

THE NAVAJO NATION



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Re: , Navajo Nation's Supplemental Comments on the Proposed Definition of Waters of the United States, 84 Fed. Reg. 4154 (Feb. 14, 2019)

Dear Asst. Administrator Ross and Asst. Secretary James:

Thank you and your staff for taking the time to meet with us on June 13, 2019 to discuss the Navajo Nation's comments on and concerns with the Waters of the United States (WOTUS) rule proposed by your two agencies. 84 Fed. Reg. 4154 (Feb. 14, 2019). At that meeting, you provided us with the opportunity to submit supplemental comments explaining why there should be 'a "carve-out" for tribes in the final rulemaking' or whether "additional regional flexibilities" should be taken into account.¹ We appreciate your willingness to consider our supplemental comments in that regard.

We submitted comments on the proposed WOTUS rule on April 11, 2019 (NN Comments), and our position has not changed, namely, the Agencies should retain the 2015 WOTUS definition, for all the reasons we expressed in those comments. If that does not occur, then we believe the Agencies should carve the Navajo Nation out of the new WOTUS rulemaking, along with all tribes who desire the same treatment, for the reasons explained in Part I below.² If the Agencies nevertheless include the Navajo Nation under the new rule, then there are circumstances pertaining to the Navajo Nation (and likely to other arid or semi-arid regions of the country, tribal and non-tribal alike) that we believe affect the interpretation that should be given to various elements of the proposed definition of WOTUS, as explained in Part II below.

¹ See Letter from David Ross, Asst. Administrator, EPA Office of Water, and Ryan Fisher, Principal Deputy Asst. Secy. of the Army, to President Nez, Navajo Nation (July 9, 2019).

² Although the comments made in Part I of this Supplemental Comment Letter would apply to all tribes, the Navajo Nation can speak only for itself in this letter, which is not a joint comment letter.

I. The Agencies Should Carve the Navajo Nation Out of the New Definition of WOTUS.

As explained in our previous comments, there are aspects of the relationship between the federal government and Indian tribes, including the Navajo Nation, and rights that stem from that relationship, that require the federal government to provide additional protections for tribal waters compared to those for state waters. The federal trust responsibility to Indian tribes, the Navajo Nation's treaty rights and reserved water rights, and principles of environmental justice all provide bases for greater protection of tribal waters. We do not repeat those arguments in detail here, but incorporate them by reference. *See* NN Comments at 4-5. Moreover, due to this relationship, as well as to various limitations on tribes' exercise of their regulatory authorities, the Navajo Nation, along with all other tribes, rely on the Agencies to implement most Clean Water Act programs on their behalf. *See* NN Comments at 13-15. Further, when implementing those programs, the federal government must recognize that decisions balancing environmental protection and economic development may turn out differently when a tribal rather than a state perspective is taken into account. *See, e.g.*, NN Comments at 3.

As a result, the Agencies' attempt to use the definition of WOTUS to preserve state and tribal management of local water and associated land-use decisions is disingenuous when it comes to the Navajo Nation and other tribes. *See, e.g.*, 84 Fed. Reg. at 4169. Speaking for the Navajo Nation, we depend on the federal government to manage and protect Navajo Nation waters under federal government authority. Further, in light of the importance of water quality to the Navajo Nation and the Navajo way of life, *see* NN Comments at 3, we would like the federal government's protection of our water quality to extend as far as possible. We therefore request the Agencies to provide a "carve-out" from the WOTUS rule for the Navajo Nation and other tribes who desire the same treatment.

II. Interpretation of Elements of the WOTUS Definition in the Context of Waters of the Navajo Nation.

If the Agencies do not carve out the Navajo Nation and other tribes from the new WOTUS rule, they should at least take into account the Navajo Nation's climate, geology, and hydrology in crafting a WOTUS definition for Navajo Nation waters. The Navajo Nation is located in the arid and semi-arid Southwest, and approximately 90% of its waters would be classified as ephemeral and intermittent streams under the proposed WOTUS rule.³ These waters are not only precious in the Navajo world view, but also are significant as headwaters supporting fish and wildlife, contribute to water flow and storage, and influence the physical, chemical and biological integrity of downstream waters. *See generally* NN Comments at 7-10. The WOTUS proposal recognizes the need for a "regionalized implementation" of the Agencies' approach to intermittent tributaries, rather than a focus on national consistency, 84 Fed. Reg. at 4178, and the Navajo Nation supports that approach.

