



WESTERN STATES WATER COUNCIL

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April 12, 2019

Mr. David Ross
Assistant Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Federal Building
1200 Pennsylvania Avenue NW (1101A)
Washington, DC 20460

Mr. R.D. James
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

Re: Revised Definition of “Waters of the United States,” EPA-HQ-OW-2018-0149

Dear Assistant Administrator Ross and Assistant Secretary James,

The Western States Water Council (WSWC), representing 18 western states on water policy issues, submits the following comments regarding the proposed rule the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) have developed to clarify the scope of Clean Water Act (CWA) jurisdiction. These comments are based on WSWC Policy #427, attached.

I. Cooperative Federalism

The CWA is built upon the principle of cooperative federalism. Efforts to redefine or clarify CWA jurisdiction have numerous federalism implications, with the potential to significantly impact states, and the potential to alter the distribution of power and responsibilities among the states and federal government. The WSWC expresses sincere appreciation for the agencies’ efforts to reach out to the states as co-regulators in meaningful consultation, to listen to their concerns, acknowledge states’ authorities over “waters of the state,” and to work toward a rule that seeks to strike a balance between the critical importance of protecting the quality of the nation’s waters and preserving the sovereignty of states over their land and water resources. We encourage the agencies to continue this outreach and consultation throughout the implementation of the rule.

Since the enactment of the CWA in 1972, the western states have made great strides in protecting water quality and coordinating quality and water quantity decisions. The states are in the best position to manage the waters within their borders because of their on-the-ground knowledge of the unique aspects of their hydrology, geology, and legal frameworks. Additionally, the states have authority under their respective constitutions, statutes, and regulations to protect the quality of “waters of the state.” State jurisdiction extends beyond the limits of federal jurisdiction. The WSWC supports and appreciates the repeated acknowledgement throughout the agencies’ explanation of the proposed rule that excluding waters from federal jurisdiction does not mean they will be exempt from state regulation and protection.

II. Technical and Financial Assistance

The WSWC supports continued access to federal technical and financial assistance to the states to protect and improve water quality under existing EPA programs. The proposed rule makes a significant distinction between the CWA's "non-regulatory measures to control pollution of the nation's waters generally" and the "federal regulatory permitting program designed to address the discharge of pollutants into a subset of those waters identified as 'navigable waters' or 'waters of the United States.'" The nonregulatory federal measures, such as grants and technical assistance, have been meaningful for the states to address point and non-point source pollution through state regulatory and voluntary programs tailored to fit unique state needs.

The six components used in the Water Pollution Control State grant allotment formula are: Surface Water Area; Ground Water Use; Water Quality Impairment; Point Sources; Nonpoint Sources; and Population of Urbanized Area (40 CFR 35.162). Many states use a combination of state funds, fee funds, and federal water pollution control grant funds to implement their water pollution control programs. The WSWC does not support any reduction in Water Pollution Control State or other grant funding for states due to the WOTUS changes.

III. Mapping and Geospatial Datasets

The WSWC supports the development of geospatial datasets for mapping jurisdictional waters through a joint federal, state, and tribal effort. WSWC supports identifying and employing the best available data and tools, and appropriate provisions for ongoing data and map maintenance.

IV. Other Considerations

The states are reviewing the impact the proposed rule will have on permits and regulated waters under their current state statutes and regulations. The WSWC supports an appropriate delay in the effective date of any new rule, or some alternative that allows a transition period, enabling states to take such actions as may be necessary to address any gaps in state law, regulation, and protection.

Additionally, the WSWC supports a clear process for resolving differences of opinion over federal and non-federal jurisdiction, as well as jurisdictional disputes between different states and tribes with Treatment-as-States authority. For example, although 40 CFR §131.7 provides a dispute resolution mechanism between states and tribes with differing water quality standards, this does not appear to apply to jurisdictional disputes between one state and another state, or between one tribe and another tribe, or between a state/tribe and a federal agency, e.g. if a federal agency determines a water is jurisdictional as a "water of the US" and a state claims it is instead a "water of the state."

Thank you for the opportunity to comment.

Sincerely,



Tony Willardson
WSWC Executive Director



RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding
CLEAN WATER ACT JURISDICTION
Coeur d'Alene, Idaho
October 26, 2018

WHEREAS, the Clean Water Act (CWA) is built upon the principle of cooperative federalism in which Congress intended the states, the Environmental Protection Agency (EPA), and the U.S. Army Corps of Engineers to implement the CWA as partners, delegating co-regulator authority to the states;

WHEREAS, the CWA's cooperative federalism framework has resulted in significant water quality improvements since the law's enactment in 1972, and western states have made great strides in protecting water quality and coordinating water quality and water quantity decisions; and

WHEREAS, EPA has actively sought meaningful state consultation, engagement and participation in its review and development of a new proposed rule to define Waters of the United States; and

WHEREAS, States are best positioned to manage the water within their borders because of their on-the-ground knowledge of the unique aspects of their hydrology, geology, and legal frameworks; and

WHEREAS, States have both state statutory and constitutional authority pursuant to their "waters of the state" jurisdiction to protect the quality of waters within their borders and such jurisdiction generally extends beyond the limits of federal jurisdiction under the CWA; and

