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

Ms. Stacey Jensen
Regulatory Community of Practice (CECW-CO-R)
U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314

Subject: Definition of “Waters of the United States”
Industry Listening Session
EPA-HQ-OW-2017-0480

Dear Ms. Christensen and Ms. Jansen:

The Western Coalition of Arid States (“WESTCAS”) appreciates the opportunity to submit recommendations to the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers, (“the agencies”) on a new regulatory definition for waters of the United States.¹

WESTCAS is a coalition of approximately 75 water and waste wastewater districts, cities, towns, and professional organizations focused on water quality and water quantity issues in the states of Arizona, California, Colorado, Nevada, New Mexico and Texas. Our mission is to work with federal, state and regional water quality and quantity agencies to promote scientifically-sound laws, regulations, appropriations and policies that protect public health and the environment in the arid West.

¹ Definition of “Waters of the United States”-Schedule of Public Meetings. 82 Fed. Reg. 40742 (August 28, 2017).

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The definition of waters of the United States and the potential reach of the Clean Water Act (CWA) is very important to WESTCAS. Our members discharge pumped groundwater, industrial wastewaters, stormwater, or pesticides under federal or state-issued National Pollutant Discharge Elimination System (“NPDES”) permits, or have obtained authorization to discharge dredge or fill material under the Clean Water Act §404 permit program.

With more than 25 years of CWA experience, WESTCAS believes our recommendations will be helpful to the agencies in tailoring a replacement definition of waters of the United States. For simplicity, we provided our suggestions in a question & answer format that closely follows the outline of questions posed by the agencies during each Listening Session.

For purposes of the Clean Water Act, what rivers, streams, and wetlands should be jurisdictional?

WESTCAS supports a definition that incorporates the full history of the U.S. Supreme Court review of the scope of waters of the United States. This includes the use of *Riverside Bayview*, *Solid Waste Agency of Northern Cook County*, and Justice Scalia’s plurality opinion and Justice Kennedy’s concurring opinion from *Rapanos*. We believe when the views of the U.S. Supreme Court are used collectively, a new definition of waters of the United States should only include:

- Standing waters that are relatively permanent;
- Streams that have continuous flow; and
- Wetlands that have a continuous surface connection to an otherwise jurisdictional water.

A key qualifier for any stream or wetland to be jurisdictional includes meeting Justice Kennedy’s significant nexus test. In addition, we also recommend that in order to meet the test, it must present a meaningful effect on the chemical, physical AND biological integrity of the adjacent or downstream jurisdictional water. Meeting only one or two measures of integrity should not be sufficient for meeting the standard.

Do you have feedback about how the agencies should interpret key terms in Justice Scalia’s opinion, such as “relatively permanent,” and “continuous surface connection?”

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The scientific and regulatory communities have established known and widely accepted terms for classifying streams as “perennial,” “intermittent,” or “ephemeral.” WESTCAS suggests the agencies tailor a definition of *relatively permanent* that is closely aligned with the scientific definitions of perennial and intermittent. For example, a *relatively permanent* water would include a stream that flows continuously throughout the year or flows continuously for at least 30 days at certain times of the year, as when it receives water from a spring or from another surface source, such as melting snow. Ephemeral streams would be excluded from the definition.

In addition, WESTCAS suggests that the agencies tailor a definition of *continuous surface connection* to include only those wetlands that abut directly to, are generally indistinguishable from, or are otherwise connected by a relatively permanent water to a jurisdictional water. Also, the presence of a manmade feature that physically separates a wetland from an adjacent or downstream jurisdictional water should sever the jurisdictional status of the wetland.

Are there certain waters or features that you recommend the agencies consider excluding from the proposed definition?

The agencies proposed a number of man-made features that were excluded from the definition of waters of the United States under the 2015 Clean Water Rule. WESTCAS recommends the agencies again propose the list of man-made features to be excluded from jurisdiction with one major modification—remove the qualifier “dry land.” Dry land is not a term defined in the scientific literature and only served to create confusion when promulgated under the 2015 Clean Water Rule. The list of excluded man-made waters should include:

- Artificial, constructed lakes and ponds such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;
- Artificial reflecting pools or swimming pools;
- Small ornamental waters;
- Water-filled depressions incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;
- Stormwater control features constructed to convey, treat, or store stormwater;

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- Wastewater recycling structures; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling; and,
- Ditches, including conveyance systems used to transmit surface water for agricultural, industrial or municipal use.

