MEMORANDUM

Date: August 22, 2017

To: The Honorable Chair and Members
Pima County Board of Supervisors

From: C.H. Huckelberry
County Administrator

Re: **Resolution 2017-60 and Pima County Comments Regarding Proposed Rule: Definition of "Waters of the United States"**

At the August 21, 2017 meeting, the Board of Supervisors adopted Resolution 2017-60. This Resolution directed that Pima County submit comments on proposed changes to the Federal "Waters of the United States" rule and urge the Environmental Protection Agency to maintain the definition for "Waters of the United States" that would retain protections for headwaters, wetlands and intermittent and ephemeral streams according to the 2015 "Clean Water Rule."

Attached for your information and review is the County's formal comment letter, which will be posted today at Docket ID No. EPA-HQ-OW-2017-0203.

CHH/mjk

Attachment

c: Linda Mayro, Director, Sustainability and Conservation
Julia Fonseca, Environmental Planning Manager, Sustainability and Conservation
Sherry Ruther, Environmental Planning Manager, Sustainability and Conservation

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August 22, 2017

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Submitted via www.regulations.gov

Re: **Docket ID No. EPA-HQ-OW-2017-0203; Proposed Rule: Definition of "Waters of the United States" – Recodification of Pre-Existing Rules**

Introduction

These comments are being submitted in response to the proposed rule published on July 27, 2017 that would recodify Clean Water Act (Act) regulations in place prior to the 2015 Clean Water Rule.[1] According to the proposed rule, this is the first step in a two-step process "intended to review and revise the definition of "waters of the United States" consistent with Executive Order 13778, entitled, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule."[2]

The overarching goal of Executive Order 13778 is to rescind the Clean Water Rule and its definition of "Waters of the U.S." and replace it with a rule more consistent with late Supreme

[1] 82 Fed. Reg. 34899 (July 27, 2017).
[2] *Id.*

Court Justice Antonin Scalia's opinion in *Rapanos v. United States.*[3] This first step proposes to "simply codif[y] the current legal *status quo* while the agencies engage in a second substantive rulemaking to reconsider the definition of "waters of the United States."[4] According to the proposed rule, it is "intended to ensure certainty as to the scope of CWA jurisdiction on an interim basis as the agencies proceed to the second step: A substantive review of the appropriate scope of the "waters of the United States."[5]

We strenuously oppose this proposal for the following reasons:

- It is an attempt to avoid due process mandated for federal rulemaking;
- It will increase regulatory uncertainty; and
- It will overturn the widely accepted standard for "Waters of the U.S."

We appreciate your consideration of our comments.

Background: "Waters of the U.S." and the Clean Water Rule

The term "waters of the U.S." is found in the CWA and dictates the scope of the CWA's protections for surface water. The CWA was signed in 1972 "to restore and maintain the chemical, physical and biological integrity of the Nation's waters;"[6] one of the CWA's primary tools to achieve this purpose is the regulation of the discharge of pollutants, including dredged or fill material, into "navigable waters."[7] The CWA defines "navigable waters" as "waters of the United States, including the territorial seas."[8]

The CWA is largely silent on the definition of "waters of the U.S.," and it has been left to agencies and the courts to determine which waterbodies fall within this category. The debate has been especially controversial as it relates to whether and how the term applies to waterbodies that are not considered "navigable in fact" themselves but are directly or indirectly connected to – and capable of impacting – waters considered "navigable in fact."

The 2015 Clean Water Rule was promulgated in order to define "waters of the U.S." and clarify the significant confusion surrounding the term. It included protections for streams and tributaries that may be intermittent or ephemeral but that have evidence of water flow such

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[3] Executive Order 13778, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule," February 28, 2017; 82 Fed. Reg. 12497 (March 3, 2017).
[4] 82 Fed. Reg. at 34900.
[5] *Id.* at 34901.
[6] Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1251 et seq.
[7] *See Id.* at §1311(a).
[8] *See Id.* at §1362(7)

as banks and high-water marks and that "contribute directly or indirectly to a traditional navigable water."[9]

The Clean Water Rule was stayed by the U.S. Court of Appeals for the 6th Circuit, but not for any substantive reason. Rather, it was stayed because of a procedural question regarding whether the 6th Circuit has jurisdiction to hear the case; the Rule was only stayed temporarily "pending judicial review" of this issue.[10] The 6th Circuit made no findings regarding whether the scope of federal jurisdiction outlined under the Clean Water Rule is appropriate.

