



COUNTY ADMINISTRATOR'S OFFICE

PIMA COUNTY GOVERNMENTAL CENTER
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C.H. HUCKELBERRY
County Administrator

June 15, 2017

Misael Cabrera, PE, Director
Arizona Department of Environmental Quality
1110 W. Washington Street, Suite 127
Phoenix, Arizona 85007

Re: **Implementing Executive Order 13778**

Dear Mr. Cabrera:

The US Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) are implementing Executive Order 13778, which directs the federal agencies to rescind the current "Waters of the U.S." Rule and replace it with a rule that is more consistent with late Supreme Court Justice Antonin Scalia's opinion in *Rapanos v. United States* (547 U.S. 715 (2006)). We understand your office has been asked to provide input to the Governor about the State's preferences for how to define the Clean Water Act's jurisdiction as it relates to the Executive Order.

Please consider our comments and recommendations in your deliberation. For many decades, Pima County has played an active role in the discussion regarding the appropriate breadth of the Clean Water Act. Our residents rely on both surface water and groundwater derived from infiltration of runoff, as well as the Colorado River. History has shown that pollutants entering dry riverbeds can contaminate our drinking water supply, and indeed the very origins of the Arizona Department of Environmental Quality (ADEQ) can be traced to several prominent water pollution cases in Pima County.

Importance of Clean Water Act Standards

The objective of the Clean Water Act is the restoration and maintenance of the chemical, physical and biological integrity of the nation's waters (33 U.S.C. §1251 et. seq (1972)). Water, even if present only during floods, can bear and carry pollutants downstream. Regulating pollutants discharged to dry or seasonally wet streams contributes to this principal objective of the Clean Water Act.

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Federal funding pursuant to the Clean Water Act was provided to state and local governments in the early 1970s to construct municipal treatment facilities; these have been very successful in reducing pollutants entering streams. Because the infiltration of water into the dry streambeds of our state is one of the principal mechanisms for replenishing our state's aquifers, most local agencies recognize the state and federal interest in regulating pollutants, even where streams do not flow year-round.

Changes in standards for the administration of the Clean Water Act would be particularly consequential in Arizona. While certain other states have authority to protect the quality of streams not subject to the Clean Water Act's jurisdiction, Arizona does not. In Arizona, state legislation forbids state agencies from exceeding the federal regulatory framework established by the Clean Water Act; in other words, the "floor" that the Clean Water Act was intended to provide the states is now the "ceiling" beyond which the state regulations may not exceed. Therefore, any reductions in the scope of federal jurisdiction may have the effect of exempting certain areas from water quality protections at the state level.

The challenge of defining what is "relatively permanent"

The late Justice Scalia, in his *Rapanos* opinion, held that "The phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water," such as streams (547 U.S. at 716). To use this standard as a basis for determining jurisdiction, one would need to know how to define "relatively permanent" streams and the connections thereto. The use of the word "relatively" should allow for the consideration of the variable state of stream flows that characterize the western United States, where climate, geology and the history of water use cause certain reaches of streams to flow or not flow year-to-year. There is no single map series, even those by the US Geological Survey, which distinguish the levels of permanence at an adequate level to implement the standard outlined in former Justice Scalia's opinion, nor can there be, because climatic conditions and use of water vary from year to year. Furthermore, future use of flows and pumped groundwater will continue to alter the permanence of water, especially in the vicinity of agricultural and urban developments, ensuring the scope of jurisdiction based on stream-flow permanence would shrink as diversions and groundwater withdrawals expand.

If the protections of the Clean Water Act are reduced to what might be defined as "perennial" waters at a particular date, the vast majority of Arizona's streams will have no water quality protections whatsoever because of the state's programs' dependence on federal jurisdiction. The mere presence of an ephemeral reach between a pollutant source and a downstream flowing stream could eliminate federal jurisdiction, thereby eliminating both federal and state protections. Clean water is the basis for a sound economy. Thus, excluding entire watershed from jurisdiction based on whether there is or was a perennial stream makes no sense.

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Scope of Jurisdiction for Waters of the US

As a general principle, pollutants entering usually dry streams should be regulated. It is the responsibility of the Corps, as well as the EPA, to state clearly where watercourses are regulated by the Clean Water Act. After *Rapanos*, the Corps redefined applicability through administrative guidelines as opposed to formal rulemaking. As a result, project proponents now voluntarily propose a Preliminary Jurisdictional Determination (PJD), which is reviewed by the Corps. This pragmatic approach has reduced the time, effort and money spent on determining jurisdiction, while avoiding most of the muddled issues created by *Rapanos* and other lower court decisions.

