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EPA Staff
CWAwotus@epa.gov

Re: Pitkin County WOTUS Comments

Dear EPA Staff:

These comments are submitted on behalf of the Pitkin County Colorado Board of County Commissioners. Pitkin County is a headwaters community situated along the west slope of the continental divide. Our geographic location in the upper Colorado River watershed, our strong local economies based in property development, tourism and agriculture, and the continued high level of investment in our growing economies, give our community a heightened concern for the management of our natural water resource.

Pitkin County supports the efforts of the EPA and Army Corps of Engineers to clarify the application of the clean water act through rulemaking and the expanded definition of “waters of the United States”. The uncertainty occasioned by the two pertinent Supreme Court decisions, *Rapanos* and *SWANCC*, have necessitated this appropriate agency response. It is critical to Pitkin County that collectively, we protect our surface and groundwater resources from degradation. We encourage the agencies to pursue this effort through to its conclusion for the protection of these water resources and to provide certainty to water rights owners and developers of the scope of the Clean Water Act. This rulemaking must ultimately serve to increase clarity as to the scope of jurisdiction.

It is also wholly appropriate and encouraged by Pitkin County that the agencies use this comment period to improve the draft rules and address particular concerns reflected through citizens’ comments from different regions of the country. To this end, Pitkin County highlights these aspects of the proposed rules that are in need of refinement.

Exclusions and Definitions.

The continued exclusion of wastewater treatment systems is wholly appropriate. It is likewise appropriate that water supply or municipal systems are not excluded. Many domestic water

supply systems and infrastructure systems are simply too large and potentially involve multiple river drainages to be safely excluded as a matter of rule.

Ditches are the lifelines which allowed development of the rural West. Given the essential nature of ditches to our community, and communities throughout the nation, the preamble, discussion, and definition of ditches necessarily requires elaboration and clarification. The proposed rule includes categorical exclusions for certain types of ditches and Pitkin County supports this approach, but refinement of the exclusions is needed. Pitkin County also supports the explicit recognition in the rule that excluded ditches cannot be “recaptured” under other provisions of the rule.

The exemption from jurisdiction for ditches excavated wholly in the uplands, with less than perennial flow, should be revised to provide additional clarity and ensure the intent of the exemption is successfully applied to these ditches. “Uplands,” as a term, is not defined with specificity and particularity; this will invite confusion in the application of the rule. Likewise, the use of the term “perennial” needs to be refined. It must be made clear that perennial flow refers to the native flow historically present in a given drainage, not the current existing flow, which is often a result of water supply development. It is our suggestion that reference to the purpose of a ditch or justification of the exclusion be explained and included in the definition as a reliable guideline to the meaning and interpretation of these definitions.

The exemption for ditches which do not contribute flow to a traditional navigable water is similarly well advised, but additional refinement will ensure the intended effect. The use of the term “contribute flow,” must be elaborated upon. In reviewing this exclusion as a whole, it would appear that given the use of “contribute flow” in the exemption, the term requires an equally extensive definition as the term “uplands.” The rule contains language to the effect that farm field features that do not possess a bed and bank are not tributaries even though they may contribute flow during some rain or snowmelt events. Similar consideration of how ditches may contribute limited flow during storm events and how that will be treated under the rule should be included.

Pitkin County agrees with the continuation of the agricultural use exclusion. Exemptions have historically been applied by the Agencies for the agricultural drainage ditches and irrigation canals and the continuation of this interpretation needs to be made overtly clear in the rule. The

use of the term “normal farming” is not self-explanatory. Farming, ranching, and silviculture are terms that even of themselves require specific definition. Most states deal with these terms in the area of property taxation. The addition of the modifier normal does not assist but only confuses what this activity might be construed to include. It should be made clear that all activities associated with any agricultural operation are exempt from the application of the Clean Water Act. These activities should specifically include return flows from agricultural irrigation activities. The exclusion should be premised upon an exclusive purpose of the infrastructure to service agricultural activities. The agricultural activities should not be a minor or merely contributing use of water supply infrastructure, but the defining application.

An additional exclusion should be provided for within the rules. This exclusion should relate to the development of municipal and residential water supplies that are utilized within the same natural river drainage from which the water is developed. This exclusion would recognize the at times exigent need for the development of domestic water supplies and the anticipated large percentage of this developed water resource returning to the natural stream channels from which it was developed after it is used than occurs in other uses. This exclusion would be a logical extension of the waste treatment systems exclusion. Including the requirement that development and utilization of water supplies for domestic needs be within the same drainage as the water naturally occurs recognizes that, if a water supply is developed and then exported away from the natural drainage of its origin, the water quality of the originating based could be severely degraded. As a consequence, the Agencies reviews would be relevant in such circumstances.

Other Waters

The draft rule, in particular the specific enumeration of multiple conservation practices that are specifically excluded from the clean water act is an appropriate direction. However, the catchall category of “Other Waters” still contains an area of uncertainty that is unacceptably large. Of particular concern to Pitkin County, is how its headwaters will be determined to be under or excluded from the Clean Water Act. The headwaters along the Rocky Mountain continental divide, particularly as evidenced in Pitkin County, constitute significant water supply to traditional “waters of the United States.” Particular inclusion of the headwaters and high mountain drainage areas above river systems that are determined to be under the Act should be specifically articulated.

Interactive Public Database & Mapping

This rule seeks to add clarity to the murky waters that local jurisdictions have navigated. This objective would be complemented by creation of a publically accessible, easy to use, database and mapping tool designed to assist a user determine if a particular river or water resource is regulated under the Clean Water Act. These resources would increase the ability of users to determine if a permit is necessary, and expedite the permitting process; resulting in increased compliance with, and efficiency in administration, of the Act.

Thank you for your consideration of these comments.

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cc: Julie Ufner/NACo (jufner@naco.org)