

Humboldt River Basin Water Authority

February 7, 2022

Damaris Christensen
Oceans, Wetlands and Communities Division
Office of Water (4504-T)
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Submitted Via Email: OW-Docket@epa.gov

And,

Online via Federal eRulemaking Portal:
<http://www.regulations.gov>

And,

Stacey Jensen
Office of the Assistant Secretary of the Army for Civil
Works Department of the Army
108 Army Pentagon
Washington, DC 203110-0104

RE: Comments from the Humboldt River Basin Water Authority (HRBWA) Pursuant to Docket ID No. EPA-HQ-OW-2021-0602 Regarding a Proposed Rule for a Revised Definition of “Waters of the United States”

Dear Mr. Christensen and Ms. Jensen,

The Humboldt River Basin Water Authority (HRBWA) appreciates the opportunity to provide comments to Docket ID No. EPA-HQ-OW-2021-0602 regarding a proposed rule to revise the definition of “waters of the United States” (WOTUS) under the Clean Water Act (CWA).

HRBWA is a unit of local government in Nevada established in 1995 by Elko, Eureka, Humboldt, Lander and Pershing Counties to ensure that a long-term supply of reasonably priced water is available to support future agricultural, municipal, recreation and industrial uses within the Humboldt River Basin while protecting existing decreed and certificated water rights.

The Humboldt River is an extensive river drainage system located in north-central Nevada. It is the third longest river in the Great Basin watershed and the only major river system wholly contained within the state of Nevada. The Humboldt River Basin is the largest sub-basin of the Great Basin encompassing an area of 16,840 square miles.

Background:

HRBWA opposes returning to pre-2015 regulations as amended by agency interpretation and informed by Supreme Court case law. The ambiguity in the pre-2015 regulations and agency guidance has led to differing interpretations and inconsistencies in permitting. Implementation of these pre-2015 regulations does not resolve these inconsistencies. The proposed regulations do not provide a known and familiar framework for stakeholders and would likely increase concerns about timeliness and consistency of jurisdictional determinations. Moreover, Nevada’s statutory definitions of “Waters of the State” which have been in place since 1973 effectively addresses water quality matters in a comprehensive manner. 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. There is no evidence that the 2020 Navigable Waters Protection Rule (NWPR) resulted in any significant loss of protection for Nevada’s waters.

HRBWA continues to support the “relatively permanent” standard set forth by Justice Scalia and the plurality in *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*). The “relatively permanent standard” which states that the regulatory authority under the CWA should extend to relatively permanent, standing or continuously flowing bodies of water that are connected to a traditional navigable water and to wetlands with a continuous surface water connection to such waters. Scalia’s approach, along with adherence to clear and well-defined WOTUS exemptions, would address the uncertainty that often causes inaction of regulators and the regulated public.

The following comments cover some of the key inputs being sought in the Federal Register Proposed Rules dated December 7, 2021 (EPA-HQ-OW-2021-0602; FRL-6027.4- 03-OW).

Proposed Rule:

Traditional navigable waters: HRBWA recommended in previous proposed rules that intrastate waters, whether navigable or not, should never be “waters of the United States.” Specifically, the HRBWA sought to make clear that the Humboldt River, which has its origin in and terminates within Nevada, is not a Water of the United States. Since the agencies are making no changes to their longstanding guidance on traditional navigable waters for purposes of Clean Water Act jurisdiction HRBWA is not opposed to the proposed rule definition of traditional navigable waters as defined in the 1986 regulations.

Other waters: HRBWA strongly disagrees with assigning jurisdiction over “other waters” based on a “significant nexus standard” as there is no clear and consistent guidance on how to provide “evidence” of significance. Prior to the regulatory changes in 2015, the use of significant nexus standard resulted in confusion amongst the public and inconsistent application throughout the country and State of Nevada. When it is unclear to the public and county agencies if a water feature may significantly affect the chemical, physical, or biological integrity of a traditional navigable water, the Army Corp of Engineers (Corps) is required to make a case-specific analysis. This results in delays in jurisdictional determinations and can result in assumptions of jurisdiction and regulation of waters never intended to be regulated under the CWA. A clear definition of WOTUS along with a list of well-defined and scientifically sound exemptions should be included in this proposed rule to provide clarity of jurisdiction that is consistently applied.

Tributaries: HRBWA has concerns with the proposed inclusion of “intermittent flow” in the definition of WOTUS and supports a definition specific to tributaries that includes, relatively permanent, standing or continuously flowing streams, rivers, and lakes having an indistinguishable surface connection with navigable-in-fact waters. HRBWA further recommends the definition of “relatively permanent” as those tributaries that flow for at least three contiguous months per year, except during periods of extreme drought or precipitation according to USGS standards rather than the current definition of “intermittent flow.”

HRBWA strongly supports the exclusion of ephemeral flows, including dry washes, arroyos and similar features that lack the required relatively permanent flow regimes to satisfy the tributary definition.

Adjacent wetlands: HRBWA does not support the term “adjacent” as currently defined by the Court to mean “bordering, contiguous or neighboring”, but supports the inclusion of wetlands that directly abut and are indistinguishable from traditional navigable waters and tributaries as WOTUS. The definition should include the fact that wetlands must meet the definition currently provided by the Corps.

