoms, open desert, and river systems. Without being able to overlay and analyze the details of a Level IV Ecoregion, NDEP’s ability to assess its usefulness is limited.

It is also unclear exactly how the agencies would use such “regions” to make jurisdictional determinations. The preamble discusses aggregation of similarly situated waters “*...particularly when considered in the aggregate, some ‘other waters’ can, in certain circumstances, have strong chemical, physical, and biological connections to and effects on foundational waters*” (p.69393). It is unclear why any particular waterbody would not be assessed on its own merits and is proposed to be assessed in combination with “*similarly situated waters in the region*”. The *Rapanos* Guidance evaluates significant nexus with respect to a reach of a tributary, and this appears to continue to be a

reasonable metric to use for the Final Rule, if it must be used at all. NDEP's perspective on a lack of relevance may be affected by the fact that in most of the Great Basin there can be vast distances between water features, but in areas of Nevada that have complex agricultural networks of river diversions, sloughs, and ditches, more clarity is needed before implementing this provision.

Connectivity Report (Science Report) concerns

The 2008 *Rapanos* Guidance has been in use in Nevada from its origination date through the effective date of the Navigable Waters Protection Rule (NWPR) in 2020. As discussed in the Proposed Rule, evaluation of significant nexus has been ongoing since that time. However, the 2015 Connectivity Report⁵ (referred to by EPA in the Proposed Rule as the "Science Report") came later and gives NDEP grave concerns about its use in the proposed rule, and potential misuse in the future. As with the NDEP comments on the 2015 Clean Water Rule and more recently in October 2021 during the Federalism Consultation effort (EPA Docket #EPA-HQ-OW-2021-0328), the State of Nevada has, and continues to, object to policy drawn from the far-reaching conclusions of the Science Report without placing clear boundaries on its application.

"Indeed, the agencies are not reaching any conclusions, categorical or otherwise, about which tributaries, adjacent wetlands (other than those adjacent to traditional navigable waters, interstate waters, or the territorial seas), or "other waters" meet either the relatively permanent or the significant nexus standard. Instead, the proposal enables the agencies to make science-informed determinations of whether or not a water that falls within these categories meets either jurisdictional standard and is therefore a "water of the United States," on a case-specific basis. The agencies also reiterate their previous conclusion that significant nexus is not a purely scientific determination. 80 FR 37054, 37060 (June 29, 2015). As the agencies charged with interpreting the statute, EPA and the Corps must develop the outer bounds of the scope of the Clean Water Act and science does not provide bright line boundaries with respect to where "water ends" for purposes of the Clean Water Act. Riverside Bayview, 474 U.S. at 132–33. This section summarizes the best available science in support of the longstanding categories of the 1986 regulation, and in support of the proposed rule and the agencies' conclusion that the proposal advances the objective of the Clean Water Act." (p. 69390, bold and underlined emphasis added)

While the underlined statement is certainly appropriate, NDEP believes that the Proposed Rule has failed to use other policy statements to provide a "bright line boundary" and appears instead to focus solely on "[advancing] the objective of the Clean Water Act" without deference to state's right to manage groundwater and land use while protecting water quality. In fact, as written in the passage below, the agencies clearly intend to place the conclusions of the Science Report over jurisdictional boundaries between the federal government and the states, leading to a potentially wholly unacceptable overreach by the agencies.

"Based on the functions that can be provided by "other waters" to traditional navigable waters, interstate waters, and the territorial seas, the agencies' proposal to assess "other waters" to

⁵ U.S. Environmental Protection Agency, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report), EPA/600/R-14/475F (2015), available at <https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414>.

determine whether they meet either the relatively permanent standard or the significant nexus standard reflects proper consideration of the objective of the Act and the best available science.”
(p.69393)

This overreach becomes clearer when taken in context with other statements related to using the Science Report as the driver for decision-making. For example, from discussion on the Science Report, Section V.A.2.c. of the Proposed Rule, Other Waters are discussed in subsection iii.

