W E S T E R N S T A T E S W A T E R C O U N C I L

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October 15, 2014 Position #373

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Federal 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: Attention – Docket ID No. EPA-HQ-OW-2011-0880

Dear Administrator McCarthy and Assistant Secretary Darcy:

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 (the Corps) have developed to clarify the scope of Clean Water Act (CWA) jurisdiction. These comments are based on WSWC Policy #369 and prior WSWC letters and testimony regarding the development of this rule, which are attached and incorporated by reference.

Please note that the WSWC's comments are applicable to all 11 sections of the Code of Federal Regulations (CFR) that are proposed for revision. However, for the purposes of this letter, the WSWC's comments are keyed to the version of the definition of "Waters of the United States" that pertains to part 230.3 of the CFR and appears on pages 22,268-22,269 of the Federal Register notice dated April 21, 2014.

I. WSWC POLICY #369

WSWC Policy #369 sets forth the unanimous, consensus position of the western states regarding federal efforts to clarify or redefine CWA jurisdiction. The WSWC urges EPA and the Corps to review this policy carefully and to incorporate its recommendations. Specifically, the WSWC urges EPA and the Corps to ensure that the rule:

A. Gives as much weight and deference as possible to state needs, priorities, and concerns;

B. Gives full force and effect to, and does not diminish or in any way detract from, the intent and purpose of CWA Sections 101(b) and 101(g);

C. Recognizes that Justice Kennedy's "significant nexus" test in *Rapanos v. United States*, 547 U.S. 715 (2006), requires a connection between waters that is more than speculative or insubstantial to establish jurisdiction. The rule 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;

D. 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;

E. Specifically excludes water and features generally considered to be outside the scope of CWA jurisdiction, including:

1. Groundwater;

2. Farm ponds, stock ponds, irrigation ditches, and the maintenance of drainage ditches, as currently excluded under the CWA's agricultural exemption;

3. Man-made dugouts and ponds used for stockwatering or irrigation in upland areas that are not connected to surface waters;

4. Dip ponds that are excavated on a temporary, emergency basis to combat wildfires and address dust abatement; and

5. Prairie potholes and playa lakes.

F. Acknowledges that states have authority pursuant to their "waters of the state" jurisdiction to protect excluded waters, and that excluding waters from federal jurisdiction does not mean that excluded waters will be exempt from regulation and protection.

More specific aspects of the WSWC's policy are discussed in greater detail below.

II. EPA'S CONNECTIVITY REPORT AND PUBLIC COMMENT EXTENSION

While the WSWC appreciates the agencies' decision to extend the public comment period for the rule, we note that the WGA requested in its August 27 letter (attached) an 89-day extension of the comment period. Such an extension would allow states to formulate thorough and thoughtful comments on the draft rule and its possible impacts, effects and implications, and also would allow for the review and consideration of the Science Advisory Board's comments on EPA's scientific report regarding the connectivity of differing waterbodies.

As stated in the WSWC's November 5th letter (attached), "the overriding question in the rulemaking is not one of science, but of legal authority, namely the extent of federal authority

over water resources under Justice Scalia's plurality opinion and Justice Kennedy's concurring opinion in *Rapanos*." Therefore, while it is important for the rule to be scientifically sound, the report should not be used to support a rule that improperly asserts that the scope of the CWA is unlimited.

III. STATE CONSULTATION AND IMPLEMENTATION OF THE RULE

The WSWC's prior correspondence with EPA and the Corps expressed repeated concerns about the lack of significant state consultation in the development of the rule before its publication for public comment. While the WSWC remains concerned about the lack of state consultation in the rule's development, it has since participated in a series of calls with EPA and the Corps after the rule's publication for public comment. The WSWC appreciates your agencies' willingness to speak with the WSWC about the rule during these calls. The WSWC also appreciates the efforts of EPA Region 8 Administrator Shaun McGrath and Region 8 Senior Advisor Joan Card in facilitating these discussions.

Nevertheless, there is still a significant need and opportunity for continued, sustained dialogue and consultation with the states in the revision and implementation of the rule, particularly on a state-by-state basis. Such consultation should treat states as co-regulators that are separate and apart from the general public, as envisioned by the CWA's framework of cooperative federalism and as required by Executive Order 13132.

One way to facilitate continued dialogue and consultation with the states would be to establish a state-federal workgroup between EPA, the Corps, and the states as your agencies work to revise and implement the rule. Although such a workgroup would be unlikely to reach a consensus on every issue, it would help facilitate the types of dialogue, collaboration, and relationship-building needed to create a more workable and effective rule. One possible model could be the workgroup EPA established with the Environmental Council of States and the Association of Clean Water Administrators to discuss revisions to the National Pollutant Discharge Elimination System electronic reporting rule. Consensus is not necessarily sought but individual state participants discuss their individual views with the federal agencies. The WSWC would welcome the opportunity to help develop and participate in a similar workgroup to review the CWA rule.

IV. AREAS WHERE FURTHER CLARIFICATON IS NEEDED

The WSWC understands that the rule is intended to clarify the scope of CWA jurisdiction in light of recent U.S. Supreme Court decisions, particularly its *Rapanos* decision. However, as noted in the following subsections, further clarification is needed in a number of areas to realize this goal. The WSWC also believes that these areas represent an opportunity for your agencies and the states to work together in joint partnership as co-regulators, both on an individual basis and through the above-requested workgroup, to further refine the rule so that it will better accomplish its stated purpose of clarifying the extent of CWA jurisdiction.

A. Other Waters

As currently drafted, the rule states that jurisdictional determinations for so-called "other waters" will be made on a "case-specific basis," provided that those waters "alone, or in combination with other similarly situated waters…located in the same region, have a significant nexus" to a traditional navigable water, interstate water, or the territorial seas.[1]

While the rule and the related preamble are clear that other waters may be jurisdictional, the documents are less clear about how, when, or in which circumstances your agencies will perform case-by-case analyses to determine the jurisdictional status of these waters. This lack of clarity could be interpreted as implying that all other waters are potentially jurisdictional until EPA and the Corps determine otherwise at an indeterminate point in time. Such an implication has the potential to put landowners in limbo regarding the status of other waters located on their property and runs counter to the proposed rule's stated purpose of increased clarity. It also requires landowners to prove a negative should they desire to develop their land, or risk the possibility of incurring fines and other penalties if your agencies subsequently determine that the water is jurisdictional.

Instead, the rule should ensure that the applicable permitting agency, such as the Corps for Section 404 jurisdictional determinations in most states, bears the burden of determining the jurisdictional status of other waters in a timely manner. To help achieve this goal, the rule should provide a specific deadline by which the applicable agency must make a jurisdictional determination for other waters after it receives a jurisdictional determination request from a landowner.

The WSWC urges your agencies to work with the WSWC and through the above-requested state-federal workgroup to determine a reasonable timeframe for jurisdictional determinations regarding other waters and to address any other issues associated with this proposal, including possible consequences and remedies in those situations where the permitting agency does not meet the specified deadline. The WSWC also proposes 180 days as an initial, possible starting point for discussions regarding the time period for your agencies' other waters determinations.

