IDAHO WATER USERS ASSOCIATION

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RE: Docket ID No. EPA–HQ–OW–2021–0328
Recommendations Regarding the Definition of "Waters of the United States"

To whom it may concern:

These comments are submitted to the U.S. Army Corps of Engineers (COE) and the U.S. Environmental Protection Agency (EPA) (collectively, the Agencies) on behalf of the Idaho Water Users Association (IWUA) regarding the efforts to revise the definition of Waters of the United States (WOTUS Rule) under the Clean Water Act (CWA). *See* Fed. R. Vol. 86, No. 147, p.41911 (Aug. 4, 2021). We incorporate and support the comments submitted by the Idaho Ground Water Appropriators and Family Farm Alliance on this issue. We appreciate the opportunity to provide these additional comments.

I. Statement of Interest

IWUA is a non-profit corporation representing approximately 300 canal companies, irrigation districts, ground water districts, municipal and public water suppliers, hydroelectric companies, aquaculture interests, agri-businesses, professional firms and individuals throughout Idaho. Our purpose is to promote, aid and assist in the development, control, conservation, preservation and utilization of Idaho's water resources.

IWUA and its members understand the importance of meeting water quality challenges in our rivers and streams. IWUA maintains an active, standing committee on water quality and many of our member irrigators actively participate in water quality/total maximum daily loads ("TMDL") efforts in the Snake, Boise, Payette and other river basins throughout Idaho.

At their 2021 Annual Convention, IWUA members adopted IWUA Resolution 2021-21 addressing the CWA. The resolution includes several provisions important to the WOTUS Rule discussion, including:

2019-22: Clean Water Act

WHEREAS, The Clean Water Act and its implementing regulations may significantly impact water users and the agricultural community of the State of Idaho; and

WHEREAS, Idaho water users must operate and maintain irrigation ditches, canals, laterals and drains without unnecessary or overreaching regulation.

NOW, THEREFORE, BE IT RESOLVED, That the Idaho Water Users Association urges federal and state governments to incorporate the following principles in any activities regarding the Clean Water Act and its implementation regulations:

…

3. No provision or program of the Clean Water Act shall be construed or applied to authorize a taking of any interest in water created pursuant to state law;

…

6. The Corps should further recognize all exemptions, protections or allowances for irrigation and drainage ditches, including the exemption for the construction or maintenance of irrigation ditches, or the maintenance of drainage ditches as discussed in the *Joint Memorandum Concerning Exempt Construction or Maintenance of Irrigation Ditches and Exempt Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act* (July 2020);

7. Federal and state agencies may not prohibit or in any way restrict or condition water diversions, depletions, or the consumptive use of water pursuant to water rights;

…

17. Clean Water Act provisions shall not be applied to irrigation delivery or conveyance systems or irrigation return flows. Existing non-point sources shall remain as non-point sources under any program adopted or implemented pursuant to the Clean Water Act. Entities owning such irrigation delivery or conveyance facilities shall be permitted to control or regulate the quality of such return flows and to develop cooperative programs with water users;

…

21. Any rules, regulations or legislation enacted by the federal or state government regarding its jurisdiction under the Clean Water Act should expressly acknowledge and return the term "navigable", consistent with the United States Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. Corps and Rapanos v. United States*; and

22. Water contained in canals, laterals, pipes, and natural drainages and drains, seep tiles, and other irrigation and water delivery facilities should not be considered "waters of the United States" by EPA, the Corps, DEQ and other federal and state agencies.

II. Comments on Definition of WOTUS

IWUA supports and appreciates efforts to provide clear, predictable regulations regarding the scope of jurisdiction under the CWA. We have been concerned that prior definitions were not clear or predictable and resulted in confusion and litigation throughout the country. Through this rulemaking, the Agencies should ensure that any WOTUS Rule maintains the plain language and effect of the CWA – including the agricultural exemptions.