During the Obama administration, rulemaking was attempted, ostensibly to clarify the scope of the jurisdiction, but court action has stayed that effort. The 2017 Presidential decree on federalism promises yet more rulemaking and centers it on former Justice Scalia's interpretation of the "Waters of the U.S." Rule. Changes could cause uncertainty and frustration for the regulated communities. Will Approved Jurisdictional Delineations be required? If not, by whom and how will jurisdiction be determined? As you might guess, the regulated community seeks clarity and consistency. Pima County is probably the largest single developer in southern Arizona, and our experience is that PJDs currently provide a clear process for getting the vast majority of projects to completion. Our concern is that, with this rule change, there will be an extended period of uncertainty and delay and that requiring more Approved Jurisdictional Delineations (AJDs) will further clog the system.

Greater clarity on how far upstream jurisdiction extends from Traditional Navigable Waters might be useful if significant delays and regulatory upheaval could be avoided. The current methods leave considerable leeway for regional distinctions at the District and Division levels of the Corps to evolve over time as better science becomes available. In our region, scientists are finding that headwater streams are very important in providing water supplies to downstream streams, springs and aquifers. Any changes made to rule must address the actual complexity presented by physical realities. At present, the piecemeal approach provided by site-by-site AJDs approved through the EPA do not lead to consistent determinations, and they take considerable time. Perhaps an approach that allows for consideration of scientific knowledge, public comment and local priorities expressed in watershed plans when determining where federal jurisdiction exists could provide a mechanism for acknowledging and managing this complexity. With an approved watershed framework, there would be little need for site-specific AJDs.

Pima County has been working very productively with the Corps to streamline the Endangered Species Act consultations for actions covered under the Section 10 (incidental take) permit issued to Pima County and the Regional Flood Control District in 2016. This promises to reduce the time and effort for public and private projects using certain Nationwide and Regional General Permits in Pima County, while ensuring meaningful conservation via locally supported open space and floodprone land acquisition.

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Pima County and the City of Tucson have issued "low-impact development" guidelines to minimize the effects of development on water quality, in addition to adopting local measures to protect the natural watercourse framework beyond the lateral limits of the Corps' jurisdiction. The Pima Association of Governments, representing all of the local jurisdictions, supported the designation of Outstanding Waters for Cienega Creek and Davidson Canyons through the State's triennial water-quality standards review.

The significant progress we have made at the local level seems to validate the concept that the chemical, physical and biological integrity of the Nation's waters can be addressed through sustained dialogue and prioritization of issues at the watershed level, involving federal and state regulators, as well as local and tribal participants.

Traditional Navigability and Interstate Waters

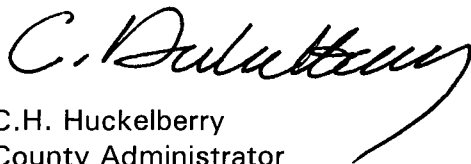
After the Supreme Court decided *Rapanos*, the Los Angeles District of the Corps made a traditional "navigable waters" determination for the Santa Cruz River. The EPA reviewed and affirmed that decision, as did the Pima County Board of Supervisors, in 2008. In 2009 and 2013, the National Home Builders Association unsuccessfully challenged the Corps' decision.

Pima County Board of Supervisors Resolution 2008-209 (attached for reference) recognizes that the Santa Cruz River is an international (Mexico) and interstate (Tohono O'odham Nation) stream. The Santa Cruz River is not unique in this regard; many streams in Arizona cross international, interstate and tribal nation boundaries (Figure 1). It is just one example of how redefining regulatory jurisdiction to conform to a particular former Justice's opinion could complicate transboundary management and spawn even more lawsuits related to jurisdiction.

Conclusion

I encourage you to take all available steps to assure the continued application of the Clean Water Act within Pima County, including its ephemeral stream systems, from which we derive most of our local water supply.

