The Western Coalition of Arid States
W E S T C A S

November 13, 2014

Submitted electronically to: ow-docket@epa.gov

Water Docket
U.S. Environmental Protection Agency
Mail Code: 2822T
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: **WESTCAS comments regarding U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers Proposed Rule Defining the Scope of Waters Protected under the Clean Water Act – *Docket ID No. EPA- HQ-OW-2011-0880***

Dear Sir or Madam:

Representatives from the Western Coalition of Arid States (WESTCAS[1]) completed its review of the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (collectively the "agencies'") proposed rule defining the scope of waters protected under the Clean Water Act (CWA), 79 Fed. Reg. 22188 (Apr. 21, 2014). WESTCAS appreciates the efforts of the agencies to clarify the scope of CWA jurisdiction; especially, those ephemeral tributaries and manmade conveyances, ponds and basins located in the "arid" West, i.e., west of the 100th meridian.

Based upon our review we believe the agencies' proposal presents too many unintended consequences that will ultimately subject persons engaging in construction and development, stormwater management, and the operation and management of water, wastewater and irrigation systems to inappropriate and unwarranted CWA jurisdiction resulting in negligible environmental benefit. In addition, the proposed rule may

[1] WESTCAS is a coalition of approximately 75 water and 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.

significantly limit our members ability to respond to and repair damage to critical surface water infrastructure, as the continuance of existing Regulatory Guidance Letters or CWA §404 Jurisdictional Determinations are not mentioned anywhere in the preamble or proposed rule.

While the agencies report that the proposed rule will actually narrow the scope of surface waters that are jurisdictional—we believe the opposite is true. Although the named water body "types" has narrowed in the proposed rule, the total number of stream miles and categories of man-made surface water features that will become jurisdictional will expand considerably.

To address these "unintended consequences," WESTCAS recommends the agencies incorporate the following changes in the Final Rule.

1. Abandon the use of groundwater connectivity to establish CWA jurisdiction. Congress never intended the agencies to regulate discharges to groundwater. Groundwater quality regulation is within the purview of the states. As proposed, the agencies have not clearly defined when an isolated (a)(6) water will have a shallow subsurface connection that affects the chemical, physical or biological integrity of downstream (a)(1) through (a)(3) waters.

2. Exclude all stormwater retention and groundwater recharge basins from the proposed definition of waters of the U.S. Although, artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as settling are currently excluded from the proposed definition, it is unclear from the preamble whether the agencies intend to exclude basins that are designed to discharge to the subsurface. Also, stormwater retention basins may be excluded as "waste treatment systems" since they are used to prevent or reduce sediment discharges from stormwater systems to waters of the U.S.

3. Exclude all non-tidal roadside, stormwater, and agricultural ditches from the proposed definition of tributary. Moreover, the agencies should reiterate that point sources, such as roadside ditches and MS4 stormwater infrastructure, are not waters of the U.S.

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4. Exclude all isolated impoundments and upland tributaries connected to them from the proposed definition of waters of the U.S. When all upland flow is terminated in a flood control structure and there is no discernible surface connection to an (a)(1) through (a)(3) water, CWA jurisdiction is not warranted.

5. Retain the use of RGL No. 07-02, *Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act* (July 4, 2007), and all existing agency jurisdictional determinations.

The technical basis for our recommendations is provided below.

Agencies Proposed Rule Expands Jurisdiction throughout the Arid West

The agencies state that the purpose of this rulemaking is to provide clarity to regulatory agencies and regulated entities regarding which waters warrant CWA protection. In order to achieve this goal, the rule must establish "bright lines" for jurisdictional determinations that will stand the test of time and avoid, or more realistically, minimize, multiple interpretations, debate, and potential litigation. We believe that the proposed rule does not achieve this. As proposed, the rule contains many defined and undefined terms that may inappropriately include many man-made features, man-made conveyances, and man-made impoundments as jurisdictional waters. These same man-made features are used by many WESTCAS members to carry out daily responsibilities, such as transmitting and distributing irrigation water, diverting and storing stormwater, and recharging or "banking" excess water for future use.

