



SOUTHERN UTE INDIAN TRIBE

May 1, 2018

Mr. Scott Pruitt
Administrator of the EPA
USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N. W.
Washington, DC 20460

Mr. R.D. James
Assistant Secretary of the Army for Civil Works
108 Army Pentagon
Washington, DC 20310-0108

Submitted via email to: CWAwotus@epa.gov

Re: Definition of “Waters of the U.S.” Forthcoming Rule and Tribal Assessment

Dear Administrator Pruitt and Assistant Secretary James:

The Southern Ute Indian Tribe (Tribe) has concerns regarding what is being referred to as “Step 2” of the rulemaking process to define “Waters of the US” (WOTUS). These concerns are outlined below:

The focus on flow frequency as the basis for jurisdiction leaves many waters in the arid west unprotected.

Based on the May 18, 2017 and February 20, 2018 webinars that were presented to tribes, it is our understanding that U.S. Environmental Protection Agency (USEPA) and the U.S. Army Corps of Engineers (USACE) have identified flow frequency (e.g., perennial, intermittent, or ephemeral) as the primary factor that will be considered when determining if a tributary to a traditional navigable water would be considered as WOTUS. Specifically, it is our understanding that the agencies intend to follow the opinion of Justice Scalia in the *Rapanos v. United States* and *Carabell v. United States* Supreme Court decision, which would apply only to tributaries of traditional navigable waters that are “relatively permanent”. Currently the agencies consider tributaries to be relatively permanent if they flow at least seasonally (i.e., three months in a typical year). We believe the Scalia opinion to be a narrow view of a complex drainage system that is inappropriate in the arid west where we have very many large ephemeral streams and less-than-seasonal intermittent streams, known locally as “washes”, “gulches” or “arroyos”. One example on the Southern Ute Indian Reservation is the McDermott Arroyo, which has an upstream watershed approximately 80 square miles in size at the location it leaves the Reservation and only has surface flow following rain or snowmelt events. An extreme example is the Blanco/Largo Canyon watershed located just south of the Reservation, which has a watershed of 1,724 square miles and

recorded peak flow of approximately 5,000 cubic feet per second, yet surface flows are typically less than “seasonal” (i.e., three continuous months). Conversely, in parts of the eastern U.S. a typical perennial stream has an upstream watershed of less than 0.1 square miles in size.

Using the current guidance, the agencies assert jurisdiction over non-navigable, not relatively permanent tributaries and their adjacent wetlands where such tributaries and wetlands have a significant nexus to a traditional navigable water. If the presence of “seasonal flow” (as currently interpreted by the agencies) becomes a requirement for jurisdiction, small perennial streams in the east would remain regulated as WOTUS, but large washes and arroyos in the arid west would not. As such, the negative effects of the proposed rule would be disproportionately experienced in the arid west, where the Southern Ute Indian Tribe and numerous other tribes reside. Therefore, we recommend that other factors such as peak flow, watershed size, the frequency and volume of subsurface flows, the presence of an ordinary high water mark, and the presence of a continuous surface connection to traditionally navigable waters be considered when determining whether or not ephemeral and intermittent streams in the arid west are regulated as “waters of the U.S.” Retaining the existing “significant nexus” process would also be an appropriate option.

Currently, the Tribe, through its Water Quality Program, is working with USACE to resolve a Clean Water Act violation where unauthorized impacts to an ephemeral stream resulted in the deposition of an approximately 2.5-acre sediment plume into Navajo Reservoir, which is a designated Section 10 navigable waterbody. The ephemeral stream that was impacted has an upstream watershed of approximately 1.4 square miles in size and was determined to be WOTUS by USACE due to its significant nexus to Navajo Reservoir. Without Clean Water Act protections for such ephemeral streams, the Tribe and other regulatory agencies would not be able to prevent or remedy impacts to these streams, which (as demonstrated by the sediment plume deposited into Navajo Reservoir) directly affect the physical, chemical, and biological integrity of downstream receiving waters.

The agencies lack a scientific basis for the proposed rule.

