

September 2, 2021

Environmental Protection Agency
Washington D.C.

Re: Docket No.: EPA-HQ-OW-2021-0328

Dear Sir or Madam:

On August 4, 2021, the U.S. Army Corps of Engineers (USACE) and the Environmental Protection Agency (EPA) published a pre-proposal Request for Recommendations concerning a new rule governing Waters of the United States (WOTUS). 86 Fed. Reg. 41911. We hope the proposed rule will both further “restore the chemical, physical, and biological integrity of the nation’s waters” (33 U.S.C. § 1251), and respect the constitutional, statutory, and judicial limitations on the legal authority of the federal government to regulate the waters of the United States.

Only by thoroughly considering all the relevant federal and state laws, science, and facts, plus the practicalities of implementing a program to protect our nation’s precious waters, will this further effort to define waters of the United States have any chance to minimize further controversy and allow the nation to focus on the important work of protecting the waters. To date, this has not happened with either democratic or republican administrations.

Today, protecting the waters or private property interests often ends up as court cases. There is strong division between those that would like to extend federal jurisdiction to the maximum extent and those who would like to limit that jurisdiction. Protecting the resource necessarily suffers in the absence of regulatory certainty about the scope of federal jurisdiction. We urge USACE and the EPA to place actual resource needs, not legal definitions, at the center of its effort to devise a new rule, while following the controlling legal precedent.

Generally, ephemeral washes provide for a large portion of basin groundwater recharge, which is an issue of state regulation. They also are important for regulating stormwater and mitigating harm to adjoining properties. In some instances, throughout the country, these washes may carry significant volumes of water to traditionally covered waters under the Clean Water Act (CWA).

While ephemeral features are not devoid of resource values, are they of sufficient importance (particularly in Arizona) to compel federal regulation? Is there no room for states to address this class of waters in a federal system for regulating waters? To answer these questions, the issue of whether the federal government has the legal authority to regulate ephemeral waters must first be answered.

Legal Framework

As is well known, federal authority to regulate waters of the United States is derived from the Commerce Clause of the U.S. Constitution. Congress enacted the Clean Water Act based on this clause, and then authorized the regulation of certain activities affecting “navigable waters.” While the contours of the relationship between “navigable waters” and “commerce” are not inherently obvious, a connection in law exists by the use of these terms in both the statute and the Constitution. “Navigable waters” qualifies, though ambiguously, the federal authority pursuant to the Commerce Clause with respect to regulation of waters. Nevertheless, Congress then defined navigable waters as WOTUS which in combination with navigable is broader than merely navigable, but still limits federal authority to something short of all waters of the United States.

The existence of some limit on federal authority to regulate waters of the United States was confirmed by Justice Kennedy in Rapanos v. United States, 547 U.S. 715 (2006). He articulated his often referred to “significant nexus” test which provides that WOTUS must “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’” for the federal government to be authorized to regulate them. This test is used by proponents of the broadest possible assertion of federal jurisdiction to support their claims. And indeed, virtually all waters have some kind of nexus with other covered waters.

However, Justice Kennedy did not formulate the “significant nexus” test in a vacuum. He set it firmly in the context of the constitutional and statutory limitations on federal power over the waters. He viewed the USACE’s then existing standard for tributaries as

“...seem[ing] to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it — preclude[ing] its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood.”

In other words, waters that are remote from any navigable-in-fact water and carry only minor water-volumes towards them are outside the reach of federal jurisdiction. The combination of the significant nexus test with the requirements for reasonable proximity and more than minor water volumes tracks the legal limits on federal authority and directly inform the validity of federal assertion of jurisdiction over ephemeral features in Arizona.

Ephemeral Features in Arizona

The State of Arizona has a unique interest in the scope of federal jurisdiction over WOTUS. The EPA estimates that 94% of the waters in Arizona are ephemeral or intermittent. Many of these features are bone dry and rarely transport water to intermittent or perennial tributaries. People living in these areas

wonder how the federal government came to assume blanket authority to regulate activities under the Clean Water Act when overwhelmingly there is no water involved. At a minimum, any federal assertion of authority over ephemeral features must be credible in terms of legal authority and the necessity of exercising the authority to protect the chemical, physical, and biological values for which the CWA was enacted.

Submitted with this comment is a paper published in the Water Report (June 2015), entitled the “2020 WOTUS Rule: Analysis of the 2020 WOTUS Rule and Policy Implications for Ephemeral Washes in Arizona.” The paper reviews the congressional and judicial history of the WOTUS rule and focuses on its principal effect for Arizona on the scope of federal authority to regulate ephemeral features in the State by examining two projects in particular: the Sierrita Natural Gas Pipeline, and the Villages at Vigneto. In both cases, the projects were constructed in areas intersecting numerous ephemeral washes. None of the washes connected with larger tributaries that would have been jurisdictional under the Trump Administration rule. Water passed through them for only a short period after a major storm event. They did not support biological activity. The risk of pollution flowing down the washes to tributaries was negligible to non-existent.