³ As we noted in our prior comments, this situation is common in the arid and semi-arid southwest, where 81% of all streams are classified as intermittent or ephemeral pursuant to the National Hydrography Dataset. NN Comments at 10.

Therefore, based on the distinctions discussed above and in our prior comments, both between the Navajo Nation and states generally, and between a tribe or state located in an arid or semi-arid region compared to those in more temperate zones of the country, and considering that the Agencies stated in their proposal that '[t]he proposed definition of "waters of the United States" is a legal and policy decision,' *id.* at 4175, we are submitting the following suggested refinements to the proposed WOTUS definition as it would apply to the Navajo Nation (and likely to similarly situated tribes and, with respect to climate at least, states). The major refinement we request to the proposed rule centers on the definition of a tributary, and in particular the classification of tributaries into perennial and intermittent but not ephemeral waters. Other requested revisions are also discussed below.

A. Definition of Tributary

The proposed rule includes as WOTUS all tributaries of traditional navigable waters (TNW). *See, e.g.*, proposed 33 C.F.R. § 328.3(a)(2). It then defines "tributary" as follows:

(c)(11) The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes **perennial or intermittent flow** to a water identified in paragraph (a)(1) of this section **in a typical year** either directly or indirectly through a water(s) identified in paragraphs (a)(2) through (6) of this section [waters defined as WOTUS] or through water features identified in paragraph (b) of this section [excluded waters] so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break **so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break.** The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.

Id. § 328.3 (emphases added.) Some of the components of that definition are in turn defined as follows:

(c)(5) *Intermittent.* The term *intermittent* means surface water flowing continuously during **certain times of a typical year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).**

(c)(7) *Perennial.* The term *perennial* means surface water flowing continuously year-round during a typical year.

(c)(12) *Typical year.* The term *typical year* means within the normal range of precipitation over a rolling thirty-year period **for a particular geographic area.**

Id. (emphases added). In contrast, the term "*ephemeral*" is defined to mean "surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall)." *Id.* § 328.3(c)(3) (emphasis added).

1. *Ephemeral, Intermittent and Perennial Waters*

The proposed definition of “tributary” includes perennial and intermittent waters. The Agencies have asked whether the definition should be limited to perennial waters, on the one hand, or should include ephemeral as well as perennial and intermittent waters, on the other. *Id.* at 4177. The Navajo Nation believes that the definition should include all three types of waters, if not nationally than at least on the Navajo Nation and in similarly arid areas. A tributary is a surface water which flows into another surface water at the confluence between the two surface waters. The flow from one surface water to the next occurs both as surface flow and subsurface ground water flow. There can be no perennial, intermittent, or ephemeral surface flow without the presence of water flowing in the subsurface in the ground water beneath the surface flow. Therefore one cannot claim that ephemeral flows are not tributaries to perennial or intermittent flowing surface waters. Even if there is no surface water flowing in the stream, there is usually subsurface flow hydraulically connecting the tributary to the next receiving water body. There may be instances where ephemeral subsurface flow dries up “seasonally” and does not establish a hydraulic connection to the intermittent or perennial water body, but the ephemeral water is still a tributary because it conveys flow during the year.

In an area such as the Navajo Nation where water is scarce to begin with, all of these waters are significant, as discussed above and in our prior comments, NN Comments at 3. Moreover, they are all interconnected, again as explained above and in our prior comments. NN Comments at 7-10 (citing to and reproducing portions of EPA’s 2015 Connectivity Report, “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence,” <https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414>). In fact, there are even waters within the Navajo Nation with flow regimes that change between perennial, intermittent, and ephemeral, illustrating the connectivity of all these waters. *See* NN Comments at 7, 10.

If the Agencies nevertheless retain their current definition of “tributary,” the Navajo Nation believes that all of its non-perennial waters should be considered intermittent under the rule. All of the Navajo Nation waters shown on the National Hydrography Database (NHD) are shown as being perennial or intermittent; no waters are shown to be ephemeral. *See* <https://viewer.nationalmap.gov/advanced-viewer>.

