

# THE NAVAJO NATION

JONATHAN NEZ | PRESIDENT MYRON LIZER | VICE PRESIDENT



Transmitted via [CWAwtotus@epa.gov](mailto:CWAwtotus@epa.gov) and [usarmy.petagon.hqda-asa-cw.mbx.asa-cw-reporting@mail.mil](mailto:usarmy.petagon.hqda-asa-cw.mbx.asa-cw-reporting@mail.mil)

**Docket ID No. EPA-HQ-OW-2021-0328; FRL-6027.4-02-OWR**

October 1, 2021

Mr. Michael S. Regan  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Mr. Jaime A. Pinkham  
Acting Asst. Secretary of the Army for Civil Works  
U.S. Army Corps of Engineers  
441 G Street, NW  
Washington, DC 20314

**RE: Navajo Nation's Comments in Response to Letter to Tribal Leaders, "Notification of Consultation and Coordination on Revising the Definition of 'Waters of the United States'" (July 29, 2021) and Notice of Public Meetings Regarding "Waters of the United States"; Establishment of a Public Docket; Request for Recommendations, 86 Fed. Reg. 147 41911 (August 4, 2021)**

Dear Administrator Regan and Acting Assistant Secretary Pinkham:

The Navajo Nation submits the following comments in response to the request of the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (together, Agencies) for early input on the Agencies' effort to revise the definition of "waters of the United States" (WOTUS). The Agencies sent a letter to Tribal Leaders on July 30, 2021 (Tribal Leaders Letter) in which they described their intent to develop a "foundational rule" which would restore the WOTUS regulations that existed prior to the 2015 Clean Water Rule, amended to be consistent with relevant Supreme Court decisions, pending development of a new WOTUS rule that would be built on the foundational rule.<sup>1</sup> The Agencies requested comment on the foundational rule. Shortly thereafter notice was published in the Federal Register requesting comment from the public on both intended rules (Federal Register Request).<sup>2</sup> The Navajo Nation is providing input on both rules, pursuant to both notices.<sup>3</sup>

---

<sup>1</sup> Notification of Consultation and Coordination on Revising the Definition of "Waters of the United States" (July 29, 2021).

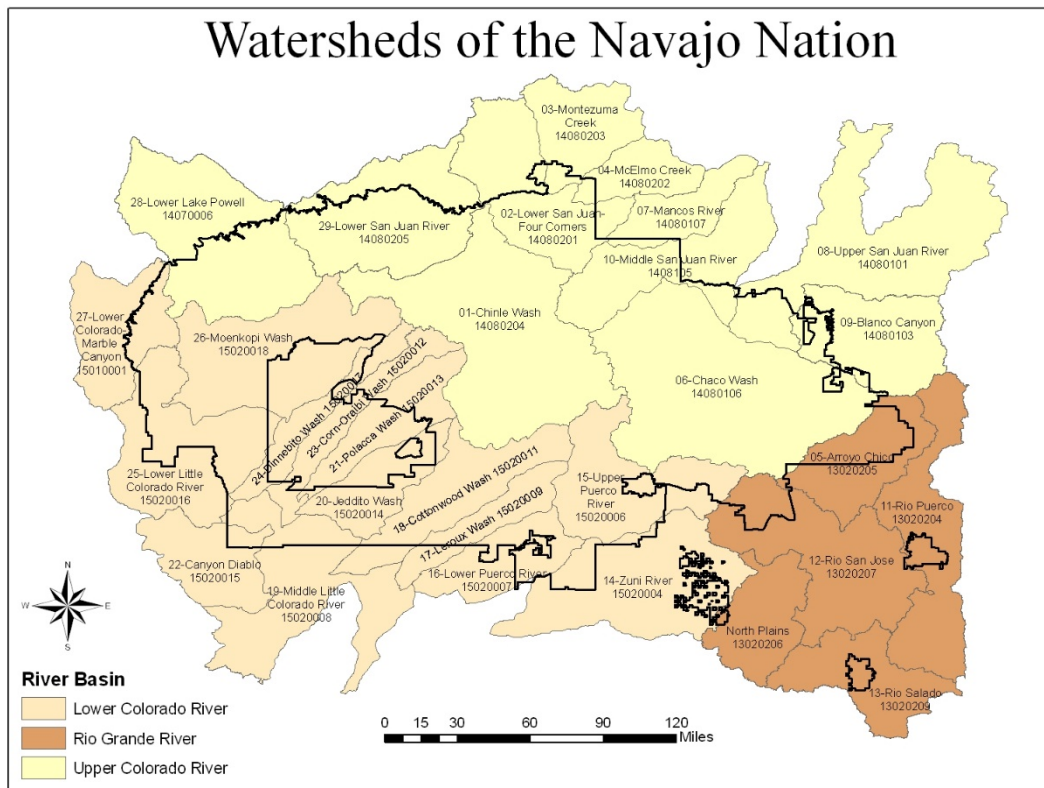
<sup>2</sup> Notice of Public Meetings Regarding "Waters of the United States"; Establishment of a Public Docket; Request for Recommendations, 86 Fed. Reg. 147 41911 (August 4, 2021).

