



Douglas A. Ducey  
Governor

# ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY



Misael Cabrera  
Director

April 15, 2019

Andrew Wheeler, EPA Administrator  
USEPA Headquarters  
William Jefferson Clinton Building  
1200 Pennsylvania Avenue, N. W.  
Mail Code 1101A  
Washington, DC 20460

The Honorable R.D. James  
Assistant Secretary for the Army for Civil Works  
U.S. Army Corps of Engineers  
441 G Street, N.W.  
Washington, D.C. 20314

Dear Administrator Wheeler and Assistant Secretary James,

The State of Arizona (the State) appreciates the opportunity to provide the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) with comments on the proposed rule "Revised Definition of 'Waters of the United States'". We applaud the EPA and USACE's efforts to seek out State feedback throughout the process in order to create a clear and effective rule. The State supports the proposed rule's overall approach to providing clarity by defining easily recognizable jurisdictional limits, and striving for ease of implementation. The current lack of jurisdictional clarity has created confusion for both the regulated community and regulators in the State, and across the country.

## **Arizona Affirms the Need for a New Rule**

A particularly salient point in favor of the proposed Waters of the United States (WOTUS) rule is the uncompensated impact that the application of the current rule has on the value of private and State Trust land, which was granted to the State by the Federal government primarily to benefit the State's public schools and universities. State Trust Land represents approximately half of the non-Federal or Tribal land available for the State's current and future growth and economic development. Assignment of jurisdictional status to ephemeral waterways under the current rule – especially the "braided channels" commonly associated with alluvial fan systems

commonly found throughout the State – can strip a parcel of sufficient contiguous farmable or developable land. A crop farmer or residential homebuilder can find their land rendered virtually unusable and worthless, making a WOTUS jurisdictional determination a regulatory taking without compensation.

In one example of the negative impacts of the current rule, its inappropriate application, has reduced – without compensation – the developable land area of a 7,000-acre block of State Trust Land in the Phoenix metro area’s path of development by 18-20%. This results in a reduction of potential returns to the trust beneficiaries by more than \$700 million through loss of developable land, increased infrastructure costs, project delays and other impacts.

The State is also aware of instances where farmers in rural Arizona are hesitant to undertake necessary drainage improvements on their land for fear that local ephemeral waterways that are dozens or hundreds of miles from Traditional Navigable Waters will be declared jurisdictional. To a rural landowner who is trying to protect life and property from damage, these jurisdictional determinations are regulatory takings without compensation that add to their operating costs and decrease their available land for farming.

### **Arizona Supports the Proposed Rule**

Arizona supports the proposed rule and thanks the EPA and USACE for their diligent work to produce a rule that is much clearer, and in our opinion, more consistent with the congressional intent of the Clean Water Act (CWA). We also appreciate that this rule is consistent with cooperative federalism and appropriately limits Federal jurisdiction over State waters without hindering our State’s ability to develop programs to protect non-jurisdictional waters.

### **Arizona Comments on the Proposed Rule**

State level outreach and solicitation of comments on the rule identified key principles consistent with those identified in the State’s 2017 letter to EPA providing input on the proposed revision to the WOTUS definition: clarity, consistency, flexibility, and a maintained ability for states to be able to protect water quality. Below are comments in support of the rule, in response to the questions laid out by the EPA and USACE in the rule preamble, and requesting additional information to provide important clarity to states in terms of how the rule will be implemented.

### **Scope of Jurisdiction**

The State supports the EPA and USACE’s statement that “the line between Federal and State waters is a legal distinction, not a scientific one...”, and their subsequent stated desire to create a definition that is “informed by the science”. The State recognizes this legal distinction and appreciates that the proposed rule is an effort to strike the proper balance between the regulatory authority of the Federal government and the states. As stated in the State’s 2017 letter regarding redefining WOTUS, the revised rule should clearly identify that states with CWA delegation

should have authority to determine which waters are WOTUS within non-tribal state boundaries. Determinations of interstate, tribal, and international waters should continue to be made by the USACE with input from affected states or tribes.

It is the State's view that the original intent of Congress was not to use the CWA as a blanket regulation to cover all waters. As such, the State supports the proposed rule's approach that ephemeral streams and waters that are fully isolated from Traditional Navigable Waters (TNWs) are better suited for regulation at the state level, thereby removing them from CWA jurisdiction. As stated in the State's 2017 letter regarding redefining WOTUS, the State recognizes and welcomes the need to protect non-WOTUS state surface waters.

While it is estimated that roughly 94% of the State's streams are intermittent or ephemeral, there has not been a systematic, comprehensive evaluation of the flow regime of all of the stream reaches within the State. ADEQ would like to collaborate with EPA, USACE and other arid states to develop new guidance for the arid southwest that documents methods to determine whether streams meet the definition of "intermittent" in the proposed rule.

### **Traditionally Navigable Waters**

The State requests clarification as to how the EPA and USACE would approach TNW determinations on major river courses in their entirety. Presently, not all of the State's eight major river courses have been fully evaluated to determine TNW status. The State, therefore, requests specificity as to how the EPA and USACE would approach making TNW determinations on these large rivers in their entirety, as this is a pivotal issue in the State, affecting hundreds of stream miles of tributary rivers and streams.