B. Significant Nexus

As noted above, WSWC policy #369 states that federal efforts to clarify CWA jurisdiction should recognize that the "significant nexus" test Justice Kennedy set forth in *Rapanos* requires a connection between waters that is more than speculative or insubstantial to establish jurisdiction. The policy further states that federal CWA jurisdiction efforts should quantify "significance" to ensure that the term's usage does not extend jurisdiction to waters with a de minimis connection to jurisdictional waters. While the WSWC appreciates language in the rule stating that effects to jurisdictional waters must be "more than speculative or insubstantial," further work is needed to quantify the concept of significance, particularly the term "significantly

[1] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,269 (April 21, 2014) (to be codified at 40 CFR Part 230.3).

affects" in paragraph (u)(7), and to flesh out a transparent process for your agencies to use when making significance determinations.[2]

To address this uncertainty, the WSWC believes the rule should use a specific, quantifiable measure or measures to determine significance rather than only stating that the water's effect on another, jurisdictional water must be more than speculative or insubstantial. Under this proposal, waters that satisfy the specified measures would be presumed to have a significant connection to the waters identified in paragraphs (s)(1) through (3) of the rule, while waters that do not would be presumed to lack a significant connection. Under this general framework, parties could still provide evidence to rebut a presumption of significance or non-significance. Consequently, the use of specific, quantifiable measures would provide much needed clarity by providing a starting point for significance determinations.

The WSWC recognizes that further discussion between the states and your agencies is needed to develop the specifics of such a process, particularly in light of the considerable variety of hydrologic and geologic conditions that exist across the nation. As such, the WSWC urges your agencies to work with the WSWC and through the above-requested state-federal workgroup to identify and develop specific, quantifiable measures for determining significance consistent with the WSWC's rebuttable presumption concept.

C. Agricultural Exemptions

The WSWC believes the CWA's current agricultural exemptions are operating properly and that the rule should not alter or create unnecessary uncertainty about these exemptions. The WSWC understands that the rule is intended to preserve these exemptions, but the rule and the related interpretive rule regarding exempt activities under Section 404(f)(1)(a) have nevertheless created confusion and uncertainty about the scope and applicability of the CWA's agricultural exemptions, as well as their interaction with state water quality programs.

Given this confusion, the rule should include language stating that:

> "Nothing in this section shall be interpreted to limit or otherwise conflict with the exemptions set forth in 33 U.S.C. 1344(f) and in 33 C.F.R. 323.4 and 40 C.F.R. 232.3."

In addition, the interpretive rule has created a significant amount of uncertainty concerning its possible implications for "normal farming, ranching, and silvicultural" activities. To resolve this uncertainty and to ensure that the current exemptions remain unchanged, your agencies should withdraw the interpretive rule, as the WSWC requested in its attached letter dated August 11, 2014. Notwithstanding the WSWC's request that the rule be withdrawn, any effort to revise the rule should be done in joint partnership with the states, particularly to determine what constitutes exempt "normal farming, ranching or silvicultural activities."

The WSWC stands ready to help facilitate further dialogue between your agencies and the western states to provide further clarity regarding the CWA's agricultural exemptions. The

[2] *Id.*

WSWC further believes that the above-requested state-federal workgroup could help ensure that the rule is revised and implemented in such a way that it fulfills your agencies' stated goal of preserving the existing agricultural exemptions.

D. Groundwater

The regulatory reach of the CWA was not intended to be applied to the management and protection of groundwater. As such, the WSWC appreciates the rule's exclusion of "groundwater, including groundwater drained through subsurface drainage systems."[3] Given the rule's use of "shallow subsurface hydrologic connections" to establish jurisdiction between surface waters, the WSWC also appreciates the preamble's statement that "nothing…would cause the shallow subsurface connections themselves to become jurisdictional."[4]

However, once codified, the preamble language regarding shallow subsurface hydrologic connections will not be published in the CFR, leading to possible misinterpretations and confusion about your agencies' intent and the jurisdictional status of such waters. Therefore, the WSWC requests that the groundwater exclusion in paragraph (t)(5)(vi) of the rule be amended to state as follows:

> "Groundwater, including *but not limited to* groundwater drained through subsurface drainage systems *and shallow subsurface hydrologic connections used to establish jurisdiction between surface waters under this section*" (changes in italics).

E. Definitions Needed for Key Terms

The rule does not adequately define the following key terms: (1) shallow subsurface hydrologic connection; (2) bed and banks; (3) ordinary high water mark; and (4) uplands. Further consultation is needed between your agencies and the states to determine how to define these terms. The WSWC believes that the above-requested state-federal workgroup would provide a suitable forum for your agencies to work in partnership with the states to define these terms. In addition to these terms, further clarification is needed regarding the terms "floodplains" and "riparian" as used in the rule.

F. The Possibility for Unintended Consequences

The WSWC believes the programs operating under Sections 402 and 303 of the CWA are working as they should, and that much of the confusion involving CWA jurisdiction pertains to the 404 program. However, in striving to address the challenges involving Section 404, there is some concern that the rule could have related and unintended impacts to Section 402 and Section 303 programs. Where possible, EPA and the Corps should ensure that their efforts to address the current uncertainty regarding Section 404 through the development and implementation of the rule do not adversely affect other CWA programs. Additional and ongoing consultation with the

[3] *Id.*
[4] *Id.* at 22210.

states, particularly through the above-requested state-federal workgroup, will help minimize the potential for unintended consequences.

V. CONCLUSION

The WSWC appreciates the EPA's and the Corps' consideration of the above comments. As always, the WSWC stands ready to work with EPA and the Corps to support further dialogue and consultation between your agencies and the western states regarding this rule and any and all other issues involving the protection of our nation's waters.

Sincerely,

Patrick T. Tyrrell, Chairman
Western States Water Council

Enclosures

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding
CLEAN WATER ACT JURISDICTION
Helena, Montana
July 18, 2014

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, 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 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, 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, Section 101(g) of the CWA 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, current federal regulations, guidance, and programs pertaining to the CWA do not always recognize the 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, effluent-dependent streams, prairie potholes, playa lakes, and numerous man-made reservoirs, waterways, and water conveyance structures; and

WHEREAS, recent federal efforts to clarify the extent of CWA jurisdiction following the U.S. Supreme Court's decisions in *SWANCC v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006), have failed to include adequate state consultation in their development, despite repeated requests from the Western States Water Council to do so; and

WHEREAS, the considerable differences in hydrology, geology, and legal frameworks that exist among the western states mean that any effort to clarify CWA jurisdiction will invariably impact each state differently, thus underscoring the need to thoroughly involve states in developing regulatory language that clearly respects and avoids conflict with state authority over the regulation and allocation of waters 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 therefore trigger federalism consultation with the states under Executive Order 13132; and

WHEREAS, as co-regulators, states are separate and apart from the general public, and deserve a unique audience with the federal government in the development and implementation of any federal effort 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;

NOW, THERFORE BE IT RESOLVED that Congress and the Administration should ensure that any federal effort to clarify or define CWA jurisdiction:

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 its development and implementation. Such consultation should take place as early as possible and before the publication of any proposal for public comment, when irreversible momentum may preclude effective state participation and the consideration of alternate ways of meeting federal objectives. Federal CWA jurisdiction efforts should also acknowledge their inherent federalism implications and comply with Executive Order 13132's state consultation criteria.