*“Other waters” individually span the gradient of connectivity identified in the Science Report; they can be open waters located in the riparian area or floodplain of traditional navigable waters, interstate waters, and the territorial seas (e.g., oxbow lakes) and otherwise be physically proximate to the stream network (similar to adjacent wetlands) **or they can be open waters or wetlands that are fairly distant from the network.** They can be connected to downstream foundational waters via confined surface or subsurface connections (including channels, pipes, and culverts), unconfined surface connections, **shallow subsurface connections, deeper groundwater connections,** biological connections, or spillage. They can also provide additional functions such as storage and mitigation of peak flows, natural filtration by biochemical uptake and/or breakdown of contaminants, **and in some locations, high volume aquifer recharge that contributes to the baseflow in downstream waters.** The strength of functions provided by “other waters” on downstream waters will vary depending on the type and degree of connection (i.e., from highly connected to highly isolated) to downstream waters and landscape features such as proximity to stream networks and to “other waters” with similar characteristics that function as a group to influence jurisdictional downstream waters.” (p. 69393, bold emphasis added)*

*“Some “other waters” are wetlands that are located **too far from other jurisdictional waters to be considered “adjacent.”** [i.e. upland wetlands, and presumably other waterbodies] The specific distance may vary based on the characteristics of the aquatic resources being evaluated, but **they are often located outside of the riparian area or floodplain, lack a confined surface or shallow subsurface hydrologic connection to jurisdictional waters, or exceed the minimum distances necessary for aquatic species that cannot disperse overland** to utilize both the subject waters and the waters in the broader tributary network. Some **“other waters” may be too removed from the stream network or from jurisdictional waters to have significant effects on downstream traditional navigable waters, interstate waters, or the territorial seas.** However, particularly when considered in the aggregate, some “other waters” can, in certain circumstances, have strong chemical, physical, and biological connections to and effects on foundational waters. (p.69393, bold emphasis added)*

There must be a balance that appropriately weighs all factors of science, law, and effective policy to draw jurisdictional conclusions that are appropriate, and that do not impinge on the rights of States. The language of the Proposed Rule preamble, and the text of the proposed definition itself do not find this balance.

“The agencies do not address the “other waters” category in the Rapanos Guidance with respect to either the relatively permanent standard or the significant nexus standard. The proposed rule adds both standards to the “other waters” category.” (p. 69436)

*“§ 120.2 (g) Significantly affect means more than speculative or insubstantial effects on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1), (2), or (6) of this section. When assessing whether the effect that the functions waters have on waters identified in paragraph (a)(1), (2), or (6) of this section is more than speculative or insubstantial, the agencies will consider: (1) The **distance** from a water of the United States; (2) The distance from a water identified in paragraph (a)(1), (2), or (6) of this section; (3) **Hydrologic factors, including shallow subsurface flow**; (4) The size, density, and/or number of waters that have been determined to be similarly situated; and (5) Climatological variables such as temperature, rainfall, and snowpack.” (p 69450)*

While the definition of “significantly affect” drafted for the Proposed Rule states that the effect must be more than speculative or insubstantial, the lengthy preamble discussions on the science blur this line. Furthermore, as highlighted above, “distance” is key in all definitions and qualifications and is not otherwise defined or qualified in the proposed definition; more importantly, as discussed herein, the agencies assert that distance can reach far and wide if it “advances the objectives of the Clean Water Act.” Distances in the West are vast and how the agencies define the spatial extent of federal regulation can have a real effect on significance.

This overreach could occur over vast reaches of floodplain areas as well as upland areas. It is presumed that the agencies do not intend to seek control of upland or floodplain land use decisions and water use allocations under the auspices of the Science Report, but it is not out of the realm of possibility given the preamble discussions. Other Waters can include lakes (manmade or natural is not defined), ponds, wetlands, playas, and other bodies of open water. They can be “fairly distant” (upland) or located in the riparian area or floodplain.

- Upland lakes with a “*deeper groundwater connection*” and “*high volume aquifer recharge that contributes to the baseflow in downstream waters*” clearly runs contrary to State’s rights to regulate groundwater quality and quantity. The fact that an open waterbody may contribute volume to a foundational water does not give the agencies the right to regulate it. The agencies’ final rule must put sideboards on this overreach. **The groundwater exemption included in the NWPR needs to be reinstated as one of the sideboards on federal overreach into State’s rights.**
- Although an upland waterbody, or a non-adjacent waterbody in a floodplain, contributes eventual flow through groundwater does not mean it necessarily adversely or beneficially affects the physical or chemical integrity of the downgradient foundational water. Natural attenuation of contaminants through chemical or biological degradation, adsorption or dilution can happen in the saturated zone of the subsurface. This does not mean that the agencies should assert jurisdiction over the waterbody. Furthermore, a pristine lake can contribute to groundwater and stream base flow, but it can also pick up naturally occurring contaminants, such as arsenic, which might contribute adversely to water quality conditions in the foundational water. That does not mean that the pristine lake should be federally regulated, in order to “advance the objectives of the Clean Water Act”. That might seem like an extreme example, but it is equally as relevant as the scenarios posed in the preamble in the interest of connectivity science.