<sup>3</sup> On September 28, 2021, the Agencies sent another email to tribes listing a series of discussions the

NAVAJO NATION OFFICE OF THE PRESIDENT AND VICE PRESIDENT

POST OFFICE BOX 7440 · WINDOW ROCK, AZ 86515 · PHONE: (928) 871-7000 · FAX: (928) 871-4025

The Navajo Nation is a federally recognized Indian tribe located in the Four Corners region. It extends into the states of Arizona, New Mexico, and Utah and encompasses 17,627,262 acres, an area about the size of West Virginia. There are approximately 39,000 miles of ephemeral, intermittent, and perennial streams and 17,057 acres of lakes and ponds on the Navajo Nation. Three major river basins drain the Navajo Nation: the Lower Colorado River, Upper Colorado River, and Rio Grande. Navajo Nation jurisdictional surface waters are located in 29 watersheds in these river basins, as shown on the map below, and there are 135 named ephemeral, intermittent, and perennial surface water bodies covered by the federally approved Navajo Nation Surface



Water Quality Standards. Each of these named surface water bodies is biologically, chemically, and physically connected to downstream and upstream ephemeral, intermittent, and perennial surface waters. In light of the Navajo Nation’s location in the arid Southwest, we are concerned with the protection of all of these hydrologically connected waters. The Navajo Nation also has traditional, cultural, and economic reasons for protecting these waters, making the Agencies’

Agencies plan to have with tribes on the proposed foundational rule and including a list of questions to consider about the rule. The list of questions by and large duplicates the questions raised in the Federal Register Request and so we have not provided a separate response to that notice; instead, our comments here may serve as that response.

intended WOTUS rulemaking of utmost significance, as discussed below in response to the Agencies' requests for comments.

### **Tribal Leaders Letter**

In the Consultation and Coordination Plan enclosed with the Tribal Leaders Letter, the Agencies acknowledge that any WOTUS rule will have different impacts on tribal waters than on state waters due to all tribes' reliance, to one degree or another, on the federal government to implement and enforce Clean Water Act (CWA) programs.<sup>4</sup> The Agencies state their belief that, with the foundational rule, CWA "regulations on tribal lands will be restored to the same level as prior to 2015," indicating that the restrictions imposed by the 2020 Navigable Waters Protection Rule (NWPR) will be lifted but not that the full extent, or framing, of regulation existing under the 2015 rule will be triggered.