3. Gives full force and effect to, and does not diminish or in any way detract from, the intent and purpose 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.

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.

6. Specifically excludes waters and features generally considered to be outside the scope of CWA jurisdiction, including:

    (a) Groundwater;

    (b) Farm ponds, stock ponds, irrigation ditches, and the maintenance of drainage ditches, as currently excluded under the CWA's agricultural exemption;

    (c) Man-made dugouts and ponds used for stockwatering or irrigation in upland areas that are not connected to surface waters;

    (d) Dip ponds that are excavated on a temporary, emergency basis to combat wildfires and address dust abatement; and

    (e) Prairie potholes and playa lakes.

7. Acknowledges that states have authority pursuant to their "waters of the state" jurisdiction to protect excluded waters, and that excluding waters from federal jurisdiction does not mean that they will be exempt from regulation and protection.

WESTERN GOVERNORS' ASSOCIATION

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August 27, 2014

Honorable Gina McCarthy
Administrator
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1200 Pennsylvania Avenue, NW (1101A)
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Honorable Jo-Ellen Darcy
Assistant Secretary of the Army
(Civil Works)
108 Army Pentagon
Washington, D.C. 20310

Dear Administrator McCarthy and Assistant Secretary Darcy,

The purpose of this letter is to request an additional extension of the comment period on the proposed rule regarding the jurisdiction of the Clean Water Act (*79 FR 22187*, published April 21, 2014).

Western Governors originally requested a 180-day extension of the comment period. While we appreciate the 91-day extension of the comment period announced on June 9, the time frame remains insufficient for states to formulate thorough and thoughtful commentary on the rule's extensive impacts, effects and implications. Moreover, a significant amount of confusion and new information regarding the proposed rule has emerged over the last several weeks thus further warranting an extra 89-day extension of the comment period.

As stated in WGA's letter dated March 25, 2014, we are concerned that this proposed rulemaking could impinge upon state authority in water management. Given the potential impacts of the rule on management of water resources – a fundamental responsibility of the states – we hope you will respond favorably to our request.

In addition, our states need more time to review the streams and waterbodies and wetlands maps recently released by the Environmental Protection Agency. The additional extension of the comment period will provide states with adequate time to review these resources.

Again, we appreciate the initial extension of the comment period, as well as your accessibility to discuss the proposed rule since its publication.

With gratitude for your consideration of our request, we are

Respectfully,

Brian Sandoval
Governor, State of Nevada
WGA Chairman

John Kitzhaber
Governor, State of Oregon
WGA Vice Chairman

cc: House Transportation and Infrastructure Committee Leadership
House Natural Resources Committee Leadership
Senate Environment and Public Works Leadership
Michael Boots, Acting Chairman, Council on Environmental Quality

WESTERN STATES WATER COUNCIL

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August 11, 2014 Position No. 370

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

RE: Interpretive Rule Regarding Applicability of the Exemption from Permitting under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices

Dear Administrator McCarthy and Assistant Secretary Darcy:

On behalf of the Western States Water Council, representing 18 western states on water policy issues, I am writing to comment on the interpretive rule your agencies adopted in March regarding agricultural exemptions under Section 404(f)(1)(A) of the Clean Water Act (CWA).

On June 3, EPA and Corps officials participated in a conference call with the Council to discuss the interpretive rule. The Council greatly appreciates your agencies' willingness to hold this call, which helped provide further clarification and insight into the intentions and motivations behind the rule. Based on the call, the Council understands that the rule is intended to identify agricultural exemptions under Section 404(f)(1)(A) that are in addition to existing agricultural exemptions under the CWA.

After further consideration, the Council believes the CWA's agricultural exemptions are operating appropriately. Notwithstanding your agencies' intentions, the interpretive rule has created a significant amount of confusion and uncertainty about the scope and applicability of the CWA's agricultural exemptions and their interaction with state water quality programs. Consequently, the Council respectfully requests that your agencies withdraw the interpretive rule to remove this uncertainty.

Please also note that the Council stands ready to help facilitate further dialogue between your agencies and the western states on ways to clarify and provide further guidance on the CWA's agricultural exemptions in a manner that creates less confusion.

Thank you for considering the Council's views on this matter.

Sincerely,

Patrick T. Tyrrell, Chairman
Western States Water Council

United States House of Representatives
Committee on Transportation and Infrastructure
Subcommittee on Water Resources and Environment

Hearing:
"Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule"

Testimony of

J.D. Strong
Western Governors' Association
Western States Water Council

June 11, 2014

I. Introduction

Chairman Shuster, Ranking Member Rahall, and members of the Committee, my name is J.D. Strong, and I am the Executive Director of the Oklahoma Water Resources Board. I am testifying on behalf of the the Western Governors' Association (WGA) and the Western States Water Council (WSWC) in my capacity as the Chairman of the WSWC's Water Quality Committee. I appreciate the opportunity to testify regarding the WGA's and WSWC's perspectives on the Clean Water Act (CWA) rule the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) proposed on March 25, and published in the Federal Register on April 21. My testimony is based on a series of attached letters the WGA and WSWC have sent EPA and the Corps regarding the rulemaking. Separately, I am submitting testimony on behalf of the State of Oklahoma.

WGA is an independent, non-partisan organization comprised of the Governors of 19 western states and three U.S.-flag islands. The WSWC is a non-partisan government entity created by western Governors, which is affiliated with WGA and advises the Governors of eighteen western states on water policy matters. The WSWC's members, including myself, are appointed by their respective Governors and include state natural resource directors, state engineers, water quality directors, assistant attorney generals, and others.

The WGA and the WSWC recognize that the EPA and the Corps are especially impactful to the West. These agencies have rich potential to either support state efforts or impinge on state authority under the CWA. They can exercise vital leadership or they can interfere with well-managed state activities. Accordingly, it is critical that state and federal agencies develop and maintain positive, cooperative working relationships. Our organizations believe that such cooperation is only possible when states are regarded as full and equal partners of the federal government in the development and execution of programs for which both have responsibility.

This is particularly true for the CWA because Congress intended for the states and EPA to implement the CWA in partnership, delegating authority to the states to administer the law as co-regulators with EPA. Such consultation will be critical in ensuring the effectiveness of this

particular rulemaking and in avoiding unintended consequences, especially in the West, which is defined by arid landscapes and unique hydrologic and geographic features not found in the East. As such, state water managers must have a robust and meaningful voice in the development of any rule regarding the jurisdiction of the CWA.