All man-made ditches should continue to be treated as point-sources under the CWA, and should never be swept into jurisdiction as waters of the United States, regardless of source, duration or frequency of flow.

Many industry groups have requested better clarity regarding where the Clean Water Act applies. What would clarity look like to you?

WESTCAS supports agency policies that empower and authorize states to take leading roles in identifying surface waters subject to CWA jurisdiction. WESTCAS believes it's appropriate for states to propose to their stakeholders those stream segments that are waters of the United States, and subject to protection under the CWA, versus other waters that are protected by state statute.² WESTCAS' recommendation is supported by the fact that most states have acquired detailed knowledge and experience in understanding, maintaining and improving the chemical, physical and biological integrity of their surface waters. Most have attained this experience by implementing water quality assessment, monitoring, and standards programs; by implementing NPDES programs; and by preparing and implementing TMDL studies to improve the quality of their impaired waters. Authorizing states to make jurisdictional determinations as part of a triennial review process is a logical outgrowth of CWA §101(b), protective of CWA §101(g), and will place the states in a truly cooperative federal-state partnership that was supported by Congress when it passed the 1972, and 1977 CWA amendments.

WESTCAS believes expanding authority will not weaken the CWA; rather, we believe it will strengthen it as the states are in the best position to work with their stakeholders in identifying, developing and applying appropriate protection programs for their surface and groundwater resources.

For example, when the State of Arizona completed its 2002 triennial review, the definition of surface water was modified to exclude all references to the territorial seas or to waters that are subject to the ebb and flow of the tide (Arizona is an inland state).

² WESTCAS believes states should have authority to make jurisdictional determinations of all waters, except navigable interstate waters and waters subject to Section 10 of the Rivers and Harbors Act.

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Moreover, Arizona also expanded its definition of surface waters to include ephemeral streams and washes--the same types of surface waters that fall outside the scope of CWA jurisdiction under Justice Scalia's *Rapanos* opinion. Considering more than 96 percent of Arizona's natural surface water features are ephemeral, it was appropriate for the state to include ephemeral features in its list of surface waters and subject to protection under the CWA.

In comparison, the State of Kansas--also authorized to implement the CWA--chose not to include an estimated 170,000 miles of ephemeral features in their classified list of surface waters [K.S.A. 82a-2001(a)(2)]. Instead, the State provides protection for ephemeral streams as waters of the state.

Although the agencies are only contemplating a rulemaking to define the jurisdictional reach of waters of the United States, WESTCAS believes it provides an opportunity to provide clarity to all parties regarding the scope of a states' CWA responsibilities. As early as 1965, states have been tasked by the Congress to develop and implement water quality based programs to support the Act. With very few exceptions, states have never been authorized with full decision-making authority to identify the scope of waters that are subject to CWA protection.³ If the agencies can empower and authorize the states to officially propose for public notice and comment those surface waters within a states' jurisdiction as waters of the United States, it will not only provide additional measures of clarity, but may also close the "cooperative federalism CWA gap."

Is there any information or data about costs and benefits to the industrial sector that the agencies should consider in their economic analysis?

WESTCAS is concerned that a narrower definition of waters of the United States could be translated to mean future reductions in CWA grant funding. States are ultimately responsible for ensuring the goals of the CWA are attained and rely on federal funding through CWA §106 and CWA §319 grants to work towards these goals. These funds provide states with resources to administer the core components of the CWA, monitor the quality of their waters, issue water pollution control permits, restore watersheds, and ensure compliance. If future grant allocations are reduced, WESTCAS believes 45-years of productive work in restoring and maintaining the integrity of the nation's waters could be at risk. WESTCAS suggests the agencies fully evaluate how the "Surface Water Area" grant funding component weight will be established under a narrower definition, i.e., 40 CFR §35.162(b)(1), and clearly identify to the states any possible reductions in grant funding.

³ Those exceptions being the states of Michigan and New Jersey implementing §404(g).

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WESTCAS appreciates the opportunity to provide comments on this very important issue. We provide them in the interest of cooperation, increased clarity and agency support.

If you have any questions regarding this letter, please feel free to contact me at 760-398-2651.

Sincerely,



Steve Bigley
President

JK:SB

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