Since the NWPR has been vacated by two federal district courts, it is now clear that the pre-2015 regulations are in effect.<sup>5</sup> The Navajo Nation agrees that those regulations must be construed in accordance with the significant nexus test in Justice Kennedy's concurrence in *Rapanos v. United States*, 547 U.S. 715 (2006), as the Agencies indicate in both the Tribal Leaders Letter and the Federal Register Request that they will propose.<sup>6</sup> The *Rapanos* concurrence is, after all, the law of the land. Any new definition of WOTUS also must be consistent with the Supreme Court's decision in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), in which the Court recognized the connectivity of water bodies in a different context.<sup>7</sup> And first and

---

<sup>4</sup> The Navajo Nation has received "treatment as a state" from EPA to implement water quality standards and certification programs under CWA §§ 303 and 401, 33 U.S.C. §§ 1313 and 1341, and we also have received federal approval of our water quality standards. The Navajo Nation Environmental Protection Agency (NNEPA) issues CWA § 401 certifications and assists EPA with permit reviews under the National Pollutant Discharge Elimination System (NPDES) program, CWA § 402, 33 U.S.C. § 1342. The Navajo Nation relies on EPA and the Corps for the remainder of CWA protections.

<sup>5</sup> *Navajo Nation v. Regan*, No. 20-CV-602, 2021 WL 4430466 (D.N.M. Sept. 27, 2021); *Pasqua Yaqui Tribe v. U.S. EPA*, No. CV-20-00266, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021).

<sup>6</sup> See also U.S. EPA, Current Implementation of Waters of the United States (Sept. 16, 2021), <https://www.epa.gov/wotus/current-implementation-waters-united-states>, in which the Agencies stated, upon receipt of the *Pasqua Yaqui* decision (which was issued prior to the *Navajo Nation* decision), that they would interpret WOTUS consistent with the pre-2015 regulations "until further notice."

<sup>7</sup> In *Maui*, the Court held that discharges through groundwater into a WOTUS are covered by CWA permitting requirements if they are the "functional equivalent" of a discharge directly into surface water. That decision recognizes the connectivity of water bodies, including through subsurface groundwater flow. See also, e.g., *id.* at 1470 ("Virtually all water, polluted or not, eventually makes its way to navigable water."). It also confirms the need for certain decisions to be made on a case-by-case basis, depending on the specifics of the particular situation. *Id.* at 1476-77.

foremost, the Agencies must define WOTUS in a way that will “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>8</sup>

In addition to recognizing the importance of federal regulation of tribal waters, the Agencies also must consider unique tribal rights and interests. First, virtually all tribes maintain a deep personal, cultural, and spiritual relationship to water. The Navajo world view is a holistic one in which the air, water, people, and wildlife are all related to one another. Indeed, water quality has an impact on wildlife, plants, and fisheries, which are important in and of themselves as well as part of Navajo traditions. Many plants and wildlife, moreover, including those used for Navajo cultural purposes, are found in the ephemeral waters and wetlands that the NWPR excluded from CWA protection.

Adequate supplies of clean water also are essential for economic growth, including tourism. The Navajo Indian Irrigation Project uses water from the San Juan River (Navajo Reservoir) to irrigate farmland managed by the Navajo Agricultural Products Industry. The Navajo Fish & Wildlife Department issues permits for hunting and fishing, which not only assist in the regulation and maintenance of wildlife resources but also are a source of tribal revenue. In addition, the Navajo Parks & Recreation Department issues permits for rafting, scientific studies, and general access to the San Juan River, and fees collected from those permits are deposited in the Navajo Nation general fund. These activities depend on protection of ephemeral waters and wetlands.<sup>9</sup>

The United States also has a trust responsibility to recognize and protect tribal lands, assets, and resources, which include the water that flows over and through tribal lands and the natural resources that depend on that water. The courts have long recognized the federal trust responsibility, as have Congress and many federal agencies, including EPA and the Corps.<sup>10</sup> For this reason, EPA issued its Indian Policy in 1984, stating that it will “give special consideration to Tribal interests in making Agency policy,” including “in making decisions and managing

---

<sup>8</sup> CWA § 101(a), 33 U.S.C. § 1251(a).