- The agencies bring the court decision in the Maui⁶ case into the discussion on “*use of scientific principles to determine the scope of WOTUS.*” The preamble specifically cites the court record stating, “*The Court further observed that “[v]irtually all water, polluted or not, eventually makes its way to navigable water. This is just as true for groundwater.”*” (p. 69396), seemingly included as justification for federal overreach into groundwater throughout the nation. What the preamble does not discuss is the fact that the subsurface geologic conditions in the Maui case are rare in comparison with the majority of geologic structures across the nation, as they consisted of lava tubes carrying flow through groundwater to the territorial sea. Despite this fact, the agencies rely on the *Maui* case in bolstering the arguments for significant nexus determinations involving groundwater. NDEP recognizes the Court’s decision given the facts at hand and understands development of the “functional equivalent” analysis to identify the potential for a discharge to groundwater to be functionally equivalent to a point source, but even “[t]he Court recognized that the difficulty with its approach was that ‘it does not, on its own, clearly explain how to deal with middle instances,’ but reasoned that ‘there are too many potentially relevant factors applicable to factually different cases for this Court now to use more specific language.’” (p. 69399). The agencies clearly intend to combine these two standards into significant nexus determinations, stating, “*both the functional equivalent standard and the significant nexus standard should be applied while keeping in mind the purposes of the Act.*” (p. 69399) NDEP is concerned about the potential use, or misuse, of this approach. “Functional equivalent” and “significant nexus” are good discussions theoretically, but a reasonable definition must place sideboards on the evaluation to prevent federal overreach into States’ jurisdiction over land and water.

This preamble discussion appears to be potentially more relevant to §402 jurisdictional determinations as much as §404. NDEP cautions that future readers could misapply this discussion to indicate, for example, that septic systems located near WOTUS waters may require §402 permits. By including it in the preamble to the definition of WOTUS without qualifiers or sideboards, the precedent that this discussion could set is concerning. These discussions of connectivity science need to be appropriately circumscribed insofar as they may be used to inform applicability of the regulations.

- Asserting jurisdiction beyond what is adjacent to a foundational water or other clearly defined and assessed jurisdictional water is an overreach into land use decisions within vast reaches of floodplain areas along Nevada waterways. Sweeping jurisdiction of large land features such as floodplains and wetlands provides unwarranted authority over extensive tracts of lands and waters that were not previously regulated under the CWA.

Ephemeral Streams, Ephemeral Breaks, and Ordinary High Water Mark

- Assessment of ephemeral waters relies in part on identification of an Ordinary High Water Mark (OHWM). As discussed in NDEP’s 2014 comment letter on the proposed 2015 CWR, “the complexity involved in hydrologic definitions is highlighted by a recent attempt by the ACOE to explain how to identify the location of an OHWM⁷. That document is 26 pages long and only

⁶ *County of Maui, Hawaii v. Hawaii Wildlife Fund (2020)*

⁷ 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)

applies to discrete portions scattered throughout the West, none however within the boundaries of Nevada. This limited scope 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.” In the event that additional work on this has occurred for the Western States, and Nevada in particular, since 2014, NDEP would appreciate agency feedback.

- Much of the Arid West contains ephemeral reaches within upper elevations of a watershed that eventually flow subsurface as groundwater before reaching WOTUS (if it makes it at all), an occurrence known as an “ephemeral break.” The proposed rule should be revised to clarify the applicability of federal regulations to ephemeral breaks, and the underlying rationale for that applicability. This clarification and rationale are essential for consistent application in practice and ephemeral breaks may be a candidate discussion for regional specialization within the Final Rule.
- Upland waterways also include ephemeral streams. Themes in the Science Report section discuss the importance of upland water features in mitigating downstream flooding. During massive, localized precipitation events in the desert environment of the Great Basin causing flooding, overland flow of precipitation and sediment are carried from high elevation to low elevation; sometimes purely overland and sometimes within ephemeral stream channels. This is the naturally occurring geologic process of creating alluvial fans or basin fill material. At times, it has been postulated that upland land use has exacerbated flooding of channels. Do the agencies intend to regulate upland land use decisions under the auspices of the Science Report?

