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Committee on Transportation and Infrastructure

Subcommittee on Water Resources and Environment

Hearing on "Potential Impacts of Proposed Changes to the Clean Water Act Jurisdiction Rule"

Testimony of

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Mr. Chairman and members of the Subcommittee, my name is Mark Pifher and I am here today to provide you with the perspective of Western water users. Municipal water and wastewater utilities, as well as irrigated agriculture, share concerns over the recently released rulemaking proposal concerning the definition of "waters of the U.S." under the federal Clean Water Act. In particular, I would like to share the views of the members of the National Water Resources Association (NWRA)and the Western Urban Water Coalition (WUWC). The NWRA is a nonprofit federation made up of municipal and agricultural water providers, state associations, and individuals dedicated to the conservation, enhancement and efficient management of our nation's most important natural resource, water. Its members provide clean water to millions of individuals, as well as families, agricultural producers and other businesses throughout the Western United States. WUWC consists of the largest urban water utilities in the western United States, serving over 35 million customers in 15 metropolitan areas across five states, some of also operate wastewater and electric facilities. The membership of WUWC includes: Arizona-Central Arizona Project and City of Phoenix; California- East Bay Municipal Utility District, Eastern Municipal Water District, Los Angeles Department of Water and Power, Metropolitan Water District of Southern California, San Diego County Water Authority, City and County of San Francisco Public Utilities Commission and Santa Clara Valley Water District; Colorado- Aurora Water, Colorado Springs Utilities, and Denver Water; Nevada- Las Vegas Valley Water District, Southern Nevada Water Authority and Truckee Meadows Water Authority; and Washington- Seattle Public Utilities. WUWC is committed to providing a progressive perspective on the management of water resources in the West.

I have been actively involved with both of the above organizations for many years, serving as the chair of their Water Quality or Clean Water Act Committees. I have also been associated with the Western Coalition of Arid States (WESTCAS). WESTCAS endorses these comments. In addition, I have worked for state government in the water quality arena, have served as the Director of Utilities for the third largest municipality in Colorado, where I oversaw the completion of a

$600M reuse project, and am currently assisting with regulatory compliance on the Colorado Springs Utilities' Southern Delivery System (SDS), a $900M municipal water delivery system that, not unlike the Aurora project, depends on the use of re-useable return flows.

I. Introduction

Western municipal utilities and irrigation districts provide essential water, wastewater and, at times, stormwater control services to their customers. They have historically been, and will continue to be, ardent supporters of the goals of the federal Clean Water Act (CWA). Achievement of the Acts' goals will assist in the protection and enhancement of the "source water" upon which such utilities depend in ensuring that a reliable, safe supply of water can be delivered to meet residential, commercial, agricultural, recreational and aesthetic demands. It is these municipal utilities who are the on-the-ground partners with EPA and the states in the implementation of both the CWA and the Safe Drinking Water Act (SDWA). They are the entities who design, construct, and operate the water and wastewater treatment and conveyance systems, and the stormwater control structures, that are essential to maintaining their citizens' quality of life, and it is their ratepayers who shoulder the majority of the financial burden associated with doing so.

With specific reference to the proposed "waters of the U.S." rule, it represents a significant expansion of the historical scope of federal jurisdiction. Under the proposal, all tributary and adjacent waters would now be "jurisdictional by rule," the definition of "tributary" and the scope of what is "adjacent" would both expand, a new concept of "neighboring waters" would be incorporated, and the significant nexus test would allow for a watershed scale determination of jurisdiction. Many of the dry arroyos, washes, ditches and ephemeral or intermittent water bodies so common in the arid West could become the subject of federal oversight. As EPA Administrator McCarthy stated shortly after the release of the proposal, "[i]f we need to make any adjustments in this, we will certainly do that." Western water providers, and NWRA members in particular, welcome the opportunity to work cooperatively with EPA in the identification of

such adjustments, while continuing to meet our environmental and water supply obligations.