A. WOTUS Rulemaking Must Reflect the CWA's "Holistic" Approach, Respect State Sovereignty, and Avoid Disrupting Successful Water Quality Management in Idaho

In the 2020 *Navigable Water Protection Rules* (2020 WOTUS Rule), published in the Federal Register, Volume 85, No. 77, p. 22250 (Apr. 21, 2020), the Agencies accurately summarized the CWA's "holistic" approach under which water quality management has evolved in Idaho:

> [T]he agencies recognize and respect the primary responsibilities and rights of States to regulate their land and water resources as reflected in CWA section 101(b). 33 U.S.C. 1251(b), see also id. at 1370. The oft-quoted objective of the CWA to ''restore and maintain the chemical, physical, and biological integrity of the Nation's waters,'' id. at 1251(a), must be implemented in a manner consistent with Congress' policy directives to the agencies. The Supreme Court long ago recognized the distinction between federal waters traditionally understood as navigable and waters ''subject to the control of the States.'' *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 564–65 (1870). Over a century later, the Supreme Court in SWANCC reaffirmed the State's ''traditional and primary power over land and water use.'' *SWANCC*, 531 U.S. at 174; *accord Rapanos*, 547 U.S. at 738 (Scalia, J., plurality)…
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> Ensuring that States and Tribes retain authority over their land and water resources, reflecting the policy in section 101(b), helps carry out the overall objective of the CWA and ensures that the agencies are giving full effect and consideration to the entire structure and function of the Act. *See, e.g., Rapanos*, 547 U.S. at 755–56 (Scalia, J., plurality) (''[C]lean water is not the only purpose of the statute. So is the preservation of primary state responsibility for ordinary land-use decisions. 33 U.S.C. 1251(b).'') (emphasis in original). That includes the dozens of non-regulatory grant, research, nonpoint source, groundwater, and watershed planning programs that were intended by Congress to assist the States in controlling pollution in the nation's waters, not just its navigable waters. These non-regulatory sections of the CWA reveal Congress' intent to restore and maintain the integrity of the nation's waters using federal assistance to support State, tribal, and local partnerships to control pollution of the nation's waters in addition to a federal regulatory

> prohibition on the discharge of pollutants to its navigable waters. *See e.g., id*. at 745 (''It is not clear that the state and local conservation efforts that the CWA explicitly calls for, see 33 U.S.C. 1251(b), are in any way inadequate for the goal of preservation.''). Regulating all of the nation's waters using the Act's federal regulatory mechanisms would call into question the need for the more holistic planning provisions of the Act and the State partnerships they entail. Therefore, by recognizing the distinctions between the nation's waters and its navigable waters and between the overall objective and goals of the CWA and the specific policy directives from Congress, the agencies can fully implement the entire structure of the Act while respecting the specific word choices of Congress. See, e.g., *Bailey*, 516 U.S. at 146; *Nat'l Fed'n of Indep. Bus*., 567 U.S. at 544.

85 Fed. R. at 22269.

Water quality management in Idaho has matured over the last 30 years with the development of TMDLs and implementation plans through which point and nonpoint source stakeholders work collaboratively to attain water quality goals for impaired Idaho water bodies. Today, implementation is the water quality management focus for Idaho watersheds that have TMDLs. Local engagement, supported by the Idaho legislature, the Idaho Department of Environmental Quality (DEQ) and other state agencies, with federal assistance and oversight, has been the key to Idaho's water quality successes and innovations. These include:

- Collaborative water quality management between local, state and federal agencies and Basin and Watershed Advisory Groups consisting of municipal, stormwater, agricultural, environmental and other water management stakeholders;
- DEQ's administration of federal 319 grants for nonpoint source best management practice (BMP) implementation;
- The Idaho legislature's creation of an ongoing State grant program to provide additional financial assistance for agricultural BMP implementation;
- Idaho attaining primacy for DEQ's administration of the Idaho Pollutant Discharge Elimination System (IPDES) program;
- Long-term implementation of on-farm BMPs in the Lower Boise River watershed, contributing to significant declines in sediment and phosphorus in the Boise River;
- Long-term implementation of agricultural drainage treatment basins in the Twin Falls area, contributing to significant declines in sediment and phosphorus in the Middle Snake River; and
- Groundbreaking development of water quality trading frameworks and legislative authorization for DEQ administration of water quality trading.

