July 29, 2011

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**Environmental Protection Agency** 

1200 Pennsylvania Ave., N.W. Washington D.C. 20460

Attn: Docket ID No. EPA-HQ-OW-2011-0409

Mr. David Olson

Regulatory Community of Practice (CECW-CO-R)

U.S. Army Corps of Engineers

441 G Street, N.W.

Washington, D.C. 20314

Attn: Docket ID No. EPA-HQ-OW-2011-0409

Comment Docket ID No. EPA-HQ-OW-2011-0409

RE: WESTCAS Comments on EPA and Army Corps of Engineers Draft Guidance Regarding Identification of Waters Protected by the Clean Water Act

Docket No. EPA-HQ-OW-2011-0409

Dear Ms. Downing and Mr. Olson:

The Western Coalition of Arid States (WESTCAS) has reviewed the Environmental Protection Agency (EPA) and the Corps of Engineers (Corps) proposed "Guidance Regarding Identification of Waters protected by the Clean Water Act," F3d. Reg. 24,479 (May 2, 2011). WESTCAS appreciates the opportunity to comment on this important Draft Guidance on behalf of its members. In addition to the comments herein, WESTCAS agrees with and supports the comments submitted by the Federal Water Quality Coalition, of which WESTCAS is a member.

WESTCAS is a coalition of 125 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. The Draft Guidance proposes one of the most significant shifts in water policy that WESTCAS has confronted in years.

# The Voice of Water Quality in the Arid West

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The Draft Guidance, unlike previous guidance documents, will be used by the EPA and the Corps (Agencies) staff to interpret the term "waters of the United States" in the context of all programs authorized under the Clean Water Act (CWA), including Section 404 discharges of dredged or fill material, the Section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the Section 311 oil spill program, the Section 401 state water quality certification process, and Section 303 water quality standards and total maximum daily load programs. As such, this proposed guidance will potentially impact water, wastewater, and stormwater infrastructure development, as well as the operations and maintenance of existing and future facilities of WESTCAS members.

The Agencies' decision to issue Guidance on this topic as opposed to conducting a rulemaking runs contrary to the expressed views of a majority of the U.S. Supreme Court and the requirements of the Administrative Procedure Act (APA). Despite repeated claims by the Agencies that they would do a rulemaking, they have not. Instead, the Agencies continue to make important changes to their regulations and expand their CWA jurisdiction through guidance, shortcutting critical rulemaking requirements such as receiving public comments, providing a rationale and factual basis for agency decision and producing a final decision that can be judicially reviewed.

The Draft Guidance represents a significant departure from the current regulations and guidance as well as EPA and Corps policy that have governed jurisdictional determinations during the history of the regulatory program. The Draft Guidance expands the universe of waters that will be considered "traditional navigable waters" by including for the first time ever, waters that support one-time recreational use. In addition, the Draft Guidance gives new and expanded regulatory status to "interstate waters," equating them with traditional navigable waters, and in addition, making it easier to find jurisdictional over adjacent wetlands, tributaries and other waters judged by a newly drafted significant nexus test. The Agencies have expanded their CWA jurisciction in a manner unsupported by their regulations and applicable Supreme Court decisions.

This expansion will have a disproportionate impact on the arid portions of the western United States without substantial environmental benefit. The arid west is characterized by water courses that are ephemeral and intermittent, many of which have been determined under current guidance to be isolated or lacking a significant nexus to traditional navigable waters and such that they are not subject to jurisdiction of the Clean Water Act. Expansion of CWA jurisdiction into water courses with no water will not result in improvements in water quality, but will increase the economic and administrative burden on Federal and State programs as well as WESTCAS member agencies.

The Draft Guidance completely eliminates any requirement of a hydrologic connection which will severely impact arid, desert regions where hydrologic connections are generally less common. The Draft Guidance also further expands jurisdiction beyond what Congress and the Supreme Court intended by applying a broadened view of Justice Kennedy's significant nexus standard not only to wetlands (as Kennedy did) but also to tributaries and isolated waters. Furthermore, the Draft Guidance also allows for decisions to be based on general scientific literature describing functions applicable to the types of waters in question, in lieu of actual case-specific analysis of a water course. Therefore, according to the Draft Guidance, an entire group of water courses could be determined jurisdictional without ever performing an analysis of those water courses. This approach appears to be inconsistent with the Kennedy decision and not scientifically based. Moreover, when asked, the Agencies could not name a single water course that would not provide at least one of these functions, thereby provide that use of functionality to find federal jurisdiction is overly inclusive and threatens to capture all waters.

In addition, the Draft Guidance creates a completely new concept of allowing for "aggregation" of the contributions of all similar water courses with an entire "watershed," thereby presuming a significant nexus between for example small intrastate waters and newly expanded roster of traditional navigable waters, all without substantiation. This novel concept results in a blanket jurisdictional determination for an entire class of waters within a watershed. This is particularly concerning for WESTCAS because dry arroyos and channels—the very geomorphology that defines the arid west—will likely be deemed jurisdictional waters under the Draft Guidance. This will serve only to increase the administrative burden without substantive, observable, or measurable improvements to water quality.

The Draft Guidance also is inconsistent with the Agencies' regulations and Supreme Court decisions. For example, the current regulations do not address ditches, but the Draft Guidance would regulate all roadside and agricultural ditches that have a channel, have an ordinary high water mark, and can meet 1 of 5 characteristics. A second example can be found with respect to "other waters." The current regulations determine jurisdiction over all waters that do not fall within any of the other categories (also known as the "other waters"). The categories are based on certain specific connections to interstate commerce. The Draft Guidance replaces this standard with the significant nexus test. Moreover, the Draft Guidance defines a significant nexus as anything that is "more than speculative or insubstantial," thus turning Justice Kennedy's "significant nexus" into an "any nexus" standard. These and numerous other changes made by the Draft Guidance that significantly broaden the Agencies' CWA jurisdiction will significantly impact the arid west are not supported by Supreme Court decisions and will have a significant negative impact in the arid west.

The Agencies have acknowledged some of the material economic impacts of the Draft Guidance in the addendum "Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction." EPA estimated that the costs of implementing the Draft Guidance will be between \$87 million and \$171 million annually, and the EPA arrived at that number without taking into consideration permitting costs, the increased delays associated with expanded federal jurisdiction, and the costs of new land use restrictions that the regulated community will bearnot to mention the costs to the states for administering program expansion. Without a doubt, the Draft Guidance will impose a significant economic burden on WESTCAS and its members in this already difficult economy. WESTCAS and its members do not begrudge additional burdens when warranted to benefit water quality in the West. However, as noted, the Draft Guidance will simply increase burdens without the attendant improvement to water quality.

In conclusion, the Draft Guidance is intended to and will have a material impact on CWA permitting and enforcement nation-wide because it broadly expands the Agencies' CWA jurisdiction. As such, the Agencies violated the APA and the express views of the Supreme Court by issuing Draft Guidance on this topic as opposed to a rulemaking.

Rather than providing clarity to the CWA permitting process, the Draft Guidance will result in greater uncertainty for the regulatory community because guidance can be changed at any time, making it uncertain whether actions that are compliant today will remain compliant in the future. This uncertainty results in grater costs and unwarranted delays for construction, operation and maintenance activities required to meet important water resources demands in arid west communities.

For the sake of efficiency and certainty for the regulatory community, WESTCAS respectfully requests that the Agencies maintain the existing guidance that reflects the Supreme Court's SWANCC and Rapanos decisions and forgo the develoment and approval of this Draft Guidance.

Thank you for your consideration

Sincerely,

Steve Bigley

Secretary, WESTCAS