<sup>9</sup> The importance to the Navajo Nation of protecting the uses of its waters for drinking and other domestic uses, recreation, fish consumption, aquatic and wildlife habitat, agriculture, and livestock watering has been recognized by EPA in its approval of the Navajo Nation’s CWA TAS application, and it cannot be overstated. *See generally* EPA Decision Document: Approval of the Navajo Nation Application for Treatment in the Same Manner as a State for Sections 303(c) and 401 of the CWA, and attached Findings of Fact, January 20, 2006.

<sup>10</sup> *See, e.g., Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (United States has a “moral obligation of the highest responsibility and trust”); American Indian Policy Review Commission (1973) (U.S. trust responsibilities include protection and proper management of Indian resources, properties and assets).

environmental programs affecting reservation lands,” and has reaffirmed it ever since.<sup>11</sup> Likewise, the Corps states in its Tribal Consultation Policy that “[t]he trust responsibility will be honored and fulfilled” and that ACE “will ensure that it addresses Tribal concerns regarding protected tribal resources, tribal rights (including treaty rights) and Indian lands.”<sup>12</sup>

The Navajo Nation also has treaty rights that include the right to hunt. *See* Treaty of June 1, 1868, 15 Stat. 667. These treaty rights require water quality sufficient to protect the habitat supporting those rights.<sup>13</sup> Treaty rights are property rights that require federal protection,<sup>14</sup> and courts have admonished the United States – and the Corps in particular – to protect these rights.<sup>15</sup> The ability of the Navajo Nation to exercise its treaty rights is completely dependent upon clean water and healthy ecosystems.

Along with its treaty rights, the Navajo Nation has reserved water rights that protect the Navajo Nation’s uses of its water.<sup>16</sup> There is no distinction in federal Indian water law as to whether these waters are perennial, ephemeral, intermittent, or connected to traditionally navigable waters. Regardless of the type of water flow, and whether those reserved rights have been confirmed through settlement or adjudication, the Navajo Nation’s reserved water rights and the waters that satisfy those rights are trust assets that are owed federal protection.<sup>17</sup>

---

<sup>11</sup> EPA Indian Policy at 1, <https://www.epa.gov/sites/default/files/2015-04/documents/indian-policy-84.pdf>. *See also, e.g.*, Reaffirmation of the U.S. Environmental Protection Agency’s Indian Policy (April 5, 2019), [https://www.epa.gov/sites/default/files/2019-04/documents/10apr19memo\\_reaffirming\\_epas\\_1984\\_indian\\_policy.pdf](https://www.epa.gov/sites/default/files/2019-04/documents/10apr19memo_reaffirming_epas_1984_indian_policy.pdf).

<sup>12</sup> Corps’ Tribal Consultation Policy (Oct. 4, 2012) at 2-3, [https://www.spk.usace.army.mil/Portals/12/documents/tribal\\_program/USACE%20Native%20American%20Policy%20brochure%202013.pdf](https://www.spk.usace.army.mil/Portals/12/documents/tribal_program/USACE%20Native%20American%20Policy%20brochure%202013.pdf).

<sup>13</sup> *See, e.g., U.S. v. Adair*, 723 F.2d 1394 (9th Cir. 1983) (treaty rights to fish necessarily require sufficient water to maintain plants and fisheries).

<sup>14</sup> *Washington v. Washington State Comm. Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979); *Menominee Tribe of Indians v. U.S.*, 391 U.S. 404 (1968).

<sup>15</sup> *Confederated Tribes of the Umatilla v. Alexander*, 440 F. Supp. 553 (D. Or. 1977); *N.W. Sea Farms, Inc. v. U.S. Army Corp of Eng’rs*, 931 F. Supp. 1515 (W.D. Wash. 1996) (The Corps has a fiduciary duty to the treaty tribe that requires the agency to consider and protect tribal treaty right).

<sup>16</sup> *United States v. Winters*, 207 U.S. 564 (1908).

<sup>17</sup> *See, e.g., Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims*, 55 F.R. 9223 (1990).