Successful water quality management requires clear and consistent water quality standards and jurisdictional definitions and parameters. The multitude of TMDLs, implementation plans, and agricultural BMPs that have been implemented over the last 30 years are based on existing identifications of point sources, nonpoint sources, and jurisdictional "waters of the United States." As explained in EPA's various WOTUS rulemakings, the Agencies have not treated irrigation ditches and drains as jurisdictional waters. Doing so at this implementation-focused stage in Idaho water quality management would needlessly disrupt and set back Idaho's progress in attaining water quality standards.

We urge the Agencies to consider the potentially disruptive impacts of a WOTUS rulemaking that would significantly alter the regulatory landscape for Idaho water quality management.

B. Irrigation Ditches and Drains are not Jurisdictional

Agricultural exemptions are engrained in the fiber of the CWA. Irrigation canals, ditches, and drains are not navigable waters, are not "waters of the United States," and are not "tributary" to waters of the United States. In fact, such facilities have long been excluded from CWA jurisdiction. The CWA specifically excludes "return flows from irrigated agriculture" from the definition of "point source." 33 USC § 1362(14). The Act also exempts "return flows from irrigated agriculture" from the NPDES permit requirements. 33 USC § 1342(1)(1). This exemption broadly includes all activities related to crop production, including flows from retired or fallowed land. *PCFFA v. Glaser*, 937 F.3d 1191, 1197-99 (9th Cir. 2019). Similarly, permits for dredge or fill material are not required "for the purpose of construction or maintenance of ... irrigation ditches, or the maintenance of drainage ditches." 33 USC § 1344(f)(1)(C)(i).

This Congressional intent was reflected in the 1975 and 1977 regulations, confirming that "manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States." 40 Fed. R. 31,321 (1975); *see also* 45 Fed. R. 62732, 62747 (Sept. 19, 1980) ("man-made, non-tidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States"); 48 Fed. R. 21466, 21474 (May 12, 1983) ("Waters of the United States do not include the following man-made waters: (1) Non-tidal drainage and irrigation ditches excavated on dry land, (2) Irrigated areas which would revert to upland if the irrigation ceased"). The exemptions were further clarified in COE's *Regulatory Guidance Letter* 07-02 (July 4, 2007) (regarding the exemptions for construction or maintenance of irrigation ditches and maintenance of drainage ditches under Section 404 of the CWA). To date, Congress has not expanded federal jurisdiction under the CWA to include irrigation and drainage facilities. Any rule defining "Waters of the United States" under the CWA must implement the clear Congressional intent regarding ditches, and categorically exclude them.

The words chosen by Congress and the intent of the Act are clear: irrigation canals, ditches and drains were not meant to be regulated under the CWA. Once water is diverted from waters of the United States, into canals, ditches, or pipes for use in irrigation, it cannot be considered "waters of the United States." Indeed, most, if not all, irrigation ditches were constructed to carry water *away from* a traditionally navigable water. Generally, they are not

tributary to a water of the United States and, as the system goes downstream, the ditches get smaller.

In 2020, the Agencies released *The Navigable Water Protection Rules* (2020 WOTUS Rule), published in the Federal Register, Volume 85, No. 77, p. 22250 (Apr. 21, 2020). As part of the 2020 WOTUS Rule, the Agencies provided extensive discussion about irrigation ditches and drains. *See Id*. at 22295. This analysis is consistent with the statutory language, and prior regulations and guidance, which confirm that irrigation ditches and drains ***should not*** be considered waters of the United States. The 2020 WOTUS Rule include the following regarding irrigation ditches and drains:

