



August 7, 2015

**BY MESSENGER**

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

Lieutenant General Thomas P. Bostick  
Headquarters  
U.S. Army Corps of Engineers  
441 G Street NW  
Washington, D.C. 20314-1000

**Re: Comments on the Final Rule to Clarify the Definition of “Waters of the United States” under the Clean Water Act**

Dear Madam Administrator and General Bostick:

The Western Urban Water Coalition (WUWC) is writing to seek clarification of certain aspects of the final rule (Final Rule) issued by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) defining the scope of waters subject to the jurisdiction of the Clean Water Act (CWA). *See* 80 Fed. Reg. 37053, June 29, 2015. Through this request, we would like to initiate a dialogue with EPA and the Corps in an effort to improve the clarity and effectiveness of the Final Rule for the WUWC members as it applies to conditions in the western states.

Created in June 1992 to address the West’s unique water issues, WUWC consists of the largest urban water utilities in the West, serving over 35 million western water consumers in major metropolitan areas in five states. The membership of WUWC includes the following urban water utilities: Arizona – Central Arizona Project, City of Phoenix and Salt River Project; California – Eastern Municipal Water District, Los Angeles Department of Water and Power, the Metropolitan Water District of Southern California, San Diego County Water Authority, San Francisco Public Utilities Commission, and Santa Clara Valley Water District; Colorado – Aurora Water, Colorado Springs Utilities, and Denver Water; Nevada – Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority; and Washington – Seattle Public Utilities.

WUWC members have a strong interest in clean water for municipal water supplies and in the regulatory processes protecting water quality. In particular, WUWC members are

concerned with the predictability and certainty surrounding whether a water body is subject to CWA jurisdiction and in reducing costs and delays in obtaining any necessary permits. The requirements for issuance of permits under sections 402 and 404 of the CWA are of great significance to WUWC members because, as municipal water providers, WUWC members build and maintain reservoirs and other essential water supply related infrastructure, including long pipelines and canals, as well as recharge and reuse facilities. In addition, many of our members are multi-service utilities and also provide stormwater and wastewater services to their customers. Our extensive systems cross many geologic features, and we are the on-the-ground partners with EPA and the states in the implementation of both the CWA and the Safe Drinking Water Act (SDWA). We have historically been, and will continue to be, supporters of the goals of the CWA.

The West is, in fact, one of the regions that will be the most directly and significantly affected by implementation of the Final Rule. This geographic region contains a vast number of dry arroyos and washes that flow only in response to infrequent storm events, isolated ponds, intermittent and ephemeral streams with a tenuous connection to downstream navigable waters, effluent dominated and dependent water bodies, and extensive ditch, canal, and aqueduct systems designed to meet both agricultural and municipal needs. The manner in which these features are treated under the Final Rule is of great importance to WUWC members and their customers.

For these reasons, WUWC has been very active in legislative and regulatory initiatives to define jurisdictional waters. We have appeared before Congressional Committees and Members of Congress, met with EPA staff and other federal agencies, and commented on EPA and Corps guidance documents. On November 14, 2014, we submitted comments to EPA and the Corps on the Proposed Rule. On May 18, 2015, we filed additional comments on the proposed rule with the Office of Information and Regulatory Affairs within the Office of Management and Budget, and met with that office, along with other water organizations.

Based on this extensive background, WUWC has identified several aspects of the Final Rule that are unclear or ambiguous and could benefit from the issuance of clarifying agency guidance.

1. Tributaries: The Final Rule first defines a “tributary” as “a water that contributes flow, either directly or through another water...to a water identified in paragraphs (l)(1)(i) through (iii) of this section....” *See, e.g.*, 33 C.F.R. § 401.11(l)(e)(iii). This threshold condition is underscored in the preamble, which states: “The final rule protects only waters that have a significant effect on the integrity of traditional navigable waters, interstate waters, or the territorial seas.” 80 Fed. Reg. at 37075. The Final Rule then provides a second test that such waters must be “characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark....” *See, e.g.*, 33 C.F.R. § 401.11(l)(e)(iii).

The preamble also acknowledges an exclusion for “erosional features, including gullies, rills and other ephemeral features.” 80 Fed. Reg. at 37098. There are many common erosional and ephemeral features in the arid West, such as arroyos, dry washes, etc., that have physical indicators of a bed, bank and ordinary high water mark, characteristics which may be found to exist as a consequence of high but extremely infrequent flows. Graf, William L. 1988. Fluvial

Processes in Dryland Rivers. The Blackburn Press, Caldwell, New Jersey, pp. 104, 197 (hereinafter “Graf 1988”).