In addition, Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” mandates that EPA, the Corps, and every federal agency “make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States[.]” The Navajo Nation relies greatly on all its surface waters, including ephemeral, intermittent, and perennial surface waters. The Navajo Nation currently lacks the resources to implement CWA permitting and other programs necessary to maintain and protect water quality and relies on the Agencies to fill that need. Therefore, any new WOTUS rule must not reduce the scope of the waters that the Agencies can protect, or it will have “disproportionately high and adverse human health or environmental effects” on the Navajo Nation. Any such rule would also be contrary to EPA’s stated goal “to understand definitions of human health and the environment from the perspective of federally recognized tribes.”<sup>18</sup> The Navajo Nation perspective is that all waters are deserving of Clean Water Act protections, and that such protection is necessary to ensure the health of tribal members and our environment and the preservation of our traditional and cultural practices.

Finally, although the Endangered Species Act consultation requirement will be triggered when individual federal permits, such as CWA § 404 dredge or fill permits, are issued, when drafting a new WOTUS definition, the Agencies should take into consideration the purposes of the Endangered Species Act. Four endangered species found on the Navajo Nation – the Colorado Pikeminnow, the Razorback Sucker, the Southwestern Willow Flycatcher and the Western Yellow-Billed Cuckoo – are critically dependent on headwater streams, including ephemeral streams.

Any new WOTUS rule must be consistent with all of these rights and obligations. It must ensure that the Agencies will have jurisdiction over all waters necessary to fulfill the essential purpose of the Clean Water Act and to protect Navajo lands, assets, resources, communities, and the Navajo way of life.

## **Federal Register Request**

### **Introduction**

The Agencies state that they “are committed to learning from [the] past regulatory approaches . . . while engaging with stakeholders and crafting a refined definition of ‘waters of the United States,’” and they include the NWPR in their list of past regulations. Federal Register Request, 86 Fed. Reg. 41911. They also discuss their concerns that “the NWPR did not

---

<sup>18</sup> EPA, Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples (2014), at 2.

appropriately consider the effect of the revised definition of [WOTUS] on the integrity of the nation's waters.” *Id.* at 41912.

The NWPR was drafted without proper consideration of the biological, chemical, and physical connectivity between surface water bodies, as the Agencies essentially acknowledged. *See, e.g.*, 85 Fed. Reg. 22,250, 22,261 (April 21, 2020). Indeed, the NWPR completely disregarded the science presented in the January 2015 EPA Office of Research and Development “Connectivity of Streams and Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence” (EPA/600/R-14/475F) (2015 Connectivity Report). The authors of the NWPR do not appear to have understood that they could not simply ignore biology, chemistry, geology, geography, hydrology, meteorology, or any of the myriad other scientific considerations required to successfully develop a WOTUS definition and still fulfill the objective of the federal Clean Water Act, which is to “*restore and maintain* the chemical, physical, and biological integrity of the Nation’s Waters,” CWA § 101(a) (emphasis added). The Navajo Nation supports the Agencies’ current intent to “[e]nsure the rule will further the principal objective of the [CWA].” 86 Fed. Reg. at 41912. Unfortunately, the Agencies misquoted CWA § 101(a) by leaving out the word “maintain,” which is an essential part of that objective. *Id.*

In light of the NWPR’s failure to fulfill the CWA’s objective and the lack of adequate record support for the rule, the Navajo Nation maintains that no portion of the NWPR can be used to refine the definition of WOTUS while still complying with the CWA and the Administrative Procedure Act. In addition, the NWPR has been vacated nationwide, as noted above, negating any continued relevance it might have had. The Agencies therefore should not focus on experiences under the NWPR, except perhaps in terms of their negative effect.

### Stakeholder Engagement

The Federal Register Request lists several topics on which it particularly seeks feedback. The Navajo Nation addresses each of these in turn.

### Implementation

The Agencies request input on experiences with implementing the various WOTUS regulations, and in particular on implementing “significant nexus analyses under the pre-2015 regulatory regime and the 2015 Clean Water Rule, as well as the typical year analysis under the NWPR.” *Id.* at 41913. The Navajo Nation believes that the significant nexus analyses conducted under the pre-2015 regulatory regime and the Clean Water Rule were appropriate both scientifically and legally for determining on a case-by-case basis the biological, chemical, and physical connectivity between ephemeral, intermittent and perennial surface waters, as already discussed above and further discussed below. Moreover, in the Navajo Nation’s recent experience

involving CWA § 404, the Corps has reverted to that analysis now that the NWPR has been vacated.