> For irrigation ditches, which typically are constructed in upland but frequently must connect to a water of the United States to either capture or return flow, Congress exempted both the construction and maintenance of such facilities. 33 U.S.C. 1344(f)(1)(C); *see also* 33 U.S.C. 1362(14) (excluding agricultural stormwater discharges and irrigation return flows from the definition of "point source"). The construction activities performed in upland areas are beyond the reach of the CWA, but the permitting exemption applies to the diversion structures, weirs, headgates, and other related facilities that connect the irrigation ditches to jurisdictional waters. *See, e.g*., Corps, Regulatory Guidance Letter No. 07–02, at 1–2 (July 4, 2007). …
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> For drainage ditches, by contrast, the permitting exemption is limited to only maintenance of such ditches. 33 U.S.C. 1344(f)(1)(C). That is because a parallel exemption for construction would allow the drainage of wetlands subject to CWA jurisdiction without a permit. Congress' intent to prevent such a result is evident in the "recapture" provision of 33 U.S.C. 1344(f)(2). *See, e.g*., Sen. Rpt. 95–370, 95th Cong. 1st Sess., at 76–77 (July 19, 1977) (noting that exempted "activities should have no serious adverse impact on water quality if performed in a manner that will not impair the flow and circulation patterns and the chemical and biological characteristics of the affected waterbody" and noting that the "exemption for minor drainage does not apply to the drainage of swampland or other wetlands").
> …
>
> Ditches used to drain surface and shallow subsurface water from cropland are a quintessential example of the interconnected relationship between land and water resource management, as is the case for managing water resources in the Western United States, conveying irrigation water to and from fields, and managing surface water runoff from lands and roads following precipitation events—all activities that rely on ditches. *See, e.g., FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) (characterizing ''regulation of land use [as] perhaps the quintessential state activity''). The majority of these ditches will not be jurisdictional under the final rule. This final rule therefore effectuates the clear policy directive from Congress to preserve and protect the primary authority of

> States over land and water resources within their borders. See 33 U.S.C. 1251(b), 1370.

85 Fed. R. at 22296-298. Any new WOTUS rule should include similar analysis and conclusions regarding irrigation ditches and drains.

This is the only practical approach for irrigation canals, ditches and drains under the statutory scheme of the Clean Water Act. In Idaho alone, there are tens of thousands of miles of constructed irrigation canals, ditches and drains crisscrossing the landscape. Many of these water delivery facilities are owned by the U.S. Bureau of Reclamation. Others are owned by individual irrigation entities. If the water in these facilities were to be actively regulated under the CWA, not only would it impose an excessive regulatory and financial burden, but on-the-ground implementation would be practically impossible with consequences rippling throughout the state and regional economy. The cost to meeting new CWA-based standards cannot be readily calculated but would undoubtedly be enormous. Furthermore, the State establishes standards for the protection of agricultural water supplies. Additional regulatory oversight is not necessary.

Likewise, requiring NPDES permits for activities within the canals, ditches and drains, which have previously been considered routine operation and maintenance, would be impractical if not impossible. Irrigation ditches and drains require regular maintenance and repairs – much of which must be done during the non-irrigation season. These activities include removing sediment, installing structures to control the flow and/or diversion of water, lining or piping projects or relocating portions of the facilities for improved efficiencies and water conservation. Designating these facilities as waters of the United States would arguably require permits for every cleaning and maintenance project. Handling the magnitude of NPDES permits that would be required in Idaho, including enforcement, would be a nightmare and would create unnecessary work for state and federal agencies. In short, it would be impracticable.

Any new WOTUS rules should provide clarity for both the Agencies and the regulated communities. Notwithstanding the clear language of the CWA, prior regulations and guidance, Idaho water users have been faced with inconsistent demands from the Agencies. For example, the Corps has tried to require 404 permits for the piping and/or relocating of irrigation ditches in areas where the change was done in response to development. Similarly, the Corps has objected to the piping of irrigation ditches when that piping would eliminate water for cat tails growing adjacent to the ditches. These are just some of the activities that regularly arise in the operation and maintenance of irrigation ditches and drains.

The Agencies seek feedback on "whether flow regime, physical features, excavation in aquatic resources versus uplands, type or use of the ditch (i.e., irrigation and drainage), biological indicators like presence of fish, or other characteristics could provide and implement distinctions between jurisdictional and non-jurisdictional ditches." Fed. R. Vol. 86, No. 147, p.41911 (Aug. 4, 2021). None of these characteristics alter the jurisdictional questions relating to ditches. In the 2015 Rule, the Agencies "acknowledged that science cannot dictate where to draw the line of federal jurisdiction, see, e.g., id. at 37060." 85 Fed. R. at 22257. As discussed above, the law is clear. Any new WOTUS Rule must affirm the agricultural exemption to ensure that

irrigation canals, ditches and drains, and the activities necessary to operate and maintain the same, are not inadvertently regulated as something they are not.

