



# Wyoming County Commissioners Association

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June 19, 2017

Donna Downing  
Project Lead  
Office of Wetlands, Oceans, and Watersheds  
Environmental Protection Agency  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

Andrew Hanson  
Office of Congressional and  
Intergovernmental Relations  
Environmental Protection Agency  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

Re: Definition of “Waters of the United States”

Dear Ms. Downing and Mr. Hanson,

On behalf of the Wyoming County Commissioners Association (WCCA), an organization representing the County Boards of Commissioners for all 23 of Wyoming’s counties, I write to offer recommendations regarding the proposed revision to the regulation that defines “Waters of the United States” under the Clean Water Act (CWA).

In Wyoming, counties serve as a legal arm of the state and shoulder the responsibility to carry out the state’s statutory and regulatory goals. As such, county government operates on the front lines of ensuring our communities are both economically vibrant and safe, healthy places to live. Successfully balancing these competing, but not mutually exclusive demands requires locally elected officials who understand the on-the-ground needs of communities; and when necessary, a regulatory framework that provides clear and achievable guidelines. This is particularly true for western states like Wyoming, where the federal government plays an outsized role in the day-to-day management of nearly half of the surface and more than three-quarters of the subsurface. In Wyoming, the most successful statutory and regulatory efforts on any issue, but especially to promote land and water conservation, always begin with intentional coordination with the local government closest to the people.

The WCCA agrees with the EPA that clean water is of utmost importance and that counties deserve clarity on the regulatory jurisdiction of waters within our borders.

After careful review, the WCCA provides the following recommendations for your consideration:

## **1) States can lead: The rule must provide sincere credence to cooperative federalism.**

Section 1251(b) of the CWA reads that, “It is the policy of Congress to recognize, preserve, and protect the primary responsibilities of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources....”<sup>1</sup>

Cooperative federalism allows a state to maintain control of its jurisdiction while abiding by federal regulations, and in Wyoming, there is no shortage of state regulations that abide by the CWA. Wyoming’s water quality regulations were developed to be consistent with Wyoming’s Environmental Quality Act and the federal CWA.<sup>2</sup> For example, the testing procedures of Wyoming’s water quality regulations are the testing procedures the EPA has laid out.<sup>3</sup> If a testing procedure has not been established, then the suitability of a proposed testing procedure is to be determined by the Wyoming Department of Environmental Quality (DEQ) and the EPA using defensible scientific methods.<sup>3</sup> This example shows that Wyoming requires the same standard as the federal government. However, many local governments go above-and-beyond EPA mandates.

Wyoming has additional protections in place to prevent water quality degradation. Waters that are at a higher quality than the standard are to be maintained at that higher level except under strict circumstances, which involve public participation.<sup>4</sup> Additionally, Wyoming requires a permit if a person “shall cause, threaten or allow the discharge of any pollution or wastes into the waters of the state; [or] alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state....”<sup>5</sup> The DEQ defines “waters of the state” to mean “all surface and groundwater, including waters associated with wetlands, within Wyoming.”<sup>6</sup>

In developing the 2015 rule, the EPA and the U.S. Army Corps of Engineers (Corps) provided numerous briefings and conversations with state and local governments. However, those briefings had the effect of either being too broad for sufficient comment or peppered with the insinuation that the reviewers simply didn’t understand the rule’s content.<sup>7</sup> Numerous commenters, including the WCCA, stressed the point that the EPA and the Corps failed to meaningfully engage the states in their obligation under the CWA and Executive Order 13132 when developing the previous rule.<sup>8</sup>

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<sup>1</sup> Clean Water Act, 33 U.S.C. § 1251(b) (2017).

<sup>2</sup> Wyoming Department of Environmental Quality, Surface Water Quality Standards, DEQ.Wyoming.gov, <http://deq.wyoming.gov/wqd/surface-water-quality-standards-2/> (last visited June 13, 2017).

<sup>3</sup> Wyo. Admin. Code § ENV WQ Ch. 1 s 10 (2017).