II. The Lack of Substantive State Consultation in the Development of the Rule

WGA and the WSWC are concerned that states were insufficiently consulted in the development of the proposed CWA rule and had no involvement in its drafting.

As indicated by the attached letters, the WSWC first wrote EPA and the Corps in 2011 to urge them to pursue formal rulemaking instead of the now withdrawn guidance.[1] At that time, the western states believed rulemaking, unlike guidance, would afford greater opportunities for early and ongong state consultation and would better ensure the treatment of states as co-regulators. In making this request, the WSWC urged EPA and the Corps to consult with the states in the early phases of the rule's development, a request it reiterated in three subsequent letters dated April 10, 2013, November 20, 2013, and March 10, 2014 (attached).

As the WSWC noted repeatedly in its letters, waiting until the public comment period to solicit state input does not allow for meaningful consideration of state views, especially with respect to the consideration of alternative ways of meeting federal objectives. Unfortunately, these requests for substantive consultation have largely been ignored, and EPA and the Corps issued the proposed rule without conducting substantive consultation with the states.

In addition, the WSWC also urged the agencies to acknowledge the federalism implications of the rulemaking and to comply with the state consultation criteria set forth in Executive Order 13132. However, as noted in the preamble of the proposed rule, EPA and the Corps do not believe that Executive Order 13132 applies to this rulemaking and also believe that the rulemaking "will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government."[2] Contrary to this belief, any effort to redefine or clarify the term "waters of the U.S." has, on its face, numerous federalism implications that some western states believe will have very substantial and direct effects, thereby requiring robust state consultation and compliance with Executive Order 13132.

While EPA and the Corps conducted some outreach with the WGA, the WSWC, and other state organizations during their development of the rule, much of this consisted primarily of communicating the agencies' goals and time lines for the rulemaking. Moreover, prior to the issuance of the proposed rule, the agencies consistently stated that they could not discuss the "substance" of the rule they were developing, thereby limiting the ability of the states to meaningfully participate in its development.

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[1] U.S. Environmental Protection Agency and U.S. Department of the Army, *Draft Guidance on Identifying Waters Protected by the Clean Water Act* (May 2, 2011), available at: http://www.epa.gov/tribal/pdf/wous_guidance_4-2011.pdf.

[2] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188, 22,220 – 22,221 (Apr. 21, 2014).

The federal government should engage in true consultation with states as co-regulators. EPA and Corps communications cannot take the place of substantive, collaborative engagement with the individual states and their respective water quality agencies. The substantial differences in hydrology, geography, and the legal frameworks in the West require significant consultation with each state to determine how the draft rule will effect them and be implemented, in order to avoid misrepresentations and unintended consequences.

Now that EPA and the Corps have issued the rule, the WGA and WSWC urge EPA and the Corps to fully avail themselves of the states' on-the-ground knowledge of their unique circumstances, as well as their primary role in protecting water quality, by giving as much weight and deference as possible to the states' collective and individudal comments, concerns, priorities, and needs.

Our organizations also reiterate a request Governors John Hickenlooper of Colorado and Brian Sandoval of Nevada, the Chairman and Vice Chairman of the WGA, made in a March 25 letter to EPA and the Corps (attached). Namely, the Governors urged the agencies to consult with the states, individually and through the WGA, "in advance of any further action" on the rulemaking. Governors Hickenlooper and Sandoval also sent EPA and the Corps a subsequent letter on May 30 (attached), requesting a 180-day extension of the public comment period for the rule, stating:

> "The published 91-day public comment period is insufficient for states to thoroughly review the content and analyze the implications of the proposed rule…. Before proceeding further with this proposal, your agencies should take the time to engage in true, substantive consultation with states."

Notably, the WGA and WSWC have had some initial contact with EPA, particularly Region 8, about this request, and the WSWC is coordinating conference calls with states, EPA and the Corps to facilitate a dialogue on particular issues of concern to the western states. While the WSWC and WGA appreciate the willingness of EPA and the Corps to participate in these calls, information sharing does not equate to meaningful consultation. Therefore, in this and future rulemaking processes, the WGA and WSWC urge EPA and the Corps to pursue an authentic partnership with the states.

III. EPA's Science Advisory Board

The states' role would also be significantly enhanced by greater state representation on EPA's Science Advisory Board (SAB), on which the agency relies to provide the scientific underpinnings for this and other regulatory decisions.

The SAB was established by the Environmental Research, Development, and Demonstration Authorization Act of 1978 in accordance with the Federal Advisory Committee Act of 1972 (FACA). It has a broad mandate to advise EPA on scientific, technological, and social and economic issues and its Charter defines the SAB as a scientific and technical advisory committee. Sections 5(b)(2) and 5(c) of FACA further require the membership of an advisory

committee to be "fairly balanced in terms of points of view represented and the functions to be performed."

Despite the foregoing mandates and the tremendous value that would be added to SAB processes by state participation, state agency scientists are woefully and demonstrably under-represented on the SAB, as well as on its standing and *ad hoc* committees. This is particularly true for the SAB panel that is reviewing the EPA connectivity report that will serve to inform the final CWA rule.[3] Of the 27 experts on the panel, not one is a state agency scientist or expert.[4]

In addition, EPA and the Corps released the proposed CWA rule before finalizing the connectivity report. Releasing the proposed rule before the report raises concerns that the final report will have little or no influence on the final rule. Many western states have submitted individual comments for the SAB to consider in its review of the draft report. Waiting until the report was finished to release the proposed rule would have given EPA more information to consider, and could have led to revisions that may have improved the proposed rule.

Notably, some press reports have indicated that the SAB is still developing its comments on the connectivity report and has identified some preliminary areas that may require further changes to both the report and the rule. Although these comments are still in draft form, the SAB's deliberations underscore the premature nature of the rule's publication. Among other things, press reports have indicated that the SAB's draft comments state that the report could be more useful to decision-makers if it brought more clarity to the interpretation of connectivity, especially regarding the quantification of the magnitude, degree, or consequences of connectivity, and the aggregate effects of streams and wetlands on downstream waters. The SAB's deliberations further note that the report often treats connectivity as a binary property, either present or absent, rather than recognizing varying degrees of connectivity.[5]

The SAB's preliminary comments speak directly to one of the concerns that the WSWC has expressed about the rule – that the rule should quantify "significance" as used in Justice Kennedy's concurring opinion in *Rapanos v. United States*[6] to ensure that the rule does not extend jurisdiction to waters that have a de minimis connection to jurisdictional waters.

For these reasons, the WSWC encouraged EPA and the Corps to complete the connectivity report before publishing the proposed rule.

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[3] U.S. Environmental Protection Agency, *Connectivity of Stream and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA/660R-11/098B, (Sept. 2013), available at: http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf.