Sincerely,



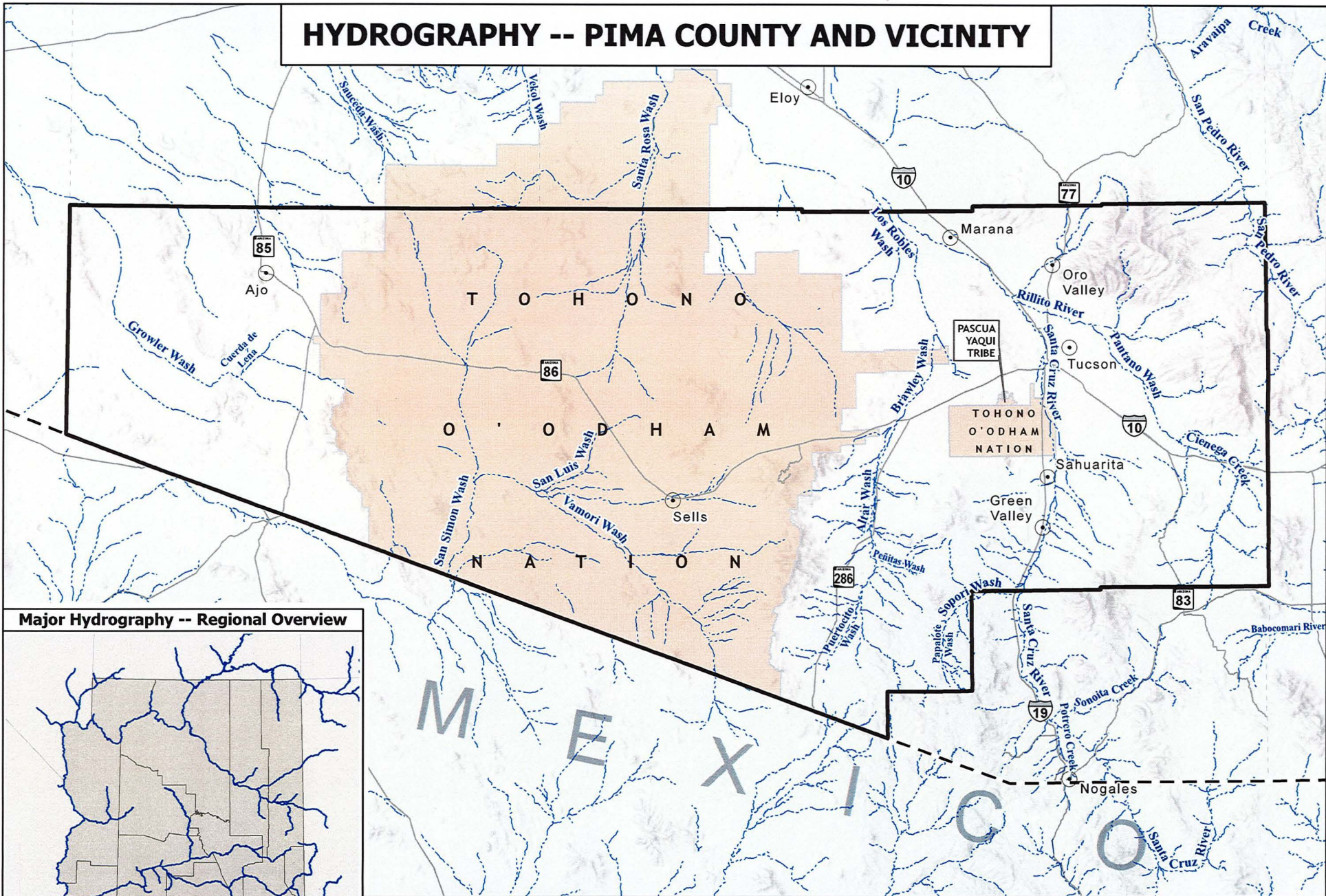
C.H. Huckelberry
County Administrator

CHH/mjk
Attachments

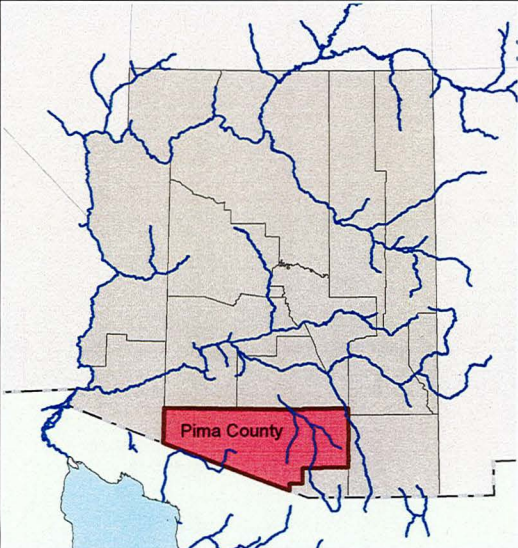
c: The Honorable Chair and Members, Pima County Board of Supervisors
Alexis Strauss, Acting Region 9 Administrator, US Environmental Protection Agency
Ursula Nelson, Director, Pima County Department of Environmental Quality

Figure 1

HYDROGRAPHY -- PIMA COUNTY AND VICINITY



Major Hydrography -- Regional Overview



- Hydrography (NHDPlus HR)
- Pima County Boundary
- Highway
- Other County Boundary
- International Boundary
- Indian Nation



Source: National Hydrography Dataset Plus High Resolution, USGS, 2017.