<sup>4</sup> Wyo. Admin. Code § ENV WQ Ch. 1 s 8.

<sup>5</sup> Wyo. Stat. Ann. § 35-11-301 (2017).

<sup>6</sup> Wyo. Admin. Code § ENV WQ Ch. 1 s 2(a)(xi).

<sup>7</sup> Letter from 24 United States Senators to the EPA, October 23, 2014.

<sup>8</sup> “Western Governors strongly urge both the EPA and the Corps to engage states as authentic partners in the management of Western waters.” *Western Governors’ Association Letter to the EPA*, March 25, 2014; and, “...consultation should treat states as co-regulators that are separate and apart from the general public...” *Western States Water Council*, Letter to the EPA, October 15, 2014 among many others.

As such, the WCCA appreciates the concerted effort by EPA to re-engage state and local governments in a manner that reflects the cooperative federalism dynamic that serves as the foundation for the CWA. The scope of the agency inquiry has been made clear; and the outreach thus far has been sincere. To that end, the WCCA provides the following recommendation.

**Recommendation:** The State of Wyoming, counties, and federal land management agencies have worked cooperatively in several instances to create rules and management practices that help protect Wyoming's land and water, support economic growth, and recognize on-the-ground realities. A rule clarifying jurisdiction of waters must be developed *and* implemented in a similar manner.

**2) Any rule must first rest on a rebuttable presumption of state jurisdiction.**

It is important to note that waters not currently found to be waters of the U.S. are in most cases claimed as "waters of the state." These waters are still subject to regulation by state departments of environment like Wyoming's Department of Environmental Quality (DEQ). In Wyoming, like in the entire semi-arid West, numerous innovative conservation practices have been employed by the state, local governments, and private entities to ensure water quality and conservation. Contrary to what WCCA proposes here, a federal presumption proves counterproductive to these locally-driven efforts in Wyoming, and may, in fact, serve to diminish the public's willingness to employ voluntary conservation efforts.

This is because individuals will be less likely to accept flexible regulations placed on water use and disturbance by the state or local jurisdictions because they cannot be assured that they will not also bear the burdens of a costly and lengthy federal permitting process. Further, a federal presumption places the burden on states, counties, and landowners to prove that a water previously managed as non-jurisdictional is still classified as such.

Wyoming has local conservation districts with watershed plans that are consistent with the CWA while seeking to improve the overall quality of the watersheds in their districts. For them to be able to do so efficiently, the state, and therefore the districts, must be able to presume that a water is considered a "water of the state" unless proven to be a "Water of the United States." This allows the state, vis-à-vis the conservation districts, to better monitor and regulate waters within Wyoming. An example of local conservation districts being able to improve water quality is the Muddy Creek watershed. From 2009 to 2011, the monitoring results showed significant improvement, mainly due to habitat restoration projects.<sup>9</sup> If the waters were to be presumed as "Waters of the United States," then local governments would be hindered in their ability to monitor and regulate the water within their communities due to unnecessary regulations, permits, delays, disputes and, in certain cases, the unnecessary expenditure of funds.

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<sup>9</sup> Wyoming Ass'n of Conservation Districts, Wyoming Watershed Progress Report 2011 37, <http://www.conservewy.com/Attached%20Files/2011WatershedReport%20video%20files/LittleSnakeRiverBasin.pdf> (last visited June 13, 2017).

Consider also the case of Sublette County, Wyoming. Sublette County has an estimated population of 10,041 spread out over approximately 4,886 square miles for a density of about 2 people per square mile. The county is home to one of the largest public lands oil and gas developments in the United States, the Jonah Field, but also boasts 398 farms and ranches that average nearly 2,000 acres in size. These farms and ranches produce approximately \$54 million in annual market value of products sold. Additionally, Sublette County's agriculture and energy-rich lands are situated in the sagebrush steppe eco-region surrounded on three sides by mountain ranges that produce significant spring runoff each year.