Surely, the rulemaking did not intend to include groundwater recharge basins, even those located "adjacent" to tributaries or TNWs, as jurisdictional waters. Also, groundwater recharge is an inherent activity performed in most arid States to manage water resources. The CWA is required to "…recognize, preserve, and protect the primary rights and responsibilities of States, to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act." (CWA Sect. 101(b)).

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In addition, the agencies also state that the total number of water bodies that warrant CWA protection under the proposed rule is decreasing. We believe this is also not true. Although the total number of named water body types is proposed to be reduced, the actual number of isolated and linear stream miles that will become categorically jurisdictional will actually increase.

To support our comments, we have prepared narrative examples describing how the proposed rule will adversely affect WESTCAS members—the unintended consequences. Consequences we believe will require our members to apply for and obtain additional CWA permits while providing marginal water quality benefits in the arid West.

1. Stormwater Retention Basins Meet the Definition of Adjacency

With the proposed rule's regulation of adjacent wetlands and non-wetland waters, the agencies extend jurisdiction to an entirely new category of waters. The broad terminology used to define "adjacent" allows for sweeping jurisdiction over every wet feature in a floodplain, or riparian area, or any wet feature that has a shallow, but unquantified, subsurface hydrologic connection to jurisdictional (a)(1) through (a)(5) waters. The breadth of the category of adjacent waters is also compounded by numerous ambiguities in the proposed terminology that, in practice, will also result in confusion and unpredictability by most permitting agencies and field personnel.

The proposed rule's regulation of (a)(6) adjacent waters gives the agencies significant discretion to assert broad jurisdiction over features that were previously considered to be outside the scope of CWA jurisdiction. The proposed rule asserts jurisdiction over all waters, including wetlands adjacent to a traditional navigable water (TNW), interstate water, territorial sea, impoundment, or tributary, i.e., the proposed rule's (a)(1) through (a)(5) waters. There is nothing in the proposed rule that limits or explains what can be considered "waters" that can be adjacent.

The agencies also use the term "waters" in a categorical reference to mean all rivers, streams, ditches, wetlands, ponds, lakes, playas, and other types of natural or man-made systems. Again, this broad language indicates that the agencies intend to treat essentially any feature that is wet, or has the potential to contain water, as an (a)(6) water that could be jurisdictional by virtue of its adjacency.

While the proposed rule does not change the definition of "adjacent," which means bordering, contiguous, or neighboring, it does add a definition for the term "neighboring", which did not exist previously and vastly broadens the concept of adjacency and expands jurisdiction to other non-wetland waters. Under the proposed rule,

neighboring waters include waters located within the floodplain or riparian area of a TNW, interstate water, territorial sea, or impoundment. If an area is not within a floodplain or riparian area, it can still be a jurisdictional adjacent water if it has a shallow subsurface hydrologic connection or confined surface hydrologic connection to a jurisdictional water.

This is ambiguous as shallow subsurface connections are not defined anywhere in the preamble or the proposed rule and will not always be physically evident. Furthermore, the proposed rule also states that all waters within the floodplain or riparian area of jurisdictional waters or that have a shallow subsurface hydrological connection to jurisdictional waters categorically have a significant nexus and will be jurisdictional by rule.

An additional ambiguity is that "interstate water" is unclear as to whether this term applies to sovereign entities such as Native American lands. Thus if an interstate water is jurisdictional by definition, would all water courses that cross Native American boundaries be jurisdictional as well?

While significant nexus and riparian areas are defined terms, floodplain is not. The determination of what waters are within a floodplain and are adjacent waters due to their shallow subsurface connection will be ultimately left to the permitting agency or field personnel using their best professional judgment to establish if the water body in question is within reasonable proximity of another (a)(1) through (a)(5) water. We do not see how this creates a clear, understandable bright line for anyone determining which waters are adjacent and warrant CWA protections, and those that do not.

Many WESTCAS members use retention basins to manage stormwater flows. Most are designed, constructed and operated to contain stormwater from a 2-hour, 100 year storm event. Many are also constructed with drywells to allow stormwater to quickly drain into the subsurface. See Figure 1, below.

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Figure 1: Stormwater Retention Basin. Gilbert, Arizona.

Under the proposed Rule, these same retention basins may meet the definition of a (a)(6) adjacent water due to their physical proximity to (a)(1) through (a)(5) waters, or they have a direct shallow subsurface hydrologic connection to the underlying aquifer which, according to the agencies' Connectivity Report[2], provides a significant nexus to (a)(1) through (a)(3) waters. As such, virtually all of stormwater retention basins will become jurisdictional waters under the proposed rule.

