

In June, the Environmental Protection Agency (EPA) organized Waters of the United States (WOTUS) regional roundtables hosted by a variety of organizations across the country including five that focus on issues in western states. On behalf of Assistant Secretary of the Army (Civil Works) Michael Connor, Stacey Jensen stated these roundtables help “strengthen communication and relationships to solve water resources challenges and enhance community resilience.” Sylvia Quest, EPA, emphasized the importance of hearing regional specific water challenges as they evaluate the new WOTUS rule. The recordings for each event are available at <https://www.epa.gov/wotus/public-out-reach-and-stakeholder-engagement-activities>.

On June 2, a roundtable organized by the Arizona Farm Bureau featured comments from the Arizona Department of Environmental Quality as well as industry, agricultural, local government and tribal stakeholders in Arizona, Colorado, New Mexico, Oklahoma, and Utah. On June 6, the Kansas Livestock Association hosted a roundtable focused on midwestern issues with participation from stakeholders in Kansas, Nebraska, and Iowa. On June 13, another roundtable focusing on southwest issues was hosted by Amigos Bravos, a non-profit based in New Mexico, that included comments from the Colorado Department of Public Health and Environment as well as participants from Arizona, Colorado, New Mexico, Oklahoma, and Texas. On June 16, the California Farm Bureau organized a round table with participation from multiple western state agencies including Nevada Division of Environmental Protection, the Montana Department of Natural Resources Conservation, the Hawaii Department of Agriculture, and stakeholders from Oregon, Idaho, Montana, California, and Nevada. On June 24, the Wyoming County Commissioners Association, Montana Association of Counties, and Idaho Association of Counties hosted a roundtable that included representatives from agricultural interests in all three states in addition to several other stakeholders. A full list of participating organizations in all of the roundtables is available on EPA’s website. The following summary highlights various themes that were discussed at the western-focused roundtables.

Uniqueness of the West

Many participants talked about the uniqueness of western landscapes and hydrology. Jennifer Carr, Nevada Department of Environmental Protection and WSWC member, said that “the vastness of western topography” needs to be considered carefully when considering WOTUS noting that the characteristics of ephemeral waters can differ significantly across the West with some ephemeral features only experiencing flow every few decades. There was extensive discussion about the nature of ephemeral waters in the west. Hawaii only has one inland navigable water and in many areas localized rains between valleys create numerous ephemeral and intermittent features. Others discussed the diversity and uniqueness of the intermountain west including high deserts and forested areas in the north and at high elevation. Many ephemeral features in southern California percolate before reaching perennial waters or only flow when they receive Title 22 recycled water. Several participants spoke about the importance of ephemeral and intermittent wet meadows and their importance to moderate temperature, sediment, and nutrient impacts in downstream waters. Some of these features provide critical hydrologic and geomorphic functions that are especially important in the context of climate change to provide water storage and flood protection.

Appropriate Balance between State and Federal Authority

Participants reminded the agencies that they need to stay true to the legislative intent of the Clean Water Act which was to strike a balance between state and federal regulation with clear exemptions. Several participants noted areas of overlap and duplication between state and federal programs and several said that some state laws are more stringent than federal regulations with respect to water quality protections and that it is important not to duplicate or complicate regulations. Further, some felt that congress assumed that states would address land management issues and that these should not be subject to federal permitting requirements. Some questioned what the natural resource protection value would be of regulating, as waters, large areas of arid land in the West considering other state and federal environmental protections. There was discussion about how state agencies and local partnerships were best placed to manage water quality in coordination with water resource and land managers. Many participants felt that state agencies can communicate clearly with one another and local staff have the best handle on the hydrology and communities in a watershed. Most states have Clean Water Act (CWA) primacy and can therefore provide clean water through a blend of federal and state programming. There is also a concern that there is insufficient capacity for federal regulators to monitor, inspect and enforce on a broader suite of waters.

Protecting agricultural economic interests

Many participants talked about the importance of agriculture to western economies and emphasized the need not to hamper production agriculture. Most participants emphasized the importance of maintaining current agricultural exemptions. More specifically, several participants argued that irrigation canals, ditches, stock ponds, as well as other western irrigation infrastructure must be excluded from WOTUS to allow for regular maintenance critical to maintaining agricultural production.

The lack of clarity and the need for case-by-case determinations was identified as a source of significant uncertainty for landowners. In some areas of the west, farms can be very small and are owned by traditionally underserved and socially disadvantaged people that often don't have the means to comply with the proposed rules. There is a concern that an uncertain regulatory process interferes with environmental justice and food security goals for some states.

Others reminded participants that most agricultural activities and features are already exempted from Clean Water Act jurisdiction and that there was some confusion about whether an expanded definition of WOTUS would affect the existing exemptions.

Several participants requested that EPA maintain the prior converted cropland (PCC) exclusion as outlined in the 2020 rule. In many western states PCC could convert to a wetland if fallowed because an agricultural producer does not have a senior water right to keep it in active production. Participants emphasized that the exemption for PCC from WOTUS must recognize western water rights and water law to ensure there are no unintended consequences of PCC reverting to wetlands.

Other Exemptions

Several participants also discussed the importance of clearly exempting water treatment infrastructure, and some upland waters that may only be connected to a traditional navigable water via groundwater. Most participants reiterated the importance of state oversight of groundwater and the need for clear guidelines associated with WOTUS in light of the Supreme Court decision in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020).

Improvements to Federal Permitting Processes

Participants offered several recommendations with respect to the 404 permitting process. One suggestion was modifying the 404 reporting process and relaxing the aquatic resource delineation requirements for restoration projects to accelerate restoration projects across the west. There was also a recommendation that jurisdictional determinations made by either the U.S. Army Corps of Engineers (USACE) or EPA should apply to both the CWA 402 and 404 permitting programs and eliminating the automatic 5-year expiration. Finally, there is a concern with USACE processing applications without making determinations in order to expedite projects. Approval of 404 permits for non-jurisdictional waters misrepresents the number of waters that are considered WOTUS. Finally, several participants identified the lack of consistency and timeliness in permit issuance as a significant problem that should be improved.

Some participants noted that there is a very strong regulatory presence associated with federal water projects and there are significant problems when federal agencies (BOR, USACE, USFWS) do not work together. Participants recommended that the administration revive the water subcommittee that was established during the Trump administration. Others discussed the importance of federal agencies adapting to changing water features due to climate change.

Clarity

Participants emphasized the importance of clarity and predictability in the final rule noting that subjective terms with case-by-case determinations are very difficult for land owners to navigate. Clarity and certainty are also necessary to ensure that the permit process is more timely. One participant highlighted the work that has been done recently in Oregon under the private forest accords which looks at how to alter protections for different types of systems and evaluate the probability that a stream is perennial.

Timeline

Several participants indicated that the roundtable discussions are not well timed given the pending *Sackett v. EPA* Supreme Court case.