[4] U.S. Environmental Protection Agency Science Advisory Board, *Members of the Panel for the Review of the EPA Water Body Connectivity Report, External Draft*, available at: http://yosemite.epa.gov/sab/sabpeople.nsf/WebExternalSubCommitteeRosters?OpenView&committee=BOARD&subcommittee=Panel%20for%20the%20Review%20of%20the%20EPA%20Water%20Body%20Connectivity%20Report.

[5] Saiyid, Amena. "Science Panel Urges EPA to Address Cumulative Impacts of Isolated Waters." *Bloomberg BNA* 7 Apr. 2014: n. pag. Web; Daily News, "EPA Plans Method for Determining Whether Waters' Nexus is 'Significant." InsideEPA (Apr. 8, 2014): n.pag. Web.

[6] 547 U.S. 715 (2006).

IV. Additional Recommendations

The lack of effective state consultation in the development of the proposed CWA rule is not unique to this particular rulemaking, and many other EPA and Corps rulemaking efforts have failed to include sufficient state consultation in their development and implementation. To address this broader concern, the WGA and the WSWC make the following recommendations.

First, the WGA and WSWC encourage congressional direction to EPA and the Corps to engage states early and often (separate and before public involvement) in the development of any CWA rulemaking, guidance, policies, or studies as such efforts cannot help but affect the roles and jurisdiction of the states.

Second, the WGA and WSWC encourage congressional direction to ensure that EPA achieves more balanced SAB representation, to include state participation that constitutes no less than 10% of the membership of SAB committees, subcommittees and subject matter panels.

We believe the above recommendations would significantly improve the EPA's and the Corps' consultation with the states, which will ultimately result in more effective CWA policies and regulations.

V. Conclusion

The foregoing comments and recommendations are offered in a spirit of cooperation and respect. As such, the WGA and WSWC are prepared to assist the Committee, the EPA, and the Corps in the discharge of their critical and challenging responsibilities.

Thank you for your leadership in addressing this important issue.

WESTERN GOVERNORS' ASSOCIATION

John Hickenlooper
Governor of Colorado
Chairman

Brian Sandoval
Governor of Nevada
Vice Chairman

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May 30, 2014

Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (1101A)
Washington, D.C. 20460

Honorable Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, D.C. 20310

Dear Administrator McCarthy and Assistant Secretary Darcy,

The purpose of this letter is to request an extension of the period for comment on the proposed rule regarding the jurisdiction of the Clean Water Act. As stated in our letter dated March 25, 2014, we are concerned that this proposed rulemaking could impinge upon state authority in water management.

The published 91-day public comment period is insufficient for states to thoroughly review the content and analyze the implications of the proposed rule. We request that the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers issue a 180-day extension of the public comment period to provide states with reasonable time for the submission of comments.

States are co-regulators of water quality and the primary managers of water resources within their borders. Before proceeding further with this proposal, your agencies should take the time to engage in true, substantive consultation with states. The Western States Water Council is coordinating conference calls with states and the EPA western Regional Offices to facilitate a dialogue on particular issues of concern to the western states. While we appreciate the willingness of the EPA regional offices to participate in these calls, we must stress that information-sharing does not equate to meaningful consultation; in this and future rulemaking processes, your agencies should pursue an authentic partnership with the states.

We are confident that such discussions could greatly enhance your efforts and ensure that the resulting rule is clear, scientifically sound and respectful of states' authority to manage water resources within their states.

Thank you for your consideration.

Sincerely,

John Hickenlooper
Governor, State of Colorado
WGA Chairman

Brian Sandoval
Governor, State of Nevada
WGA Vice Chairman

cc: House Transportation and Infrastructure Committee Leadership
House Natural Resources Committee Leadership
Senate Environment and Public Works Leadership
Michael Boots, Acting Chairman, Council on Environmental Quality

WESTERN GOVERNORS' ASSOCIATION

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March 25, 2014

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

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

Dear Administrator McCarthy and Assistant Secretary Darcy:

We are writing with respect to the pending rulemaking regarding the jurisdiction of the Clean Water Act. As Governors of Western states, we are concerned that this rulemaking was developed without sufficient consultation with the states and that the rulemaking could impinge upon state authority in water management.

As co-regulators of water resources, states should be fully consulted and engaged in any process that may affect the management of their waters. While the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) have provided briefings to inform states that rulemaking is underway, the conversations to date have not been sufficiently detailed to constitute substantive consultation. Western Governors strongly urge both EPA and the Corps to engage states as authentic partners in the management of Western waters.

States have federally-recognized authority to manage and allocate water within their boundaries. Section 101(g) of the Clean Water Act (CWA) expressly states that, "the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act." The Western States Water Council, in its March 10, 2014, correspondence to you both, delineates the areas of concern states have with this rulemaking process. Western Governors urge you to engage with us, individually and through the Western Governors' Association, to resolve these important concerns in advance of any further action on this issue.

We appreciate your consideration and hope to remain productive partners in the management of waters in West.

Sincerely,

John Hickenlooper
Governor, State of Colorado
Chairman, WGA

Brian Sandoval
Governor, State of Nevada
Vice Chairman, WGA

Attachment

WESTERN STATES WATER COUNCIL

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Web Page: www.westernstateswater.org

March 10, 2014

Gina McCarthy
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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

WESTERN STATES WATER COUNCIL

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December 23, 2013

Sent Via Fax: (202) 395-3888

The Honorable Sylvia Mathews Burwell, Director
Office of Management and Budget
725 17th Street N.W.
Washington, D.C. 20503

RE: Draft Clean Water Act Rule

Dear Director Burwell:

On behalf of the Western States Water Council, representing 18 western states on water policy issues, I am writing to ask that the Office of Management and Budget (OMB) ensure that the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) comply with the state consultation criteria set forth in Executive Order (E.O.) 13132 as they formulate and implement their Clean Water Act (CWA) jurisdiction rule. These comments are based on our enclosed position dated July 29, 2011, as well as our letters to EPA and the Corps dated April 10, 2013, November 5, 2013, and November 20, 2013.

A. State Consultation and E.O. 13132

The submission of a draft rule on CWA jurisdiction to OMB without any state consultation raises significant concerns about how and when EPA and the Corps will consult with the states regarding the formulation of this rule. Congress intended that the states and EPA would implement the CWA as a federal-state partnership, delegating authority to the states to administer the law as co-regulators with EPA.

While EPA has conducted some outreach with the Council and other organizations, these efforts have consisted primarily of communicating EPA's and the Corps' goals and time lines for the rulemaking. There is a difference between communication and consultation, and EPA and the Corps have yet to engage the states regarding state needs, perspectives, or expertise in developing the draft rule. Ideally, EPA and the Corps would have conducted this type of consultation with the states prior to beginning the rulemaking process and before submitting a draft rule to OMB.

We are also concerned that EPA and the Corps apparently do not consider the rulemaking to have federalism implications requiring compliance with E.O. 13132, which sets forth specific state consultation criteria for federal agencies to follow when formulating and implementing policies that have federalism implications. According to Section 1(a) of the order, a policy will have federalism implications if it has "substantial direct effects on the States." Efforts to redefine or clarify the term "waters of the U.S." have, on their face, numerous federalism implications that many states believe will have very substantial and direct effects, thereby requiring compliance with E.O. 13132.