### **Interstate Waters**

The State generally agrees that the jurisdiction of interstate waters can be determined based on the proposed jurisdictional categories and exclusions, without the need for a separate "interstate waters" category. However, the State cautions that lack of this category could, in some cases, result in a loss of easily accessible water quality data from EPA's WQX database. For example, upon the occurrence of a pollution event such as the Gold King Mine Spill, neighboring states may not have access to data currently required as part of CWA Section 106 monitoring funding. Additionally, under the new rule, EPA would lose the assessment of contiguous segments of the State's large interstate rivers in its reporting on the Condition of the Nation's waters to Congress.

The State, therefore, requests clarity as to whether the EPA and USACE would retain the ability to function in a facilitating role across state lines for data collection and storage, as well as mitigation and management of the impacts to downstream states from upstream states on non-WOTUS interstate waters if this exclusion becomes final.

### **Tributaries**

The State supports the approach that a tributary does not lose jurisdictional status if it flows through a natural or man-made break, so long as the break conveys perennial or intermittent flow to a jurisdictional water at its downstream end. The State agrees with the approach of not proposing a specific flow duration for intermittent streams based on the fact that the time period that encompasses intermittent flow can vary widely across the country based on climate, hydrology, topography, soils, and other conditions.

### **Impoundments; Lakes and Ponds**

The State supports the proposed rule's retention of "impoundments of otherwise jurisdictional waters" as a jurisdictional category.

The State suggests that as long as a lake or pond is contributing intermittent or perennial flow to a downstream TNW (i.e. it meets the definition of a tributary within the proposed rule), its jurisdictional status is clear and attempts at more specific definitions are unnecessary.

### **Ditches**

The State agrees with the proposed exclusion of ditches in upland areas, and inclusion of ditches that convey perennial or intermittent flow to jurisdictional tributaries at the downstream end of the ditch.

### **Groundwater**

The proposed rule exempts "Groundwater, including groundwater drained through subsurface drainage systems". The State agrees with the groundwater exclusion in the proposed rule, however questions whether the preamble language "including diffuse or shallow subsurface flow" should be included in this exclusion. In the State, intermittent streams typically contain sub-surface water which interacts with surface water in an interrupted way, where these waters are not part of deep underlying groundwater aquifers and their chemical composition more closely resembles surface water. These sub-surface waters (termed the hyporheic zone) perform many important functions in stream ecosystems, such as processing of nutrients, and harboring burrowing aquatic life such as macroinvertebrates. Since shallow, subsurface flows are important sources of water for the State's intermittent streams, adding this language to the groundwater exclusion would mean that the subsurface flow is excluded, but becomes a jurisdictional water when it surfaces to flow intermittently. The continuity of water quality between the shallow subsurface water and surface water would not be recognized by this language addition and creates confusion. Therefore, the State requests clarification regarding how the additional proposed exemption language regarding "shallow subsurface flow" would clarify the rule.

### **Existing Datasets**

The State supports the proposal for federal, state, and tribal partnerships to work together to develop maps of jurisdictional waters to increase certainty for stakeholders. Such maps would be a useful tool to help provide clarity and predictability, although they should be used as a complement to (rather than a substitute for) the regulatory framework and definitions provided in the rule. We encourage the EPA and USACE to consider the following to see this concept come to a scientifically defensible fruition:

- The NHD has several versions and states, tribes and federal agencies may be working from different datasets (NHDPlusv1, NHDPlusv2, NHDPlus HR),
- Flow regimes are not static and can change over time; mapping tools should be flexible enough to account for this,
- The National Wetland Inventory (NWI) maps are outdated and inaccurate,

### **Resource Assessment**

As identified in the Resource Assessment, Arizona statute defines “waters of the state” in broad terms, offering opportunity for the State to respond to decreased federal regulation and maintain appropriate protectiveness of state waters. While the State has a robust groundwater protection program that affords some level of protection to surface waters, the State does not currently have a robust state-level program designed specifically to protect and restore surface water quality. Time and resources will be needed to work with stakeholders to determine the appropriate state response to reduced CWA jurisdiction, and to draft, pass, and implement any necessary changes or additions to state statutes and rules. As such, the State suggests that the EPA and USACE consider a delayed implementation of the new federal rule.

### **Loss of Clean Water Act Related Funding and Revenues**

The proposed rules distinguish between non-regulatory pollution control measures and federal permitting programs. Because non-regulatory measures like grants and technical assistance play such an important role in individual state non-point source pollution control programs, the State requests that states retain the same level of access to federal technical and financial assistance to protect and improve water quality under existing EPA programs.

The State appreciates the EPA and USACE efforts to engage states throughout this process, and supports the proposed rule’s overall approach to providing clarity by defining easily recognizable jurisdictional limits, and striving for ease of implementation. Such cooperation and clarity furthers the objective of the CWA to restore and maintain the quality of the nation’s waters while respecting state and tribal authority over their own land and water resources.

Sincerely,



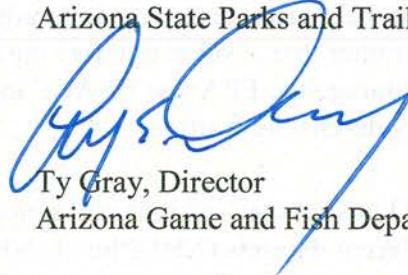
Lisa A. Atkins, Commissioner  
Arizona State Land Department



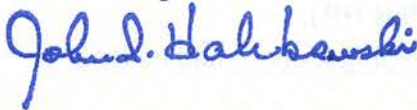
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