Pima County's Interest

Federal protections for intermittent or ephemeral streams are especially important in arid regions of the western United States, including Arizona, where the vast majority of streambeds do not flow year-round. History has shown that pollutants entering dry streambeds can contaminate our drinking water supply, and the very origins of the Arizona Department of Environmental Quality (ADEQ) can be traced to several prominent water pollution cases in Pima County.

Our residents rely on surface water, including the Colorado River, as well as ground water, with the infiltration of surface water into dry streambeds being one of the principal mechanisms for replenishing the state's aquifers. This is why Pima County, and most other local agencies, recognize the state and federal interest in regulating the discharge of pollutants into streambeds, headwaters and wetlands, even where water is not present year-round.

Changes to the scope of the CWA's jurisdiction would be particularly consequential in Arizona. While other states have the authority to protect the quality of streams not subject to the CWA's jurisdiction, Arizona does not. Here, state legislation forbids state agencies from exceeding the federal regulatory framework established by the CWA; in other words, the "floor" the CWA intended to provide the states is now the "ceiling" for Arizona, beyond which state regulations may not exceed.[11]

Because of this, if federal protections are reduced for ephemeral or intermittent streams, the vast majority of Arizona's streams will have no water quality protections whatsoever. The mere presence of an ephemeral reach between a pollutant source and downstream flowing water could prevent the application of federal protections, possibly putting entire watersheds at risk.

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[9] *Id.* at 37058.
[10] See *In re U.S. Dep't. of Def. and U.S. Envtl. Protection Agency Final Rule: Clean Water Rule*, No. 15–3751 (lead), slip op. at 6.
[11] *See* A.R.S. 49-203(A)(2); *See also* ARS 49-255.01.

According to the EPA, 117 million Americans – one in three people – got their drinking water from streams that lacked clear protection prior to the Clean Water Rule.[12] In fact, the agency estimated that "up to 60% of the nation's streams and millions of acres of wetlands lacked clear protection from pollution prior to the Clean Water Rule."[13] This proposal to "rescind or revise" the Clean Water Rule, which protects intermittent and ephemeral streams, and replace it with a much narrower definition of "waters of the U.S." that does not include such protections, would have disastrous consequences for Pima County's drinking water supply and could compromise the health and integrity of our watersheds.

The Proposed Rule is an Attempt to Avoid Due Process Mandated for Federal Rulemaking

The agencies claim this proposed rule will "simply codif[y] the current legal *status quo* while the agencies engage in a second substantive rulemaking."[14] However, the stated objective and intended result of this proposed rule is the repeal the Clean Water Rule, which was finalized through the appropriate rule-making process on June 29, 2015. The agencies expressly acknowledge this intent when they state, "In this first step, the agencies are proposing as an interim action to repeal the 2015 definition of ''waters of the United States''[15]

The definition of "waters of the United States" is the heart of the 2015 Clean Water Rule, and the sole reason for its promulgation. According to the Rule itself, "This final rule does not establish any regulatory requirements. Instead, *it is a definitional rule that clarifies the scope of ''waters of the United States''* consistent with the Clean Water Act (CWA), Supreme Court precedent, and science."[16] For the agencies to claim this proposed rule is something other than a proposal to fully repeal the Clean Water Rule is disingenuous at best.

Yet, that is exactly what they seem to be claiming here. The agencies seem to be deliberately obfuscating the fact that they are proposing to repeal the Clean Water Rule by framing it as a "recodification of existing rules" and expressly rejecting comments related to repealing the current law. The proposed rule states, "the agencies are not at this time soliciting comment on the scope of the definition of ''waters of the United States'' that the agencies should ultimately adopt in the second step of this two-step process."[17] In other words, the agencies are proposing to repeal the Clean Water Rule, but will not accept comments on the substance

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[12] Environmental Protection Agency, "Clean Water Rule Protects Streams and Wetlands Critical to Public Health, Communities, and Economy," News Release, May 27, 2015.
[13] William Yardley, "With new EPA water rule, Obama again takes executive action on environment," Los Angeles Times, May 25, 2015.
[14] 82 Fed. Reg. at 34900.
[15] *Id.* at 34902.
[16] 80 Fed. Reg. 37054 (June 29, 2015) (emphasis added).
[17] 82 Fed. Reg. at 34903.

of the Rule until the second step of this process is initiated, *which would be after the Rule is already repealed*.

