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# Board of Supervisors Memorandum

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August 21, 2017

**Resolution 2017-\_\_\_ in Support of Retaining the "2015 Clean Water Rule"  
Definition of Waters of the United States and  
Protections for Intermittent and Ephemeral Streams**

## Introduction

Resolution 2017-\_\_\_ in Support of Retaining the "2015 Clean Water Rule" Definition of Waters of the United States and Protections for Intermittent and Ephemeral Streams is provided pursuant to the request of Board of Supervisors Chair Sharon Bronson.

## Background

On February 28, 2017, President Donald Trump signed Executive Order 13778, "*Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule.*" This Executive Order directs the Environmental Protection Agency (EPA) and the US Army Corps of Engineers (Corps) to "rescind or revise" the 2015 Clean Water Rule and redefine the term "waters of the United States."

On July 27, 2017, the EPA and the Corps published a proposed rule that would re-establish the definition of "waters of the US" that was in place prior to the Clean Water Rule. This is the first step in a two-step process that will result in a "substantial re-evaluation of the definition of 'waters of the United States'" per the Executive Order. The agencies are accepting comments on this proposed rule through August 28, 2017.

The term "waters of the US" is found in the Clean Water Act and dictates the scope of the Act's protections for surface water. The purpose of the 2015 Clean Water Rule was to define the term "waters of the US" and clarify more than a decade of confusion surrounding which waterbodies are included in this category. The 2015 Rule included protections for streams and tributaries that may be intermittent or ephemeral but that have evidence of water flow and that "contribute directly or indirectly to a traditional navigable water."

With this newly proposed rule, the Administration seeks to officially rescind the Clean Water Rule and replace it with a rule that redefines this term "waters of the US" in a much narrower fashion, potentially removing protections for intermittent and ephemeral streams, which could have a significant impact on Pima County's watersheds and drinking water supply.

Resolution 2017-\_\_\_ would direct County staff to develop and submit comments on this proposed rule and urge the agencies to maintain the 2015 definition for "waters of the US" that retains protections for headwaters, wetlands, and intermittent and ephemeral streams,

The Honorable Chair and Members, Pima County Board of Supervisors

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which make up the vast majority of Arizona’s and Pima County’s streams and waterways. This is especially relevant in arid regions of the western United States, including Arizona, where the vast majority of streambeds are ephemeral and do not flow year-round. Our residents rely on surface water, including the Colorado River, as well as groundwater, with the infiltration of surface water into dry streambeds being one of the principal mechanisms for replenishing the State’s aquifers.

History has shown that pollutants entering dry streambeds can and do contaminate our drinking water supply, and the origin of the Arizona Department of Environmental Quality can be traced to several prominent water pollution cases in Pima County. 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.

#### Importance of Retaining Current Protections

Any reduction to the scope of the Act’s protections would be particularly consequential for Arizona. While other states have the authority to protect the quality of streams not subject to the Act’s jurisdiction, Arizona does not. Here, State legislation forbids State agencies from exceeding the federal regulatory framework established by the Act. In other words, the “floor” that the Act intended to provide the states is now the “ceiling” for Arizona beyond which State regulations may not exceed.

As a result, if federal protections are reduced for ephemeral or intermittent streams, the vast majority of Arizona’s streams will have no water quality protections. 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.

According to the EPA, 117 million Americans – one in three people – get their drinking water from streams that lacked clear protection prior to the Clean Water Rule. In fact, the agency estimated that “up to 60 percent of the nation’s streams and millions of acres of wetlands lacked clear protection from pollution prior to the Clean Water Rule.” The Administration’s efforts to “rescind or revise” the Clean Water Rule and replace it with what will likely be a much narrower definition of “waters of the US” could have disastrous consequences for our drinking water supply and could compromise the health and integrity of our watersheds.

#### Conclusion

For many decades, Pima County has played an active role in the discussion around the scope of protections under the Clean Water Act. In 2008, the Corps made a traditional “navigable

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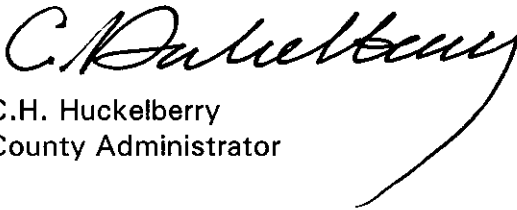
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waters" determination for the Santa Cruz River; meaning it is considered "navigable in fact," and ephemeral or intermittent streams and tributaries that are directly or indirectly connected to the Santa Cruz are also afforded Clean Water Act protections. This designation was affirmed by the EPA, as well as the 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.

Recommendation

I recommend the Board of Supervisors approve Resolution 2017-\_\_ in Support of Retaining the "2015 Clean Water Rule" Definition of Waters of the United States and Protections for Intermittent and Ephemeral Streams.