In the Phoenix Metropolitan area, one WESTCAS member routinely allows municipal stormwater agencies to construct retention basins within their electrical utility transmission line rights-of-way (See Figure 2, below). The basins are needed to attenuate stormwater flows from highly urbanized areas that have poor drainage characteristics or lack sufficient local retention capacities.

The utility maintains the basins, applying herbicides to prevent vegetative growth and scarifying the bottoms to ensure rapid infiltration. These basins are also connected to a drywell to ensure rapid infiltration of stormwater to the underlying aquifer. And because the basins are located in a floodplain and immediately adjacent to an ephemeral tributary that is connected to a TNW, they also meet agencies' definition of water adjacent to a TNW.

[2] Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (September 2013. External Review Draft. EPA/600/R-11/098B.)

Therefore, the basins will become jurisdictional under the proposed rule. And if jurisdictional, the utility would then be required to apply for and obtain coverage under Arizona's §402 Pesticide General Permit to cover the discharge of herbicides used to control vegetation and possibly coverage under a Federal §404 Nationwide General Permit for any activities that involve grading to minimize compaction.

And as further clarified in our comments, the management of stormwater using drywells is already regulated under the Arizona's groundwater protection statute.

Figure 2: Retention Basins in Transmission Line Right-of-way. Salt River Project. Phoenix, Arizona.

Many WESTCAS members also utilize retention basins for the treatment of solids that are generated during routine groundwater production well maintenance activities. Occasionally, wells that are drilled in loosely consolidated alluvium soils need to be purged and flushed to remove naturally occurring fine grained sediments from the wells' screened interface. Rather than discharging sediment laden water into the adjoining irrigation or domestic water system, retention basins are used allowing discharged water to infiltrate back into the aquifer while trapping fine grain sediments on the surface.

One California WESTCAS member utilizes 20 different "well blow off ponds," for this purpose. Each pond is constructed directly adjacent to a TNW, has a shallow subsurface connection to the TNW, and is located in a floodplain. See Figure 3, below.

Figure 3: Well Blowoff and Recharge Pond. Eastern Municipal Water District. San Jacinto, California.

2. Groundwater Recharge Basins Meet the Definition of Adjacency

WESTCAS members also participate in groundwater recharge projects throughout the arid West. Unused irrigation water or effluent from municipal water treatment plants is diverted to basins designed, constructed, and operated to allow incoming flows to be "banked" in shallow aquifers for future beneficial uses.

One California WESTCAS member operates 10 recycled water facilities, covering 500 acres that have an aggregate storage capacity of 2-billion gallons (6,137 AF). Each facility was constructed in an alluvial basin immediately adjacent to a TNW. The sites were intentionally selected to ensure incoming recycled water could be rapidly infiltrated and stored in the underlying aquifer. Under the proposed rule, each facility is a surface water directly adjacent to a TNW, has a shallow subsurface connection to the TNW, and is located either in or near a floodplain. As such, most of these basins will also meet the definition of a (a)(6) water adjacent to a TNW, and therefore become jurisdictional.

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Similar to our discussion of stormwater retention basins, we believe the proposed rule will unfairly require our WESTCAS members to obtain additional §402 and §404 permits to operate their groundwater recharge projects. At a minimum, our members would be required to apply for and obtain coverage under a §402 Pesticide General Permit to address herbicide application activities to control vegetation, and possibly coverage under a federal §404 Nationwide General Permit for any maintenance activities that involve excavating or grading to control compaction.

In addition, our members that use treated effluent for recharge may also be required to apply for and obtain individual NPDES discharge permits before their flows could be discharged into the basins. This is in addition to any required groundwater quality protection or recharge permits that are required by each respective state agency. Groundwater recharge basins should be exempt from jurisdiction since the recharge/storage activity and water quality requirements of the water (if recycled water) are regulated by State laws and protected by CWA Sect. 101(b). Also, the basins are specifically designed and operated to maximize recharge to the subsurface and, therefore, minimize discharge to the (a)(1)-(a)(4) waters.

