

**WESTERN COALITION OF ARID STATES
POSITION STATEMENT ON
WATERS OF THE UNITED STATES (WOTUS)
March 22, 2018**

I. DEFINITION OF “WATERS OF THE UNITED STATES”

II. BRIEF SUMMARY OF THE ISSUE

a. Introduction

The Federal Water Pollution Control Act Amendments of 1972, also known as the Clean Water Act (CWA), is a comprehensive statute that partners federal, state and local governments, and deploys a number of programs--both regulatory and non-regulatory--to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters (CWA §101(a)).

The responsibility for protection of surface waters is divided between federal and state water quality agencies. The U.S. EPA (EPA) and the U.S. Army Corps of Engineers (Corps) are responsible for protecting federal navigable waters, while state agencies are responsible for protecting non-navigable intrastate waters and groundwater. In doing so, Congress chose to regulate only pollutant discharges into those waters in which the federal government has an interest--not as all waters within the United States.

When Congress stated the objectives of the CWA, and the scope of waters that warrant protection, it did not define “waters of the United States.” Congress left it upon the EPA and the Corps to develop, through rulemaking, a comprehensive regulatory definition that would be used to establish the jurisdictional reach for all CWA regulatory programs.

However, over the past 45 years, numerous administrative actions have attempted to expand jurisdiction beyond “navigable” by claiming jurisdiction over “other waters” that Congress could regulate under the Commerce Clause of the U.S. Constitution. As a result, petitions for review of key agency decisions have provided some effect for limiting the scope of non-navigable intrastate waters that can be swept into CWA jurisdiction.

b. U.S. Supreme Court Decisions

In *Riverside Bayview Homes* (1985), the court found that the Act’s definition of navigable waters as the waters of the United States indicated an intent to regulate “at

least some waters” that were not navigable in the traditional sense, and upheld Corps jurisdiction over wetlands that “actually abut a navigable waterway.”

In *Solid Waste Agency of Northern Cook County* (2001), the court evaluated the Corps determination of jurisdiction over small isolated ponds, which were created when rain filled abandoned sand and gravel pits and were used by migratory birds. Rejecting jurisdiction over these ponds--and the Migratory Bird Rule generally--the Court explained that the CWA’s use of the term “navigable waters” demonstrates Congress’ understanding that its “authority for enacting the CWA was its traditional jurisdiction over waters that were or had been navigable-in-fact or which could reasonably be so made.”

In *Rapanos* (2006), the plurality criticized the agencies for extending jurisdiction to, “ephemeral streams, wet meadows, storm sewers and culverts, directional sheet flow during storm events, drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert.” Moreover, the court also stated that, “Wetlands are waters of the United States if they bear the “significant nexus” of physical connection, which makes them as a practical matter *indistinguishable* from waters of the United States.”

c. Regulatory History of Ditches

Congress included the term “ditch” in the statutory definition of a “point source” under the CWA. Beginning in 1975, and continuing through 1986, the Corps issued a series of administrative actions that excluded “drainage and irrigation ditches” from the definition of waters of the United States. In the 1990 preamble to EPA’s Phase I storm water regulations, the agency made it clear that storm water runoff into municipal sewers (roads, ditches, storm drains, etc.) is not a discharge of a pollutant to a water of the United States. The plurality and Kennedy opinions in *Rapanos* also made it clear that most drainage and irrigation ditches are not jurisdictional waters of the United States.

III. DESCRIPTION OF IMPACTS ON ARID WEST

The definition of waters of the United States and the potential reach of the CWA has direct ramifications on our ability to meet the demands for water in the Arid West. WESTCAS members operate surface water storage reservoirs, transmission and distribution systems, stormwater conveyance and retention systems, groundwater recharge projects, and discharge wastewaters under state and EPA authorized National Pollutant Discharge Elimination System (NPDES) permits or Corps authorized dredge and fill permits. Our members also discharge pumped groundwater, stormwater, or apply pesticides under NPDES permits or prepare and implement oil pollution prevention and response plans for facilities that are subject to the CWA. In order to maintain, develop

and construct these facilities, our members desire regulatory clarity and the ability to easily identify jurisdictional waters without having to rely upon lengthy agency review.

IV. PRINCIPLES AND GUIDELINES

- The definition of waters of the United States should be consistent with *Riverside Bayview*, *SWANCC*, and meet both the plurality and Kennedy tests from *Rapanos*.
- The term “navigable waters” must be given consideration.
- Recognition from the EPA and Corps that the primary responsibility for and rights over land and water resources resides with the states, i.e., §101(b).
- Clarity that empowers the states to identify and distinguish waters subject to Clean Water Act jurisdiction and “waters of the state.”
- Reliance upon peer-reviewed scientific literature as a basis for establishing chemical, physical and biological connectivity of upstream waters to downstream traditional navigable waters.
- Acknowledgement of the opinion of the EPA Science Advisory Board that connectivity, particularly in the Arid West, should not be treated as a binary property--either present or absent--but as a gradient that recognizes variation in the frequency, duration, magnitude, predictability and consequences of chemical, physical and biological connections.

V. PRIORITIES AND ACTION PLAN

Since 1992, WESTCAS has advocated for the use of sound science with the interpretation and application of the CWA and its underlying regulatory programs. WESTCAS also recognizes the importance of having regulatory clarity and the ability for stakeholders to easily identify navigable waters of the United States. Finally, WESTCAS strongly supports cooperative federalism as the basis of the CWA; Arid West water quality agencies should be authorized to identify navigable waters within their jurisdictions.

To attain these priorities, over the next three to five years WESTCAS plans to:

1. Actively engage and participate in waters of the United States rulemakings to promote the incorporation of sound science, relevant legal principals, and widely accepted agency guidance.
2. Advocate for the development of an appropriate regulatory definition of waters of the United States that recognizes the unique climatic, geographical and hydrological features in the Arid West.

3. Seek opportunities to assist water quality agencies with developing and implementing regulations, policies, procedures and guidance that are uniquely tailored to the Arid West.

VI. UPDATES

This position statement will be reviewed and updated on an annual basis, and no later than March 31 of each calendar year. Questions or suggested edits should be forwarded to <http://www.westcas.org>.