The characterization of the physical attributes of ephemerals in Arizona is so uniform as to merit categorical exclusion from a WOTUS definition. Concerns have been voiced that these waters will then not be protected under WOTUS. This kind of political assertion, not based on facts about resource impacts, or science, or the law, should have no room in the federal government’s consideration of a new rule. Do ephemerals in Arizona contribute significant volumes of water to jurisdictional waters? Are they reasonably proximate to jurisdictional waters? Clearly, the ephemerals in the state are very minor water features in terms of protecting the environmental values of traditionally navigable waters.

Apart from the legal limitations on federal authority over these waters, there are also larger policy issues to be considered in deciding whether to include Arizona ephemerals in a new WOTUS rule. USACE and EPA should evaluate regulation of Arizona ephemerals in the context of all clean water problems they must address both in the country and in the region. Does regulation of these ephemerals rise to the level of a priority issue to be addressed? Assuming the federal government has limited resources, should it not be focusing on the waters most at risk? Given the minor volumes of water and distance to jurisdictional waters of Arizona’s ephemeral features, it makes sense for the federal government to invest resources where they can actually make a difference in improving water quality in the region and the country. The resources should not be directed to these types of ephemeral features.

Additionally, Governor Ducey signed into law the Surface Water Protection Program in May 2021 authorizing the state to fill the gaps in water protection left by the Trump Administration WOTUS rule. The Arizona Department of Water Quality is working on a draft list of protected waters that will be made available for public comment before being finalized. The Clean Water Act envisions an important role and partnership with states in water protection. Not all members of the public will agree with the State’s delineation of authority in the legislation or the forthcoming rule. In a democracy, the party in power makes the rules which the public is then bound to follow. We call on the EPA and USACE to respect the work of Arizona in this matter as fulfilling the appropriate role for the state under the CWA in protecting waters within its borders.

There have been public requests for complete federal regulation over all ephemeral features in the country, however, such a claim for authority does not track with the law in Arizona, nor the facts concerning the contributions of these features to traditionally navigable waters. Neither does it track the science.

Science Considerations

In connection with preparation of the Obama Administration's 2015 WOTUS Rule, EPA's Science Advisory Board (SAB) reviewed scientific reports from over 1,200 published and peer-reviewed journal articles and over one million solicited comments. In issuing its report on this review, the SAB confirmed, among other findings, that:

- Waters are connected in myriad ways, including physical connections and the hydrologic cycle; however, connections occur on a continuum or gradient from highly connected to highly isolated.
- These variations in the degree of connectivity are a critical consideration to the ecological integrity and sustainability of downstream waters.
- Tributary streams, including perennial, intermittent, and ephemeral streams, are chemically, physically, and biologically connected to downstream waters, and influence the integrity of downstream waters.

Each of these summations of science concerning waters of the United States are important. As proponents of the broadest assertion of federal jurisdiction point out, the SAB recognized that all streams are connected. What they rarely recognize is that the SAB also found that the variations in the degree of connectivity are a "critical consideration" to the ecological integrity and sustainability of downstream waters. Most if not all ephemeral features in Arizona are negligibly connected to downstream waters.

Conclusion

The guidance offered by Justice Kennedy and the Science Advisory Board was most recently ignored by the Federal Court for the District of Arizona in [Pasqua Yaqui Tribe v. U.S. Environmental Protection Agency](#), No. CV-20-00266-TUC-RM (August 30, 2021). In support of its decision, the Court cited Justice Kennedy's significant test, but made no mention of the limitations he put around the test of water of volume and proximity to traditionally navigable waters. It also ignored the conclusion of the SAB that the variations in the degree of connectivity are a critical consideration in the integrity and sustainability of downstream waters. Such haphazard rulings do little to promote a stable regime of regulation to protect our nations' waters.

A proposal to rewrite the WOTUS rule that tracks the law would exclude minor features from federal jurisdiction. A proposal that tracks science would recognize that minor waters are not necessarily critical to the ecological integrity and sustainability of downstream waters. In the opinion of the Science Advisory Board must be included into the definition of WOTUS to maintain the “ecological integrity and sustainability of downstream waters.”

Any regulatory program will be more successful and enjoy greater compliance if the public believes in it because it is credible. Stable regulatory environments also promote compliance. While there will always be members of the public who reject any government regulation, the goal for the program should be to remain faithful to the law, facts, and science to gain the most legitimacy and acceptability possible. For these reasons, we urge your forthcoming rulemaking proceedings to track the law, facts, and science as closely as possible to give the strongest possible support to the environmental integrity of the waters of the United States.

Thank you for your attention to our concerns.

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