The importance of this change to municipal utilities lies primarily in its relationship to sections 404 and 402 of the CWA. If a water feature is determined, either per se or on a case-by-case basis, to be a "water of the U.S.", the dredge and fill permit provisions of section 404 and the point source permit provisions of section 402 are potentially triggered by a variety of municipal undertakings. Invoking these provisions can, in turn, implicate the need for a section 401 water quality certification from the state and, more importantly, may necessitate a costly and time consuming review of the local initiative under the National Environmental Policy Act (NEPA). Finally, the need for the issuance of federal approvals may, in turn, also trigger consultation requirements under the federal Endangered Species Act (ESA).

II. Placing the Proposal in Context

It is important that the implications of this proposed agency interpretation of Congressional language be considered in the context of the full panoply of environmental and water supply challenges being faced by local communities in the West. This would include those challenges associated with climate change, most notably drought, forest fires, post fire floods, and the overall health of forested watersheds.

The arid West is, in fact, the region which will be the most directly and significantly affected by the outcome of this rulemaking process. It is within this geographic region that one frequently finds dry arroyos and washes that flow only in response to infrequent storm events, isolated ponds, intermittent and ephemeral streams with a tenuous connection to downstream navigable waters, and effluent dominated and dependent water bodies.

In order to meet water supply and wastewater treatment needs, as well as stormwater control requirements, Western municipal utilities and irrigation districts must make substantial infrastructure investments, often requiring creative and innovative approaches. These investments will include new or

expanded storage reservoirs; reuse facilities; desalinization plants; water collection, delivery and distribution pipelines; pump-back projects; groundwater recharge facilities; and reverse osmosis water treatment plants. Many of these facilities will, of necessity, be in somewhat close proximity to the types of "waters" discussed in the current rule proposal. It is essential that these critical activities, many of which may be undertaken in direct response to emergency conditions related to drought, fire, or post-fire damage, do not unnecessarily trigger a federal nexus and its concomitant lengthy and costly permitting procedures.

By way of example of the impact of the existence or non-existence of a federal nexus, in 2010, Aurora Water, in Aurora, Colorado, completed, with the support of the environmental community and other stakeholders, its award winning Prairie Waters Project (PWP). The PWP is an approximately $638M pump-back reuse project pursuant to which the City recaptures its treated re-useable return flows downstream of the City and, utilizing a thirty-four mile pipeline, three pump stations and a state-of-the-art water treatment plant, delivers potable water back to its customer base. The City, working cooperatively with the Army Corps of Engineers, was able to go from alternatives analysis, to final design, to construction, to grand opening in approximately five years, with less than $2M in total permitting and mitigation costs. The individual permit provisions of section 404 were never triggered, a situation that it is doubtful could be repeated if the current proposal becomes the law. Though the City employed some re-design efforts and micro-tunneling to avoid traditional navigable waters, it never-the-less did cross a number of what were, at the time, "non-jurisdictional" dry arroyos, washes, swales and ditches, or waters which then qualified for "nationwide" status.

The City of Colorado Springs, on the other hand, is currently constructing its $900M Southern Delivery System (SDS). It also entails three pumping stations, a new treatment plant, and a pipeline to bring water from an existing reservoir located approximately fifty miles downstream. SDS did need to obtain a section 404 permit, and hence did go through the Environmental Impact Statement (EIS) process under NEPA. The planning and permitting for the project took over a

decade, with NEPA and related environmental studies costing approximately $30M ($12M for NEPA alone), and project mitigation costs, many local in nature, exceeding $150M. Hence, the importance, from both a time and cost perspective, of avoiding unnecessary reviews is apparent. Unfortunately, it would appear that the "Economic Analysis" submitted by the agencies with this proposal significantly underestimates the true costs associated with its implementation.

In addition to constructing new infrastructure projects, many Western municipal water providers are seeking additional "firming" water supplies through the establishment of leasing/fallowing or other interruptible supply arrangements with the agricultural community. The delivery of water under such water sharing contracts often times entails the use of agricultural ditches and diversion structures, many of which may be in need of repair or replacement. To the extent the proposed rule addresses water found in ditches, canals, and even pipes, a finding of a federal nexus, and the regulatory consequences thereof, may very well lead to time delays and cost increases that would preclude such mutually beneficial cooperative transactions.