The NDEP concurs with the following parts of the Proposed Rule without further discussion

- §120.2 (a)(1) Interstate or foreign commerce waters; essentially Rivers and Harbors Act Section 10 waters and other waters designated as traditionally navigable or subject to interstate commerce.
- §120.2 (a)(2) Interstate waters including interstate wetlands. As with prior year’s comments, this is particularly relevant when interstate waters are listed as impaired under the CWA §303(d) program and states must work together to find solutions to delisting these waters.
- §120.2 (a)(3) All other waters such as intrastate lakes, rivers, streams, (including intermittent streams), mudflats, sandflats, wetlands, sloughs, wet meadows, playa lakes, or natural ponds:
 - (i) *That are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1), (a)(2), (a)(5)(i), or (a)(6) of this section.*
 - It should be noted that a “slough” in Nevada can also be a “ditch”; ditches are discussed further below.
- §120.2 (a)(4) Impoundments of WOTUS waters - i.e., reservoirs – that are not identified in (a)(3).
- §120.2 (a)(5) Tributaries of waters identified in (a)(1), (2), (4), or (6) of this section.
 - (i) *That are relatively permanent, standing or continuously flowing bodies of water.*
 - The NDEP would support a definition of intermittent flow – at least seasonally – and has supported the 3-month rule as a reasonable metric in the past. We would also suggest “typical year” be reconsidered to assist with these determinations, which will also to adapt to climate change using the rolling 30-year record for precipitation data. The NDEP

recognizes the agencies plan to continue to use Antecedent Precipitation Tool discussed in the preamble.

- §120.2 (a)(6) Territorial seas – for which NDEP has no opinion.
- §120.2 (a)(7) Wetlands adjacent to the following waters (other than waters that are themselves wetlands): (i) ... identified in paragraph (a)(1), (2), or (6) of this section;
 - (ii) or relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(4), or (a)(5)(i) of this section and with a continuous surface connection to the waters.
- §120.2 (a)(8) Exclusion of waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA.

Other Comments

- It is time for the agencies to improve the jurisdictional determination processes. The agencies should consider: determinations made by the ACOE should be usable for EPA's purposes under CWA §402; doing away with the 5-year life of project-specific case-by-case jurisdictional determinations; improving information and documentation relevant to a project determination; and actively providing state co-regulators with a role in the process of making a determination.
 - Currently a determination made by the ACOE includes a disclaimer that it can only be used for the purposes of the CWA §404 program. This creates confusion and potential inefficiency of government if one agency must review the same material to come to a new determination for another program under the CWA.
 - The 5-year expiration and extension process results in unnecessary regulatory burden as watercourses do not typically change character in a 5-year timeframe. Determinations should stand until a new application revisits the waterbody and a different determination is made. This will facilitate creation of accurate geospatial datasets and maps of jurisdictional waters.
 - Mapping would also be improved if the agencies applied the “reasonable person effect” when documenting project specific determinations. For example, when a project for a bridge identifies jurisdiction as it crosses a waterbody, the extent of the determination should not simply be the boundaries of the project itself. Clearly, the stream segment between the project and the lower jurisdictional water should be delineated as jurisdictional because the stream reach must be jurisdictional for the bridge project to be subject to regulation under the CWA. Mapping is critical to every landowner's understanding of federal jurisdiction.
 - The agencies should enhance the co-regulator partnership by providing States with a meaningful role in making determinations. The collective human resources that can be brought to bear on a decision would make the process more informed and more efficient. State staff have local knowledge of climactic, hydrologic, and legal land use and water use factors. Information sharing during the process would provide valuable resources and help avoid misinterpretations, delays, and unintended consequences.
- The Proposed Rule preamble focuses heavily on topics relevant to CWA §404 but only mentions §402 tangentially and occasionally. More discussion should be given to how “significantly affect” applies to §402 permitting. States that have robust groundwater protection regulations should not be adversely affected by interpretation of definitions that appear to focus more on CWA §404.

Please feel free to reach out to further discuss the topics covered herein, or others for which the agencies seek a western perspective. I can be reached at jcarr [at] ndep.nv.gov or 775-687-9302.

Sincerely,

A handwritten signature in blue ink that reads "Jennifer Carr". The signature is written in a cursive style.

Jennifer L. Carr, PE, CPM, CEM
Deputy Administrator

cc: Greg Lovato, NDEP Administrator
Brad Crowell, NDCNR Director