



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

682 East Vine Street / Suite 7 / Murray, UT 84107 / (801) 685-2555 / Fax 685-2559 / www.westernstateswater.org

Chair - Jennifer Verleger; Executive Director - Tony Willardson; Editor - Michelle Bushman; Subscriptions - Julie Groat

ADMINISTRATION/LITIGATION

EPA/WOTUS/*Pascua Yaqui Tribe v. EPA*

On September 3, the public comment period closed on the Environmental Protection Agency's (EPA) Request for Recommendations: Waters of the United States (WOTUS) (Docket #EPA-HQ-OW-2021-0328). EPA received over 23,000 written comments, in addition to feedback from various public meetings.

The Alaska Department of Environmental Conservation wrote that, in the 15 months they've been implementing the Navigable Waters Protection Rule (NWPR), they have little to offer in terms of negative consequences. They expressed concerns about federal overreach, particularly in terms of regulating permafrost wetlands. As a large percentage of Alaska's lands are categorized as wetlands, there is a need for regulatory efficiency and certainty in project permitting. Given the potential for criminal and civil sanctions, "...it is essential that any refinement of the definition of WOTUS provide clarity to states and the regulated community." The 12-page letter included recommendations.

Colorado Governor Jared Polis and Attorney General Philip Weiser submitted a 17-page letter, accompanied by an appendix on ephemeral and intermittent streams, another on the science of tributaries, a white paper on dredge and fill issues, and a summary of a discussion with stakeholders on protecting gap waters not covered by the NWPR or current Colorado laws. They expressed concern over the lack of federal protection under the NWPR for the large number of intermittent and ephemeral streams, placing new, extensive regulatory burdens on Colorado.

With half of Colorado's acreage dedicated to agriculture, farmers and ranchers must have certainty about whether their lands include jurisdictional waters in order to make the most responsible and productive decisions. "Unfortunately, over the last decade, we have operated in a period of considerable uncertainty, as efforts to revisit the regime in place under the 2008 Guidance led to significant revisions in 2015 and 2020. Therefore, Colorado supports objective, clear, and recognizable limits on the extent of CWA jurisdiction and a reinforcement and clarification of the scope of existing agricultural exceptions, as discussed below. In short, we

believe a recommitment to an approach along the lines of the 2008 Guidance would promise an end to the ongoing uncertainty and litigation we have witnessed over the last decade."

Colorado expressed a preference for a rule consistent with Justice Kennedy's concurrence in *Rapanos v. U.S.*, one that: (1) is based on science rather than arbitrary categories; (2) is flexible enough to acknowledge the biological and hydrological conditions of western streams and wetlands; (3) considers the cumulative impacts of tributaries on downstream navigable waters; (4) preserves the NWPR's agricultural exemptions; (5) continues the previous WOTUS rules' consistency with CWA §101(g) and recognition of states' authority to manage water quantity; and (6) provides clarity regarding the application of the significant nexus test, by establishing criteria or factors to be considered.

Nebraska Governor Pete Ricketts and the Nebraska Departments of Environment and Energy, Agriculture, and Natural Resources, noted that the scope of the WOTUS definition has a "direct and meaningful impact on Nebraska farmers, ranchers, industries, developers, homebuilders, and others whose proposed projects or developments may be required to obtain permits and approval from federal agencies." They added that water quality is important to Nebraska, and that their regulatory agencies "have clear authority and are well equipped to protect waters of the state." They expressed concern over "an expanded definition of WOTUS similar to what was adopted in 2015, both because of its extensive reach into waters already regulated by the State as well as the increased difficulty in determining what waters might be considered WOTUS. This is why Nebraska joined several states to legally challenge that rule on both procedural and substantive fronts. We continue to be committed to preserving our authority to protect Nebraska's water resources."

Nebraska's preferred approach to CWA jurisdiction is based on Justice Scalia's plurality opinion in *Rapanos* and limited to "relatively permanent streams and wetlands with a direct surface connection," with a clear and predictable standard for state and federal agencies, such as the NWPR with explicit descriptions of waters covered and excluded, and a definition that allows for regionalized approaches.

