

The Western Coalition of Arid States

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Testimony
(submitted for the record)
Of
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President
Western Coalition of Arid States

On

The Status of the Nation's Waters,
Including Wetlands, Under the Jurisdiction of the Federal
Water Pollution Control Act

Before
The U.S. House of Representatives
Committee on Transportation and Infrastructure

July 17 and 19th, 2007

The Voice of Water Quality in the Arid West

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The Western Coalition of Arid States (WESTCAS) is submitting this testimony regarding The Status of the Nation's Waters, Including Wetlands, under the Jurisdiction of the Federal Water Pollution Control Act. This testimony is in response to proposals to amend the Federal Water Pollution Control Act to clarify the jurisdiction of the United States over waters of the United States, to provide a definition of Waters of the United States within the Clean Water Act.

The definition of Waters of the United States is of paramount importance for our member's states and the regulated entities (including municipalities), who will bear the cost of having no distinction between actual wet waters of the United States and the predominantly dry water courses that epitomize the arid west. Our members provide water and wastewater services in the arid west and in the process must manage water resources in various ways that will be severely impacted by the overly-broad proposed definition of Waters of the United States. Our members move water through canals and ditches that must be maintained, manage storm water through urban and rural environments, and discharge treated effluent to the otherwise naturally dry water courses. The increased costs, in time and money, of permitting activities associated with the affect of the proposed legislation and its impact on water resource management, provides no significant environmental benefit and is an unnecessary cost that will ultimately be borne by the residents of the arid western states.

WESTCAS is a coalition of approximately 125 water and wastewater districts, cities and towns, and professional associations focused on water quality and water quantity issues in the States of Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon 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.

Legislative proposals seek to define the waters of the United States that are subject to the Federal Water Pollution Control Act by changing the applicability from "navigable waters" to "waters of the United States" and providing a definition of "waters of the United States."

"Waters of the United States means all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent

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that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.”

The proposed definition unnecessarily broadens the scope of waters subject to the Clean Water Act and oversteps the balance of Federal authority with respect to States and their management of water resources. WESTCAS emphatically believes that the proposed definition of “waters of the United States” will lead to three significant types of impacts:

- Requiring Section 404 permits for ditch/canal/acequia operation and maintenance by including these previously non-jurisdictional water conveyance systems
- Impacting the ability of state and local governments to implement land use planning and zoning by applying to “activities affecting these waters”
- Further complicating Section 402 NPDES permits, particularly for storm water discharges, because the proposed legislation does not provide any clearly articulated definition of the extent of tributaries.

Impacts on Water Conveyances

Western water providers are dependent on moving water from one location to another in canals and ditches. Over the past decade, the population of the Western states has grown 19.7 percent—greater than any other region of the United States. The demand for water has increased just as dramatically, and is impacting the demand for increased water conveyance and inter-basin transfers. Aging infrastructure, increasing environmental mandates, serious forest fires, and prolonged drought conditions have added to this demand, threatening the very communities and economies established throughout the West.

A number of important factors applicable to the arid west should be considered regarding inter-basin water transfers and the operation of water conveyances:

- In 2000, about 9,500,000 acre-feet per year of surface water was used for public water supply in the arid west. Most of that surface water was delivered via water aqueducts or canals from within basins and inter-basin transfers.
- The rapid population growth in the arid west is challenging the districts and municipalities to provide quality utility services for water and wastewater due to the sheer number of potential customers, their water demands, and the volumes of wastewater produced requiring treatment.
- Environmental regulations and standards are continuing to become more stringent over time regarding both water supply and wastewater treatment, requiring more actions that increase the costs of water supply distribution and wastewater treatment and discharge.

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- The population growth in the arid West has a significant component of retired and older citizens who are on a fixed and/or limited financial budget, and who cannot afford the escalating utility costs being distributed to the local customer base.

The expansion of Clean Water Act jurisdiction to these waters would impose Section 404, Dredge and Fill, requirements on the operations and maintenance of these water

conveyances. One of our members in Colorado who provides raw water through canals and ditches says “Perhaps of even greater consequence to my district is the extension of jurisdictional waters to canals, ditches, storm drains, etc. Both the “activities affecting” and the “to the fullest extent” language guarantees unintended consequences.

Thousands of miles of manmade water conveyances in Colorado and throughout the arid west would be affected and the cost would depend on exactly how the expanded jurisdiction is interpreted. It’s the unknowns that scare us all.”

The expanded definition of “waters of the United States” could require a 404 permit application to be filed for each maintenance activities in order to obtain the maintenance exemption under 404(d). The USACE must conduct a review of all permit applications, often including site visits, before the USACE can issue the exemptions. The result is that for each of the western states thousands of new permit applications will be submitted annually to the USACE.

Impacts to Local Water Resource and Land Use Planning

The Clean Water Act clearly gives the States the primary responsibilities and rights to prevent water pollution and to plan the development of land and water resources. Section 101 (b) provides that the state have the “primary responsibilities and rights” to prevent water pollution and “plan the development and use...of land and water resources.” 33 U.S.C. § 1251 (b). Section 101 (g) provides that the congressional “policy” is that “the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by” the statute. 33 U.S.C. § 1251 (g). States and local governments have traditionally been responsible for regulating water uses and local land uses. In regulating water uses, the States allocate water among different consumptive uses, such as urban or agricultural uses and also allocate water to protect environmental needs, such as fish and wildlife, recreation, and scenic beauty. In balancing these needs, the States make choices whether local water resources should be developed to promote local growth or instead retained in their natural condition as part of the environmental heritage, and they respond to the public in developing the balance between competing needs.

