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Henry R. Darwin
Director

November 14, 2014

Mr. Ken Kopocis
Deputy Assistant Administrator for Water
United States Environmental Protection Agency
Office of Water
William Jefferson Clinton Building
1200 Pennsylvania Ave NW, MC 4101M
Washington, DC 20460

Ms. Jo Ellen Darcy
Assistant Secretary of Army (Civil Works)
U.S. Army Corps of Engineers
108 Army Pentagon, Room 3E446
Washington, DC 20310-0108

Via email to: ow-docket@epa.gov

***Re: Definition of "Waters of the United States" Under the Clean Water Act
Proposed Rule: Docket ID No. EPA-HQ-OW-2011-0880***

Dear Deputy Assistant Administrator Kopocis and Assistant Secretary Darcy:

The Arizona Department of Environmental Quality (ADEQ) appreciates the opportunity to provide the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (collectively the ("Agency" or "Agencies") with comments on the proposed national rulemaking *Definition of "Waters of the United States" Under the Clean Water Act* (79 Fed. Reg. 22188, April 21, 2014) (hereinafter, "Proposed Rule").

ADEQ is supportive of common sense environmental regulations that are supported by both law and science and that also result in measurable environmental protection or improvements. Notwithstanding the widely questioned legal standing of this Proposed Rule, regulations that also result in more predictable, consistent and timely Agency decisions regarding the jurisdiction of waters under the Clean Water Act are a shared goal.

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Comments Regarding the Rulemaking Process

Though the stated purpose of the Proposed Rule is to ensure protection of the nation's aquatic resources and make the decision making process "less complicated and more efficient", the Proposed Rule as developed and currently drafted may not increase the predictability of decisions and may possibly increase confusion. The lack of meaningful consultation with Arizona prior to proposal of the rule deprived the EPA and the Corps of the knowledge and context necessary to construct a regulation that is clear, understandable and usable by the states that are responsible for implementation of Clean Water Act Section 402 programs. Further, the construction of the Proposed Rule without the benefit of public comment to and finalization of the underlying *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (September 2013 External Review Draft)* report ("Connectivity Report") further erodes confidence that the Proposed Rule is supported by peer reviewed science.

For these reasons, ADEQ respectfully requests that the Proposed Rule be withdrawn and the rulemaking process resume only after careful consideration of all comments received to the Connectivity Report and only again after close collaboration with the states. Only in this way will a rule of national scope be developed that recognizes how regional environmental differences will inform jurisdictional decisions that also result in measurable environmental protection or improvements.

Specific Comments to the Proposed Rule

Tributaries, Other Waters, and Significant Nexus

While there are approximately 90,000 total stream miles in Arizona, water flows year around in only 3,500 of those miles. The vast majority of Arizona waterways (96%) flow only part of the time or only in direct response to precipitation events. Thus, how the Proposed Rule addresses "tributaries," "other waters," and the "significant nexus" of their connection to downstream waters of the United States is of intense interest to Arizona and other similarly situated dry states.

ADEQ has a long history of the effective protection of waters of the state both as a co-regulator with EPA in the administration of Clean Water Act Section 402 program via the Arizona Pollutant Discharge Elimination System (AZPDES), and through the control of pollutant discharges that may impact or threaten groundwater through the Aquifer Protection Permit (APP) program. We have carefully and deliberately developed and implemented these programs to work in concert to target the control of pollutant sources that cause or threaten to cause impacts to surface and groundwater of the state. As a result, we believe that expanding the jurisdiction of the Clean Water Act is unnecessary.

The Connectivity Report concludes that in the strictest sense, all waters are connected. While this is true, under the Clean Water Act Section 402 program not all individual connections will result in a measureable and meaningful (“significant”) impact that affects the chemical, physical, and biological integrity of the downstream water. ADEQ does agree that there are situations in which even relatively “low” levels of connectivity can be meaningful in terms of environmental impact depending upon the frequency, duration, and composition of pollutant discharged, and that the cumulative effects of multiple small discharges can have a measurable environmental impact.

However, under the Proposed Rule, all “tributaries” will be considered waters of the United States without consideration to the degree of impact to downstream waters or whether the regulation of such tributaries under the Clean Water Act would actually result in measurable environmental protection or improvements. “Other waters” on a case-by-case basis may be considered waters of the United States if they have a “significant nexus” to downstream waters, but just how the significance of that connection will be assessed by the Agencies is unclear.

To this point, the Connectivity Report upon which the Proposed Rule relies was reviewed by the Science Advisory Board (SAB). In their report dated October 17, 2014, the SAB observed that while all waters are indeed connected:

“In order to make the Report more technically accurate, the SAB recommends that the interpretation of connectivity be revised to reflect a gradient approach that recognizes variation in the frequency, duration, magnitude, predictability, and consequences of those connections.”

Further, the SAB recommended:

“...that the EPA considers expanding the brief overview of approaches measuring connectivity. This expansion would be most useful if it provided examples of the dimensions of connectivity that could most appropriately be *quantified*, ways to construct connectivity metrics, and the methodological and technical advances that are most needed.” (emphasis added)

ADEQ also recommends that decisions regarding jurisdiction and connection between individual “tributaries” and “other waters” under the Clean Water Act be, in part, subject to a case-by-case assessment of the significance of the connection that considers the gradient approach recommended by the SAB.

Key Terms

ADEQ respects the difficulty of developing a national rule that addresses regional variations in hydrology and the challenge to constructing definitions that will bring the desired clarity to Agency decision making processes. However, concerns regarding clear definitions of key terms keep us from supporting this regulation in its current form.

While key terms are defined in the Proposed Rule for the first time, these terms (and in some cases terms and phrases within those definitions and within the Proposed Rule) will require clear definition. Examples include (but are not limited to) the following:

- the definition of “floodplain” does not describe a clear bound on the extent of such features;
- “gullies” and “rills” are not waters of the United States in the Proposed Rule, but are also not clearly defined;
- within the definition of the word “neighboring,” the subjective phrase “shallow subsurface connection” is used without a description of just what “shallow” means;
- within the definition of “significant nexus,” additional subjective terms including “speculative” and “insubstantial” are proposed as a test for the effect to be significant. A more precise and less subjective definition will be required if the Proposed Rule is to meet the objective of providing clarity to Agency (and State) decision makers.

Exclusions

ADEQ appreciates the clarity added to the existing rule through the enumeration of waters that are not waters of the United States. There are some exclusions that will require clarification. Specifically, further clarity is needed on whether, when and what parts of stormwater collection systems fall within the exclusion of “waste treatment systems.”

Thank you for this opportunity to provide comments to the Proposed Rule. As we believe the numbers of proposed changes to respond to these and other stakeholder’s concerns will be large, we again urge the Agencies to withdraw the Proposed Rule. ADEQ stands ready to actively participate in a renewed rulemaking process that results in a future proposed rule that truly clarifies the definition of “waters of the US” as supported by law and science and that also considers the unique environmental conditions of arid states.

Sincerely,



Henry R. Darwin
Director