The proposed definition of “intermittent” includes the concept of surface water flowing during part of the year, and of the water flow being due to more than precipitation. The Agencies have stated that they “are not proposing a specific duration (e.g., the number [of] days, weeks, or months) of surface flow that constitutes intermittent flow as the agencies believe the time period that encompasses intermittent flow can vary widely across the country based upon climate, hydrology, topography, soils, and other conditions.” 84 Fed. Reg. at 4173. The Agencies also are not requiring a particular flow volume. *Id.* at 4175. The Navajo Nation agrees with this formulation, for the reasons the Agencies express in the proposal. Moreover, the concept of a “typical year,” which is included in the definition of “tributary,” is also defined to reflect a “particular geographic area,” which the Navajo Nation believes is appropriate. We suggest that the Agencies recognize changing weather patterns and that what was a typical year 30 years ago

may not be typical today. We also suggest that the phrase “typical year” be implemented flexibly, in consultation with the Navajo Nation, and that all available information be utilized.

2. *Breaks in Tributaries*

The proposal also asked for comments “on whether less than intermittent flow in a channel breaks jurisdiction of upstream perennial or intermittent flow and under what conditions that may happen.” *Id.* at 4177. If the Agencies do not consider all Navajo Nation waters to be perennial or intermittent, then this proposal could affect waters within the Navajo Nation with flow regimes that may be viewed as changing between perennial, intermittent, and ephemeral before reaching a TNW, such as Shonto Wash and the Little Colorado River. *See* NN Comments at 7, 10. We are supplementing our comments by suggesting that, in those and similar situations, any so-called ephemeral portion of the water body should not be viewed as severing the connection to the TNW at issue, since the water continues to flow to the TNW through those reaches. The Agencies observe in this regard that it may be difficult to know from a vantage point upstream whether there is ephemeral flow downstream, or whether such change in flow would create a “jurisdictional break” such that the water would no longer be considered a tributary. 84 Fed. Reg. at 4177. The Navajo Nation agrees that it would be difficult to differentiate the ephemeral reaches from the perennial and intermittent portions of a water body, and that this concern is an additional reason not to find a severing of the connection. Our water quality standards account for the possibility of all surface flow types in each stream (with the understanding that, based on the NHD, virtually all Navajo Nation waters would be considered perennial or intermittent).

Moreover, one of the Agencies’ stated goals for proposing a new WOTUS definition is to make it easier to implement the rule. *See, e.g., id.* at 4170 (“This proposal is intended to establish categorical bright lines that provide clarity and predictability for regulators and the regulated community”). For this reason as well, we support a finding that changes in flow patterns in a tributary will not break jurisdiction, as long as the water body eventually conveys flow downstream to another tributary or TNW.

B. Treatment of effluent-dependent streams

The Agencies asked for comment “on how effluent-dependent streams . . . should be treated under the tributary definition.” 84 Fed. Reg. at 4177. The Navajo Nation agrees with the proposed rule on this issue. The proposal includes effluent-dependent streams in the definition of “tributary” “as long as they contribute perennial or intermittent flow to a traditional navigable water . . . in a typical year.” *Id.* In our previous comments, we noted that 23 of the 25 NPDES-permitted wastewater treatment facilities on the Navajo Nation discharge into and transform what might otherwise be considered ephemeral washes into effluent-dependent perennial or intermittent streams. NN Comments at 10-11. It is essential that such streams be considered as WOTUS on the Navajo Nation and thereby be subject to water quality standards and other Clean Water Act requirements. As already noted, water is scarce on the Navajo Nation and whatever can be found is used. These streams are used by wildlife and for livestock watering, and may also be used for agricultural and commercial purposes; indeed, on the Navajo Nation, where approximately 40%

of the population lacks access to running water and will haul it from the closest source, these streams may be used for domestic purposes as well.

