

Western Growers comments to the EPA and Army Corps on the Proposed Definition of “Waters of the United States” under the Clean Water Act.

1) The Appropriate Reach of the Clean Water Act

We make the case the EPA and Army Corps (the agencies) have gone beyond their limits and the proposed rule should be scrapped and the process should start over. Why?:

A. Federal Jurisdiction Under the Clean Water Act is Not Unlimited:

The Supreme Court put limits on the Clean Water Acts jurisdiction which the agencies exceed.

B. Federalism Concerns:

Proposed rule has not adequately involved the States and the agencies have ignored the federalism boundaries of the Act and the Constitution.

C. The Role of Congress:

The role of the Executive Branch is to implement, not write the laws under the Constitution.

We argue that the agencies are writing law which is not properly their role and infringing on Congress.

D. Agencies’ Process Violates the Administrative Procedure Act

The rule relies on a scientific report that is not yet final.

This creates uncertainty and does not allow the public to adequately comment as the APA requires.

2) Parts of the Rule in Need of Clarification and Improvement

If the agencies proceed forward with the rule (which we believe likely) then we argue these parts of the proposed rule need to be either changed or clarified.

A. Confusion surrounding the definition of “Tributary”

The agencies need to more accurately define aspects of the new tributary definition.

Specifically the “flow” parameters that are necessary to identify a tributary.

B. What is a “Ditch”?

There are multiple areas of confusion in the agencies definition of ditch and how it relates to jurisdictional water under the tributary definition. We identify these areas and demand clarification.

C. The confusion around “Adjacent Wetlands”

The agencies leave many questions about how they would define the concept of *neighboring* and *adjacent* which hinges on being within a floodplain or riparian area.

Neither of these terms are sufficiently defined to determine jurisdiction easily so we ask for clarity.

D. What is a “Significant Nexus” needs further clarification

How the agencies plan to make significant nexus determinations is critical for several aspects of the rule, most importantly how they characterize “other waters” (ie this is their catch-all category).

As proposed the standards for determination are overbroad and in direct violation of the Supreme Court’s admonition for clarity.

3) Interpretative Rule as Constructed is Not Helpful and Should be Withdrawn

The Interpretative Rule signed by the Corps and USDA might limit the exemption defined as “normal farming” in the Clean Water Act plus it creates a regulatory role for USDA under the Act; as such we ask that the Interpretative Rule be withdrawn.