A. Guidance is needed as to when “physical indicators of a bed and banks and ordinary high water mark” will be deemed to be present and qualify a water as a tributary. The Proposed Rule required “the presence of a bed and banks and ordinary high water mark” (79 Fed. Reg. at 22199), but the Final Rule requires the “presence of physical indicators of a bed and banks and ordinary high water mark.” 80 Fed. Reg. at 37058, 37076. According to the agencies, the “physical indicators of bed and banks and ordinary high water mark demonstrate that there is sufficient volume, frequency, and flow in such tributaries” to a traditional navigable water, interstate water, or the territorial seas to establish a significant nexus. 80 Fed. Reg. at 37058. However, the preamble to the Final Rule suggests that even when “physical characteristics of bed and banks and another indicator of ordinary high water mark no longer exist, they may be determined by using other appropriate means that consider the characteristics of the surrounding areas.” 80 Fed. Reg. at 37077.

We are concerned that even when physical characteristics of bed, banks, and ordinary high water mark are “absent in the field,” an area could still be considered a tributary and subject to the CWA. If this is the adopted interpretation, this could be particularly problematic in the arid West where, due to the extremely infrequent nature of flows or other possible reasons, such physical characteristics of bed, banks, and ordinary high water mark may not exist but the indicators may be determined to be present based on characteristics of the area. Also, this seems to contradict the agencies’ stated position that both an ordinary high water mark and flow are necessary for a water to be considered a tributary. *See, e.g.*, 80 Fed. Reg. at 37079. Indeed, as the agencies have clarified, the “flow must be sufficient to create these physical indicators” (Clean Water Rule Response to Comments – Topic 8: Tributaries at 47).

An interpretation that fails to emphasize relatively frequent and significant flow would cause havoc in the arid West, where the physical indicators of the “volume, frequency and duration” of flow, as referenced in the Final Rule, differ from humid areas.<sup>1</sup> Moreover, the preamble demonstrates the agencies’ recognition that intermittency can preclude a jurisdictional finding: “For example, an intermittent stream that exists wholly within one state, is not itself a traditionally navigable water, and whose flows eventually ends [sic] without connecting to a traditionally navigable water, interstate water, or the territorial seas is not a water of the United States as a ‘tributary’ for the purposes of this rule.” 80 Fed. Reg. 37076.

---

<sup>1</sup> The difficulty in transferring concepts of channel behavior from humid to dryland areas lies in the underlying assumptions of continuous system operation with well-defined feedback mechanisms, assumptions that are not met in the dryland process (Graf 1988, p. 197). Precipitation and runoff inputs to dryland channels are sporadic, so the difference between high and low flows is greater than in humid streams. These wide fluctuations prevent the development of a linkage between a particular flow magnitude and channel geometry related to bankfull conditions (Graf 1988, p. 296). Extensive data collection show that the range of frequency of bankfull flows in dryland channels is from 1 to 32 years, a breadth too great to inspire confidence in the reliability of the measure (Graf 1988, p. 104). The order of events of varying magnitudes may be more important in explaining the presently observed geomorphic conditions than the exact nature of the flood frequency curve or the statistical properties of flood frequencies (Graf 1988, p. 104).

B. We request guidance be provided on when the flows in ephemeral and intermittent drainages are considered to “eventually end without connecting to a traditionally navigable water.” *Id.* The preamble explains that “[t]o determine whether a water meets this aspect of the definition, the connection can be traced using direct observation, U.S. Geological Survey (USGS) data, stream datasets such as the National Hydrography Dataset, aerial photography or other reliable remote sensing information, or other appropriate information.” *Id.* However, guidance is needed as to what factors should be used in making this determination. As noted above: “The final rule protects only waters that have a significant effect on the integrity of traditional navigable waters, interstate waters, or the territorial seas.” The frequency and strength of a connection to a traditionally navigable water relates to the connection’s potential to significantly affect the integrity of traditional navigable waters, interstate waters, or the territorial seas. A weak and infrequent connection is unlikely to have this significant effect.

C. Clarification and guidance is also requested regarding the Final Rule’s treatment of breaks in jurisdictional characteristics of a tributary. The Final Rule states “a water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this section.” *See, e.g.,* 33 C.F.R. § 401.11(1)(3)(iii).

The Final Rule is not clear concerning whether if the break is not a water (e.g., dryland, upland grassland, desert floor or upland vegetated swale), the drainage upgradient of such a break that meets the definition of tributary is nevertheless non-jurisdictional since it does not contribute flow through a water of the United States. The way the Final Rule is written, for a tributary to connect to a traditionally navigable water, it must contribute flow through a jurisdictional or non-jurisdictional water. It is our understanding of the Final Rule that overland flows through dryland breaks to a water of the United States would be considered to form a break that renders a tributary upgradient of the dryland break to be non-jurisdictional and lose its status as a tributary. WUWC supports this interpretation and requests guidance to provide clarity and consistency in implementation of the Final Rule regarding this situation.

