**WESTERN STATES WATER COUNCIL**

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June 19, 2017

Ms. Donna Downing
EPA Project Lead

sent via email: cwawotus@epa.gov
downing.donna@epa.gov

RE: E.O. 13132 Federalism Consultation

Dear Ms. Downing:

The Western States Water Council (WSWC), created to advise the governors of 18 western states on water policy issues, submits the following comments regarding federalism and the evaluation of a revised rule under consideration by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) to clarify the scope of Clean Water Act (CWA) jurisdiction. These comments are based on WSWC Policy #369, which is attached and incorporated by reference. The WSWC urges EPA and the Corps to review this policy carefully and to incorporate its recommendations.

WSWC Policy #369 sets forth the unanimous, consensus position of our western state appointees regarding federal efforts to clarify or redefine CWA jurisdiction. The policy explicitly addresses substantive comments regarding any rule, as well as calling for further ongoing dialogue between states as co-regulators and the federal agencies also charged with administering the CWA. Implementation of any rule will require broad support among state agencies with delegated authority to administer CWA programs.

Specifically, the WSWC urges EPA and the Corps to ensure that the rule gives as much weight and deference as possible to state interests, needs, priorities, and concerns. CWA Section 101(b) recognizes the States' critical role in protecting water quality.

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act.

The primary controversy has involved CWA jurisdiction pertaining to the 404 program, but this has now led to confusion regarding other CWA programs. The WSWC believes the programs operating under Sections 402 and 303 of the CWA are working as they should. The new rule should address 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 ongoing consultation with the states will help minimize the potential for unintended consequences.

Notably, even in the absence of federal jurisdiction over any particular waters, the States have authority to regulate such waters, including authority to permit or preclude discharges now regulated under Section 402. The WSWC is working to compile a list of these state authorities.

The U.S. Supreme Court has clearly determined that not all waters are jurisdictional, and the rule should not try to expand jurisdiction beyond the limits set by the Court to address a perceived gap in regulation. Rather, the rule should acknowledge 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.

States should be directly and intimately involved in development of the rule, and subsequent jurisdictional determinations should be made in collaboration with the States. Such involvement will lead to better, and often more timely determinations, given the states' familiarity with and interest and experience in protecting both "waters of the United States," and "waters of the State." Indeed, states' constitutional and statutory authorities to protect "waters of the State," extend to all waters, subsuming any jurisdictional "waters of the United States," and state protections may be more stringent than CWA requirements.

In the West, where water scarcity is pervasive, it is important that any rule also explicitly acknowledge the primary and often exclusive role of the States in allocating and administering rights to the use of water under authorities to which the Congress has a long history of deference. Indeed, CWA Section 101(g) 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.

The WSWC reiterates the continuing need for EPA and the Corps to work collaboratively with the States to develop a workable rule, consistent with Sections 101(b) and 101(g). The rule should give full force and effect to, and not diminish or in any way detract from, the intent and purpose of CWA Sections 101(b) and 101(g).

One way to facilitate continued dialogue with the western states would be for the agencies to avail themselves of the existing Western Federal Agency Support Team, a federal working group with a liaison in the WSWC offices. EPA and the Corps have WestFAST representatives that can serve as a bridge to the western states as part of an ongoing conversation as your agencies work to revise and implement the rule. Continuing dialogue, collaboration, and relationship-building will be needed to create a workable and effective rule.

Any revised rule must comply with the limits Congress and the U.S. Supreme Court have placed on CWA jurisdiction, while providing greater certainty, clarity and recognizable limits to the extent of CWA jurisdiction. No universally acceptable definition nor guide has emerged from often contentious

dialogue and litigation to date. A "clear bright line" has yet to be recognized. However, it is possible for EPA and the Corps to more clearly define those waters that are "in" from those waters that are "out," and narrow the gray area in between, in which waters "may be" jurisdictional.

Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), is an appropriate first test for determining what is "in," or jurisdictional, requiring a direct relatively permanent surface water connection. It is also important to note that Justice Kennedy's concurring opinion and "significant nexus" test for evaluating waters that "may be" jurisdictional, required a connection between waters that is more than speculative or insubstantial. The rule should quantify "significance" to the extent practical to ensure that the term's usage does not extend jurisdiction to waters with a de minimis or inconsequential connection to jurisdictional waters.

Waters and features that should be "out"-side the scope of CWA jurisdiction, should include groundwater, as well as man-made impoundments and conveyances such as farm ponds, stock ponds, irrigation ponds, irrigation ditches, drainage ditches, dugouts (and similar works currently excluded under the CWA's agricultural exemption). Moreover, dip ponds that are excavated on a temporary, emergency basis to combat wildfires and address dust abatement should be excluded. Prairie potholes and playa lakes should be excluded. Further, consideration should be given to excluding ephemeral streams, dry washes and effluent dominated streams.

To address uncertainty related to waters that "may be" jurisdictional, the WSWC believes the rule should use a specific, quantifiable measure or measures to determine significance (rather than simply stating that the water's effect on another jurisdictional water must be more than speculative or insubstantial). Waters that satisfy the specified measures would be presumed to be jurisdictional, while waters that do not would be presumed to not be jurisdictional. Under this general framework, parties could still provide evidence to rebut a presumption of jurisdiction or non-jurisdiction. 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 to identify and develop specific, quantifiable measures for determining significance consistent with the WSWC's rebuttable presumption concept.

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

The WSWC urges your agencies to work with the WSWC to determine a reasonable timeframe for such jurisdictional determinations and to address any other issues associated with this proposal, including the possible consequences and remedies in those situations where the permitting agency does not meet the specified deadline. The WSWC has in the past proposed 180 days as an initial, possible starting point.

We note that WSWC member states unanimously requested that EPA and NRCS withdraw prior guidance related to enumerating agricultural practices that would clearly fall under the CWA exemption,

as that guidance raised the implication that any practice not specifically listed could then be considered to fall under EPA regulation. We would hope that this Administration would not again consider any such guidance.

Recent conversations among our members have also raised questions regarding the impact of any jurisdictional determination on eligibility for grants and other financial support under the CWA. The rule should clarify what if any impact it has on eligibility.

Another issue raised relates to water transfers, which in the West are pervasive and critically important to supply water for urban population centers and vital agricultural areas, as well as other economic sectors. Nothing in any proposed rule should be construed so as to call into question EPA's current interpretation that transfers between waters without any intervening use or the addition of a pollutant are not subject to NPDES permitting requirements – which would be a costly proposition without commensurate improvements in water quality. The WSWC strongly supports this exclusion.

The WSWC appreciates the EPA's and the Corps' consideration of the above comments. As always, the WSWC, and its member state agencies as co-regulators, stand ready to work with EPA and the Corps in a joint partnership both on an individual state basis, and through the WSWC, to further refine the rule so that it will better accomplish its stated purpose of clarifying the extent of CWA jurisdiction.

We look forward to further dialogue and consultation between your agencies and the western states regarding this rule, and any other issues involving the protection of our Nation's waters.

Sincerely,

Jerry Rigby
Chairman
Western States Water Council

cc: Andrew Hanson, EPA Federalism Contact
Roger Gorke, WSWC EPA Contact