3. Every Natural Watercourse and Man-made Conveyance is a Defined "Tributary"

The proposed rule defines a tributary as a water physically characterized by the presence of a bed and banks and ordinary high water mark (OHWM), which contributes flow, either directly or through another water to a TNW, interstate water, territorial sea, or impoundment, i.e., the (a)(1) thorough (a)(4) waters. Adjacent wetlands, lakes, and ponds can also be treated as tributaries if they contribute flow to a TNW, interstate water, or territorial sea, even if they lack a bed, bank, and OHWM. The proposed rule further states that a water does not lose its status as a jurisdictional tributary due to man-made breaks (*e.g.*, bridges, culverts, pipes, or dams) of any length, so long as a bed, banks, and OHWM can be identified upstream of the break.

The proposed definition of a tributary will virtually sweep in every natural or man-made water feature in the arid West and beyond the current reach of the agencies' CWA authority. Most ephemeral drainages only flow in response to precipitation events and typically occur only during the North American Monsoon or winter rain seasons. For example, of the documented 284,908 miles of linear streams in Arizona, over 96 percent were classified by the United States Geological Survey (USGS) as intermittent or ephemeral.[3] Rarely can a large industrial development project like a linear electrical

[3] United States Geological Survey. Office of Water. Washington, DC. National Hydrography Dataset. October 2013.

transmission line or water transmission pipe line be constructed without crossing or disturbing at least one or more of these ephemeral features and triggering the need for a CWA permit.

The agencies assert that when a tributary is cut off from downstream traditional navigable waters, it still has a significant physical, chemical or biological connection to that downstream (a)(1) through (a)(3) water. And as the preamble notes, it does not matter if there is a man-made break or a dam that cuts off flows, or stores or diverts water for flood control, irrigation, energy generation, or any other use, the tributary upstream and downstream of the break will still retain their jurisdictional status.

The agencies also state that any man-altered natural streams, or man-made conveyances, that meet the definition of a tributary, do not lose their status as jurisdictional waters. The agencies, however, do not discuss anywhere in the rule's preamble, in Appendix A to the preamble, or the Connectivity Report, the science that supports this decision. Allowing for categorical jurisdiction of all man-altered streams or man-made conveyances, regardless of breaks, or conversions, and that lack a scientific chemical, physical, or biological connection, expands the concept of jurisdictional tributary beyond reason. The proposed definition of tributary will significantly affect the manner in which WESTCAS members construct, maintain and operate our critical water infrastructure.

4. Diversion Ditches Become Tributaries

WESTCAS members routinely have to construct conveyances to divert upstream ephemeral flows around water, solid waste, industrial and power transmission facilities. The diversion of upstream flows is not only a good engineering practice, it is also required under federal and state stormwater regulations to prevent flows from coming into contact with unstable soils during construction activities and potential solid waste and industrial activities. For example, Arizona's Stormwater Construction General Permits (CGP) require the use of certain types of control measures to prevent stormwater from flowing onto disturbed areas and transporting pollutants off-site.

One common measure used to meet this requirement is the construction of up gradient interceptor ditches or channels. When constructed properly, these control measures intercept up gradient flows, channel the water around the disturbed project site, and discharge the intercepted flows downstream of the project. Often-times these temporary control measures become permanent stormwater management features and are included in the final design of the project.

An example up gradient diversion ditch is depicted in Figure 4, below.

