

February 18, 2019

Note to George Ruyle

From: Jeff Eisenberg

Subject: Stakeholder Solicitation to Comment on New WOTUS Rule

The U.S. Environmental Protection Agency published a proposed rule on February 14, 2019, defining Waters of the United States (WOTUS) which overturns the definitional rule issued by the Obama Administration in 2015. Comments may be submitted to the EPA by April 15 via the rulemaking website, email, postal mail, or hand delivery. The proposed change in definitions would mark a significant reduction of the federal government's jurisdiction over waters in Arizona. It is less clear what the proposed shift in jurisdiction towards the state actually means for management of water quality and quantity in the state.

In the Federal Register notice publishing the 2015 rule, the Administration observed that “tributaries and adjacent waters play an important role in maintaining the chemical, physical and biological integrity of traditional navigable waters, interstate waters, and the territorial seas—and of other jurisdictional waters—because of their hydrological and ecological connections to and interactions with those waters. Therefore, it is appropriate to protect all tributaries and adjacent waters, because the tributaries, adjacent waters, and the downstream traditional navigable waters, interstate waters, and the territorial seas function as an integrated system.” And this is what they did. The 2015 rule defined Waters of the United States as including all upstream tributaries that physically connected to traditionally navigable waters, and the wetlands adjacent to these tributaries.¹

The new proposed rule cuts back on this broad claim of federal jurisdiction. While it is true that tributaries and adjacent waters play an important role in maintaining the chemical, physical, and biological integrity of traditional navigable waters, the scientific relationship of these waters and their properties does not change the legal requirement that federal jurisdiction over the waters is predicated on navigability. It is this Administration's view that the requirement of navigability imposes a limit on federal power to claim jurisdiction over waters in the United States.

This change in understanding about the scope of federal jurisdiction brings a significant change to the number of waters over which the United States would claim jurisdiction in Arizona under the proposal. Most significantly, the proposal excludes ephemeral streams from federal jurisdiction. These are streams that flow only in direct response to precipitation. Intermittent streams, which are those with

¹ It is important to note that the 2015 rule is not actually in effect in Arizona due to a preliminary injunction issued in litigation over the rule. Accordingly, Arizona is presently governed by the pre-2015 definition of WOTUS as embodied in 1986 federal regulations and modified by Supreme Court caselaw. These regulations largely require a case-by-case determination of whether a specific water body is: traditionally navigable or an adjacent wetland; relatively permanent tributary to a navigable water and abutting wetlands; or non-permanent tributaries that have a “significant nexus” with navigable waters and adjacent wetlands to such tributaries if the wetlands have a “significant nexus” with navigable waters.

surface water flowing continuously during certain times of a typical year, continue to be claimed as jurisdictional by the United States under the proposal. Of the surface waters flowing in Arizona, 94% are either intermittent or ephemeral which is the highest percent of these categories of streams of any state in the country according to the National Hydrography Dataset compiled by the U.S. Geological Service. The federal government estimates that 35% of waters in arid western states are ephemeral and will be excluded from jurisdiction under the proposed rule.

The proposal to limit the scope of jurisdiction of tributaries could also have significant impact on the number of wetlands and ditches in the state that will be subject to federal management. Wetlands are jurisdictional if they are adjacent to jurisdictional waters such as navigable waters, or perennial or intermittent tributaries. Wetlands adjacent to ephemeral streams are excluded. Ditches constructed in tributaries or in jurisdictional wetlands are jurisdictional, with some more minor exceptions. Ditches on farms constructed in uplands are excluded. Groundwater is uniformly excluded from federal jurisdiction under the proposal as it was under the 2015 rule.

It is clear this proposal would have a significant impact on the numbers of waters the federal government regulates in Arizona should it be finalized. What is less clear is the impact the proposed reduction in federal jurisdiction would have on the actual management of either water quality or quantity in Arizona. To understand the impact, major water issues and activities in the state would have to be identified as would the federal and/or state response to the issues and activities. It may be the federal government has played a minimal or significant role in managing state waters. For example, one could ask how this proposal would affect regulation of new residential construction in which both the state and federal governments could have overlapping or parallel responsibilities for management. Examples of possible scenarios involving state and federal regulation include:

- Federal and state authorities are involved in regulating the same activity and the combined public effort is redundant and wasteful of resources;
- Neither federal or state authorities are involved in regulating a particular issue and the environment is being harmed;
- The state is regulating an activity inadequately and the outcome would be improved if the federal government were involved;
- The federal government is regulating an activity which the state may not have the resources to address should the federal government lose jurisdiction over the waters at issue.
- The federal or state government is regulating an activity in such a way that imposes undue burdens on landowners without providing sufficient environmental benefits.

Stakeholders should submit comments on the rule addressing the impact of the change in jurisdiction on their activities on the ground. For each of these scenarios, the jurisdictional status of the water under the old and proposed rule should be identified. In this manner, a strong Arizona record can be prepared and submitted either for or against the proposal.

Do not hesitate to contact George Ruyle [gruyle@cals.arizona.edu] or Jeff Eisenberg [jeffeisenberg@rockspringsr] with the Natural Resource Users Law and Policy Center at the University of Arizona if you have questions about this matter.