Exclusions: HRBWA recognizes that the proposed rule does not alter statutory permitting exemptions for agriculture, silviculture, or those waters considered “generally not jurisdictional” in prior preamble language, and HRBWA supports the inclusion of the two exemptions within the proposed rule. However, HRBWA requests that the agencies bring back several of the exclusions provided in the NWPR and include a written list of water features that are NOT determined to be WOTUS in the proposed rule. Clearly established exclusion of water NOT determined to be WOTUS would provide greater clarity to county agencies and landowners, increasing project efficiencies and decreasing costs. In addition to the two currently proposed exclusions, HRBWA requests the Corps and EPA include to the following exclusions that clearly identify waters that are NOT determined to be WOTUS.

Prior converted cropland: HRBWA supports this exemption for prior converted cropland but is not supportive of a 5-year window for determining if such cropland is ‘abandoned’. Often times, prolonged drought can result in a 5-year non-use based on a lack of water alone. 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. In terms of evaluation of the cropland exclusion, documentation of state-managed or issued water rights should be considered in making such a determination as such rights have to be documented, filed and kept in good standing with the State.

Groundwater: It is HRBWA’s position that groundwater should never qualify as WOTUS and it should be specifically excluded in the definition. The exclusion of groundwater in the definition should be expanded to include groundwater drained through subsurface drainage systems and shallow subsurface hydrologic connections used to establish jurisdiction between surface and groundwater.

Non-relatively Permanent Waters: HRBWA supports an exemption for, non-relatively permanent waters (*waters flowing less than three contiguous months peryear, except during periods of extreme drought or precipitation according to USGS standards*). This includes waters with ephemeral and intermittent flow regimes. HRBWA supports incorporation of a specific exclusion of non-relatively permanent waters in the proposed rule. This exemption should specifically reference the exclusion of stormwater run-off, including directional sheet flow over upland areas, swales, erosional features, and arroyos.

Other Definitions:

Adjacent: HRBWA does not support the definition of “adjacent” within the proposed rule as it means “bordering, contiguous, or neighboring.” As currently written, this definition has proven to be inconsistently applied and has led to sweeping extension of the agency’s jurisdiction and over regulationsof waters with no connection to traditional navigable waters.

HRBWA requests the reinstatement of the previous interpretation of “adjacent” as applied under the NWPR to mean directly abutting a jurisdictional water or those wetlands that are (1) inundated by flooding from a jurisdictional water, 2) separated from a jurisdictional water only by natural features (e.g., a berm, bankor dun), or (3) physically separated from a jurisdictional water by an artificial structure that “allows for a direct hydrologic surface connection” between the wetland and the jurisdictional water.

Uplands: HRBWA encourages the agencies to provide a definition of “upland” in the proposed rule to provide clarification of the jurisdictional extent of the agencies’ regulations.

HRBWA strongly encourages the agencies to clarify, or at a minimum, maintain that areas within the 100- year floodplain that do not meet wetland criteria and/or wetlands that have been converted to upland do not qualify under the definition of WOTUS. With Nevada being the driest state in the nation, most historic development occurred near and around perennial water. This resulted in a high density of County infrastructure (roads, ditches, wastewater treatment plants, etc.) being located within the 100-year flood plain (due to periodic flood events) that often did not contain areas that would meet wetland criteria. A clear definition of ‘upland’ provides regulatory consistency with regards to County critical infrastructure that is built on upland and non-jurisdictional under the CWA.

HRBWA suggests a definition of “relatively permanent” waters as *those waters that flow for at least three contiguous months per year, except during periods of extreme drought or precipitation according to USGS standards*. As such, HRBWA strongly supports the exclusion of non- relatively permanent waters, including waters with ephemeral and intermittent flow regimes, that do not meet this definition. This exclusion would include dry washes, arroyos and similar features that lack the required relatively permanent flows.

Significantly Affect:

HRBWA strongly disagrees with the definition and use of the term “significantly affect” for the purposes of determining whether a water feature meets the significant nexus standard, especially when it is applied to non-relatively permanent waters. Implementation guidance on applying the term suggests that field staff evaluate all available hydrologic information, such as gauge data, flood predictions, historic records of water flow, statistical data, personal observations, etc., the vast majority of which will never be available for non-relatively permanent waters. If available, this type of analysis cannot be completed by the average landowner or local and state agency personnel, and response times for USACE and EPA determinations on jurisdiction are crippling. Landowners and regulatory agencies need a clear definition of WOTUS that can be applied consistently.

Implementation of Proposed Rule:

Generally Not Considered “waters of the United States”

HRBWA strongly suggests that the agencies provide clear definitions of certain waters that are NOT classified as WOTUS in this proposed rule. Those waters include ditches currently exempt per regulatory guidance and those non-jurisdictional waters discussed in the regulatory preamble. This portion of the rule can be valuable in providing clarity and certainty to counties that are responsible for providing critical services and infrastructure, and the cost of providing said services and infrastructure.

Certain ditches: HRBWA believes that a separate definition for jurisdictional ditches is helpful. However, under the proposed rule, the jurisdiction of ditches is still overly complicated. As previously mentioned, HRBWA supports an exclusion for ditches that would be used for agricultural and flood control purposes. The same concern would apply to ditches and structures utilized for flood abatement and/or stormwater control purposes including roadside ditches.

Thank you for your attention and consideration of these comments. If you have any questions, please donot hesitate to contact me at ccjfontaine@gmail.com or by phone at (775) 443-7667.

Sincerely,

A handwritten signature in black ink that reads "Jeff Fontaine". The signature is written in a cursive style with a large, stylized "J" and "F".

Jeff Fontaine
Executive Director
Humboldt River Basin Water Authority