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MEETING DATE: June 5, 2014

AGENDA ITEM: Discussion and Consideration of Action to Adopt Position on the Proposed Rule, "Definition of 'Waters of the United States' Under the Clean Water Act" (the "Proposed Rule")

RECOMMENDATION: Staff recommends that the Board adopt a resolution opposing adoption of the Proposed Rule.

FINANCIAL IMPLICATIONS: None

LINKAGE TO STRATEGIC PLAN, POLICY, STATUTE OR GUIDING PRINCIPLE:

2010 CAWCD Board of Directors Strategic Plan

- Project Reliability: Effectively Operate and Maintain CAP Assets
- Project Reliability: Maintain Business Continuity
- Water Supply: Reliability of the CAP Water Supply

PREVIOUS BOARD ACTION/ACTIVITY:

April 3, 2014 – Jay Johnson and David Johnson briefed the Board on the Proposed Rule.

ISSUE SUMMARY/DESCRIPTION:

On Monday, April 21, 2014, the United States Environmental Protection Agency and the United States Army Corps of Engineers (together, the "agencies") jointly proposed a rule to clarify protection under the Clean Water Act by re-defining the term "waters of the United States" (WOTUS). Among the changes proposed by the agencies is the treatment of "tributaries." While "tributaries" have long been considered WOTUS under the existing rules, this rulemaking proposes, for the first time, a regulatory definition of "tributary." The proposed rule would now define a "tributary" as those waters that flow directly or indirectly into a traditional WOTUS and which is "physically characterized by the presence of a bed and banks and ordinary high water mark" and which "can be natural, man-altered, or man-made" water-bodies.

In expounding on this new definition, the agencies explain that "[n]atural, man-altered and manmade tributaries provide many of the same functions" and that the "discharge of a pollutant into a tributary generally has the same effect downstream whether the tributary waterway is natural or manmade." Moreover, the agencies state that, "it is often difficult to distinguish between natural watercourses and watercourses that are

wholly or partly manmade or man-altered. For example, tributaries that have been channelized in concrete or otherwise have been human-altered, may still meet the definition of tributaries under the agencies' proposed regulation so long as they still contribute flow to a "traditional WOTUS.

Given CAP's interconnection to Lake Pleasant, the wording of the rule, and the agencies' explanation, it is likely that the entire CAP would be considered a "tributary" of Lake Pleasant, which would subject CAP to regulation under the Clean Water Act.

The immediate effect of this rulemaking would be to bring the CAP into the Clean Water Act's section 404 program, which requires a permit whenever anyone discharges dredged or fill material into a water of the United States. Currently, CAP obtains 404 permits when performing certain dredge and fill activities in areas with a significant nexus to a traditional WOTUS, such as Lake Pleasant, but not when performing maintenance within the canal. If approved, this rule would require CAP to obtain a 404 permit anytime dredge and fill work is performed anywhere on the canal. This could potentially delay emergency work required on the canal in the event of a failure.

The other major program created by the Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), which regulates point sources that discharge pollutants into a WOTUS. Tempering the impact of the proposed rulemaking on CAP for NPDES purposes is the current EPA Waters Transfers Rule, which is codified at 40 CFR § 122.3(i). That rule exempts water transfers, such as the CAP, from the permitting requirements of NPDES. Water transfers include activities that convey or connect WOTUS without subjecting the transferred water to intervening industrial, municipal, or commercial use. The recent WOTUS rulemaking states that it, "does not affect either the existing statutory and regulatory exemptions from NPDES permitting requirements ... or the status of water transfers."

Though it is clear that the WOTUS rulemaking does not intend to bring water transfers into the NPDES program, the approval of this rulemaking could still subject CAP to NPDES regulation when combined with other factors, such as the invalidation of the rule as the result of ongoing litigation, or EPA's decision to withdraw the rule. Should the Proposed Rule be approved and the EPA Water Transfers Rule be ultimately vacated, CAP would be regulated under NPDES and would need to obtain a permit to discharge pollutants into a traditional WOTUS, such as Lake Pleasant. Additionally, CAP could be required to obtain separate permits each time it introduces water into the CAP system. In both instances, CAP could be required to treat waters as it moves into and out of the CAP system based on differences in the chemical, biological, or physical characteristics of the source and receiving water. Such an outcome could be disastrous for CAP and its customers; treatment methods for that volume of water are technically impractical and the costs of compliance are prohibitively expensive.

SUGGESTED MOTION:

I move that the Board adopt the position opposing the EPA and the Army Corps' of Engineers proposed rule, "Definition of 'Waters of the United States' Under the Clean Water Act."