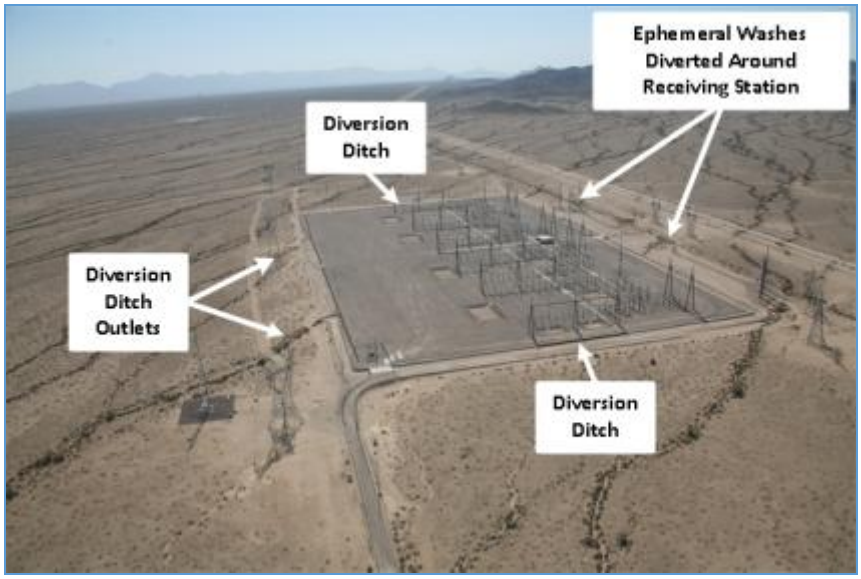

Figure 4: Jojoba Substation. Salt River Project. Phoenix, Arizona.

However, under the proposed rule these ditches will retain their status as jurisdictional waters and any activities undertaken to maintain their function or integrity, i.e., applying pesticides to control vegetation or remove sediment that would impede flow, will be subject to the same §402 or §404 permitting requirements as stormwater retention and groundwater recharge basins. Furthermore, the desire to categorically designate man-made ditches as jurisdictional waters is inconsistent with proscriptive state stormwater permitting requirements that encourage the use of man-made channels to divert upstream flows. In particular, Arizona's CGP requires site operators to, "…divert run-on flows, or otherwise provide other appropriate control measures to account for off-site contributions of stormwater and non-stormwater flow."[4]

Therefore, the imposition of additional permitting requirements on diversion ditches that will be above and beyond those required in the CGP will only frustrate efforts to comply with both. Additional language should be included in the Final Rule that makes these already regulated channels exempt from jurisdiction, or at the very least, that maintenance activities carried out to maintain their function, performed according to industry standards do not require additional permits.

[4] See AZG2013-001. Part 3.1.1.1.1. Run-on Management.

5. Municipal Separate Storm Sewer Systems (MS4) and Highway Ditches are Tributaries

The agencies proposed rule also directly contradicts longstanding EPA guidance regarding the jurisdictional status of MS4s. In the 1990 preamble to the Phase I stormwater regulations, EPA made clear that storm water runoff into municipal sewers (roads, ditches, storm drains, etc.) is not a discharge of a pollutant into a water of the United States.[5] Recently, the agency also confirmed that MS4s are "by definition" not CWA navigable waters.[6] And under agency guidance issued by the Arizona Department of Environmental Quality for their §402 Construction General Permit project, the state asserts that, "Man-made structures such as retention basins, storm sewer systems or city storm drains are not [CWA] receiving waters.[7]

From interpretations made by both EPA and several state agencies under their respective stormwater programs, it is obvious that roadside ditches, especially those that are associated with a MS4 permit are not jurisdictional waters. They are, however, point sources under the CWA. And any person who discharges a pollutant to a roadside ditch or to a MS4 that, in turn, results in a discharge of pollutants under §301(a), must obtain a permit. The physical act of discharging pollutants to a roadside ditch or MS4 does not automatically trigger CWA jurisdiction. This is a practice that has been enforced throughout the history of the CWA and needs to be reflected in the Final Rule.

6. Every Construction Project Will Need to be Permitted Under §402

Under the agencies proposed rule, any construction activity (of one acre in size or greater) that can discharge pollutants to a roadside ditch, MS4, or an adjacent stormwater retention basin will be required to prepare and submit a Notice of Intent (NOI) for coverage under a state or federal §402 Construction General Permit (CGP) and prepare and implement a Stormwater Pollution Prevention Plan (SWPPP). Presently, only those construction and development activities that can discharge to roadside ditches or MS4's, that are also point sources, are required to obtain coverage under a §402 permit. As a result, many WESTCAS members will be required to apply for §402 permits to cover virtually every new construction and development activity that has reasonable potential to discharge to a ditch, MS4 or retention basin.

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[5] 55 Fed. Reg. 47990, 47991, Nov. 16, 1990.

[6] In a memo from Ann R. Klee, Former General Counsel, and Benjamin H. Grumbles, Former Assistant Administrator for Water, EPA, to Regional Administrators, August 5, 2005.

[7] 2013 Construction General Permit Fact Sheet, Page 17 of 71, June 3, 2013.

