Oregon Water Resources Congress
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November 14, 2014

Attn: Docket ID No. EPA-HQ-OW-2011-0880
Environmental Protection Agency-Water Docket Center
Mail Code: 2822T
1200 Pennsylvania Ave N.W.
Washington, DC 20460
Submitted via email

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

Dear Administrator McCarthy and Lieutenant General Bostick:

The Oregon Water Resources Congress (OWRC) is submitting comments on the proposed definition of "Waters of the United States" (WOTUS) under the Clean Water Act (CWA) released on April 21, 2014. The proposed rule, as written by the Environmental Protection Agency (EPA) and the Army Corps of Engineers (ACOE), creates more uncertainty for water users, is an overreach of agency power, fails to take into account the significant differences among the states, and its lack of clarity will likely result in continued litigation. We request that you rescind or substantially revise the proposed rule, taking into consideration stakeholder input regarding a clear, workable definition of WOTUS under the CWA.

As a nonprofit association representing irrigation districts, water control districts, improvement districts, drainage districts, and other local government entities delivering agricultural water supplies, OWRC has a strong interest in the CWA and specifically, in the definition of WOTUS. The water stewards we represent operate complex water management systems, including water supply reservoirs, canals, and pipelines, delivering water to roughly one-third of all irrigated land in Oregon. These entities and the thousands of water users they supply embody the association's founding principles to promote the development, control, conservation, preservation, and utilization of land and water resources of the State of Oregon.

OWRC strongly believes that while EPA and ACOE have indicated that a principal goal of this rulemaking is to provide clarity for determining jurisdiction under the CWA, the proposed rule would do the opposite and only increase uncertainty and litigation over what is or is not covered. Our members would like to participate in an EPA and ACOE led collaborative process to develop a rule that will better provide the certainty so desperately needed, while taking into consideration the myriad of stakeholder issues and challenges involved in defining and implementing WOTUS.

The Proposed Rule Lacks Clarity

EPA and ACOE have indicated that a principal goal of this rulemaking is to improve clarity for determining jurisdiction under the CWA; however, the proposed rule as written does not provide the intended clarity or certainty for regulated entities. Instead, the proposed rule only raises more questions. Our members find themselves each coming up with different answers to the question of which types of water and land areas the EPA and the ACOE are in fact attempting to regulate. This result is the opposite of the stated intention of the proposed rule and is likely to fuel decades of costly litigation rather than resulting in any improvement to our nation's waters.

Part 328-Definition of Waters of the United States, proposes new definitions of jurisdictional and non-jurisdictional waters under the CWA, including "tributaries," "adjacent waters," and other waters with a "significant nexus" to jurisdictional water. These definitions are both incredibly broad and in some cases extremely unclear. For example, the definition of "adjacent waters" relies on several newly defined terms: "neighboring," "riparian area," and "floodplain." The agencies may have been attempting to provide certainty regarding the extent of their jurisdiction through all of these new definitions, but in practice, our members would be required to figure out whether or not these new terms apply to them. And in that context, the proposed definitions are vague and leave far too much room for agency interpretation and discretion. For instance, in the case of "other waters" with a "significant nexus" to jurisdictional water, the nexus is to be determined on a case-by-case basis. Regardless of significant problems with the definition of significant nexus, as outlined below, a "case-by-case" determination flies in the face of the agencies' stated goal of drafting a rule intended to provide clarity.

The critical term "significant nexus" is also not fully explained, nor is it a scientific term with a well-understood meaning. In the absence of a more clearly defined meaning for "significant nexus," the proposed rule permits the agencies to make subjective jurisdictional determinations based on far too many variables. Our members are not able to predict or foresee the outcome of an agency determination using the proposed definition of "significant nexus." This definition needs to be more fully outlined, and include more objective criteria for what will be included and excluded when jurisdictional determinations are made.

While the proposed rule creates additional categorical determinations to provide certainty as to what types of waters are always jurisdictional, the rule does not provide an equivalent level of certainty that other waters are never jurisdictional. Instead, our members who have waters in their districts that are not categorically jurisdictional will still be left wondering the outcome of the agencies' case-by-case "significant nexus" determination. Regardless of the determination, it is likely that litigation will ensue (either from the project proponent or project opponent disagreeing with the decision), at the detriment of farmers and other water users who are essential contributors to our nation's economy and our global food supply.