WHEREAS, CWA Section 101(b) supports the states' critical role in protecting water quality by stating: "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution;" and

WHEREAS, CWA Section 101(g) further provides that the primary and exclusive authority of each state to "allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act;" and

WHEREAS, a one-size-fits-all national approach to federal regulations, guidance, and programs pertaining to the CWA does not recognize specific conditions and needs in the West, where water can be scarce and a variety of unique waterbodies exist, including but not limited to small ephemeral washes and arroyos, snow dependent intermittent streams, effluent dependent and dominated streams, prairie potholes, playa lakes, and terminal lakes, as well as numerous man-made reservoirs, impoundments, and water and stormwater conveyance structures; and

WHEREAS, physical, biological, and chemical differences between waters, and hydrologic differences, both spatially and temporally, as well as considerable differences in legal doctrines that govern water in western states, mean that any federal effort to clarify CWA jurisdiction will inevitably impact each State differently, thus underscoring the need to thoroughly involve states in developing and implementing any rule so as to clearly respect and avoid conflict with state authority over the regulation of water quality and the allocation of waters and water rights within their respective borders; and

WHEREAS, any efforts to redefine or clarify CWA jurisdiction have, on their face, numerous federalism implications that have the potential to significantly impact states and alter the distribution of power and responsibilities among the states and the federal government; and

WHEREAS, as co-regulators, States are separate and apart from the general public, and have a unique role with the federal government in the development and implementation of any rule to clarify or redefine CWA jurisdiction; and

WHEREAS, information-sharing does not equate to meaningful consultation, and the uncertainty and differences of opinion that exist regarding CWA jurisdiction requires EPA and the Corps to develop and implement federal CWA jurisdiction efforts in authentic partnership with the states; and

WHEREAS, uncertainty and differences of opinion have and continue to exist regarding CWA jurisdiction among States, and challenge EPA and the Corps to develop and implement any new rule in cooperation with the States, based on principles of cooperative federalism, and together to provide greater certainty and a clearer definition of the limits of federal jurisdiction; and

WHEREAS, perennial streams with a relatively permanent surface water connection to navigable waters are now presumptively considered to be under federal CWA jurisdiction.

NOW, THEREFORE BE IT RESOLVED that Congress and the Administration should ensure that any federal effort to clarify or define CWA jurisdiction and define Waters of the United States:

1. Gives as much weight and deference as possible to state needs, priorities, and concerns.
2. Includes robust and meaningful state participation and consultation in the development and implementation of any rule, acknowledging the inherent federalism implications.
3. Gives full force and effect to Congress' intent and the purposes of CWA Sections 101(b) and 101(g).
4. Recognizes that Justice Kennedy's "significant nexus" test in *Rapanos* requires a connection between waters that is more than speculative or insubstantial to establish jurisdiction. Federal CWA jurisdiction efforts should also quantify "significance" to ensure that the term's usage does not extend jurisdiction to waters with a *de minimis* connection to jurisdictional waters, applied to individual waters on a case-by-case and not watershed basis.
5. Complies with the limits Congress and the U.S. Supreme Court have placed on CWA jurisdiction, while providing clear and recognizable limits to the extent of CWA jurisdiction, consistent with the plurality opinion authored by Justice Scalia in *Rapanos*.
6. Specifically excludes waters and features outside the scope of CWA jurisdiction, including:
 - (a) Groundwater;
 - (b) Man-made conveyances and related control features for water supply, stormwater and flood water management, including but not limited to: (i) agricultural irrigation canals, laterals and ditches and drains; (ii) municipal and industrial water supply pipelines, conduits, and aqueducts; (iii) storm sewers, drains, and flood flow bypass features; (iv) roadside barrow pits, ditches, and culverts.

- (c) Man-made impoundments on ephemeral or intermittent streams (or off stream impoundments), such as farm and stock ponds, dugouts and similar features; and
 - (d) Dip ponds that are excavated on a temporary, emergency basis to combat wildfires and address dust abatement; and
 - (e) Isolated, non-navigable, intrastate waters and wetlands, including prairie potholes and playa lakes, as well as intrastate terminal lakes, individually or in combination with similarly situated waters; and
 - (f) Arroyos, coulees, washes and similar features.
7. Acknowledges that states have authority to protect all “waters of the state,” and that excluding waters from federal jurisdiction does not mean that they will be exempt from state regulation and protection.
 8. Continues to provide access to appropriate technical and financial assistance to the States to protect and improve water quality under existing EPA programs without regard to jurisdictional determinations.
 9. Provides a clearly delineated process for resolving differences of opinion over federal and non-federal jurisdiction, and jurisdiction between different States and Tribes (treated as States).
 10. Provides for mapping of jurisdictional waters as a joint federal/state/tribal effort employing the best available data and tools, with appropriate provisions and processes for map maintenance.
 11. Includes an appropriate delay in the effective date of any new rule or otherwise allows for a transition enabling States to take such actions as may be necessary to address any gaps in state law, regulation and protection.

The State of Washington voiced concerns and abstained from the vote.