B. E.O. 13132's State Consultation Criteria

There is a considerable amount of uncertainty and significant differences of opinion regarding the extent of the CWA's authority and the impacts of any new rule. Such uncertainty underscores the need for EPA and the Corps to consult with the states as co-regulators regarding the formulation and implementation of this rule. Such consultation should be separate and apart from the general public comment period, and should give as much weight and deference as possible to state needs, priorities, and concerns. Indeed, numerous provisions of E.O. 13132 call for substantive state consultation, including among others:

- Section 2(i): "The national government should be *deferential to the States* when taking action that affects the policymaking discretion of the States and should act only with the *greatest caution* where State or local governments have identified *uncertainties regarding the constitutional or statutory authority* of the national government." (emphasis added)

- Section 3(b): "Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether *Federal objectives can be attained by other means*." (emphasis added)

- Section 3(c): "With respect to Federal statutes and regulations administered by the States, the national government shall grant the States *the maximum administrative discretion possible*. Intrusive Federal oversight of State administration is *neither necessary nor desirable*." (emphasis added)

- Section 6(b): Requiring federal agencies to consult with state and local officials "*early in the process* of developing the proposed regulation" where the regulation will impose "substantial direct compliance costs on State and local governments and that is not required by statute." (emphasis added)

C. Conclusion

As the Council has stated in its prior correspondence and interactions with EPA and the Corps, waiting until the publication of a proposed rule for public comment to solicit state input will not allow for meaningful consideration of state views, especially with respect to the consideration of alternative ways of meeting federal objectives.

Quite simply, it will be very difficult to develop a workable rule that resolves the considerable uncertainty regarding CWA jurisdiction and that leads to actual water quality improvements without meaningful, substantive consultation with the states. Changing the current trajectory of this rulemaking to include the states' views and concerns before seeking public comment is a needed first step. Promulgating this rule without complying with E.O. 13132's consultation criteria would be counterproductive and detrimental to building a positive and productive relationship with the states in implementing the CWA.

We respectfully request that OMB ensure that EPA and the Corps comply with E.O. 13132's state consultation criteria as they formulate and implement their CWA jurisdiction rule.

Thank you for considering the Council's views on this matter.

Sincerely,

Phillip C. Ward
Chair, Western States Water Council

Enclosures

cc: Howard Shelanski, Administrator, Office of Information and Regulatory Affairs
Nancy Sutley, Chair, White House Council on Environmental Quality
Gina McCarthy, Administrator, Environmental Protection Agency
Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works)

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November 20, 2013

Gina McCarthy
Administrator
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Ariel Rios Building
1200 Pennsylvania Avenue, NW (1101A)
Washington, DC 20460

Ms. 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 18 western states on water policy issues, I am writing to strongly urge your agencies to consult with the states as soon as possible in the development of their Clean Water Act (CWA) jurisdiction rule. These comments are based on our enclosed position and our letters dated April 10, 2013, and November 5, 2013.

A. State Consultation and Executive Order 13132

The submission of a draft rule on CWA jurisdiction to the Office of Management and Budget (OMB) without any state consultation raises significant concerns about how and when the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers will consult with the states regarding this rule. Congress intended the states and EPA to implement the CWA as a federal-state partnership, delegating authority to the states to administer the CWA as co-regulators with EPA. As such, your agencies must treat the states as co-regulators in the development of any proposed rule regarding CWA jurisdiction. Ideally, EPA and the Corps would have consulted with the states prior to beginning the rulemaking process and certainly prior to submitting a draft rule to OMB.

We are especially concerned that your agencies may not consider the rulemaking to have federalism implications requiring compliance with Executive Order (E.O.) 13132's state consultation criteria. Such a perspective is in direct opposition to the principles of cooperative federalism embedded within the CWA. Any efforts to redefine or clarify the term "waters of the U.S." have, on their face, numerous federalism implications that necessitate compliance with E.O. 13132. In particular, such efforts qualify as "policies that have federalism implications" under the order because they have "substantial direct effects" on the states and on the "distribution of power and responsibilities among the various levels of government."

For example, aside from four states, including Idaho and New Mexico in the West, every state is primarily responsible for regulating discharges of pollutants to jurisdictional waters because they have delegated responsibility from EPA to operate approved National Pollutant Discharge Elimination System permitting programs under Section 402 of the CWA. Any

changes to the regulations and policies that govern which waters are jurisdictional will have a direct substantial impact to these programs. Specifically, changes limiting CWA jurisdiction could affect the states' ability to regulate waters previously considered to be jurisdictional, while changes that expand authority could require states to expend additional resources to permit discharges to previously unregulated waters.

Moreover, regardless of whether they have delegated authority under Sections 402 or 404, the requirements and limitations associated with jurisdictional waters will directly impact the ability of every state to enact policies regarding waters within their borders, as well as the allocation of their already limited resources. This is particularly true if the rule compels states to extend their Section 303(d) responsibilities to waters that are functionally marginal.

The considerable uncertainty and differences of opinion that exist regarding the extent of the CWA's authority demand that states receive a unique audience with your agencies as co-regulators that is separate and apart from the general public, and gives as much weight and deference as possible to state needs, priorities, and concerns. Indeed, numerous provisions of E.O. 13132 call for exactly this type of consultation, including among others:

- Section 2(i): "The national government should be deferential to the States when taking action that affects the policymaking discretion of the States and should act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government." (emphasis added)

- Section 3(b): "Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means." (emphasis added)

- Section 3(c): "With respect to Federal statutes and regulations administered by the States, the national government shall grant the States the maximum administrative discretion possible. Intrusive Federal oversight of State administration is neither necessary nor desirable." (emphasis added)

- Section 6(b): Requiring federal agencies to consult with state and local officials "early in the process of developing the proposed regulation" where the regulation will impose "substantial direct compliance costs on State and local governments and that is not required by statute." (emphasis added)

As we have stated repeatedly in our prior correspondence and interactions with officials from your agencies, waiting until the publication of a rule for public comment to solicit state input will not allow for meaningful consideration of state views, especially with respect to the consideration of alternative ways of meeting federal objectives. Quite simply, it will be very difficult to develop a workable rule that resolves the considerable uncertainty regarding CWA jurisdiction and that leads to actual water quality improvements without changing the current trajectory of this rulemaking to include the states' views and concerns before seeking public comment. Further, promulgating this rule without complying with E.O. 13132's consultation criteria could threaten the historically positive and productive relationship that states have enjoyed with EPA and the Corps in implementing the CWA.

B. Concerns to Address Through Consultation

As stated in our prior correspondence, there are a number of issues that require state consultation to address, including but not limited to:

- State Deference: How the rule will ensure deference to the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality as required under Sections 101(b) and 101(g).