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7. Isolated Impoundments & Connectivity

In locations throughout the arid West, many upland ephemeral waters have lost their connections to downstream waters after local agencies constructed flood retardation structures (FRS), dams, and/or retention basins as a means of protecting infrastructure and private property from flooding.

For example, in the Phoenix metropolitan area, numerous flood retardation structures (i.e., dams) constructed above the Central Arizona Project (CAP) canal have created basins that intercept and impound upstream ephemeral flows during storm events. These basins have no physical connection to, or man-made conveyances that would allow impounded waters to flow downstream to, (a)(1) through (a)(3) waters. But, under the proposed rule, these same ephemeral tributaries, if they have a bed, bank and ordinary high water mark upgradient from the cut-off impoundment, are still jurisdictional.

The agencies also assert that all impoundments of waters of the U.S. will be categorically determined to have a significant nexus with downstream (a)(1) through (a)(3) waters--even if they do not have a chemical, physical, or biological effect. The proposed rule also asserts jurisdiction over tributaries to impoundments, wetlands and waters adjacent to impoundments, and waters adjacent to tributaries of impoundments.

Figure 5: Reach 11 Flood Retardation Structure located in Phoenix, Arizona.

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Again, the agencies do not discuss anywhere in the rule's preamble, in Appendix A to the preamble, or the Connectivity Report, the science that supports this decision. As a result, the regulation of isolated impoundments and the upstream tributaries that connect to them is likely to continue to cause confusion among permitting agencies and field personnel. If the agencies can identify a legal and scientific basis for regulating cut-off impoundments, such as those described in our comments, the agencies should provide a clear description in the Final Rule.

8. Agricultural Ditches meet the Definition of Tributary

WESTCAS members operate and maintain thousands of miles of water transmission canals, distribution laterals, and drainage ditches, (i.e., "ditches") throughout the arid West. These ditches are used to transport and distribute water for agricultural, industrial, and municipal uses. When combined, many of our members ditch systems are also larger than most river systems in the United States. In addition, there are hundreds of private irrigation and federal reclamation projects in the arid West that provide drinking water to over 31 million people, irrigation water to more than 140,000 farmers, and irrigate over 10 million acres of farmland. These lands produce 60% of the nation's vegetables and 25% of its fruits and nuts.

Under the proposed rule, man-made conveyances, including ditch systems, meet the definition of an (a)(5) water if they have a bed, a bank, and an ordinary high water mark (OHWM), and contribute flow either directly or indirectly to a (a)(1) through (a)(4) water. Almost every ditch system in the arid West can meet this definition. Most transmission and distribution ditches meet the physical description of having a bed, bank and OHWM, and usually discharge a small percentage of their water as "carriage" water at the end of their system. This is needed to ensure there is adequate head pressure in the ditch to deliver water at various turnout gates. When the carriage water is discharged, it is typically delivered to the next irrigation operator, or to a TNW.

The prosed rule only offers two exemptions to ditch operators: (1) ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow, and (2) ditches that do not contribute flow, either directly or indirectly, to a TNW, interstate water, territorial sea, or impoundment of such waters. If a ditch does not meet one or both exclusions, it meets the definition of a tributary and is regulated as a jurisdictional water.

There's one significant problem with this exclusion—most transmission and distribution ditches are designed to contribute flow to another ditch company, discharge to a groundwater recharge basin, or return flow to a jurisdictional receiving water. The proposed ditch exclusion may be applicable to individual irrigators who can control

excess flows in tail water ponds excluded under (b)(5), but not very practical to the hundreds of large irrigation districts and federal reclamation projects across the arid West. While farming, silvicultural, and ranching exemptions to permitting will be retained in the rules, it is not clear how and under what types of circumstances they will be applied. Without clarity, tens-of-thousands of ditch miles will become jurisdictional under the proposed rule.

If this occurs, many of the maintenance activities needed in order to operate transmission and distribution ditches will become subject to state and federal §402 or §404 permit requirements. These activities include: converting open ditches to concrete lined or closed pipe systems; replacing damaged linings; channel or bank stabilizations; control system and structure modifications; construction of seepage controls; mechanical and chemical plant and aquatic animal controls; and silt or debris removal. In each instance, coverage under a §402 Pesticide General Permit, §402 Construction General Permit, or §404 Nationwide General Permit may be required. And if the ditch operator discharges excess flows into a groundwater recharge facility that is also an adjacent (a)(6) water, coverage under an individual §402 discharge permit will also be required.