We believe the onus is on the USEPA and USACE to review or conduct the scientific studies necessary to determine the effects that ephemeral and intermittent streams in the arid west have on downstream receiving waters before proceeding with any rulemaking process that excludes these streams from the WOTUS definition. On January 15, 2015 USEPA published "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*", which summarizes the current scientific consensus of how streams and wetlands affect the physical, chemical, and biological integrity of downstream waters. This report, currently available on the EPA website <https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414>, states the importance of ephemeral and intermittent streams to downstream, traditionally navigable waters. To our knowledge, nothing in this report has been refuted by the scientific community or regulatory agencies. However, it is our understanding that USEPA and USACE intend to publish a definition of WOTUS that will exclude many, if not all ephemeral streams, intermittent streams and associated wetlands. Unless USEPA and USACE can provide scientific evidence refuting the above-referenced report, the drafting of any regulation that excludes ephemeral and intermittent streams would be counter to USEPA’s mission of ensuring Americans have clean water.

Excluding intermittent and ephemeral streams from “waters of the U.S.” would leave important Reservation waters unprotected.

The primary regulatory mechanism used by the Tribe to prevent impacts to water quality is the Section 401 water quality certification process. On March 2, 2015, the Tribe submitted an application for “Treatment as a State” (TAS) for the authority to administer its water quality standards and the Section 401 program. Until the Tribe obtains Section 401 certification authority, the 401 process within the Southern Ute Indian Reservation is administered by USEPA Region 8. The current USEPA process requires that all projects authorized under a Section 404 permit (for dredge or fill to WOTUS) contact and solicit comments from the Tribe’s Water Quality Program as part of the application process, and the Water Quality Program’s comments are typically addressed as conditions of any granted 401 certification. This process allows tribal staff to review all projects impacting WOTUS on the Reservation to verify that the projects will not result in exceedances of the Tribe’s water quality standards and to ensure that best management practices (BMPs) are employed to limit non-point source pollution.

Since 2014, there have been 67 projects within the Reservation that have required a Section 404 permit and a Section 401 water quality certification. Of these, approximately 23 projects (34%) involved work in ephemeral or intermittent tributaries. Without WOTUS designation, these projects in ephemeral and intermittent streams would no longer require a 401 water quality certification from the Tribe or EPA. Without the need for a Section 404 permit and 401 certification, project proponents would not be required to implement appropriate BMPs when working in ephemeral or intermittent streams. As the Tribe observed with the project referenced above (that resulted in a deposition of a sediment plume into Navajo Reservoir and a CWA violation by USACE), when BMPs are not employed, projects in ephemeral streams within the Reservation have the capacity to greatly impact downstream waters. Further, without the Clean Water Act protections for ephemeral and intermittent streams, the Tribe and other natural resource agencies may not have the ability to require project proponents to clean up pollution resulting from impacts to these stream types.

Furthermore, if intermittent and ephemeral streams are no longer considered WOTUS, protections provided to surface waters on the Reservation through Section 402 of the Clean Water Act could also be weakened. Within the Reservation, Section 402 permits are also administered by USEPA. Projects that disturb greater than one acre of land are required to follow the terms of USEPA’s 2017 Construction General Permit for Indian Country in Colorado (COR120001). The permit requires the development of a Stormwater Pollution Prevention Plan (SWPPP) to prevent stormwater discharges into WOTUS. Without Clean Water Act protections, operators will potentially be allowed to discharge stormwater (and any pollutants it carries) into ephemeral and intermittent streams. These pollutants could be carried to downstream waters and negatively affect groundwater.

Unlike some states where waters that are not classified as WOTUS can be protected by state-only water quality laws, due to the checkerboard land ownership nature of the Southern Ute Indian Reservation, and the complex division of jurisdiction on the Reservation among the Tribe, federal government, and state government, the Tribe’s water quality laws alone might not be effective at protecting water quality within the entire Reservation. Further, due to the shape and location of the Reservation (approximately 15 miles wide by 110 miles long and located in southwest Colorado), numerous intermittent and ephemeral streams originate off-Reservation that flow into the traditional navigable waters located within the Reservation’s exterior boundary. In the former scenario, the Tribe depends on USEPA, USACE, and

other federal agencies to prevent impacts to Reservation streams. In the later scenario, the Tribe depends upon federal and state agencies to prevent impacts to streams flowing onto the Reservation.

Conclusion

We respectfully request that this letter be included in the appropriate docket for the “Step 2” process. Further, we request that you publish a copy of this letter on the appropriate USEPA webpage (<https://www.epa.gov/wotus-rule/tribal-consultation>) so that our concerns may be read by other interested stakeholders. Finally, we would like to request a staff-level consultation with USEPA and USACE to discuss the numerous concerns raised in this letter and work towards a mutually agreeable solution. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Christine Sage". The signature is written in a cursive, flowing style.

Christine Sage, Chairman
Southern Ute Indian Tribal Council