



# The Western Coalition of Arid States

## WESTCAS

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September 26, 2017

*Submitted electronically to: ow-docket@epa.gov*

Office of Water – Docket  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

**Re: Letter of Support from the Western Coalition of Arid States  
U.S. Environmental Protection Agency and U.S. Army Corps of  
Engineers Proposed Rule, “Definition of ‘Waters of the United  
States’ – Recodification of Pre-Existing Rules,” EPA-HQ-OW-2017-  
0203.**

Dear Sir or Madam:

The Western Coalition of Arid States (WESTCAS) appreciates the opportunity to file this letter in support of the U.S. Environmental Protection Agency and the Army Corps of Engineers (“the agencies”) proposed rule, “Definition of ‘Waters of the United States’ – Recodification of Pre-Existing Rules.” The proposed rule was issued in the Federal Register on July 27, 2017. 81. Fed. Reg. 34899.

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.

WESTCAS is also a member of the Federal Water Quality Coalition (FWQC). We are supportive of the comments filed by FWQC on the agencies proposal and incorporate them by reference.

***The Voice of Water Quality in the Arid West***

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## WESTCAS

When the Clean Water Rule (CWR) was proposed in 2014, WESTCAS filed extensive comments describing the unintended consequences the rule would present to persons engaging in construction and development, stormwater management, and the operation and management of water, wastewater and ditch systems throughout the arid west. Although the agencies created several categorical exclusions to address some of our concerns, the final rule still swept many man-made features into jurisdiction if it met the newly created definition of a “tributary.” This definition can include manmade conveyances, i.e., ditches that previously were never subject to jurisdiction.

Diverting surface water for agricultural, industrial or municipal uses is ubiquitous throughout the arid west. However, if a ditch system operator diverts flows from a traditional navigable water (TNW), interstate water, or tributary to a TNW or interstate water, and can return flow to another jurisdictional water, the entire length of ditch between the point of diversion and point of return would meet the agencies’ new definition of a “tributary” and subject to the permitting under the Clean Water Act. Any activities conducted by the ditch operator to maintain or repair the jurisdictional water would require a site-specific evaluation by the U.S. Army Corps of Engineers before an exemption from permitting could be issued<sup>1</sup>. Or, at worst case, after review, the Corps could decide that the planned maintenance or repair activity was subject to the Corps “recapture provision” and require the operator to apply for and obtain coverage under a §404 permit.

We do not believe Congress intended to regulate the activities of ditch operators when the Federal Water Pollution Control Act was amended in 1972. Nor do we believe regulation of ditches was in Congress’ viewfinder when they developed the Act’s national goals or policy objectives. The federal regulation of ditches is unwarranted, and for this specific reason, WESTCAS is very supportive of the agencies’ proposal to rescind the 2015 CWR and recodify the pre-CWR definition of waters of the United States. There needs to be regulatory certainty for determining jurisdictional waters while the agencies are developing, public noticing and promulgating a replacement definition.

WESTCAS is also aware of the agencies August 28 proposal to host a series of 10 industry-specific listening sessions to receive verbal recommendations on waters of the United States. Although WESTCAS is not planning to participate, we do intend to submit written suggestions to the rulemaking docket for the agencies to consider.

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<sup>1</sup> Regulatory Guidance Letter. No. 07-02. Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches under Section 404 of Clean Water Act. U.S. Army Corps of Engineers. July 4, 2007.

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**W E S T C A S**

WESTCAS appreciates the opportunity to provide comments on this very important rulemaking. 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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