- Groundwater: How to ensure that the rule will not be misinterpreted as extending CWA jurisdiction to groundwater, including state concerns regarding the use of "shallow subsurface hydrologic connections" to establish jurisdiction.

- Extent of CWA Jurisdiction: How the rule will comply with the limits Congress and the U.S. Supreme Court have established regarding the extent of CWA jurisdiction, including how the rule will provide clear and recognizable limits to such jurisdiction, especially pertaining to isolated wetlands.

C. Conclusion

In light of the above, we urge EPA and the Corps to recognize the significant federalism implications of this rulemaking and to comply with E.O. 13132's state consultation criteria. We also respectfully request additional information on how and when your agencies will consult with the states regarding the development of this rule, including how they will ensure the treatment of states as co-regulators.

We look forward to your response to these concerns.

Sincerely,

Phillip C. Ward
Chair, Western States Water Council

Enclosure

cc: Robert Perciasepe, Deputy Administrator, Environmental Protection Agency
Let Mon Lee, Deputy Assistant Secretary for Policy and Legislation, U.S. Army Corps of Engineers

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November 5, 2013

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Docket ID No. EPA-HQ-OA-2013-0582

Dear Administrator McCarthy:

On behalf of the Western States Water Council, and its members, representing the governors of 18 western states, I am writing to comment on your agency's draft science report titled *Connectivity of Stream and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (September 2013 External Review Draft, EPA/600/R-11/098B). Our understanding is that the final version of this report will serve as the scientific basis for rulemaking that the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers are jointly developing to clarify the extent of Clean Water Act (CWA) jurisdiction in light of the U.S. Supreme Court's *SWANCC* and *Rapanos* decisions. Our comments are based on our attached position and related letter dated April 10, 2013, which we sent to your agency and the Corps regarding the now withdrawn CWA guidance.

We are concerned that the report may be misinterpreted inappropriately to suggest that a scientific connection between waters alone is sufficient to establish CWA jurisdiction. The report only discusses well-known scientific principles of hydrology and geohydrology regarding the interconnections between waters, but does not and cannot describe how these principles apply to the legal and institutional boundaries that Congress and the Supreme Court have placed on CWA jurisdiction.

The overriding question in the rulemaking is not one of science, but of legal authority, namely the extent of federal authority over water resources under Justice Scalia's plurality opinion and Justice Kennedy's concurring opinion in *Rapanos*. For example, under Justice Kennedy's test, a mere scientific connection or "nexus" between waters is not sufficient to determine CWA jurisdiction. Instead, Justice Kennedy's test requires a fact-intensive, case-by-case physical and legal inquiry to determine whether that nexus is "significant" enough to establish CWA jurisdiction. Since the report does not describe how its scientific findings apply to this test or Justice Scalia's plurality decision, it is insufficient alone to establish or support CWA jurisdiction.

The report should not be used to support a rule that improperly asserts that the scope of the CWA is essentially unlimited. We recognize that there are differing interpretations of *Rapanos*, but it is undisputed that the Court rejected the EPA's and the Corps' pre-*Rapanos* interpretation of CWA authority. A rule that attempts to return CWA jurisdiction to the pre-*Rapanos* "status quo," using the report's findings of global hydrologic connectivity would be contrary to the limits that Congress and the Court have established, and would be an improper use of the report and federal rulemaking authority. Moreover, the CWA does not apply to ground waters, which are protected and allocated by western states, which recognize the hydrogeologic connections. Any reference to ground waters, including "shallow subsurface flows," is inappropriate in any related rulemaking.

As stated in our position regarding the draft CWA guidance, efforts to expand CWA authority beyond the limitations the Court established in *SWANCC* and *Rapanos* "would likely lead to further litigation" and would do little to resolve the current uncertainty regarding the extent of CWA jurisdiction.

We are also concerned about the lack of state expertise and state representation on the Science Advisory Board. Not a single member of the board is a state agency expert or administrator. As stated in our April letter, the states have on-the-ground expertise and knowledge of water quality conditions and challenges within their borders.

In light of the above, we urge you to recognize the limitations of the report as it does not address the legal limits of CWA jurisdiction and authority, and how those limits apply to the scientific principles discussed in the report.

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
Chair, Western States Water Council

Enclosures

cc: Office of Environmental Information (OEI), Docket (Mail Code: 28221T),
Docket ID No. EPA-HQ-OA-2013-0582, U.S. Environmental Protection Agency,
1200 Pennsylvania Ave. NW, Washington, DC 20460

WESTERN STATES WATER COUNCIL

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April 10, 2013

Sent via email: Perciasepe.bob@epa.gov
ASACWPOC@conus.army.mil

Mr. Robert Perciasepe
Acting Administrator
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Ms. 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 Guidance and Rulemaking

Dear Acting Administrator Perciasepe and Assistant Secretary Darcy:

On behalf of the Western States Water Council, representing the governors of 18 western states, I am writing to reiterate concerns regarding the *Draft Guidance on Identifying Waters Protected by the Clean Water Act*, which the Council set forth in the enclosed comment letter dated July 29, 2011.

It is our understanding that your agencies are developing a proposed rule to clarify Clean Water Act (CWA) jurisdiction, as indicated in the Uniform Regulatory Agenda and Regulatory Plan published on December 21, 2012. As explained in our comment letter, the Council prefers rulemaking to clarify CWA jurisdiction instead of legally unenforceable guidance. Therefore, we urge you not to issue or apply the guidance to determine CWA jurisdiction while your agencies develop a new rule.

The vast majority of states have long worked as co-regulators with your agencies to protect water quality pursuant to the framework of cooperative federalism embodied in the CWA. Although states are responsible for implementing and administering most CWA programs, EPA and the Corps did not consult with the states in developing the draft guidance, nor did they share the document with the states prior to releasing it for public comment in April 2011. We understand your agencies have since revised the guidance after the public comment period and submitted it to the Office of Management and Budget for final review. Nevertheless, the revised guidance has not been made public nor has it been provided to the states for review.

We remain concerned about the lack of state consultation in developing the guidance and the potential that the final document may not adequately account for state needs and perspectives. The complexities of CWA jurisdiction and the broad ramifications for state and federal water quality programs warrant a formal and transparent rulemaking process. Unlike guidance, the notice and comment provisions of formal rulemaking facilitate early and ongoing engagement with states and other stakeholders. Formal rulemaking also triggers Executive Order 13132, which provides states with further opportunity to review a proposed regulation and offer perspectives prior to the publication of a rule.

States bear the primary responsibility for preventing, reducing, and eliminating water pollution. By providing greater consultation with states, formal rulemaking is more likely than guidance to produce actual water quality improvements because it would better take into account state needs and perspectives, as well as the states' on-the-ground expertise and knowledge of water quality conditions and challenges within their borders. Issuing the guidance in the interim while EPA and the Corps pursue rulemaking would be a distraction that would create unnecessary conflict and uncertainty that would hinder the development of an effective rule.