2. Treatment of Ditches: The WUWC believes that the exclusions in the Final Rule applicable to ditches are potentially an improvement over the proposed rule. The actual scope of the ditch exclusion remains unclear, however.

A. The agencies should clarify their position on the types of flows that qualify the ditch for an exclusion. The preamble refers to “precipitation and groundwater flow or seasonal flow” when speaking of intermittent ditches (80 Fed. Reg. at 37098), while it describes ephemeral ditches as those which flow in response to precipitation and snowmelt in a typical year. *Id.* If this preamble language is intended to describe the types of flows that qualify the ditch for an exclusion, most Western municipal and agricultural ditches will be jurisdictional

because most ditches in the West derive their water from the exercise of lawful decreed diversions from rivers or streams. In addition, reference is made in the preamble to a ditch's inability to qualify for an exclusion if it "redirects the majority of a stream's flow." *Id.* However, in the West, it is not uncommon for a ditch or series of ditches along the reach of a stream to divert, under their respective priorities, the majority of the natural flow regime during certain periods.

The definitions employed by the agencies for "intermittent" and "ephemeral" streams may have some applicability to constructed roadside ditches and drainage ditches, but they do not fit well with irrigation and water supply canals which commonly occur throughout the western United States. The canals and flows they convey are highly managed, and flows within the canals can vary substantially based on supply, demand and type of use. Based on the language in the Final Rule, WUWC interprets canals with ephemeral or intermittent flow (*i.e.*, less than perennial flow) that are not a relocated tributary or excavated in a tributary or drain wetlands not to be waters of the United States. WUWC requests that the agencies confirm this interpretation.

B. WUWC believes the Final Rule's language that allows the jurisdictional status of a ditch to be determined segment-by-segment (*id.*) is appropriate because, in the western states, canal systems are extensive with numerous branches and laterals. Nonetheless, it would be helpful to obtain guidance on the criteria and approach for determining the jurisdictional status of a portion of a ditch. Some portions of a canal system may meet the criteria for an exclusion, while other portions of the canal system may include a relocated tributary or have been excavated in a tributary. The preamble discusses that the upstream and downstream portions of the same ditch would have to be assessed based on the specific facts and under the terms of the rule to determine flow characteristics and whether or not the ditch is excavated in or relocates a tributary.

C. Clarification of what constitutes a relocated tributary is also requested. According to the preamble, a stream is relocated "either when at least a portion of its original channel has been physically moved, or when the majority of its flow has been redirected." 80 Fed. Reg. at 37078. Is a relocated tributary simply a situation where a ditch is used to physically reroute the channel of a tributary or does it also include the situation where a tributary ends in a canal and the canal conveys the water carried by the tributary? The preamble points out that a ditch that is a relocated stream is distinguishable from a ditch that withdraws water from a stream without changing the stream's aquatic character. 80 Fed. Reg. at 37078. The latter type of ditch is excluded from jurisdiction where it meets the listed characteristics of excluded ditches under paragraph (b)(3). Most of the canals in the western U.S. withdraw water from a stream or reservoir. In addition, many such canals may divert on only a "seasonal" basis. WUWC therefore requests guidance and clarification on what constitutes "changing the stream's aquatic character."

3. Treatment of Canals: The Final Rule states that canals can be jurisdictional tributaries, and there is a reference in the preamble to canals becoming jurisdictional if they move water between traditional navigable waters, *i.e.*, by meeting the definition of "tributaries." 80 Fed. Reg. at 37100.

A. The existence and scope of any canal exclusion should be clarified. Canals and ditches functioning as part of a distribution system should be treated the same as ditches (assuming they serve a similar function) and are not built in a tributary. This would exclude ephemeral and intermittently flowing canals.

B. Further clarification on the status of sub-surface drains would also be useful. 80 Fed. Reg. at 37089.

4. Exclusion for Water Systems: Though it is clear from the Final Rule that the wastewater system exclusion remains intact, the status of portions of water systems, including recycling, recharge and reuse facilities, is uncertain. 80 Fed. Reg. at 37100. This is due in large measure to the consistent use of the word “wastewater” in conjunction with such facilities. In reality, many of the systems in question do not move, store or treat wastewater, but rather handle “raw water” or even treated water. The existence of an exclusion for these “water” system components is very important and appears to be consistent with the intent of the wastewater exemption to promote solutions in areas where drought has exacerbated supply issues. WUWC would like to confirm that such an exclusion is provided by the Final Rule.