C. Groundwater

The CWA does not regulate groundwater. As the EPA recognized in summarizing the CWA, "industrial, municipal, and other facilities must obtain permits ***if their discharges go directly to surface waters***."[1] (emphasis added). Non-point source discharges are left to state regulation. A plain language reading of the CWA finds no inclusion of discharges to groundwater. This is no doubt due, at least in part, to the fact that groundwater is not "navigable." *See Kentucky Waterways Alliance v. Kentucky Utilities Co.*, 2017 WL 6628917, *9 (E.D. Ky. 2017); *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) ("Neither the Clean Water Act nor the EPA's definition asserts authority over ground waters"); *Cape Fear River Watch, Inc. v. Duke Energy Process, Inc.*, 25 F.Supp.3d 789, 810 (E.D.N.C. 2014) ("Congress did not intend for the CWA to extend federal regulatory authority over groundwater regardless of whether that ground water is eventually or somehow 'hydrologically connected' to navigable surface waters"); *Rice v. Harken Expl. Co.*, 250 F.3d 264,269 (5th Cir. 2001) ("[G]round waters are not protected waters under the CWA"); *Cooper Indus. Inc. v. Abbott Labs*., No. 93-CV-193, 1995 WL l 7079612 (W.D. Mich. May 5, 1995).

Recently, the Supreme Court confirmed that groundwater is exempt from CWA regulations. In *County of Maui v. Hawai'i Wildlife Fund*, SCOTUS Slip Op. 18-260 (Apr. 23, 2020), the Court discussed the history of the CWA and groundwater:

> Fifty years ago, when Congress was considering the bills that became the Clean Water Act, William Ruckelshaus, the first EPA Administrator, asked Congress to grant EPA authority over "ground waters" to "assure that we have control over the water table … so we can … maintai[n] a control over all the sources of pollution, be they discharged directly into any stream or through the ground water table." …
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> But Congress did not accept these requests for general EPA authority over groundwater. It rejected Representative Aspin's amendment that would have extended the permitting provision to groundwater. Instead, Congress provided a set of more specific groundwater-related measures such as those requiring States to maintain "affirmative controls over the injection or placement in wells" of "any pollutants that may affect ground water." *Ibid*. … ***The upshot is that Congress was fully aware of the need to address groundwater pollution, but it satisfied that need through a variety of state-specific controls. Congress left general groundwater regulatory authority to the States; its failure to include groundwater in the general EPA permit- ting provision was deliberate***.

[1] https://www.epa.gov/laws-regulations/summary-clean-water-act (viewed March 25, 2019).

County of Maui, at pp.7-8 (emphasis added). Any new WOTUS rules should continue to recognize that groundwater is not a water of the United States.

The CWA gives the Agencies authority over discharges from *point sources* to *navigable water*. Indirect discharges were left to the states under the non-point source programs. In the *County of Maui* opinion, the Court held that an NPDES permit may be required for the discharge of a pollutant into groundwater ***only if*** the discharge is a "functional equivalent" of a direct discharge from a point source to navigable waters. The Agencies should clarify and broadly apply the groundwater exemption to include point source discharges of pollutants that reach jurisdictional surface waters via groundwater or other subsurface flow, to the maximum extent possible considering *County of Maui*. Broad application of the exemption is appropriate in light of the Congressional designation of the exemption and the fact that regulation of groundwaters, which are in themselves not navigable, is traditionally left to the states.

Aquifer recharge should be exempt from CWA regulation. Idaho water users rely heavily on aquifer recharge to restore, enhance and sustain water supplies. Recharge occurs naturally (via seepage through river beds and canals) and through managed recharge projects. In either case, no pollutants are added to the water – it is merely being "transferred" from water body (i.e. the river) to another water body (i.e. the aquifer). *South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004)

We appreciate the Agencies' efforts to draft a new WOTUS Rule. We urge the Agencies to draft a rule that is clear and predictable and that aligns with the plain language and Congressional intent of the CWA. The Idaho Water Users stand ready to work with the Agencies to promulgate and finalize this rule.

Sincerely,

Paul Arrington, Executive Director
Idaho Water Users Association

cc: Governor Brad Little
Congressman Russ Fulcher
Congressman Mike Simpson
Senator Jim Risch
Senator Mike Crapo
Speaker Scott Bedke
President Pro Tempore Chuck Winder