Sublette County's water resources are primarily headwaters, and the county has partnered with the local conservation district to develop ways to conserve and store water during the critical spring runoff months. By controlling spring runoff, the county is able to divert and recapture water for use in agriculture irrigation, often on private lands, while simultaneously providing flood mitigation for county residents. The diversion technique effectively raises the water table, allowing for a more controlled release of waters through a series of intermittent, ephemeral and perennial streams that have been created by this process. In other words, the dual-purpose diversion practice creates perennial streams that would otherwise be intermittent and ephemeral streams that otherwise would not display a bed, bank, and ordinary high water mark.

The failings of the 2015 rule are illustrative for what should be done this time around. For example, the 2015 rule's expansive definition of tributary, and its silence on dual-use diversions provide no certainty to a county like Sublette that its snow melt diversion/irrigation system would not be jurisdictional. Proving that the system of streams created by the diversion practice would revert to uplands or croplands would require ending the practice of diversions itself. Thus, by way of example, the WCCA believes the 2015 rule left little choice but to presume that these ditches and streams would be jurisdictional. Recall that even the mere presumption of federal jurisdiction creates a burden on the county and creates a perverse incentive for actively controlling potential floodwater in a beneficial way.

**Recommendation:** The WCCA requests that a revised rule refrain from a blanket presumption of federal jurisdiction and instead move toward a broad presumption of state jurisdiction unless—and until—proven otherwise. A rebuttable “waters of the state” presumption will serve the dual-purpose of avoiding the unintended consequences of perverse incentives for state and locally-led water quality efforts and shift the burden of proof back onto the EPA in cases when jurisdiction may not be clear, such as Sublette County’s dual-use diversions. Given that the EPA has twice failed to prove that expanded jurisdiction is warranted under the CWA, it is clear that the burden of proof should rest at the EPA whenever it seeks to expand its authority beyond that explicitly granted in the CWA and has been further constrained by the Supreme Court.<sup>10</sup> This is particularly important to Wyoming’s counties that with limited budgets must comply with all state and federal permitting requirements and cannot afford to seek judicial redress for every disputed case of state vs. federal jurisdiction.

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<sup>10</sup> See *SWANCC v. the U.S. Army Corps of Engineers*, 531 U.S. 159, regarding the limitations on EPA’s jurisdiction over isolated waters, and *Rapanos v. the United States*, 547 U.S. 715, regarding the limitations on EPA’s jurisdiction over intermittent and ephemeral streams.

- 3) The attached proposed WOTUS definition offers a simple, concise expectation for when waters may qualify as “Waters of the United States” and those circumstances where waters may never be understood as being “Waters of the United States.”

While the WCCA believes the attached proposed definition speaks for itself, a couple points deserve context.

*Regarding the exclusion for ditches, conveyances, and other structures related to agricultural or flood and storm-water control.*

For county government in Wyoming, jurisdiction over county-owned or maintained ditches and its resulting ramifications on county budgets when undertaking infrastructure projects is critical. While the WCCA appreciates that EPA attempted to exclude ditches in the 2015 rule, and had gone to great lengths to argue that its effect would not regulate ditches that the EPA is not already regulating, again we believe that the EPA’s stated intent does not match a plain reading of the 2015 rule.

Because the potential exists for ditches to be automatically considered jurisdictional if the ditch meets the definition of a WOTUS, then the exclusion must be taken in the context of the attached definition. In contrast to agricultural ditches and canals, which may exist in uplands and drain in uplands to meet specific agricultural purposes, county-owned and maintained ditches exist primarily to divert water away from roads and other structures, but may also serve a dual-use. The specific purpose of a county-owned or maintained ditch is to convey water – particularly during heavy rain or snowmelt events – away to somewhere else. If these ditches carry water through a series of connected “tributaries,” perhaps “considered in combination,” and *eventually* drain in a water of the U.S., then the exclusion appears to no longer apply to the ditch. Quite plainly, for a county evaluating a road, bridge, or other infrastructure projects, the exclusions provided in the 2015 rule simply were not explicit enough to provide the assurance necessary to move ahead with these projects absent an on-the-ground determination.