Further, many smaller Western municipalities are not located in close proximity to perennial rivers or streams and use lagoon or "package plant" technology to treat their wastewater effluent. Though the proposed rule retains the exclusion for CWA wastewater treatment facilities, to the extent the lagoons may discharge to washes or dry arroyos that may now become "waters of the U.S.", additional costly treatment requirements may be imposed in order to ostensibly protect uses that may have once existed in these dry environments or, in theory, could exist in the future. Added to this is the risk of crossing such common arid area "water" features in the extension of wastewater collection lines or the construction of lift stations. Further, to the extent total maximum daily loads (TMDLs) may be needed to alleviate existing water quality impairments, more small facilities may be caught in the TMDL web as the jurisdictional reach moves even further upstream. Should such requirements be imposed as a consequence of the new federal nexus, this would be potentially cost prohibitive for these communities, yet most likely not result in any significant environmental gains.

Finally, Western municipal utilities and agricultural water providers are also interested in assisting EPA in pursuing "green infrastructure" options for stormwater control. Indeed, stormwater flows remain one of the largest impediments to meeting water quality standards. However, the installation of such infrastructure, including artificially constructed wetlands, natural detention basins, and pervious drainage ways or channels could prove problematic if such infrastructure was found to then be located within, or if itself became, "waters of the U.S.".

III. Impacts on Western Water Operations

Western water users have acquired most, if not all, of their water portfolio under the prior appropriation system as administered by their respective states. However, as alluded to above, in order to place those waters to beneficial use, they must divert and/or store that water and subsequently deliver it through a complex set of collection and distribution infrastructure. Congress, through sections 101(g) and 510(2) of the CWA, has afforded an appropriate measure of deference to state water allocation decisions. That said, given the expansive reach of the proposed rule, including its determination as to what constitutes waters that are "jurisdictional by rule," it would appear that at least some of the infrastructure related activities of the municipal water providers might be subject to federal oversight, even in the absence of any commerce clause connection. The proposal, in effect, removes the concept of "navigable" from the Act contrary to the Supreme Court's admonition in SWANCC that this term must be accorded some effect. Certainly in an area of traditional state primacy, such as the allocation and distribution of essential water supplies, the federal agencies should take all steps necessary to prevent the expansion of federal jurisdiction in the absence of a clear Congressional directive to do so. No such directive exists here.

IV. The Need for Further Clarification

As this Committee is aware, the proposed rule and accompanying supporting documentation is extremely lengthy and, in places, quite technically complex. In addition, the proposal places reliance not only on numerous published scientific articles, But also EPA's own draft study, "Connectivity of Streams and Wetlands to

Downstream Waters," which has not been finalized and published yet. Hence, it is difficult at this early stage in the process to identify, in detail, all potential concerns. That said, upon initial review the proposal raises a number of questions. In particular, it remains unclear as to whether, and if so, "why" all of the following waters fall within the definition of "waters of the U.S.". To the extent such waters are considered jurisdictional, many would raise the specter of potential future legal and/or technical challenges, and would certainly complicate the ability of Western municipal utilities and irrigated agricultural water providers to fulfill their core service missions.

- Isolated waters without any direct surface or shallow subsurface connection to (1) –(3) waters, i.e., TNWs, interstate waters and the territorial seas, but which periodically capture sheet flows containing pollutants.
- Normally dry arroyos that flow only in response to infrequent, e.g., one in five year or greater, rainfall events.
- Water treatment, storage, and/or conveyance systems that do not discharge to a TNW and are not otherwise designed to meet CWA requirements, including certain recharge, recycling and reuse projects.
- Artificial lakes or ponds that are not used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing, including stormwater detention ponds.
- Water-filled depressions that are incidental to other than construction activity.
- Man-made swales used to capture stormwater.
- Ditches that are excavated in uplands, drain only uplands or non-jurisdictional waters, but have standing water after rainfall events or due to other natural conditions occurring at such times as irrigation water is not being introduced.
- Construction detention ponds that ultimately drain to navigable waters
- Isolated waters where the only connection to (1)-(3) waters is the migration of amphibians, waterfowl or other wildlife.