The Texas Commission on Environmental Quality (TCEQ) requested durable regulatory certainty so that states can implement and administer CWA programs in a clear and transparent manner. “Extensive litigation and continuous rulemakings have contributed to the uncertainty and confusion of the WOTUS definition. States have dedicated time and resources toward maintaining situational awareness of the status of jurisdiction in a particular state or region, a difficult task due to the patchwork of litigation and rulemakings initiated from 2015-2021.” TCEQ requested regional flexibility, noting that Texas experiences drought and floods with regularity and that national benchmarks or thresholds may be problematic to implement in certain regions. “Various physical indicators that integrate long-term changes in environmental conditions (such as the ordinary high water mark) may most appropriately capture long-term environmental changes and account for regional differences.” Finally, TCEQ requested ample opportunities for co-regulator coordination, as states have a unique role in protecting water quality. They asked that regional roundtables referenced in the Federal Register notice “be planned and announced with sufficient advance notice to state co-regulators.”

Wyoming Governor Mark Gordon took issue with the suggestion that a lack of federal justification justified revisiting the WOTUS rulemaking, except in order to “restore longstanding protections,” as if regulation of water bodies were entirely revoked by the NWPR. “The question of WOTUS jurisdiction is in fact much more complex.” He questioned how the recent federal court decision in Arizona vacating the NWPR, will affect the WOTUS rulemaking. Meanwhile, Wyoming remains engaged in litigation over the 2015 Clean Water Rule. He said the 2020 NWPR “was mindful of the limits Congress set in the CWA,” adding “Wyoming appreciated the great care that was taken to gather meaningful feedback from states during consultation for [the NWPR],” which included “multiple in-person meetings that went beyond merely providing on-way information to the public. It entailed robust dialogue between the federal agencies and state co-regulators, which is the kind of consultation that should be conducted...during a new rulemaking.”

Governor Gordon expressed a preference for an appropriately narrow rule that excludes man-made features, and takes into account regional variations and unique hydrologic regimes, such as the arid and snowmelt-driven regions in Wyoming, which has a bearing on intermittent and ephemeral waters. His 25-page letter included a copy of his 2019 comments, and also referenced a separate letter from the Wyoming Department of Environmental Quality (WDEQ).

WDEQ recommended revising rather than repealing the NWPR, and noted that implementation of the NWPR has been straightforward and effective in Wyoming. They

described recent efforts to develop a permitting process based on the Wyoming Environmental Quality Act to cover dredged and fill discharges to non-WOTUS waters. They supported the integration of the most relevant science, within regulatory constraints, and expressed concerns about the use of WOTUS to address environmental justice and climate concerns. They supported the development, through federal-state partnerships, of publicly-available national geospatial mapping tools. “Though technical and procedural challenges exist, phased-development of a national WOTUS map is certainly feasible. Mapping traditional navigable waters, territorial seas, and many of the excluded waters would be a large step forward, followed by the more complex jurisdictional waters such as tributaries, lakes and ponds, and finally adjacent wetlands. Such maps would improve regulatory certainty, consistency and transparency, and also recognize and embrace cooperative federalism. These maps should be periodically updated (e.g., every 5 years to be consistent with the effective duration of jurisdictional determinations) using the latest scientific data to reflect long-term changes in the hydrology of the nation’s waters.” <https://westernstateswater.org/policy-letters/2021/state-wotus-recommendations/>

According to EPA’s website, “The Environmental Protection Agency and U.S. Army Corps of Engineers (the agencies) are in receipt of the U.S. District Court for the District of Arizona’s August 30, 2021, order vacating and remanding the Navigable Waters Protection Rule in the case of *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency*. In light of this order, the agencies have halted implementation of the Navigable Waters Protection Rule and are interpreting ‘waters of the United States’ consistent with the pre-2015 regulatory regime until further notice. The agencies continue to review the order and consider next steps. This includes working expeditiously to move forward with the rulemakings announced on June 9, 2021....” <https://www.epa.gov/wotus/current-implementation-waters-united-states>

MEETINGS

NOAA/NIDIS Drought Forum

On September 21-22, and 28-29, the National Oceanic and Atmospheric Administration’s (NOAA) National Integrated Drought Information System (NIDIS) will host the 2021 Southwest Drought Virtual Forum to assemble stakeholders, decisionmakers, and drought experts for a cross-cutting dialogue on long-term implications of drought in the Southwestern United States, and response and relief efforts across levels of government and sectors, with the goal of supporting communities and building long-term drought resilience in the region. For further information, including how to register see: <https://www.southwestdroughtforum.com/>.

The WESTERN STATES WATER COUNCIL is a government entity of representatives appointed by the Governors of Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.