



The Western Coalition of Arid States

WESTCAS

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April 11, 2019

Mr. Michael McDavit
Oceans, Wetlands and Communities Division
Office of Water (4504-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

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

RE: WESTCAS Comments on the Agencies' Proposal to Redefine the Definition of "Waters of the United States"; EPA Docket ID No. EPA-HQ-OW-2018-0149

Dear Mr. McDavit and Ms. Moyer:

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 water and wastewater districts, political subdivisions, 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"-84 Fed. Reg. 4154 (February 14, 2019).

The Voice of Water Quality in the Arid West

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The definition of waters of the United States (“WOTUS”) and the potential reach of the Clean Water Act (“CWA”) is very important to WESTCAS. Many of our members discharge pumped groundwater, municipal and industrial wastewaters, stormwater, or pesticides under federal or state-issued National Pollutant Discharge Elimination System (“NPDES”) permits, or have obtained authorization to discharge fill material under the CWA §404 permit program. Some of our members also operate public and private irrigation and drainage districts and are responsible for administering the adjudicated surface water rights within the communities they serve. Other members are responsible for diverting and delivering untreated water from river systems and Bureau of Reclamation projects to municipal and rural water systems.

WESTCAS has been an active stakeholder and has provided numerous suggestions to the agencies regarding the jurisdictional scope of the CWA, including our recent submittal that was offered during the industry listening sessions.²

WESTCAS supports the agencies’ current proposal to revise and refine the regulatory definition of WOTUS. The proposal emphasizes clarity and regulatory certainty, and it also respects the limited powers of the Executive Branch to regulate navigable waters under the Constitution and the CWA. The proposal promotes greater management and authority by states and tribes, as directed by the CWA, and returns to an appropriate balance between state and federal oversight for regulation of jurisdictional waters. The agencies’ focus on common-sense definitions and clear lines provides much needed predictability for the regulated community, while protecting waters of vital importance for our nation.

WESTCAS is providing the following comments for additional consideration. While we did not respond to all areas of the proposal, we focused on the topics and categories of waters that are of most concern to our members.

Section III.A - Traditional Navigable Waters should be broadly defined.

WESTCAS generally supports the agencies’ proposed definition of traditional navigable waters that includes: 1) all waters that are currently defined in 33 CFR § 329; 2) waters identified as navigable by numerous federal court decisions; 3) all other waters that are navigable-in-fact, including waters beyond those capable of navigation by large vessels; 4) waters that are not continuously navigable or are not navigable in all seasons; and 5) waters that have never been used in commerce, so long as they are susceptible for use in commerce. 84 Fed. Reg. 4170.

² Definition of “Waters of the United States”- Schedule of Public Meetings 82 Fed. Reg. 40742 (August 28, 2017).



The Western Coalition of Arid States

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Furthermore, WESTCAS believes the definition of “navigability” should never be limited to waterways that are used or are susceptible to being used only for waterborne transportation of goods in interstate commerce. Considering one of the underlying goals of the CWA includes “an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water,” we believe the definition of navigability should continue to be interpreted as broadly as possible and incorporate perennial and intermittent waters that are used or are susceptible to being used in commerce, including recreational uses.

Section III.C - Impoundments

The agencies requested comment on maintaining impoundments as a separate category of WOTUS. Impounding natural surface waters for storage and then releasing flow downstream into natural channels or excluded ditches is a common activity across the arid-West. WESTCAS believes the agencies should continue to regulate impoundments as a separate category of WOTUS. WESTCAS further suggests that the agencies include in the final regulatory text a statement that retains the agencies’ long-term position that impounding a WOTUS will not change the jurisdictional status of the upstream tributary, even if flows downstream from the impoundment are significantly reduced or impeded. 84 Fed. Reg. 4173. We believe this language is important as several WESTCAS members operate surface water impoundment and diversion systems that can reduce and/or impede downstream perennial or intermittent tributary flows.

The agencies also requested comment on whether certain categories of impoundments should not be jurisdictional, such as certain types of impoundments that release water downstream only very infrequently or impede flow downstream such that the flow is less than intermittent. As noted above, WESTCAS supports impoundments as a category of WOTUS. However, WESTCAS also recommends that the agencies clarify in the final regulatory text that, if a dam or structure is used to impound the entire flow regime of a tributary, then the dam or structure severs the jurisdiction between upstream and downstream and the water course below the impoundment should be judged to be jurisdictional based on the flow regime (perennial, intermittent, or ephemeral). Where the downstream channel is ephemeral, it is no longer jurisdictional, although it should not affect the upstream jurisdictional status. The ephemeral tributaries should be regulated by states, given the frequency of diverted stream channels throughout the arid-West and the fact that many communities rely upon diversions to provide water for many different uses, including municipal sources of drinking water.