C. Lakes and Ponds

There are numerous lakes and ponds on the Navajo Nation that are jurisdictional as traditional navigable waterways themselves (such as Lake Powell), that contribute perennial or intermittent flow to a traditional navigable waterway through a jurisdictional water in a typical year, or that are flooded in a typical year by a jurisdictional water. *See, e.g.*, 33 U.S.C. § 328.3(a)(4). We agree that all of these water bodies should be considered WOTUS, consistent with the proposed definition. Further, so-called ephemeral flows from lakes and ponds to a jurisdictional water should also be sufficient to extend jurisdiction to those lakes and ponds. Doing so, at least on the Navajo Nation, will promote regulatory certainty.

We also believe that all artificial lakes and ponds that are water storage reservoirs should be considered as WOTUS, in the event that they are not already included in the proposed definition of WOTUS. *See id.* § 328.3(a)(5) (including impoundments of lakes and ponds); (a)(7) (excluding artificial lakes and ponds constructed in “upland”). Such artificial lakes and ponds support aquatic habitat and fisheries and may be used for domestic and other purposes.

D. Wetlands

The proposed rule includes wetlands adjacent to other jurisdictional waters within the definition of WOTUS. *See, e.g.*, proposed 33 C.F.R. § 328.3(a)(6). The term *adjacent wetlands* is proposed to mean:

wetlands that **abut or have a direct hydrologic surface connection** to a water identified in paragraphs (a)(1) through (5) of this section in a typical year. **Abut** means to touch at least at one point or side of a water identified in paragraphs (a)(1) through (5) of this section. A direct hydrologic surface connection occurs as a result of **inundation** from a paragraph (a)(1) through (5) water to a wetland or via **perennial or intermittent flow** between a wetland and a paragraph (a)(1) through (5) water. Wetlands physically separated from a paragraph (a)(1) through (5) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.

Id. § 328.3(c)(1) (emphases added).

The Navajo Nation has many wetlands that satisfy the proposed definition. For example, many Navajo Nation wetlands are associated with rivers, such as the San Juan River and the Little Colorado River. These rivers are jurisdictional under the proposed WOTUS definition as navigable waterways or perennial or intermittent tributaries of navigable waterways. The Agencies should confirm that the wetlands associated with these rivers, including shrublands, woodlands, and emergent wetlands, are also jurisdictional. These wetlands are indistinguishable from and inseparably bound up with those jurisdictional waters. They generally abut the rivers and are not separated by upland, dike, barrier, or similar structure. To the extent any of these wetlands do not abut the rivers, they share a direct hydrological surface connection with the jurisdictional rivers, at least through inundation or perennial or intermittent flow in a typical year.

Similarly, other Navajo Nation wetlands abut lakes and ponds that are covered by the proposed WOTUS definition, and so those wetlands also are adjacent wetlands. These wetlands also generally have a direct hydrological surface connection to those lakes and ponds.

There also are Navajo Nation wetlands associated with streambeds such as the Chaco River, the Puerco River, and the Chinle Wash. Like the wetlands discussed above, the wetlands associated with these streambeds are indistinguishable from and inseparably bound up with those jurisdictional streambeds. They may abut the seasonally flowing streambeds or have a direct hydrological surface connection to the streambeds when the latter are flowing. And some Navajo Nation wetlands are subject to inundation from a jurisdictional water during a typical year and so are similarly bound up with those jurisdictional waters.

The Navajo Nation depends on all of these wetlands to maintain its water supply and water quality and provide aquatic and wildlife habitat, *see* NN Comments at 8-9, and we believe they all would be covered under the proposed definition “adjacent wetlands.” To the extent there is any uncertainty whether these wetlands are covered as WOTUS, the proposed rule should be revised to make their inclusion clear. Our first preference, however, would be for the Agencies to retain the significant nexus test for this category of water, as well as to retain the 2015 definition of “adjacent wetlands,” due to the significance of wetlands to downstream waters, as established in the 2015 Connectivity Report.

