



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 - Julie Cunningham; Executive Director - J.D. Strong; Editor - Elysse Campbell

ADMINISTRATION/WATER QUALITY **Waters of the United States**

On November 17, the Environmental Protection Agency (EPA) and the Army Corps of Engineers proposed a rule to revise the definition of "waters of the United States" (WOTUS) under the Clean Water Act. EPA held a prepublication meeting on the same day. The proposed rule will be open for public comment until January 5. The agencies will hold two in-person public meetings, with an option for virtual participation. Dates and registration information is forthcoming. Requests to speak will be taken the day of the meeting.

Under the proposed rule, the agencies would define key terms such as "relatively permanent," "continuous surface connection," "tributary," "ditch," "prior converted cropland," and "waste treatment system." It would limit federal jurisdiction to: (1) traditional navigable waters and territorial seas; (2) most impoundments of WOTUS; (3) relatively permanent tributaries of traditional waters with predictable, consistent flow; and (4) wetlands and lakes/ponds having a continuous surface connection to jurisdictional waters and hold surface water "at least during the wet season." The rule would also amend the exclusions for waste treatment systems, prior converted cropland, and certain ditches, and add an exclusion for groundwater. The agencies clarified that when preparing an approved jurisdictional determination (JD), the agencies bear the burden of proof in demonstrating, and adequately documenting, that an aquatic resource is jurisdictional or excluded.

The agencies sought comment on improving predictability and clarifying the scope of traditional WOTUS. They requested feedback on a narrower approach based on Justice Clarence Thomas' *Sackett* concurrence, which would limit jurisdiction to traditional navigable waters, their direct tributaries, and wetlands with continuous surface connections.

"Relatively permanent" would mean "standing or continuously flowing bodies of surface water that are standing or continuously flowing year round or at least during the wet season," including continuous hydrology occurring annually in response to the wet season (such

as delayed snowmelt) would also be covered. This definition would exclude ephemeral waters. The Agencies solicited comments on several alternative approaches to defining "relatively permanent," including: (1) Limiting the definition solely to perennial waters, meaning standing or continuously flowing year-round, which would exclude waters the *Rapanos* plurality specifically contemplated and disproportionately limit scope from east to west; (2) Setting specific minimum flow duration or volume thresholds or "bright lines"; (3) Defining "relatively permanent" consistent with the pre-2015 regulatory regime, requiring standing or continuously flowing water at least seasonally (e.g., typically three months), an approach familiar to practitioners but which may not be consistent with *Sackett*; and (4) Interpreting seasonal flow as "continuous surface flow except in dry months," similar to the wet season concept but possibly requiring longer flow periods.

"Tributary" would mean "a body of water with relatively permanent flow, and a bed and bank, that connects to a downstream traditional navigable water or the territorial seas, either directly or through one or more waters or features that convey relatively permanent flow." Natural, man-altered, and man-made waters meeting the proposed tributary definition would qualify. Lakes, ponds, and in-line impoundments with continuous or seasonal flow would count as tributaries because they contribute downstream flow. Tributaries interrupted by non-relatively permanent waters or wetlands generally would not retain upstream federal jurisdiction, except for water transfers.

"Continuous surface connection" would be defined as "having surface water at least during the wet season and abutting (i.e., touching) a jurisdictional water." This would provide a two-prong test that requires both (1) abutment of a jurisdictional water; and (2) having surface water at least during the wet season." If a touching wetland transitions from having "surface water at least during the wet season" to seasonally saturated, only the portion with wet season surface water would be considered jurisdictional.

The agencies requested comment on an alternative approach requiring wetlands, lakes, and ponds to both

touch a jurisdictional water “and have a continuous surface water connection to that water,” which the agencies would interpret to mean having perennial surface water. They asked: (1) whether this better implements *Sackett’s* “indistinguishable” standard; (2) whether “continuous surface connection” could simply mean abutting, covering all abutting waters without considering wet-season surface water; and (3) whether “continuous surface connection” could require a unique 90-day “wet season.”