Lastly, we urge you to continue to view the states as co-regulators and to ensure that state water managers have a robust and meaningful voice in the development of any rule regarding CWA jurisdiction, particularly in the early stages of development before irreversible momentum precludes effective state participation.

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
Chair, Western States Water Council

Enclosure (WSWC Position #330.5)

WESTERN STATES WATER COUNCIL

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Position #330.5

July 29, 2011

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: EPA–HQ–OW–2011–0409

To Whom It May Concern:

On behalf of the Western States Water Council, representing the governors of 18 western states, we are writing to provide our comments on the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' *Draft Guidance on Identifying Waters Protected by the Clean Water Act*. Before commenting on the guidance, we wish to express our preference for EPA and the Corps promulgating a clarifying rule, as opposed to legally unenforceable guidance.

We understand that the intent of the draft guidance is to provide clearer, more predictable guidelines for determining which water bodies are subject to Clean Water Act (CWA) jurisdiction, consistent with the U.S. Supreme Court's *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC)* [1] and *Rapanos v. United States* (*Rapanos*)[2] decisions. It is also our understanding that EPA and the Corps intend to undertake rulemaking after the guidance is final to provide further clarification regarding the extent of CWA jurisdiction. Indeed, Justice Kennedy's opinion in the *Rapanos* decision would appear to invite promulgation of a rule.

The guidance provides no clear and concise limits to federal jurisdiction. Further, it could actually lead to an expansion of claims of jurisdiction beyond the limitations delineated in *SWANCC* and *Rapanos*, and if promulgated as regulations, once applied, would likely lead to further litigation.

A. State Water Resources Allocation and Water Rights Administration

Section 101(g) of the CWA expressly states: "It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."

Section 101(b) of the CWA further states: "It is the policy of Congress to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . ."

[1] 531 U.S. 159 (2001).
[2] 547 U.S. 715 (2006).

The guidance and any subsequent regulations regarding the extent of CWA jurisdiction should reference Sections 101(b) and 101(g), and should not infringe upon the states' primary authority to allocate water and administer water rights within their borders and protect water quality.

B. The Watershed Approach to Jurisdiction

The draft guidance sets forth a "watershed" approach for satisfying Justice Kennedy's "significant nexus" test in which CWA jurisdiction is determined by reference to the nexus between the watershed and the closest traditional navigable water, not the nexus between the particular wetland or tributary in question and the navigable waters. Under this approach, virtually any tributary or wetland, or "other waters," no matter how far removed, no matter how small or insignificant, could become jurisdictional if aggregated with all other tributaries and wetlands or other waters within a watershed. Such an outcome raises questions as to whether a watershed approach is consistent with *SWANCC* and *Rapanos*, which hold that the CWA's jurisdiction is not without limits.[3]

Questions also remain as to whether the EPA and the Corps can use guidance to promulgate a "watershed" approach instead of a "case-by-case" determination. In particular, Justice Kennedy stated in his concurring opinion in *Rapanos* that "absent more specific regulations," a "case-by-case" analysis is needed to determine jurisdiction for wetlands based upon adjacency to navigable tributaries.[4] Kennedy further stated that such a showing is necessary to avoid "unnecessary application" of the CWA given the "potential overbreadth" of the federal regulations at issue in *Rapanos*.[5] The draft guidance, while not a regulation, needs further clarification to ensure that it complies with this requirement.

With respect to CWA jurisdictional determinations for tributaries, the draft guidance states that a significant nexus is presumed to be established if it can be shown that the tributary: (1) contains a bed, bank, and ordinary high water mark; and (2) drains, or is part of a network of tributaries that drain, into a downstream navigable water or interstate water. However, the draft guidance does not address how much water a tributary is required to drain in order to meet this test, leaving open the possibility that an ephemeral or other stream with a *de minimis* volume of flowing water is enough to constitute a jurisdictional tributary. This could create uncertainty and lead to further confusion about the types of waters subject to CWA jurisdiction, particularly in the arid West where there are a variety of waters with minimal flows.

In light of the above, the Council urges EPA and the Corps to ensure that the guidance and any related regulations comply with *SWANCC* and *Rapanos*, while also providing clear and recognizable limits on CWA jurisdiction. In carrying out these tasks, EPA and the Corps should also ensure that the guidance does not displace nor circumvent the regulatory and legislative processes.

C. Groundwater

Page 16 of the draft guidance states that a wetland can be deemed to be "adjacent," and therefore jurisdictional, if there is an unbroken "surface or shallow sub-surface hydrologic connection between the wetland and the jurisdictional waters." Although the draft guidance does not use the term "groundwater," nor define the term "shallow sub-surface hydrologic connection," it could be interpreted as referring to

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[3] *See Rapanos*, 547 U.S. at 739 (stating, "The Corps' expansive interpretation of the 'waters of the United States' is thus not 'based on a permissible construction of the statute.'"); *Id* at 778 – 79 (J. Kennedy concurring) (stating that the deference owed to regulations at issue in *Rapanos* does not extend so far as to apply CWA jurisdiction "…whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters."). *Id.* at 778-79 (Kennedy concurring)

[4] *Id.* at 782.

[5] *Id.*

groundwater, tributary or alluvial groundwater, water stored in the bed and banks of streams, or even soil moisture, again expanding the jurisdictional reach without legal basis or limit, resulting in greater uncertainty and likely litigation.

Groundwater is not subject to the CWA and states are solely responsible for protecting, allocating and administering water rights pertaining to this resource. Accordingly, administrative and judicial interpretations of the CWA have consistently treated groundwater separately from "waters of the United States." The guidance and any related regulations regarding the extent of CWA jurisdiction should make clear that such jurisdiction does not extend to groundwater, and that groundwater allocation and water rights administration fall under the exclusive purview of the states.

D. States as Co-Regulators

The states, EPA, and the Corps have made progress in working together to carry out the CWA's goal of controlling water pollution. The EPA and Corps should continue to view states as co-regulators and should ensure that state water managers have a robust and meaningful voice in the development of any guidance and/or regulations regarding CWA jurisdiction, particularly in the early stages of development before irreversible momentum precludes effective state participation.

E. Conclusion

In sum, the guidance and/or regulations that EPA and the Corps may promulgate regarding CWA jurisdiction should: (1) provide clear and concise limits to federal jurisdiction; (2) not infringe upon the states' primary authority to allocate water and administer water rights within their borders; (3) be consistent with *SWANCC* and *Rapanos*, while also providing clear and recognizable limits on the extent of CWA jurisdiction; (4) make clear that CWA jurisdiction does not extend to groundwater and that groundwater allocation and water rights administration fall under the exclusive purview of the states; and (5) be developed with robust and meaningful state participation.

We very much appreciate the opportunity to comment on the draft guidance, and look forward to continuing our work with EPA and the Corps to address water quality in the West. Thank you again for considering the Council's views on this matter.

Sincerely,

Weir Labatt, III
Chair, Western States Water Council