In contrast, the so called “typical year analysis” has no scientific validity. It is not used in meteorological, hydrological, or engineering sciences to define precipitation occurrence or frequency, nor subsequent rates or volumes. The term itself is an artifact of the NWPR, which as already mentioned should not be relied upon in any way to define WOTUS. It was not part of either the pre-2015 regulatory regime or the 2015 Clean Water Rule, and it should not be used in any future rule.

Moreover, the NWPR definition of “typical year” was impermissibly vague. The term was defined as meaning “when precipitation and other climatic variables are within the normal periodic range (*e.g.*, seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period.” *See, e.g.*, 33 C.F.R. § 328.3(c)(13), 85 Fed. Reg. at 22339. However, there was no definition of “normal periodic range,” and the concept of “normal” is becoming less and less meaningful with the effects of climate change. There also was no basis provided for selecting 30 years, nor was it explained how to calculate a rolling 30-year period, other than to say it need not be based on a calendar year *Id.* at 22274.

As for tools “that have been, or could be, developed to assist in determining jurisdiction,” 86 Fed. Reg. at 41913, the Navajo Nation is aware of the following: piezometers along stream channel cross sections; lysimeters to determine soil moisture content; stream weather stations to determine precipitation rates, volumes, humidity, barometric pressure, dew point, temperature, and other meteorological measurements; and stream gauges to determine stream flow and temporal/spatial distribution and flow responses to precipitation. The Navajo Nation requests that the Agencies provide funding to tribes for the installation of these tools in all ephemeral, intermittent, and perennial surface waters.

### Regional, State, and Tribal Interests

The Agencies ask “whether states and tribes have taken any actions in response to changes in the jurisdictional scope of ‘waters of the United States’ under the NWPR.” *Id.* The Navajo Nation had a series of internal discussions on whether and how to develop its own permitting program that would cover all ephemeral, intermittent, and perennial surface waters and all tributaries to those waters which are biologically, chemically, and physically connected. All such waters are considered “waters of the Navajo Nation” under Navajo law. Navajo Nation CWA (NNCWA), 4 N.N.C. § 1302(A)(43). Since, however, the NWPR is no longer in effect, we have suspended these discussions, at least for the time-being.

Under this same heading, the Agencies request information on “whether there are certain waters that could be addressed by regionalized approaches.” The Navajo Nation filed supplemental



comments on the proposed NWPR exactly on this subject. Essentially, the federal trust responsibility to Indian tribes, the Navajo Nation's treaty rights and reserved water rights, and principles of environmental justice, all discussed briefly above, provide bases for greater protection of tribal waters than of other waters. To fulfill these obligations, as well as to recognize the essential role that water plays for most tribes, the Agencies should consider regional differences and address factors such as climate, geology, and hydrology in developing a WOTUS definition. The Navajo Nation, which is located in the arid and semi-arid Southwest, relies on streams that flow seasonally, after precipitation events. Many of these waters were classified as ephemeral under the NWPR and were not protected but should have been, based not only on the science but also on these additional tribal considerations.

These waters are not only culturally significant but are vital as headwaters supporting fish and wildlife, contribute to water flow and storage, and influence the chemical, physical and biological integrity of downstream waters, as explained in the January 2015 Report issued by EPA's Office of Research and Development, "Connectivity of Streams and Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence" (EPA/600/R-14/475F) (Connectivity Report), as discussed further below. They are defined as "waters of the Navajo Nation" under NNCWA, 4 N.N.C. § 1302(A)(43), and the Agencies should recognize their status as protected waters by including them as WOTUS in their current rulemaking.