If the Agencies do not revert to 2015 definitions, we support certain aspects of the proposed definition of “adjacent wetlands” and also request that certain changes be made. The Navajo Nation agrees with the Agencies that: “For purposes of adjacency under the proposed rule, the entire wetland would be considered adjacent if any portion of the wetland abuts or has a direct hydrologic surface connection to another ‘water of the United States,’ regardless of the size and extent of the wetland.” 84 Fed. Reg. at 4188. We agree that this approach is “simpler and easier to implement in the field than establishing a means of bifurcating wetlands.” *Id.* It also would be arbitrary to create a jurisdictional cut-off in a contiguous wetland, as the Agencies note some commenters suggested, *see id.* at 4189, and would eliminate the regulatory certainty the proposal seeks.

The Agencies should also continue to allow adjacency to be established by direct hydrologic surface connection. *See id.* at 4189. Many wetlands in the Navajo Nation have a direct hydrologic surface connection to a jurisdictional water, including by seasonal overtopping or perennial or intermittent flows in a typical year. Including this provision results in regulatory certainty and obviates the need to determine whether the wetlands abut a jurisdictional water, which the Agencies recognize can be challenging, *see id.* Wetlands with a direct hydrologic surface connection to jurisdictional waters are indistinguishable from and inseparably bound together with the jurisdictional water and it would be arbitrary to exclude these wetlands from coverage because of separation by upland, a dike, barrier, or other similar structure.

At the same time, we think that the following changes to the proposed definition of adjacent wetlands should be made, at least with respect to the Navajo Nation, to provide certainty, save resources of regulators and the regulated community, and reflect geographic realities on the Navajo Nation. Wetlands on the Navajo Nation should be considered adjacent to jurisdictional waters

even if they have a so-called ephemeral hydrologic surface connection during a typical year.⁴ When wetlands and their associated jurisdictional waters have any hydrologic surface connections, they are indistinguishable and inseparably bound together. Trying to differentiate between a typical year's inundation from a jurisdictional water, or between different types of surface flows, particularly in an arid or semi-arid climate, will cause regulatory uncertainty and waste limited resources. It may even require more specific case-by-case determinations than the significant nexus test that the proposal seeks to replace. The Agencies' desire to "exclude isolated wetlands with only physically remote hydrologic connections to jurisdictional waters," *id.* at 4185, would still be satisfied because of the requirement to have a direct hydrologic surface connection. The definition's inclusion of the "typical year" requirement already prevents the inclusion of wetlands when the only connection consists of flows from, for example, 100-year storm events. *See id.* at 4186.

Wetlands on the Navajo Nation also should be considered adjacent to jurisdictional waters if they contain a subsurface hydrologic connection during a typical year. The proposal briefly notes that subsurface connections do not constitute a direct hydrologic surface connection, *id.* at 4188-89, but also asks whether and under what circumstances subsurface water connections should be considered, *id.* at 4189. Including wetlands with a subsurface hydrologic connection would not infringe on the Agencies' concerns regarding isolated wetlands; if anything, it would be more consistent with the Agencies' intent because wetlands with a subsurface hydrologic connection are inseparably bound up with the jurisdictional water. The typical year requirement also prevents concerns about speculative connections.

Finally, determining whether a direct surface hydrologic connection is intermittent or ephemeral is an uncertain task, and allowing adjacency to be established through a subsurface hydrologic connection would remove some of the line-drawing otherwise inherent in the proposed definition. In fact, it may often be too difficult to separate the different types of connection from each other, as the Agencies acknowledge:

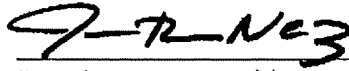
The categorical inclusion of all wetlands that abut other "waters of the United States" and all wetlands with a direct hydrologic surface connection to other jurisdictional waters will invariably include some wetlands that also connect to those waters through shallow subsurface flow.

84 Fed. Reg. at 4189.

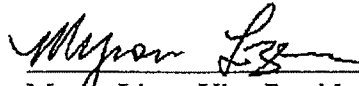
Again, we appreciate your consideration of these supplemental comments when you develop the final WOTUS rule.

⁴ Section II.A.1 above explains that the definition of tributary should include ephemeral as well as perennial and intermittent waters. Even if the Agencies do not define tributaries to include ephemeral waters, or consider all Navajo Nation waters to be perennial or intermittent, they still should determine that wetland adjacency can be established by direct ephemeral hydrologic surface connections in a typical year, as explained in this paragraph.

Sincerely,



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