This is a clear violation of the Administrative Procedure Act (APA). The APA requires agencies to go through the federal rulemaking process when agencies are formulating, amending or repealing a rule.[18] This means that if agencies want to repeal a current law, they must engage in a rulemaking process that provides the public with notice of the intent to repeal a law and allows the public to comment on the proposed repeal, including on the substance of the law at issue and the impacts of repealing it. Here, agencies are only soliciting comments on "whether it is desirable and appropriate to re-codify in regulation the *status quo* as an interim first step pending a substantive rule-making to reconsider the definition of "waters of the United States" and the best way to accomplish it."[19]

This proposed rule reflects an unquestionably inappropriate approach to reconsidering the definition of "waters of the U.S." If the EPA and the Corps want to repeal the Clean Water Rule, they must engage in a meaningful rulemaking process under the law that provides notice of intent to repeal the law and accepts public comments regarding the repeal of the law. The final Clean Water Rule reflected input received during over 400 meetings nationwide and in "over one million public comments...the substantial majority of which supported the rule."[20] With this proposed rule, the agencies would disregard this significant public input and repeal a widely supported law without providing the due process mandated by the APA, clearly violating both the spirit and the letter of the law.

The Proposed Rule Increases Regulatory Uncertainty

This proposed rule would replace the Clean Water Rule and its definition of "waters of the U.S." with "the exact regulatory text that existed prior to the 2015 rule, which reflects the current legal regime under which the agencies are operating pursuant to the 6th Circuit's order."[21] According to the proposed rule, "Proposing to recodify the regulations that existed before the 2015 Clean Water Rule will provide continuity and certainty for regulated entities, the States, agency staff, and the public."[22]

Re-codifying prior regulations, and in turn scrapping the Clean Water Rule wholesale, will not provide certainty regarding the scope of federal jurisdiction, as the proposed rule claims. The definition of "waters of the U.S." found in the prior implementing regulations provides no

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[18] *See* 5 U.S.C. §551(5), §553
[19] 82 Fed. Reg. at 34903.
[20] 80 Fed. Reg. at 37057.
[21] 82 Fed. Reg. at 34900.
[22] *Id.* at 34899.

guidance whatsoever regarding how to determine whether a waterbody falls under this definition, which is precisely what led to the decades of confusion the 2015 Clean Water Rule was meant to remedy. The proposed rule indirectly acknowledges this by directing agencies to also use "applicable agency guidance documents," as well as "Supreme Court decisions and longstanding practice" in addition to the original regulatory definition in order to implement the regulations.

In fact, that this proposed rule is only intended to be an interim rule while the agencies "conduct a substantive re-evaluation of the definition of "waters of the United States" actually injects a far deeper level of uncertainty into the implementation of CWA protections and all but guarantees even more controversy with regard to this issue. Regulated parties and other interested stakeholders have no idea how long this interim period will be or what changes to the rule will come next. This proposed rule will clearly exacerbate the confusion and uncertainty, not provide relief from it.

The Proposal Would Overturn Widely Accepted Standard for "Waters of the U.S."

As stated in this proposed rule, the overarching objective of the two-step process it describes is to rescind the Clean Water Rule and replace it with a rule more consistent with the late Justice Scalia's plurality opinion in *Rapanos v. United States.*[23] Crafting a rule that aligns with Scalia's "continuous surface water connection" standard, rather than with the far more widely used "significant nexus" standard as described in Justice Anthony Kennedy's concurring opinion in *Rapanos,* goes against the vast bulk of court opinions and agency guidance developed to clarify the definition of "waters of the U.S."

U.S. Supreme Court decisions, peer-reviewed science and practical experience have all demonstrated that to achieve the purpose of the CWA, the term "waters of the U.S." must not only include those waters considered "navigable in fact," but must also include upstream waters, including headwaters, tributaries and wetlands directly or indirectly connected to traditionally navigable waters and have the potential to affect the chemical, physical and biological integrity of those waters.[24] The 2015 Clean Water Rule acknowledged this fact and included protections for streams and tributaries that may be intermittent or ephemeral but that have evidence of water flow such as banks and high-water marks and that "contribute directly or indirectly to a traditional navigable water."

