RURAL COUNTY REPRESENTATIVES OF CALIFORNIA

August 29, 2014

Ms. Donna Downing
Jurisdiction Team Leader
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

Ms. Stacey Jensen
Regulatory Program Manager
U.S. Army Corps of Engineers
441 G St. NW
Washington, DC 20314

RE: Definition of "Waters of the United States" Under the Clean Water Act (Docket Nos. EPA-HQ-OW-2011-0880; FRL-9901-47-OW)

Dear Ms. Downing and Ms. Jensen:

The Rural County Representatives of California (RCRC) represents thirty-four rural counties across California. Our Board of Directors is comprised of one elected Supervisor from each member county, and our counties are tasked with a variety of permitting, maintenance, and decision-making responsibilities related to water conveyance, land use, and development in rural California communities. County Boards of Supervisors are vital in the stewardship of our state's water resources. They take the role very seriously and are committed to carrying out provisions of the Clean Water Act (CWA) to aid in better protection of our water systems. RCRC opposes the proposed rulemaking changing the definition of "Waters of the United States" under the CWA and asks that your agencies withdraw the rule immediately.

RCRC has been engaged in this issue through its various iterations, and filed extensive comments on the proposed "*Guidance to Identify Waters Protected by the Clean Water Act*" (Guidance) released in 2011. At that time, the proposed Guidance was highly controversial, with many stakeholders, including RCRC, believed it to be a drastic de facto jurisdictional expansion by your agencies. We are disappointed that you have decided to essentially repackage the Guidance into a proposed rule before

issuing the draft science report without extensive nationwide outreach to counties, farmers, landowners, and the other myriad stakeholders that this rule will impact should it be adopted. We are also frustrated that your agencies have attempted in the media to marginalize the valid concerns of stakeholders rather than conducting meaningful outreach to address the glaring problems with the proposed rule.

In light of our concerns, we would like to offer the following comments in opposition to the proposed rule:

The changes to the definition of "Waters of the U.S." triggers new unfunded mandates on local governments by expanding federal jurisdiction

The term "navigable water" has a distinct meaning in the CWA and requires state and local government administrative and regulatory actions that can increase the scope and cost of permitting. Changes to the definition of tributary, as well as the inclusion of the vague and relatively undefined "adjacent waters," will likely alter the way many water bodies are regulated.

For example, a tributary defined as a Water of the U.S. under this rule would have to be added to the list of impaired waters in the state. Such a listing will trigger a number of cost-prohibitive requirements on local governments, including but not limited to: the development of a use attainability study; the identification of designated beneficial uses; the adoption of site specific water quality objectives; the application of and compliance with numeric effluent limits, and the potential for a Total Maximum Daily Load allocation. These additional requirements will make counties subject to additional enforcement actions - including civil and criminal penalties - and place local governments at great risk of third-party litigation.

In addition, water supply systems could be defined as Waters of the U.S. under the new definition of a tributary as they convey flow to downstream water. These could include not only large federal and state water delivery systems, such as the California Aqueduct and the Colorado River Aqueduct, but also reservoirs and other water supply features constructed and managed by local and private interests.

Furthermore, even though your agencies have maintained that there is no intent to impact water reuse facilities, the rule does not clearly address reuse facilities associated with wastewater treatment systems. Reuse facilities were constructed to augment water supply for irrigation and sometimes drinking water, and were not designed with the objective to meet the parameters of the CWA. The rule needs to clearly state your agencies' intent for water reuse facilities.

The proposed rule will hinder the ability of counties to manage public infrastructure ditch systems and impact public safety

The expansion of the definition of Waters of the U.S., as drafted, will also force counties to seek Section 404 permits for the now-routine maintenance of such "waterways" as roadside ditches and storm water drains. Public infrastructure ditch systems can stretch for hundreds of miles across local jurisdictions, and it is unclear how these systems will be classified under the rule. This is particularly onerous for rural counties as many are already struggling with tough budgeting decisions in the face of diminishing funding from the state and decreased public appetite for approving new taxes to cover such costs. It also could dramatically interfere with the ability of counties to properly maintain roadways to keep them safe and accessible to rural residents, particularly since the U.S. Army Corps of Engineers (Corps) is already significantly backlogged in evaluating and processing of 404 permits.

Moreover, water conveyance systems for flood control purposes may also fall under the new definitions, which could ultimately hinder counties from ensuring public safety in extreme storm events. In the face of possible climate adaptation issues from sea level rise, the need to seek permits for maintenance of such systems would be a nearly insurmountable obstacle to developing effective adaptation strategies in emergency situations, and runs counter to the Administration's recent climate adaptation policies and calls to action.

The rule must clarify the impacts on MS4 permits to avoid double regulation of permitted entities

As it stands, the proposed rule provides no clarification on ditches used as conveyance for runoff in municipal storm water activities. Ditches are commonly used by municipalities for storm water discharge under the Municipal Separate Stormwater Sewer Systems (MS4) program, and such activities are already regulated as waste treatment systems under Section 402(p) of the CWA. The proposed rule would reclassify those ditches as Waters of the U.S., whereby the applicable control standard would no longer be maximum extent practicable under Section 402(p), but the attainment of water quality standards thereby requiring the imposition of numeric effluent limits.

California has imposed stricter standards on all storm water permittees, including MS4 permit holders, and the proposed rule as it stands would only serve to exacerbate the already difficult task of compliance for rural counties in our State by causing jurisdictional confusion and dramatically increased compliance costs. Many rural California counties have either recently been required to comply with the MS4 permit, or will be required to comply within the next permit cycle. The implementation costs for new permittees would increase exponentially if the proposed rule is not modified to include clarification and exemptions for MS4 permit holders.

RCRC recommends that, should you choose to proceed with the rulemaking, you specifically include ditches and other conveyance methods used to comply with MS4 permits under the exemption for waste water treatment systems.

The rulemaking should not have been initiated before the issuance of the draft science report

Your agencies have stated that the draft science report, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" is informing the proposed rule. However, you are moving forward with the rulemaking before the report has been finalized and released, making it impossible to truly use the conclusions from the report to inform this proposal. Moving forward with the proposed rule before the science report is finalized is bad public policy and premature at best, particularly when the proposal has the far-reaching impact that this one does. RCRC recommends that your agencies withdraw the rule so that a thorough review of the draft science report can be conducted before finalizing such a far-reaching regulatory proposal.

The rule was developed without proper engagement of local and state governmental partners

The CWA identifies state and local governments as partners in enforcing and implementing the Act, yet your agencies have proposed a rule that imposes all costs and responsibilities on these other partners. In Congressional testimony, the U.S. Environmental Protection Agency (EPA) representatives have been unable to name any public interests your agencies engaged with during development of the rule, which not only violates the spirit of the CWA, but also underscores the inadequate analysis of local impacts that will result from this rule. If your agencies decide to move forward with a change to the definition of "Waters of the U.S.," we strongly urge you to redraft the proposed rule and fully engage local and state governments in a meaningful process to draft the new rule.

In light of our comments, RCRC respectfully recommends that EPA and the Corps withdraw the proposed rule. Thank you for considering our comments, and encourage you to contact us if you have any questions.

Sincerely,

Staci Heaton
Regulatory Affairs Advocate

cc: Members of the California State Congressional Delegation
RCRC Board of Directors