- Waters that are not (1)-(3) waters, tributaries thereof or adjacent thereto, and for which no site specific study has been performed, but which lie within a watershed in which a general scientific study has been conducted and a conclusion reached that the waters, in combination with other similarly situated waters in the region, affect the chemical, physical or biological integrity of downstream (1)-(3) waters.
- Ditches that may meet the definition of a wetland or tributary or adjacent water, but which also meet the terms of the exclusions under (b)(3) or (b)(4) of the proposal.
- All ephemeral and intermittent headwater streams.
- Waters that are "adjacent" to tributaries, including non-navigable tributaries, regardless of how remote or insubstantial the connection thereto.

The agencies must be called upon to clarify their position on such waters, explaining in detail "why" it is necessary to include such waters under the regulatory definition if that is the conclusion the agencies have reached.

As I have touched on throughout my testimony there is concern about the "waters of the U.S." rule in both the municipal and agricultural water delivery communities. I would like to take a moment to expand on some of the concerns noted by irrigation water suppliers. Historically, under Section 404 of the CWA, the discharges of dredged or fill material associated with the construction or maintenance of irrigation ditches, or the maintenance of drainage ditches, are not subject to regulation under Section 404. In addition, discharges of dredged or fill material associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures and other facilities functionally related to irrigation ditches have been included in this exemption.

Irrigation districts, canal companies and other water providers preform routine maintenance work in their conveyance facilities every year. In addition, they are required to make more extensive improvements in the form of rehabilitation or replacement of some of the works from time to time. As demand for water in the West grows, water conservation activities such as lining or piping canals and drains are also commonplace activities, along with relocating portions of these water conveyance facilities for improved efficiencies. Without the ability to

conduct these necessary activities free of time consuming and costly federal processes, agricultural water delivery, and many of the efforts aimed at improving efficiencies and conserving water, would be severely challenged. Additionally, many of these facilities provide a flood control function. In such cases, regular maintenance activities to maintain channel capacity are necessary to protect life and property and prevent serious flood damages. Though EPA has published its "Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(1)(A)", and the NRCS has posted its Conservation Practice Standards Exemption List, additional clarity on the nature and scope of the exemptions may be necessary.

To put the challenges that expanded jurisdiction would create in perspective, I will note the Nampa and Meridian Irrigation District (District) in Idaho. The District, which was formed in 1904 and has been delivering water ever since, operates hundreds of miles of canals, laterals, ditches and drains to provide water to their hundred square mile service area. The District's effective operation depends on numerous factors, including the safe and efficient use of approximately eighty drains. The District performs regular maintenance on these drains to ensure effective system use. If the District were required to obtain a CWA permit for each such activity, these routine activities would become exponentially more expensive, time consuming and difficult. This would not only adversely affect system operations, but would likely cause increased water costs, unintentionally creating an incentive to increase groundwater pumping. This one example could be extrapolated to almost any other irrigation district in the West.

Expanded CWA jurisdiction would not only trigger Section 404 permitting requirements but would also precipitate Section 401 and 402 permitting as well as potential Section 303 requirements. Each of these would create additional burdens for irrigation districts. The proposed rule needs greater clarity, ensuring that the historic exemptions for irrigation ditches and associated infrastructure are retained.

V. Conclusion

Western water suppliers, both municipal utilities and agriculture water providers, will encounter daunting challenges in the years ahead as they strive to meet both water supply and wastewater/stormwater treatment obligations in the face of challenges associated with growing demand, drought, fires, extreme storm events

and unhealthy watersheds. Nevertheless, they remain dedicated to full compliance with CWA and SDWA mandates, and the protection of our most valuable resource—water.

Unfortunately, the "waters of the U.S." rule, as currently proposed, could serve to impose additional regulatory burdens on local communities and economies without any concomitant environmental benefits. The rule could "federalize" many of the local geologic and man-made water related features common to the arid West, including dry arroyos, washes, conveyance ditches and ephemeral streams that flow only in response to infrequent storm events. This would further complicate the permitting and approval process, negatively impacting the ability of utilities to timely and cost effectively respond to the significant challenges noted above.

That said, Western municipalities and irrigated agriculture are prepared to work with the federal agencies and Congress in the crafting of a rule that adds clarity and certainty to the CWA and its implementing regulations, yet respects local needs, acknowledges the efficacy of local solutions, and achieves an appropriate cost/benefit balance.