



March 13, 2019

Via Electronic Mail (tb4@azdeq.gov)

Trevor Baggione
Director, Water Quality Division
Arizona Department of Environmental Quality
1110 West Washington Street
Phoenix, Arizona 85007

Re: Arizona Mining Association Preliminary Input on Proposed New Definition of Waters of the United States

Dear Director Baggione:

At a public meeting on February 8, ADEQ indicated that it was preparing comments on the proposed new definition of “waters of the United States” (“WOTUS”) released by EPA and the Corps of Engineers (collectively, the “agencies”) in December 2018 and subsequently published in the Federal Register in mid-February 2019. *See* 84 Fed. Reg. 4154 (February 14, 2019) (the “Proposal”). The deadline for comments on the Proposal is currently April 15. To facilitate ADEQ preparation of comments by this deadline, you requested that any stakeholders wishing to apprise ADEQ of their thoughts on the Proposal do so by March 15.

The purpose of this letter is to make you aware of comments that the Arizona Mining Association (“AMA”) is considering providing on the Proposal. Our comments are still being developed, so of necessity we are limiting this letter to more general positions that AMA is considering, rather than providing detailed comments. I expect AMA’s positions to evolve somewhat between now and the submission of any comments. I also expect some of our member companies will submit comments that may address topics not identified by AMA in this letter.

At the present time, here are the positions that AMA has identified for possible inclusion in our final comment letter:

- AMA generally supports the approach reflected in the Proposal that federal Clean Water Act (“CWA”) jurisdiction should focus on traditional navigable waters (“TNWs”), properly understood, and certain tributaries to such waters (i.e., those that contribute flow to TNWs on a perennial or intermittent basis). We feel the 2015 definition went too far by essentially regulating all tributaries, which we believe was not consistent with the plurality and concurring opinions in the Supreme Court’s *Rapanos* decision.

- AMA supports the Proposal's exclusion of ephemeral features from the definition of WOTUS under the CWA. Such an exclusion appears consistent with the position articulated by the State in Governor Ducey's June 16, 2017 letter to the EPA Administrator. Whether, to what extent, and how such ephemeral features should be regulated is best left to states to determine. As you know, Arizona already has an expansive definition of "waters of the State" on the books (A.R.S. § 49-201(41)), and ADEQ already possesses the authority to adopt new rules establishing water quality standards for such waters even if those waters do not represent WOTUS under the CWA. See A.R.S. § 49-221(B). Governor Ducey's 2017 letter references a willingness for the State to consider protection of some waters of the State that would no longer constitute WOTUS. AMA looks forward to participating in the stakeholder process associated with potential ADEQ regulation of waters of the State in the event a narrowed definition of WOTUS is adopted by the agencies and becomes effective in Arizona.
- AMA feels that the agencies' understanding of TNWs, as explained in the preamble to the Proposal, is too broad. That understanding is essentially the same as articulated by the agencies in Appendix D to the 2008 guidance interpreting the *Rapanos* decision, and in the 2015 definition of WOTUS. For example, AMA believes that navigability-in-fact alone is not sufficient to make a feature into a TNW, and that a determination of navigability for purposes other than determining the scope of federal regulatory authority should not be sufficient to support a conclusion that a feature is a TNW for CWA regulatory purposes.
- AMA supports the Proposal's elimination of interstate waters as features that are automatically jurisdictional. Although this represents a change in the agencies' longstanding positions, we believe (and commented to this effect in our comments on the proposed version of the 2015 WOTUS definition) that in the wake of the Supreme Court's decisions in *SWANCC* and *Rapanos*, there is no adequate legal basis for automatically regulating waters that cross state boundaries without any consideration of whether those waters represent (or have an effect on) TNWs.
- AMA generally supports the Proposal's codification of exemptions for some features that have previously been excluded only by policy (e.g., the waste treatment system exclusion). Although this is the first official codification of these exemptions, they have long been recognized by the agencies.
- AMA supports the Proposal's exclusion of groundwater from the definition of WOTUS. This is consistent with the CWA, the agencies' past policy, and the 2015 definition that currently applies in a number of states (although not Arizona). Whether discharges to groundwater that then reach surface water can be regulated under the NPDES program (or a state equivalent like AZPDES) is beyond the scope of the Proposal; moreover, we expect both EPA and the Supreme Court to directly address that topic over the next year.
- AMA may have some comments requesting clarification on certain proposed definitions. We are still evaluating these definitions and how they would apply in Arizona.

- In summary, we feel the Proposal provides greater clarity than the regulatory regime that has been operative in Arizona since 2006, represents a reasonable interpretation of challenging Supreme Court precedent, and better reflects the federal-state balance of power envisioned by Congress when it enacted the CWA.

The AMA appreciates the opportunity to submit provide preliminary input to ADEQ on this critical issue, and we look forward to continuing to work with ADEQ on issues related to CWA jurisdiction moving forward. Should you have any questions on these comments or require additional information, please feel free to contact me at steve@azmining.org or (602) 266-4416.

Sincerely,

A handwritten signature in cursive script that reads "Steve Trussell".

Steve Trussell

Executive Director