9. Proposed Rule Does Not Address Regulatory Guidance Letters or Agency Jurisdictional Determinations

Nowhere in the proposed rule do the agencies discuss continuance of existing policy or guidance, regulatory guidance letters, or final or pending agency jurisdictional determinations. This is especially problematic as there are some private irrigation companies and federal reclamation projects that operate ditch systems that are already regulated as jurisdictional waters. Within Arizona, the state's water quality standards regulation specifically names two individual irrigation canals and two geographic areas in their §303(c) list of surface waters protected under the CWA. This list includes: the Arlington Canal, Wellton Canal, Phoenix Area Canals, and Yuma Area Canals.[8] Irrigation operators in these areas rely upon existing agency guidance to routinely maintain, respond to and repair storm damage, and perform physical modifications of their ditch systems.

One guidance document in particular, the *U.S. Army Corps of Engineers, Regulatory Guidance Letter (RGL) No. 07-02: Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act (July 4, 2007)* , is frequently used to perform such work. We recommend the agencies acknowledge the existence of and include reference to these regulatory guidance letters. Equally troubling is agencies treatment of jurisdictional determinations. Nothing

[8] Arizona Administrative Code, R18-11, Appendix B.

in the preamble or proposed rule discusses the status of existing §404 jurisdictional determinations or draft determinations under agency review.

We recommend the agencies clarify that existing RGL's and issued or pending jurisdictional determinations are still valid under the Final Rule.

Agencies Request for Comments on Specific Sections of the Proposed Rule

Gullies, Rills, Swales & Ephemeral Tributaries

The agencies propose to exclude gullies, rills, and non-wetland swales, but do not propose definitions of those terms. The preamble states that the agencies specifically seek comment on how to distinguish between erosional features, such as gullies, which are excluded from jurisdiction, and ephemeral tributaries, which are categorically jurisdictional.

The agencies should exclude erosional features like rills and gullies from jurisdiction when their formation can be clearly associated with mining, construction or other man-made projects that disturb large areas. These types of activities create expansive areas of disturbed soils and, under certain slope and stability characteristics, are prone to producing erosion that is actively controlled under the §402 Construction General and Industrial General Permits or MS4 permit programs. There is no need to further clarify the definition or description of a non-wetland swale. The agencies are already defining ephemeral tributaries. If a depressed feature does not have a bed, bank and OHWM per agency guidance, it is not a jurisdictional water. Non-wetland swales will not be included in this definition.

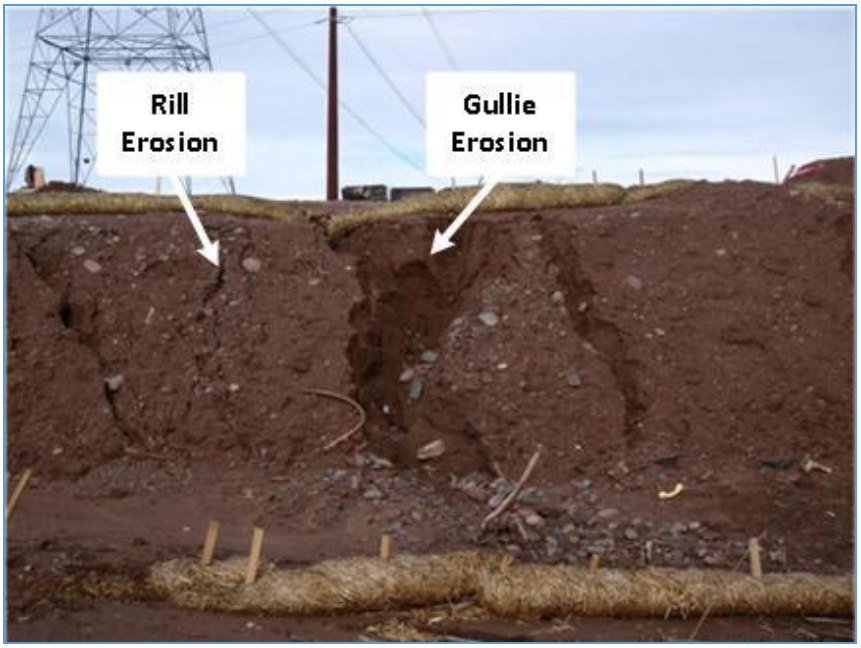


Figure 6: Examples of gully and rill erosion associated with construction. Salt River Project. Phoenix, Arizona.