Consider for example Park County, Wyoming. Park County has an estimated population of 29,227 spread out over 6,942 square miles for a density of around 4 people per square mile. Park County’s median household income is \$51,449, which falls below Wyoming’s statewide median income of \$56,573. With limited means, Park County must maintain an approximate 1,200 miles of drainage conveyances within its rights-of-way. Like Sublette County discussed above, Park County is a headwaters county that must effectively deal with seasonal runoff for the safety of its citizens and to hedge against the dry summer months in this semi-arid region.

Park County diverts snowmelt for agricultural use in some cases. However, it is often difficult to determine which conveyances are for agriculture purposes and those that are merely for snowmelt flood mitigation. Previous attempts to create exemption definitions proved too vague, and in the case of tributaries, the definition was so expansive as to

imply that Park County might experience a significant increase in federal permits required to continue this practice. To date, Park County has secured national permits like National Permit 14 for Linear Transportation Projects. However, it is unclear if such vague definitional exemptions would alter the ability of counties to make use of a permit like National Permit 14 because these diversions both originate and drain to perennial streams. Accordingly, adopting a concise, unambiguous definitional exemption that captures the nuances of western counties such as Park County is key to successful implementation of any promulgated WOTUS rule.

*Regarding the proposed definition for “relatively permanent” (proposed (o)a.5.B.).*

While acknowledging and affirming our support for what the WCCA proposes in the attached definition, we encourage the EPA and the Corps to evaluate if a further narrowing of the definition is warranted given the contextual narrative put forward above and additionally offered by other local government entities in relation to defining “relatively permanent.” The WCCA believes that EPA’s adoption of a narrower definition that excludes a reference to a three contiguous month floor for potential qualification as “relatively permanent” should be adopted if the EPA and the Corps, through this rulemaking, can provide an accommodation to those who believe such a floor is necessary to meet the objectives of the CWA in their jurisdiction. Absent such accommodation, the WCCA offers the attached definition for “relatively permanent.”

Thank you for the opportunity to engage the EPA as it attempts to make good on the promise of cooperative federalism as envisioned in the CWA. Wyoming’s counties look forward to seeing a collaboratively developed, clear line of jurisdiction with state and local governments at the table as co-regulators.

Sincerely,



Rob Hendry  
President, Wyoming County Commissioners Association  
Commissioner, Natrona County, Wyoming

CC: Matthew H. Mead, Governor  
Wyoming Federal Delegation  
Wyoming Association of Conservation Districts

With Attachment

**PROPOSED Clean Water Rule: Definition of "Waters of the United States" 40 CFR 230.3**

**PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL.**

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**§230.3 Definitions.**

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(o) The term *waters of the United States* means:

- a. For purposes of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (o)(2) of this section, the term "waters of the United States" includes only:
  1. Those interstate waters that are navigable-in-fact and currently used or susceptible to use in interstate or foreign commerce. These waters include the territorial seas.
  2. Relatively permanent, standing or continuously flowing streams, rivers, and lakes having an indistinguishable surface connection with navigable-in-fact waters described in a.1.
  3. Those wetlands that directly abut and are indistinguishable from the waters described in a.1. and a.2. Wetlands are those areas inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands are indistinguishable from the waters described in a.1. and a.2.
  4. The following are never "Waters of the U.S.":
    - A. Groundwater or channels through which waters flow intermittently or ephemerally.
    - B. Ditches, conveyances, and other structures, manmade or otherwise, used for agricultural, or flood abatement or storm-water control purposes.
  5. The following definitions apply to terms used under this section:
    - A. Indistinguishable means relatively permanent waters that are directly connected at the surface by other relatively permanent waters.
    - B. Relatively permanent waters are those waters that flow for at least three contiguous months per year, except during periods of extreme drought or precipitation according to USGS standards, and have an indistinguishable surface connection with navigable-in-fact waters described in a.1.

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