



COACHELLA VALLEY WATER DISTRICT

Established in 1918 as a public agency

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September 3, 2021

VIA FEDERAL eRULEMAKING PORTAL: [HTTPS://WWW.REGULATIONS.GOV/](https://www.regulations.gov/)

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

Ms. Stacey Jensen
Office of the Assistant Secretary of the Army for Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 20310-0104

Re: Docket No. EPA-HQ-OW-2021-0328
Comments from Coachella Valley Water District

Dear Ms. Christensen and Ms. Jensen:

The Coachella Valley Water District (“District”) submits these comments in response to the U.S. Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers’ (“Corps”) (collectively, “the Agencies”) August 4, 2021 request for pre-proposal feedback on revising the definition of “waters of the United States.”¹

The Agencies seek feedback on the definition of the term “waters of the United States” as it relates to climate change, environmental justice, relevant science, regional/state/tribal interests, and implementation.²

The District is a special district formed in 1918 to protect and conserve local water resources in the Coachella Valley. Today, the District delivers irrigation and drinking water, collects and recycles wastewater, provides regional storm water protection, replenishes the groundwater basin and promotes water conservation. The District is working to supply and manage water resources in the near and long-term future and strengthen resilience to the increased frequency and intensity of extreme weather patterns as the climate changes.

¹ 86 Fed. Reg. 41,911 (Aug. 4, 2021).

² *Id.*

The District understands that it is the Agencies' intent to repeal and replace the existing 2020 definition of "waters of the United States" via a two-step process. Following the first step (repeal of the existing definition), the effective regulatory definition of the term will be based on the 1986 promulgated regulation and guidance issued by the Agencies following the *Rapanos* decision in 2008.

To avoid uncertainty, the District requests that the Agencies clarify, throughout the entire rulemaking process, that infrastructure that facilitates the District's water supply and stormwater management-operations is excluded from the definition of "waters of the United States." Appropriately crafted exclusions can and do protect the nation's waters in a manner that does not hinder operation or maintenance of crucial services. These exclusions allow the District to provide affordable, reliable, and resilient drinking water and stormwater management.

The District appreciates the opportunity to provide pre-proposal recommendations for the Agencies' two-step rulemaking process. The District supports the Agencies' commitment to learn from the past regulatory approaches and craft a rule that reflects the current science, protects the nation's waters, and safeguards public health. The District's comments follow.

I. Consequences of "Waters of the United States"

Real consequences attach to the designation of "waters of the United States" for public entities. An overly expansive definition can result in the wrongful classification of water infrastructure as jurisdictional waters. Aqueducts, irrigation canals and ditches, groundwater recharge basins, percolation ponds, and stormwater and wastewater infrastructure may be at risk. Classifying water infrastructure as jurisdictional would not only interfere with the District's ability to provide necessary and affordable services to its population, but would also hinder the advancement of environmentally beneficial projects. Such a result would not advance the Agencies' mission and would frustrate the Clean Water Act's goal of cleaning up the nation's waters.

A. Requirements to internally attain water quality standards

If water infrastructure is designated as "waters of the United States," requirements to attain water quality standards could result in situations that are highly prohibitive or impossible for the District to comply.

Under the Clean Water Act, states adopt water quality standards for all intrastate waters such that the waters attain designated uses.³ Generally, states must include the basic "fishable, swimmable" standard as a designated use.⁴ The District's infrastructure, however, is inherently not designed to meet fishable, swimmable standards. Stormwater and wastewater infrastructure treat polluted water prior to discharging into traditional navigable waters. Though highly clean, recycled water can have elevated levels of total dissolved solids and nutrients, and discharges into percolation ponds could trigger Clean Water Act permitting requirements or discharge prohibitions. The application of these Clean Water Act requirements to infrastructure designed to treat water for beneficial purposes would be misplaced.

³ 33 U.S.C. § 1313(c)(2)(A).

⁴ *See id.*

Moreover, of great concern is the possibility that the EPA or a state regulatory agency would adopt a total maximum daily load (“TMDL”) for infrastructure on the premise that the conveyance is a water of the United States failing to meet applicable water quality standards.⁵ A TMDL could result in limitations on discharges into, and therefore use of, the infrastructure. Such compliance is in many cases infeasible and will force dischargers into non-compliance.

B. Prohibition of pollution treatment infrastructure

States may not adopt “waste transport or waste assimilation” as a designated use for waters of the United States.⁶ This prohibition prevents treatment systems that ultimately improve water quality from being constructed within waters of the United States. Thus, inappropriately designating infrastructure such as stormwater drains, flood control systems, or wastewater infrastructure as waters of the United States would hinder the ability of downstream waters to attain applicable water quality standards.