Respectfully submitted,



C.H. Huckelberry  
County Administrator

CHH/mjk – August 9, 2017

Attachment

## RESOLUTION 2017 - \_\_\_\_

### RESOLUTION OF THE PIMA COUNTY BOARD OF SUPERVISORS FOR

#### The Pima County Board of Supervisors finds:

1. On February 28, 2017, President Donald Trump signed Executive Order 13778, "*Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule,*" which directs the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps), to "rescind or revise" the "Clean Water Rule" and re-define the term "waters of the U.S.;"<sup>1</sup> and
2. The purpose of the 2015 "Clean Water Rule" is to define and clarify the term "waters of the U.S.," which determines the scope of waters protected under the Clean Water Act (Act);<sup>2</sup> and
3. The Act was signed into law in 1972 "to restore and maintain the chemical, physical and biological integrity of the Nation's waters;"<sup>3</sup> and
4. One of the Act's primary tools to achieve this purpose is the regulation and limitation of the discharge of pollutants, including dredged or fill material, into "navigable waters";<sup>4</sup> and
5. The Act defines the term "navigable waters" as "waters of the United States, including the territorial seas;"<sup>5</sup> and
6. U.S. Supreme Court decisions, peer-reviewed science, and practical experience have all demonstrated that to achieve the purpose of the Act, 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 that are directly or indirectly connected to traditionally navigable waters and have the potential to affect the chemical physical, and biological integrity of those waters;<sup>6</sup> and
7. The "Clean Water Rule" includes protections for streams and tributaries that may be intermittent or ephemeral but that have evidence of water flow such as banks and high water mark and that "contribute directly or indirectly to a traditional navigable water;"<sup>7</sup> and

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<sup>1</sup> "Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule," February 28, 2017. (<https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic>)

<sup>2</sup> 80 Fed. Reg. 37054 (June 29, 2015).

<sup>3</sup> Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1251 *et seq.*

<sup>4</sup> *See id.* at §1311(a).

<sup>5</sup> *See id.* at §1362(7)

<sup>6</sup> *See 80 Fed. Reg. at 37055.*

<sup>7</sup> *Id.* at 37058.

8. The final “Clean Water Rule” reflects input received during over 400 meetings nationwide and in “over 1 million public comments ... the substantial majority of which supported the rule;”<sup>8</sup> and
9. The EPA estimated that “up to 60 percent of the nation’s streams and millions of acres of wetlands lacked clear protection from pollution prior to the Clean Water Rule;”<sup>9</sup> and
10. 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;<sup>10</sup> and
11. For many decades, Pima County has played an active role in the discussion around the scope of protections under the Clean Water Act, as history has shown that pollutants entering dry riverbeds can contaminate drinking water supplies, and indeed the very origins of the Arizona Department of Environmental Quality can be traced to several prominent water pollution cases in Pima County; and
12. Pima County residents rely on both surface water and groundwater derived from infiltration of runoff, as well as the Colorado River, for their drinking water; and
13. Because the infiltration of water into dry streambeds is one of the primary mechanisms for replenishing the state’s aquifers, most local agencies recognize the state and federal interest in regulating discharge of pollutants to streambeds, headwaters and wetlands, even where water is not present year-round; and
14. If Clean Water Act protections are reduced for intermittent and ephemeral waterbodies, the vast majority of Arizona’s streams will have no water quality protections whatsoever because the state’s programs are dependent on the federal jurisdiction defined by “waters of the U.S.”; and because Arizona’s legislature has prohibited greater protections than are afforded by the Clean Water Act; and
15. On July 27, 2017, the EPA and the Corps published a proposed rule that would re-establish the definition of “waters of the U.S.” that was in place prior to the “Clean Water Rule”, the first step in a two-step process that will result in a “substantial re-evaluation of the definition of “waters of the United States” per Executive Order 13778; and
16. The agencies are accepting comments on this proposed rule through August 28, 2017.

NOW, THEREFORE BE IT RESOLVED, the Pima County Board of Supervisors:  
directs that:

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<sup>8</sup> *Id.* at 37057.

<sup>9</sup> William Yardley, “With new EPA water rule, Obama again takes executive action on environment,” Los Angeles Times, May 25, 2015.

<sup>10</sup> “Clean Water Rule Protects Streams and Wetlands Critical to Public Health, Communities, and Economy,” EPA News Release, May 27, 2015.

1. County staff shall develop and submit comments on the proposed rule that would re-codify the previous definition of "waters of the U.S.;" and

2. Pima County, in its comments on the proposed rule, will the urge the EPA and Corps to maintain the definition for "waters of the U.S." that would retain protections for headwaters, wetlands and intermittent and perennial streams according to the 2015 "Clean Water Rule."

Passed, adopted and approved, this \_\_\_ day of \_\_\_\_\_, 2017.

\_\_\_\_\_  
Sharon Bronson, Chair  
Pima County Board of Supervisors

ATTEST:

APPROVED AS TO FORM:

\_\_\_\_\_  
Julie Castañeda, Clerk of the Board

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Andrew Flagg, County Attorney