Clarify Exclusion for Ditches Based on Existing Guidance

Currently, ditches are not included as either a categorical jurisdictional water or non-jurisdictional water under the CWA, as the agencies tend to make a determination on a case-by-case basis. The proposed exclusion for ditches under the CWA is far too restrictive, including only "ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow," and "ditches that do not contribute to flow, either directly or

through another water, to a water identified in paragraphs (a)(1) through (4) of this section." By excluding two specific types of ditches from jurisdiction, it can be interpreted that all other types of ditches would be jurisdictional by default. To address this lack of clarity, we recommend that EPA and ACOE revise the proposed rule's exclusion for ditches to include "irrigation ditch" as defined in current ACOE guidance (RGL No. 07-02). That definition of irrigation ditch is as follows:

> *"A man-made feature and/or an upland swale that either conveys water to an ultimate irrigation use or place of use, or that moves and/or conveys irrigation water (e.g. "run-off" from irrigation) away from irrigated lands. Irrigation Ditches may include the distribution system or parts thereof, consisting of manmade canals, laterals, ditches, siphons, and/or pipes, or pump systems. If a ditch carries only irrigation water, irrigation return flows, and overland flow (precipitation and/or snowmelt) that moves from an irrigated field either to or away from an area subject to irrigated agriculture (e.g. an irrigated field), that ditch would be considered an irrigation ditch…"*

All man-made ditches should be categorically exempted from CWA jurisdiction. Including man-made ditches as part of the jurisdictional waters under the CWA is broad regulatory overreach, amounts to an unnecessary burden on the agencies (in terms of permitting), and would have negative impacts for our members as well as agricultural water users generally.

Impacts on Permitting

Irrigation districts, other agricultural water suppliers, and the water users who depend upon them will be significantly impacted under the proposed rule. As outlined above, it could be implied that because only two types of ditches are specifically excluded from jurisdictional coverage, all other types of ditches can and will fall under the definition of WOTUS. In addition to irrigation ditches and canals, water storage ponds and reservoirs could also be considered jurisdictional waters under the proposed rule. Rather than providing clarity for our members, this places the burden on them to prove that their ditches or reservoirs are exempt under the rule if the agency or a third party asserts that they are for some reason jurisdictional. This lack of clarity will cause unnecessary delays in projects and significant increases in legal and permit costs for irrigation districts and the farms and other water users they serve. The proposed rule will also be detrimental to Oregon irrigation districts and their water users who are actively pursuing water conservation, efficiency, and storage projects that often have a water quality component as well as other benefits. In some cases, these delays and increased costs could cause a project to lose time limited grant or loan funding or be shelved altogether.

If the intent of the agencies is to keep intact current CWA definitions and practices, while providing more clarity, we would like to reiterate our request that RGL 07-02 be fully integrated into the current proposed rulemaking, and preclude it from somehow being superseded by adoption of the proposed rule. This guidance was the subject of many years of input and consideration, and provides clarity for our members in regard to permitting, which the rule as currently proposed does not. It is critical for our members that definitions and guidance provided within RGL 07-02 remain effective and intact.

Agency Overreach

EPA and ACOE developed the proposed WOTUS definition without taking into account, or bringing to the table, input from local stakeholders across the country. As a result, there is much debate and uncertainty on how expansive the new definition truly would be. Whether large or small, the expansion of agency jurisdiction beyond statutory authority through agency rulemaking is regulatory overreach, which we cannot support. Moreover, coupled with the previously stated permitting issues, the expansion would disproportionately burden farmers and other agricultural water users who supply the food and fiber we all depend upon.

Had EPA and ACOE proactively engaged States and local officials representing a broad cross-section of economic and geographic perspectives, the regulated community might not view the agencies as taking a backdoor approach to expanding their jurisdiction through a rule purportedly designed to provide clarity. The agencies have only now, after the rule was proposed, begun to reach out to regional stakeholders to explain the development and application of the proposed rule. Reaching out to educate now rather than take input on the proposed rule's preparation strikes many in the regulated community as disingenuous. It would have been far more productive to take input early in the process and craft a more balanced and detailed rule.

Conclusion

Ultimately, the rule proposed by EPA and ACOE redefining WOTUS is not ready for implementation as it does not solve the issues with what is included or excluded within the jurisdictional reach of the CWA. The expansion of the categorical exclusions and inclusions still leaves plenty of room for interpretation and many waters will still need to be determined on a case-by-case basis. The rule needs to be substantially revised based on broad stakeholder involvement and implementation delayed until the language clarifies codifying existing agency guidance (such as RGL 07-02).

The CWA has been successful to date, in large part because of collaboration with the States, and the desire of water users to support efforts to keep our waters safe and clean. We would like to see that continue. And while we understand the necessity of crafting a new regulatory definition of WOTUS that is in accordance with recent Supreme Court decisions, the proposed rule is not workable for our members and only confuses the issues. Had EPA and ACOE worked with the States and local stakeholders from the start, the proposed rule could have taken into consideration varying geographic, climate, and economic issues across the nation, could have been more fully and comprehensively developed, and at long last, could have provided a clear, concise, and reasonable definition for water users. Instead, we are left with only more confusion and anxiety. We encourage the agencies to take this opportunity to reach out to States, local officials and other stakeholders, and collaboratively create a more thoughtful rule that will provide the clarity water users need while protecting our nation's water within the agencies' existing jurisdiction under the CWA. Thank you for your careful consideration of our comments.

Sincerely,
April Snell
Executive Director