The proposal would remove “interstate waters” as a standalone category. Waters would not be jurisdictional solely because they cross state lines unless they otherwise meet WOTUS criteria. The agencies said that regulating all interstate waters impermissibly reads the term “navigable waters” out of the statute, and that other interstate waters are “more appropriately regulated by the States and Tribes.”

“Waste treatment systems” would be clarified to cover all components designed to treat wastewater to meet Clean Water Act requirements by conveying, retaining, or removing pollutants before discharge. The agencies requested comment on this definition, its implementation, and whether it is clearer than the current definition.

The agencies proposed to continue excluding prior converted cropland (PCC) but clarify that the exclusion ends if the land is abandoned (not used for agricultural purposes at least once in the past five years) and otherwise meets WOTUS criteria.

Under the proposed rule, ditches that are constructed or excavated entirely in dry land are not WOTUS. “Ditch” would mean “a constructed or excavated channel used to convey water.” The agencies would first ask if the ditch is navigable; if not, they would check if it was dug entirely on dry land; if still not, they would evaluate whether it functions as a tributary. The agencies asked for comment on this order of evaluation. The agencies sought comment on this evaluation order and on alternative approaches, including (1) excluding all ditches with less than relatively permanent flow or (2) excluding all non-navigable irrigation and drainage ditches regardless of location or construction.

The agency proposed to add a groundwater exclusion. “The agencies propose that there is a need for a regulatory exclusion to provide clarity on this matter. This position is longstanding and consistent with Supreme Court case law.... The agencies acknowledge the importance of groundwater as a resource and its role in the hydrologic cycle. But its regulation is most appropriately addressed by other Federal, State, Tribal, and local authorities. <https://www.epa.gov/newsreleases/epa-army-corps-unveil-clear-durable-wotus-proposal>

WATER RIGHTS

Colorado/Shoshone Water Rights Acquisition

On November 19, the Colorado Water Conservation Board (CWCB) voted to approve the acquisition of two water rights associated with the Shoshone Power Plant, including one of the state’s most significant Colorado River water rights, to secure permanent instream flow protection on a 2.4-mile reach of the Colorado River between the Shoshone Power Plant diversion and discharge points. The approval advances the project to the water court phase, where the change of use to instream flow will be reviewed for potential injury to existing decreed rights.

The project is supported by state and local funding, including a \$20M State Projects Bill contribution, and includes commitments to maintain historical usage patterns while pursuing negotiated resolutions with affected water users.

Lauren Ris, CWCB Director, said “Securing one of the state’s most significant Colorado River water rights for permanent instream flow protection is a momentous achievement. This outcome reflects a tremendous amount of work, from extensive technical analysis and stakeholder engagement to thorough regulatory review and legal preparation. This careful evaluation ensures our investment delivers long-term benefits for the river and for Coloradans.”

“I want to thank all the people who have worked so hard to inform this decision for the Board and the diverse range of stakeholders who earnestly engaged,” said Dan Gibbs, Executive Director, Colorado Department of Natural Resources. “Acquiring the Shoshone water rights for instream flow use is a once-in-a-lifetime opportunity to preserve and improve the natural environment of the Colorado River. But I also want to stress that the state is committed to ensuring that the historical use of the water rights is maintained at the status quo and we are committed to participating in any process to settle and resolve these issues for all water users. I am confident in our ability as a state and as a water community to come together in a way that is beneficial to all.” <https://www.coloradoriverdistrict.org/press-release-shoshone-water-court-application-filed/>

MEETINGS

On November 20, the Army Corps of Engineers published notice of the first in-person meeting of the Western Water Cooperative Committee in Bismarck, North Dakota from 8:00 AM CST to 5:00 PM CST on Wednesday, December 3-4, and Thursday, December 4. The meeting will be open to the public.

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.