5. Breadth of Significant Nexus Test: In the West, where water providers have decreed water interests located in basins hundreds of miles from their customer base (80 Fed. Reg. at 37092), a dilemma arises as dredge and fill applications are filed by others and significant nexus determinations are made for the entire “region” without the benefit of the providers’ knowledge or participation. *See, e.g.*, 80 Fed. Reg. at 37094-95. While the agencies appear to indicate that an entity can “back out” an individual waterbody after such a basin determination has been made (80 Fed. Reg. at 37095), it is unclear how this would occur. Thus, the significant nexus definition needs to be revisited and clarified on this point, along with information on how specific locations can be removed from a regional determination.

6. Stormwater Control Features: The Final Rule includes an exclusion for stormwater control features “created in dry land.” While the preamble states that “dry land” appears in the 1986 and 1988 rulemaking preambles and the term refers to areas of the geographic landscape that are “not water features such as streams, rivers, wetlands, lakes, ponds and the like” (80 Fed. Reg. at 37098), uncertainty remains relative to stormwater control features placed in low lying depressions or drainage ways that periodically flow in response to significant precipitation events. This includes natural drainages in forest lands where wildfires have created the need to install facilities designed to control post-fire sediment and debris flows. Though the preamble indicates that “dry land” can be further defined during implementation (80 Fed. Reg. at 37099), the best time for clarification is now as, especially in burn areas, decisions must be made expeditiously once the wildfire is out. Clarification of this issue is unquestionably of pre-eminent concern in the West, where wildfires that are large in scale and devastating in impact occur with considerable frequency. The WUWC believes it is important that an answer to this question be provided soon, rather than to await for an “implementation” situation in the aftermath of a fire where immediate action is needed.

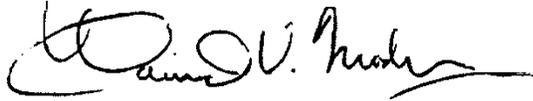
7. 100-Year Floodplain: The Final Rule provides that waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas and waters within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundments, or covered tributary are subject to case-specific significant nexus determinations, unless the water is excluded under paragraph (b) of the rule. In addition, the term “neighboring” is defined in the Final Rule as including waters located in whole or in part in the 100-year floodplain and that are within 1,500 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment, or a tributary, as defined in the rule (“floodplain waters”). However, 100-year floodplain maps are missing, incomplete, out-of-date, and/or being revised for many parts of the country. Although the agencies state they will “rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain” (Clean Water Rule Response to Comments, Topic 4: Other Waters at 65), the agencies recognize that “much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and may not accurately represent existing circumstances on the ground, such as streams or rivers moving out of their channels with associated changes in the location of the floodplain.” *Id.* In those circumstances, the agencies state they will “rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, Natural Resources Conservation Service (NRCS) Soil Surveys (Flooding Frequency Classes), tidal gage data, and site-specific modeling (e.g., Hydrologic Engineering Centers River System Analysis System or HEC-RAS). *See* <http://websoilsurvey.sc.egov.usda.gov/App/HomePage.htm> and HEC-RAS and <http://www.hec.usace.army.mil/software/hecras/>. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site [sic].” *Id.* at pp. 65-66. Due to the lack of FEMA Flood Zone Maps for much of the country, guidance as to how to identify the location and extent of the 100-year floodplain is needed.

As stated above, we believe that all of these concerns could be resolved through implementation guidance or other interpretative documents that provide clarity and certainty to the regulated community and the Corps and EPA staff implementing the Final Rule. To the extent that this may prove not to be feasible for certain issues, at the very least the scope of any ambiguity or disagreement could be significantly narrowed.

In addition to providing these written comments, we would like the opportunity to meet with staff members from your agencies to discuss these issues and their possible solutions. Our counsel Don Baur of Perkins Coie, LLP will be contacting the agencies about arranging a meeting.

Thank you for your consideration of a meeting with us. If you have any questions regarding the comments in this letter, please contact our counsel, Donald C. Baur or Paul B. Smyth of Perkins Coie, LLP at (202) 654-6200.

Sincerely,

A handwritten signature in black ink, appearing to read "David Modeer". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

David Modeer  
Chair  
Western Urban Water Coalition

cc: Ken Kopocis  
Deputy Assistant Administrator, Water  
Environmental Protection Agency  
1301 Constitution Avenue NW  
Washington, DC 20460

Perkins Coie LLP  
700 Thirteenth St. NW, Suite 600  
Washington, D.C. 20005-3960