The Agencies also seek "input on the use and value of the jurisdictional category for interstate waters." 86 Fed. Reg. at 41913 The Navajo Nation supports retaining this jurisdictional category, which exists in both the pre-2015 regulations and the 2015 Clean Water Rule. The definition should be expanded, however, to include surface waters which flow between states and tribes and between adjacent tribes. For instance, there are Navajo waters that flow into Hopi waters and vice versa, as well as waters that flow from neighboring states into Navajo waters and vice versa. This connection must be recognized in order to protect tribal water quality and avoid conflicting water quality regimes. For the Agencies to do otherwise also would undermine the federal trust responsibility as well as treaty rights and reserved rights dependent on water quality, as discussed above. Only in this way can there be compliance with CWA § 518(e), 33 U.S.C. §1377(e), which requires consideration of "the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards."

### Science

Many of the terms used in the NWPR had no scientific meaning, as the Navajo Nation pointed out in its comments on the proposed NWPR.<sup>19</sup> The Agencies now state that they will

---

<sup>19</sup> Navajo Nation's Comments on Proposed Revised Definition of "Waters of the United States," April 11,

“[c]onsider the latest peer-reviewed and relevant science” when drafting the new rules, 86 Fed. Reg. at 41912, which the Navajo Nation emphatically supports. *See also* Executive Order 13990 (Jan. 20, 2021), in which the President states, before anything else, that “it is . . . the policy of my Administration to listen to the science.”

The scientific basis for defining WOTUS is unequivocally the Connectivity Report, which was prepared after years of effort and an exhaustive scientific literature review.<sup>20</sup> The Connectivity Report also was peer-reviewed by premier scientists appointed to EPA’s Science Advisory Board and edited thoroughly after taking into account the Board’s expertise.

The Connectivity Report describes in simple terms how waters are biologically, chemically, and physically connected. The Report explains that all tributaries, including perennial, intermittent, and ephemeral streams, “exert a strong influence on the integrity of downstream waters,”<sup>21</sup> and that wetlands and open waters in floodplains are “highly connected” to tributaries and rivers “through surface water, shallow groundwater, and biological connectivity.”<sup>22</sup> Moreover,

The incremental effects of individual streams and wetlands are cumulative across entire watersheds and therefore must be evaluated in context with other streams and wetlands.

Downstream waters are the time-integrated result of all waters contributing to them.

In addition, when considering the effect of an individual stream or wetland, all contributions and functions of that stream or wetland should be evaluated cumulatively. For example, the same stream transports water, removes excess nutrients, mitigates flooding, and provides refuge for fish when conditions downstream are unfavorable; if any of these functions is ignored, the overall effect of that stream would be underestimated”<sup>23</sup>

These findings formed the foundation of the Clean Water Rule, which was based on the significant

---

2019; Navajo Nation’s Supplemental Comments on the Proposed Definition of Waters of the United States, July 15, 2019.

<sup>20</sup> Connectivity Report at xii-xviii, ES-6.

<sup>21</sup> Connectivity Report at ES-2.

<sup>22</sup> *Id.* at ES-2, 4-39.

<sup>23</sup> Connectivity Report at ES-5 - ES-6.

nexus test, and should be used by the Agencies as the basis for the new rules, informed, of course, by “the latest peer-reviewed and relevant science,” as the Agencies propose.<sup>24</sup>

### Environmental Justice Interests

Please see discussion above at p. 6.

### Climate Implications

Climate change may affect the biological, chemical, and physical integrity of the nation’s waters through increasing acidity, temperature, reduced surface water volume, and reduced surface water inflows from diminishing snowpack. All of these factors combined affect aquatic habitat diversity and water supply for irrigation, livestock, and human consumption. For example, the Navajo Nation has been undergoing a long-term drought, which many have attributed to climate change. The acknowledged impacts of climate change on water resources makes the protection of those resources all the more important, and speaks for having a broad and inclusive definition of WOTUS. It certainly supports protecting the network of interconnected waters throughout a watershed, including ephemeral and intermittent waters.