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At the local level, local governments are responsible for approving development projects, such as residential and commercial developments, that will provide housing and accommodate economic growth and environmental preservation, including preservation of wetlands and other water resources in their natural condition. The local governments may approve development projects because the public benefits outweigh the environmental harm or they may disapprove projects because the environmental costs are unacceptably high. They will approve projects subject to conditions to avoid or mitigate the environmental harm.

These water resource and land use decisions are properly made at the state and local level because they involve resources, including local waters, which have purely local rather than national effects. The Senate and House bills proposed amendment of the

Clean Water Act threatens to change this long-accepted regime by authorizing Federal agencies to regulate local, intrastate, non-navigable waters and activities that affect these waters even where there is no conceivable national or Federal interest at stake. This diminishes the traditional authority of state and local governments to regulate local land and water resources, and disturbs the balance between the Federal government and the States with regard to the legislative intent of the Clean Water Act. It has been long-held that decisions affecting the use of local resources having primarily local effects are better made at the local rather than the national level

Tributaries and Section 402 Permits

WESTCAS members operate storm sewers and other municipal facilities that discharge into desert washes, drainage ditches, concrete-lined flood-control channels and other areas that are normally dry. Under current federal and state law, these dry channels are already invariably characterized as “waters of the United States” by state agencies, the US Environmental Protection Agency (EPA) and the US Army Corps of Engineers (USACE). Dry channels thereby become regulated under the Clean Water Act. Despite their dryness, these “waters” take on the regulatory classification of the wet bodies of water downstream, and become classified for fishing, swimming, and other uses such as drinking-water supply. These classifications, and the criteria established to protect them, are known as “water quality standards”. WESTCAS members are issued Federal and State permits prohibiting the discharge of any substance in concentrations that might interfere with fishing or swimming in the dry channel, or otherwise cause the channel to exceed applicable water quality standards. In this way, Federal and State agencies declare that dry channels of the arid west must be protected for fishing and swimming, and exercise their authority to impose and enforce Clean Water Act requirements intended for wet waters.

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Without the proposed legislation changing the definition of “waters of the United States”, discharges into dry channels are at present more heavily regulated than most discharges into wet waters. Regulators do not need to impose special requirements on most discharges into wet waters, where the discharge is diluted and quickly assimilated without causing violations of water quality standards. Because dry channels lack water for dilution, regulators may impose special requirements to ensure that the dry channel does not exceed its water-quality standards and that the classified used are fully protected. These standards are applied currently because the dry channels are considered tributaries of “waters of the United States”.

In various Courts of Appeal cases, the term “tributary” has been defined differently. The Sixth and Fourth Circuits have held that large expanses of dry lands, which have the presence of a hydrological connection which can be established by artificial “tributaries” such as roadside ditches and drains, may be classified as tributaries. By defining “tributary” to include artificial channels, they extend the concept not only to roadside ditches and irrigation canals, but arguably also to urban gutters, concreted storm drains,

and even underground storm sewers. By defining “tributaries” to include intermittent hydrological connections and the ability to move water downstream, these cases extend “waters of the United States” to cover virtually all dry land. Because with few exceptions, rain falls on land and then flows downhill, potentially if not eventually reaching a water and thereby establishing an intermittent connection. Surely Congress does not intend to apply the Clean Water Act to deserts, mountain peaks, urban streets and all the otherwise dry land where rain falls and runs off. Dry land should not be included as a *water* of the United States.

The Fifth Circuit, in comparison, has properly held that dry land and intermittent creeks are not waters of the United States. This Court held that tributary waters should be treated as within the jurisdiction of the Clean Water Act only when they are so “inseparably bound up” that a discharge to a tributary will produce imminent, actual, identifiable and significant contamination in a navigable water.

Downstream waters are already protected under the Clean Water Act. When point-source discharges into tributaries flow far enough to reach a water of the United States (currently navigable water), they are regulated directly as discharges into navigable waters. Discharges that are eventually carried to navigable waters by storm water runoff are regulated indirectly through the permitting of storm water discharges. Both waters are also within the jurisdiction of state and local governments, which regulate the discharge of wastes into water and the dumping of wastes onto the ground. Therefore,

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waters of the United States are protected without categorizing dry land as waters of the United States.

Without further refining of the definition of “waters of the United States”, water in storm water conveyances and in storm sewers beneath of cities are waters of the United States. These waters are subject to water quality standards and permitting requirements within the pipes that the water flows in because they become “tributaries” of the receiving waters. Obviously, a clear definition of “waters of the United States” that addresses the extent and significance of tributaries is critical in determining the jurisdiction and application of the Clean Water Act, particularly Section 402 and 404 permitting programs. The existing statutory and regulatory protections of waters of the United States argue for a tributary definition that limits the Clean Water Act jurisdiction to “wet flowing waters” that have a “significant nexus” to navigable waters. Respectfully, WESTCAS submits that a clear, yet reasonable, definition is required.

WESTCAS thanks you for the opportunity to provide this statement for the hearing record and WESTCAS would like to work with the Committee as you move forward in addressing this issue legislatively. We bring a unique and important perspective to an issue of paramount importance to the West.

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