Other (a)(7) waters

As an alternative to conducting case-by-case analyses of other waters under (a)(7), the agencies suggest that all waters that are not specifically listed as (a)(1) though (a)(6) waters be categorically jurisdictional if they are located within any of the 25 Ecoregions listed in the preamble to the proposed rule. The agencies believe these areas contain similar communities of flora and fauna, soil types and landforms, and that the waters located in these areas perform similar functions and are sufficiently close together that they can be aggregated as a single landscape unit in regard to their effect on the chemical, physical, or biological integrity of a downstream water. As a result, the agencies believe that the proposed list of Ecoregions have "similarly situated" waters that, when aggregated, have a significant nexus on downstream (a)(1) through (a)(3) waters, and can be categorically jurisdictional under the proposed rule.

WESTCAS members operate irrigation systems, drainage systems, and public water treatment plants and/or conduct construction and development activities in several Ecoregions listed in the preamble to the proposed rule.[9] For example, Ecoregion No. 81, the Sonoran Basin and Range, was identified as an Ecoregion that meets the agencies other waters (a)(7) aggregation test.

Figure 7: Ecoregion No. 81. Sonoran Basin and Range.

While some natural undeveloped desert areas in the Sonoran Basin and Range Ecoregion meet the agencies broad characteristics, most do not. Almost every perennial surface water is dammed and diverted for agricultural, industrial, or municipal use. In agricultural areas, many ephemeral streams were converted to cropland, decades, if not more than 100 years ago. And where ephemeral streams are still present in urbanized areas, they largely are channelized, diverted or dammed to prevent flooding.

In addition, one distinct physical characteristic within the Sonoran Basin and Range Ecoregion is the widespread occurrence of land subsidence. After decades of intensive agricultural groundwater pumping, large tracks of land have experienced permanent subsidence rates varying from a few feet at the base of mountain ranges, to more than 40 feet in some alluvial basins. As a result, many natural ephemeral streams in some areas were permanently and negatively modified and no longer follow previous flow patterns.

[9] Other Ecoregions listed include: No. 6, Central California foothills and Coastal Mountains; No. 7, Central California Valley; No. 8, Southern California Mountains; and No. 85, Southern California/Northern Baja Coast.

P. O. Box 77561 Washington, D. C. 20013-7561
770-424-8111 Fax: 770-424-9468

We acknowledge and support the "agencies" efforts to streamline the process for jurisdictional determinations, but for the reasons stated above, we strongly oppose the proposal to categorically designate all other (a)(7) waters within the listed Ecoregions as jurisdictional waters. Such waters should continue to be evaluated by permitting agency staff and field personnel on a case-by-case basis.

WESTCAS Adopts and Supports the Comments filed by Other Industry Coalitions

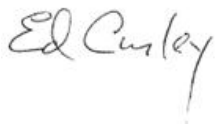
WESTCAS has coordinated with other member trade associations; including, the Federal Water Quality Coalition (FWQC), National Water Reuse Association (NWRA), and the Association of California Water Agencies (ACWA) in commenting on the proposed rule. WESCAS formally supports and incorporates those comments by reference here.

Conclusion

When Congress enacted the CWA, they intended that federal agencies recognize, preserve, and protect a state's authority and responsibility over local land and water resources. Furthermore, federal agencies are required to co-operate with state and local agencies to develop comprehensive solutions to prevent, reduce, and eliminate pollution in concert with programs for managing water resources. However, lack of clarity in the proposed rule may risk expanding the list of jurisdictional waters to include most man-made canals and ditches, stormwater retention basins, or groundwater recharge projects.

Once again, WESTCAS appreciates the opportunity to provide comments on this important rulemaking. We provide them in the interest of cooperation, increased clarity, and in order to avoid the unintended consequences. If you have any questions regarding our comments please contact me at 520-724-6638.

Sincerely,



Ed Curley, President

JK : EC