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[23] *See Id.* at 34902; *See also* Executive Order 13778, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule," February 28, 2017; 82 Fed. Reg. 12497 (March 3, 2017).
[24] *See* 80 Fed. Reg. 37054, 37055 (June 29, 2015).

Unfortunately, the late Justice Scalia's "continuous surface water connection" standard does not acknowledge this fact. Under the "continuous surface water connection" standard, CWA jurisdiction would extend to "only those relatively permanent, standing or continuously flowing bodies of water ... described in ordinary parlance as "streams, oceans, rivers, and lakes....The phrase does not include channels through which water flows intermittently or ephemerally or channels that periodically provide drainage for rainfall."[25]

Under Justice Kennedy's "significant nexus" standard, "waters of the U.S." includes wetlands or other non-navigable waterbodies "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as "navigable.""[26] In contrast to Justice Scalia's standard, Justice Kennedy's standard does not preclude finding jurisdiction for intermittent or ephemeral waters. As challenging as it can be to determine if a "significant nexus" exists, Justice Kennedy's standard has the advantage of having been tested in court and in practice. The "significant nexus" standard has wide acceptance from both the courts and the agencies, and it continues to be used when implementing Clean Water Act protections today.

Subsequent to the *Rapanos* case, seven federal appellate courts have heard the issue of which *Rapanos* test is controlling. The U.S. Court of Appeals for the 7th, 9th and 11th Circuits have all held that Kennedy's "significant nexus" standard test is controlling.[27] The 1st and 8th Circuits have held that either standard may be used,[28] and the 5th and 6th Circuits have avoided the question altogether.[29] Only a single lower court has held that Scalia's "continuous surface water connection" is controlling.[30] Similarly, post-*Rapanos* agency guidance also strongly favors the "significant nexus" standard and directs agencies to use it when making fact-specific determinations about CWA jurisdiction; this guidance includes no mention of the late Justice Scalia's standard.[31]

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[25] *Rapanos v. United States,* 547 U.S. 715, 739 (2006).
[26] *Id.* at 779.
[27] *United States v. Gerke*, 464 F.3d 723 (7th Cir. 2006); *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007); *United States v. Robison*, 521 F.3d 1319 (11th Cir. 2008)
[28] *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006); *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009).
[29] *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008); *United States v. Cundiff*, 555 F.3d 200 (6th Cir. 2009)
[30] *United States v. Chevron Pipe Line Co.,* 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006).
[31] *See* Environmental Protection Agency and U.S. Army Corps of Engineers, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States,*"

It is puzzling that the agencies would suddenly reverse course and favor the "continuous surface water connection" standard when it is not consistent with the bulk of existing law nor with their own guidance. Using Scalia's untested standard would only increase the uncertainty already being fueled by this proposed rule and the two-step process it is initiating.

Conclusion

For many decades, Pima County has played an active role in the discussion around the scope of protections under the CWA. In 2008, the Corps made a traditional "navigable waters" determination for the Santa Cruz River, meaning it is considered "navigable in fact;" as such, the ephemeral or intermittent streams and tributaries that are directly or indirectly connected to the Santa Cruz are also afforded CWA protections. This designation was affirmed by the EPA, as well as the Pima County Board of Supervisors, which passed Resolution 2008-209 recognizing that the Santa Cruz River is an international (Mexico) and interstate (Tohono O'odham Nation) stream.

The Santa Cruz River is just one example of how rescinding the 2015 Clean Water Rule and revising the definition of "waters of the U.S." to align with Scalia's much narrower and far less accepted interpretation of the CWA's jurisdiction will only complicate the implementation of the CWA and will result in even more conflict and controversy over this issue.

Pima County has much at stake in this issue. We encourage the EPA and the Corps to take all available steps to ensure continued federal water quality protections for ephemeral stream systems from which we derive most of our local water supply. We will continue to be part of the discussion to ensure our concerns are considered during this rulemaking process. We appreciate your consideration.

Sincerely,

C.H. Huckelberry
County Administrator

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