



WESTERN STATES WATER COUNCIL

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March 10, 2014

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW (1101A)
Washington, DC 20460

Jo Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

RE: EPA and Army Corps Draft Clean Water Act Rulemaking

Dear Administrator McCarthy and Assistant Secretary Darcy:

On behalf of the Western States Water Council, representing eighteen western governors on water policy issues, I am writing to provide additional comments to inform your agencies' efforts to develop a rule on Clean Water Act (CWA) jurisdiction. These comments are intended to build upon our previous correspondence and meetings with representatives from your agencies on this issue.

We have also received a letter dated February 10 from EPA Acting Assistant Administrator for Water Nancy Stoner, which responds to our November 2013 letters. As discussed in our comments below, the western states continue to have concerns about EPA's and the U.S. Army Corps of Engineers' coordination efforts, and request extensive interaction with the individual states and the state agencies that deliver and implement the CWA.

A. Connectivity Report

EPA has indicated that its draft connectivity report will serve to inform the final rule on CWA jurisdiction. However, the draft rule's submission to the Office of Management and Budget (OMB) before the finalization of the connectivity report raises concerns that the final report will have little or no influence on the final rule. Therefore, the connectivity report should be finalized before EPA and the Corps publish the draft jurisdictional rule in the Federal Register for public comment.

Additionally, many western states have submitted individual comments for the Environmental Protection Agency's (EPA) Science Advisory Board (SAB) to consider in its review of the draft connectivity report. EPA should carefully evaluate the SAB's consideration of these comments and any subsequent recommendations from the final report. Waiting until the report is finalized will give EPA more information to consider, and may possibly lead to revisions that improve the rule before its publication for public comment.

B. Deference to State Water Law

The text of the rule itself should give full force and effect to, and should not diminish or in any way detract from, the intent and purpose of CWA Sections 101(b) and 101(g) regarding the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality.

C. Groundwater

The Council understands that the draft rule would establish jurisdiction for waters that have a “shallow subsurface hydrologic connection” with jurisdictional waters. Congress did not intend for the regulatory reach of the CWA to apply to the management and protection of groundwater.

The Council understands that the preamble for the draft rule may include disclaimers that the rule is not intended to cause the shallow subsurface connections themselves to become jurisdictional, and that such connections would not be considered Waters of the United States (WOUS) in and of themselves. The Council supports the intent of such language. However, to fully clarify that groundwater is not subject to CWA jurisdiction, the text of the rule itself should expressly exclude groundwater and any subsurface flows used to establish shallow subsurface hydrologic connections between surface waters.

D. Exclusions

The Council understands that the draft rule may specifically exclude certain waters from its definition of WOUS. The Council supports the intent of such a provision and requests that your agencies also include other waters and features that are generally considered to be outside the scope of the CWA. In addition to groundwater, the following should also be excluded:

1. Farm ponds, stock ponds, irrigation ditches, and the maintenance of drainage ditches, as currently excluded under the CWA’s agricultural exemption;
2. Man-made dugouts and ponds used for stock watering or irrigation in upland areas that are not connected to surface waters;
3. Dip ponds that are excavated on a temporary, emergency basis to combat wildfires and address dust abatement;
4. Man-made pits and quarries that have been excavated in uplands and that fill with groundwater but are not connected to surface waters; and
5. Prairie potholes and playa lakes.

The preamble for the rule should also recognize that the states have authority pursuant to their “waters of the state” jurisdiction to protect excluded waters, and that excluding such waters from federal CWA jurisdiction does not mean that they will be exempt from regulation. The preamble should further recognize that the states are best suited to understand the unique aspects of their geography, hydrology, and legal frameworks, and are therefore in the best position to provide the most feasible and effective protections for excluded waters.

E. Significant Nexus

The Council understands that the draft rule may recognize that Justice Kennedy’s significant nexus test requires a connection between waters that is “more than speculative or insubstantial” to establish jurisdiction. The Council supports the intent of such recognition. However, the rule should also quantify “significance” to ensure that it does not extend jurisdiction to waters that have a de minimis connection to jurisdictional waters.

F. State Consultation

As noted in the Council’s prior correspondence and meetings with your agencies, the western states remain concerned about the process EPA and the Corps are using to develop this rule.

In 2011, the Council asked EPA and the Corps to pursue formal rulemaking instead of finalizing the now withdrawn guidance. At that time, the Council believed rulemaking, unlike guidance, would afford greater opportunities for early and ongoing consultation with the states. The Council also believed rulemaking would better ensure the treatment of states as co-regulators in the development of a draft rule.

However, the submission of a draft rule on CWA jurisdiction to OMB for interagency review without any substantive state consultation in the development of the rule raises significant concerns that your agencies will use a process that is no better than the one they used to develop the draft guidance. In particular, we remain concerned that individual states will not have the opportunity to provide substantive feedback until after EPA and the Corps have developed a draft rule and published it for public comment in the Federal Register.

While we recognize that EPA and the Corps have participated in various meetings and calls with the Council and other state organizations to discuss their goals and time lines for the rulemaking, such communication cannot take the place of substantive, collaborative engagement with the states and their respective water quality agencies on an individual basis. In particular, the substantial differences in hydrology, geography, and legal frameworks in the West will require significant consultation with each state to determine how the draft rule will be implemented in order to avoid misinterpretations and unintended consequences. The potential for unintended consequences further underscores the need for EPA and the Corps to avail themselves of the states' on-the-ground knowledge of their unique circumstances by giving as much weight and deference as possible to the states' collective and individual comments, concerns, priorities, and needs.

In sum, EPA and the Corps should not wait until the public comment period to involve the states on a collective and individual basis in the development of the draft rule. States are co-regulators and are therefore separate and apart from the public. As such, waiting until the public comment period to consult with the states, both individually and collectively, in the development of the draft rule ignores their role as co-regulators and will not allow for meaningful state input or consideration of state concerns.

G. Conclusion

We appreciate your consideration of our concerns and look forward to continuing our work with EPA and the Corps to protect water quality in the West.

Sincerely,



Phillip C. Ward
Chairman, Western States Water Council