### The Scope of Jurisdictional Tributaries, Jurisdictional Ditches, and “Adjacency”

The Connectivity Report is critical to addressing the questions raised by the Agencies regarding the scope of jurisdictional tributaries, jurisdictional ditches and “adjacency”.. Based on that information, the Navajo Nation has the following comments:

(1) All tributaries should be jurisdictional, as they all are biologically, chemically, and physically connected with and contribute to the health and integrity of downstream waters. As stated in our prior supplemental comments on the proposed NWPR, a tributary is a surface water that 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

---

<sup>24</sup> The five major conclusions from the Connectivity Report are discussed at pp. 1-6 of the Report and must be considered when crafting the new definition of WOTUS.

flow during the year.

Moreover, the Navajo Nation includes ephemeral and intermittent tributaries in the NNCWA definition of “waters of the Navajo Nation” for this reason, and the Navajo Nation believes that our designated waters should be protected, as discussed at p. 8 of these comments. It is in any event difficult to distinguish between “intermittent” streams (which were protected under the NWPR) and “ephemeral” streams (which were not).

(2) We agree that ditches that reroute jurisdictional tributaries should also be jurisdictional.

(3) The Navajo Nation supports the inclusion of wetlands behind artificial berms, neighboring wetlands, and adjacent lakes and ponds, all regardless of the presence of a surface connection, because they are interconnected with jurisdictional waters, as discussed in the Connectivity Report. As noted in our prior comments, there are Navajo Nation wetlands associated with streambeds such as the Chaco River, the Puerco River, and the Chinle Wash. These wetlands also 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. 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.

We agree that non-adjacent, intrastate/tribe, non-navigable waters should be evaluated on a case-by-case basis.

### Exclusions

The Navajo Nation has reviewed the pre-2015 regulations and guidance, the 2015 Clean Water Rule, and the NWPR. We have noticed that with each re-write of the WOTUS definition there are more exclusions from the definition. The Navajo Nation agrees, in general, with the exclusions which were in place in the pre-2015 regulations and guidance.

Any exclusion of ephemeral and intermittent streams in the revised WOTUS definition omission would not only be at odds with the findings of the Connectivity Report but also would be particularly significant for the Navajo Nation. Ephemeral and intermittent streams make up over 81% of all streams in the arid and semi-arid Southwest, including Arizona, New Mexico, and Utah where the Navajo Nation is located, according to the U.S. Geological Survey National Hydrography Dataset. “They are often the headwaters or major tributaries of perennial streams in the Southwest.”<sup>25</sup> For example, the Little Colorado River, which is a major tributary to the

---

<sup>25</sup> *The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest*, EPA (Nov. 2008), <https://www.epa.gov/sites/production/files/2015->

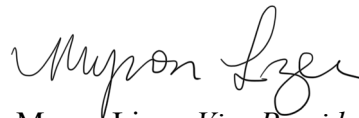
Colorado River, has reaches that flow ephemerally, intermittently, and perennially. Ephemeral, intermittent, and perennial flow regimes may occur within a single named waterbody and between named water bodies. The flow regimes from headwater up-gradient flows to down-gradient flows ending at confluences with other surface waters do not follow a strict hierarchy of types of flow conditions. In other words, flow within a given surface water body may begin as perennial flow in the headwaters, then turn into ephemeral flow, then become intermittent flow, return to perennial flow, and finally end as ephemeral flow as it reaches the confluence with the next named stream. There is, however, one commonality among surface waters with differing flow regimes: they are chemically, biologically, and physically connected, as the Connectivity Report explained.

The Navajo Nation intends to supplement these comments when appropriate, including once the actual rules are proposed. Should you need to contact our office, please reach out to Santee Lewis, Executive Director of our Navajo Nation Washington Office, at (202) 981-4331 or by email at [slewis@mnwo.org](mailto:slewis@mnwo.org). Ahéhee’.

Respectfully submitted,



Jonathan Nez, *President*  
**THE NAVAJO NATION**



Myron Lizer, *Vice President*  
**THE NAVAJO NATION**