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Section III.D - Tributaries

The agencies requested comment on whether the definition of “tributary” should be limited to perennial waters only. WESTCAS generally supports the agencies’ proposed definition of “tributary” and agrees with the statement that “...certain excluded waters and features are incapable of providing perennial or intermittent flow as defined in this proposal (e.g., ephemeral features) and therefore break jurisdiction upstream of the excluded feature.” 84 Fed. Reg. 4173. Again, we believe that ephemeral water courses should be under the jurisdiction of the states, who are best suited to regulating water quality in their waters.

For example, the Gila River originates in the upper elevations of western New Mexico and is fed by seasonal snowpack runoff. As the Gila descends in elevation and meanders through New Mexico and then into Arizona, much of its base flow is diverted for beneficial uses, resulting in an ephemeral channel for hundreds of miles as it crosses the Arizona desert to its confluence with the Colorado River. WESTCAS submits that it would be inappropriate to assign Federal jurisdiction to these hundreds of ephemeral stream miles in Arizona based on perennial/intermittent stream flow in New Mexico.

The agencies also requested comments on the definition of “intermittent.” 84 Fed. Reg. 4173. WESTCAS supports the proposed definition; however, we recommend that the agencies do not establish any type of flow or duration criteria in order for an intermittent stream to be jurisdictional. The arid-West has precipitation patterns that are seasonal, but not typical. Precipitation is often highly localized, flashy, and variable in the extreme. For these reasons, WESTCAS is concerned about how the “typical year” would be implemented in the arid-West. WESTCAS recommends that the agencies consider intermittent streams as those with seasonal flow that is not solely the direct result of precipitation events.

Section III.E - Ditches

WESTCAS supports the agencies’ proposal to exclude most “ditches,” including roadside, agricultural, irrigation, industry-site, and other storm water, process water and wastewater ditches. We also believe that the regulation of ditches as WOTUS is unnecessary and should be deferred to local ditch operators and/or water quality permitting authorities, as they have the most immediate knowledge of the geographic, hydrologic and geomorphic conditions of their systems and are in the best position to protect their water resources and the communities they serve.

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Many of our members also have decades of experience operating public irrigation and drainage districts, or apply for and implement Municipal Separate Storm Sewer System, i.e., MS4 permits, and are very familiar with the requirements of operating and managing a conveyance system that is also a “point source” under the CWA. Furthermore, many of our members operate their conveyance systems to ensure any discharge they receive that is not comprised entirely of storm water, irrigation return flow or agricultural storm water runoff must be authorized under a CWA §402 permit. As such, WESTCAS recommends that the agencies continue to treat ditches as excluded features.

In addition, WESTCAS also recommends that the agencies clarify an inconsistency in the proposal. Ditches are defined as an *artificial channel*, while tributary is defined as a *naturally occurring* surface water channel. For a ditch to be a jurisdictional water, the agencies should provide additional language that the ditch must also satisfy the hydrological conditions of the tributary definition.

Section III.H - Waters and Features That Are Not Waters of the United States

The agencies propose to exclude any feature that does not fall within one of the six categories proposed as jurisdictional WOTUS. To provide further clarity and certainty, WESTCAS recommends the agencies confirm in the final regulatory text that any feature that qualifies for one of the exclusions is NOT jurisdictional, even if it would otherwise meet one of the six categories of WOTUS.

The 2015 Clean Water Rule contained a similar disclaimer, noting that features expressly excluded from jurisdiction are not a WOTUS even where they otherwise meet the terms of the WOTUS definition. See 80 Fed. Reg. 37105. WESTCAS recommends the agencies adopt similar language in the final rule.

Several of the exclusions are tied to whether the feature was created wholly in “upland.” WESTCAS also recommends the agencies revise the proposed exclusions to eliminate the requirement that a feature must be wholly created in upland to continue to be excluded. Tying exclusions to historic features may only serve to create confusion; especially, features such as drainage, irrigation and roadside ditches that in many cases predate the CWA and are located in areas that do not meet the proposed definition of upland. In fact, many of these features either begin and/or terminate at a jurisdictional water, and that connection is a functional and operational necessity.

The proposal also maintains the agencies’ long-standing interpretation that groundwater is not a jurisdictional WOTUS and clarifies that “groundwater drained through subsurface drainage systems” is excluded from CWA regulation. 84 Fed. Reg. 4190. Excluding groundwater from the WOTUS definition is consistent with the CWA, the legislative history, agency interpretations, and federal case law. WESTCAS supports this approach.

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A new definition of waters of the United States should be implemented in phases.

Under the proposal, some surface waters will lose their CWA jurisdictional status without the safety net of being rolled directly into an existing state-equivalent surface water protection program. WESTCAS recommends that the agencies tailor the effective date of the final rule to provide state water quality agencies with the requisite time to properly assess, prepare for, and implement an appropriate state-level surface water quality assessment, permitting, and protection program. The length of time needed will vary and should be established through state consultation.

Conclusion

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 our comments, please feel free to contact me at 760-398-2651.

Sincerely,



Steve Bigley
President

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