For example, if portions of a municipal separate storm sewer system (“MS4”) are converted to waters of the United States, implementation of best management practices or other treatment controls that would benefit downstream traditional navigable waters may not be allowed. Similarly, manmade wetlands constructed as part of the wastewater treatment system, at the point of discharge and outside the waters of the United States, could be prohibited.

C. Federal permitting

Section 404 of the Clean Water Act requires permits for the “discharge of dredged or fill material” into waters of the United States.⁷ Section 404 permitting in turn may trigger consultation under the federal Endangered Species Act. If percolation ponds and constructed wetlands are designated as waters of the United States, normal maintenance operations could result in requirements to obtain permits under Section 404. In some cases, these regulatory requirements may obstruct the purpose of the facility. In others, environmentally beneficial projects may be delayed or prohibited from being constructed altogether.

II. Requested Exclusions and Clarifications

As discussed above, the designation of “waters of the United States” has real, practical consequences. To avoid unnecessary, costly, and counterproductive burdens, the District requests express exclusions for its water infrastructure. Express exclusions provide the clarity, consistency, and predictability that will not only protect the District’s operation of key services, but ease implementation by the Agencies.

The District additionally requests that EPA clarify that a water body cannot be both “waters of the United States” and a point source. By statutory definition, a point source is the mechanism of delivery for pollutants into “waters of the United States.” Failure to clearly delineate between the two creates confusion about the point of compliance for a discharger and the ability of a discharger to construct and operate treatment works and other infrastructure.

⁵ See 33 U.S.C. § 1313(d).

⁶ 40 C.F.R. § 131.10(a).

⁷ 33 U.S.C. § 1344(a).

In addition to this clarification, the District requests that, in both the forthcoming repeal and replacement rules, the Agencies expressly exclude the following from the definition of “waters of the United States”:

1. Water conveyance and supply systems, including aqueducts, canals, ditches, storage ponds or lagoons, and treatment ponds.

Aqueducts, irrigation canals, ditches, and other manmade channels are used to transport water across the arid West for drinking water and irrigation. Storage ponds and other water storage facilities are frequently used in recycled water facilities. The District requests that the Agencies exclude all water conveyances and water supply infrastructure, as they are crucial for managing water resources.

The 2015 Clean Water Rule (“CWR”) and the 2020 Navigable Waters Protection Rule (“NWPR”) excluded ditches and other water supply infrastructure subject to certain limitations.⁸ The District requests that the Agencies exclude all artificial ditches for water conveyance, whether or not they were constructed in a natural channel, as they are essential for irrigation systems in the West.

The District additionally requests that the Agencies return to following Army Corps regulatory guidance on exempting certain operation and/or maintenance of irrigation and drainage ditches from Section 404 permitting requirements.⁹

2. Groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins or ponds.

The 2020 NWPR excluded infrastructure for groundwater recharge and water recycling, with the limitation of being constructed in “upland.”¹⁰ As the Rule noted, these are increasingly important tools for water supply and drought resilience. For clarity and ease of administration for both the District and the Agencies, the District requests that the Agencies wholly exclude infrastructure for the purposes of groundwater recharge and water recycling.

3. Stormwater control systems constructed to convey, treat, infiltrate, or store stormwater run-off.

Stormwater control features were excluded in both the 2015 CWR and the 2020 NWPR, with certain limitations.¹¹ For the sake of clarity and ease of implementation for both the District and the Agencies, the District requests the Agencies wholly exclude stormwater control features from the definition.

⁸ 80 Fed. Reg. 37,105; 85 Fed. Reg. 22,338.

⁹ RGL No. 07-02 (July 4, 2007).

¹⁰ 85 Fed. Reg. 22,338.

¹¹ 80 Fed. Reg. 37,105; 85 Fed. Reg. 22,338.

4. Groundwater, including groundwater drained through subsurface drainage systems.

The 2015 CWR and 2020 NWPR excluded groundwater, including groundwater drained through subsurface drainage systems.¹² The District requests the Agencies to maintain this exclusion, and to additionally clarify that groundwater is excluded in all circumstances as consistent with Congressional intent.

5. Waste treatment systems, including treatment ponds, treatment wetlands, storage ponds or lagoons, and infiltration basins or ponds

The 2015 CWR and 2020 NWPR excluded waste treatment systems.¹³ The District requests that waste treatment systems will continue to retain their exempt status, and that infiltration (or percolation) basins that are used for recycled wastewater should be excluded.

III. Conclusion

The District appreciates the Agencies' time and consideration of its request. The District looks forward to working with the Agencies in developing a robust definition of "waters of the United States" that protects both the nation's waters and the public health and safety of the District's served populations.

Sincerely,

Steve Bigley
Director of Environmental Services
Coachella Valley Water District

¹² 80 Fed. Reg. 37,105; 85 Fed. Reg. 22,338.

¹³ 80 Fed. Reg. 37,105; 85 Fed. Reg. 22,338.