ATTACHMENT 1

**Resolution of the Pima County Board of Supervisors Affirming
Pima County's Commitment to the Clean Water Act**

Whereas, the Pima County Board of Supervisors has consistently affirmed its commitment to natural resource conservation and its devotion to environmental sensitivity in implementing all of its projects and programs, and

Whereas, the Pima County-adopted Sonoran Desert Conservation Plan and efforts underway to implement its various elements clearly confirm the Board's commitment to minimizing impacts of growth and development on the natural environment, and

Whereas, federal environmental regulations are rigorously followed by all Pima County agencies responsible for implementing projects and programs, and

Whereas, federal Clean Water Act permits have been solicited and secured for various Pima County projects since the adoption of this law in 1972, and

Whereas, recent changes to Section 404 Clean Water Act permit processes incorporate the identification of Traditional Navigable Waters and the determination of Significant Nexus to those Waters to define federal regulatory jurisdiction, and

Whereas, the U.S. Army Corps of Engineers has determined that the Santa Cruz River is a Traditional Navigable Water based on a May 23, 2008 Memorandum for the Record, and

Whereas, the Board of Supervisors desires to clearly declare its position with regard to adherence to federal regulatory requirements, and

Whereas, scientific, cultural and historic data presented by the Corps demonstrate navigability of the Santa Cruz River and the capacity to support and facilitate past and future commerce, such as outdoor recreation including cultural activities as well as the economic activity of national and international tourism,


Now, Therefore, be it resolved that the Pima County Board of Supervisors hereby directs staff to undertake the following actions:

1. Acknowledge and approve the Corps regulatory determinations of two segments of the Santa Cruz River as Traditional Navigable Waters within Pima County.
2. Request an Environmental Protection Agency (EPA) determination by Special Case that the entire Santa Cruz River is a Traditional Navigable Water, also known as (a)(1) waters, or that, at a minimum, preserves the Corps' regulatory determinations of two reaches of the Santa Cruz River as Traditional Navigable Waters and take other action to assure Clean Water Act application to Traditional Navigable Waters within Pima County if the designation is challenged by other parties.
3. Request the Governor of Arizona to: A) support EPA determination by Special

Case that the entire Santa Cruz River be designated a Traditional Navigable Water and take all available steps to assure Clean Water Act application to Traditional Navigable Waters within Pima County, and B) instruct the Arizona Department of Environmental Quality to support such action.

4. Advise the Arizona congressional delegation of Pima County's support with respect to proposed federal legislation pertaining to the Clean Water Act clarifying the scope and definition of Waters of the United States (House of Representative Bill 2421 and Senate Bill 1870).
5. Request State assistance to resolve conflicts over the ownership and control of navigable waters, specifically to allow counties and flood control districts, as political subdivisions of the State, to retain ownership and control of any properties under their ownership that are declared navigable waters, subject to the requirements of the public trust doctrine, regardless of jurisdictional location. Further, request the Governor of the State of Arizona to instruct State agencies to support County and Flood Control District ownership of navigable waterways.
6. Request Corps of Engineers and Environmental Protection Agency assistance regarding regulatory protection of all waterways within Pima County.
7. Request Corps of Engineers acknowledgment of the Regional Riparian Restoration element of the Sonoran Desert Conservation Plan and the development of program as well as regulatory incentives to facilitate implementation of this plan and to work cooperatively with the County in developing a Special Area Management Plan to assess impacts on valued aquatic or riparian resources on a cumulative basis.
8. Request Federal, as well as State, assistance to facilitate compliance with the Clean Water Act through the development of a transparent, efficient and standard process for application of, and compliance with, the Act.

Passed, adopted, and approved this 18th day of August, 2008.



Richard Elias, Chairman
Pima County Board of Supervisors
AUG 18 2008

Attest:




Clerk of the Board of Supervisors

Approved as to Form:



Deputy County Attorney