



SOUTHERN UTE INDIAN TRIBE

September 13, 2021

Via Electronic Mail to: CWAwotus@epa.gov

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Mr. Michael S. Regan
Administrator of the E.P.A.
U.S. E.P.A. Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Lieutenant General Scott A. Spellmon
Commanding General of the U.S. Army Corps of Engineers
108 Army Pentagon
Washington, DC 20310

Re: Revising the Definition of "Waters of the United States"

Dear Administrator Regan and Lieutenant General Spellmon:

The Southern Ute Indian Reservation ("Reservation") is located in southwestern Colorado. The Reservation consists of approximately 700,000 acres and is a checkerboard of tribal trust, Indian fee, non-Indian fee, state-owned, and federal lands. Due to the shape and location of the Reservation (approximately 15 miles wide by 110 miles long, in the arid west), numerous intermittent and ephemeral streams originate on and off-Reservation and flow into what have been regarded as jurisdictional waters under the Clean Water Act. Six major tributaries course through the Reservation – the La Plata, Animas, Florida, Pine, Piedra, and Upper San Juan Rivers – and they all flow to the San Juan River, which then flows into Lake Powell and the Colorado River.

In addition to significant water resources on the Reservation, there is significant oil and gas development. There are approximately 3,000 natural gas and oil wells within the Reservation's exterior boundaries and these wells are located on a mix of tribal, private, and federal land. There are miles of gas gathering and transportation pipelines and numerous compression and processing facilities on the Reservation.

The Tribe relies on the U.S. Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers (“Corps”) to permit discharges into waters within Reservation boundaries. The Tribe also relies on these federal agencies to prevent impacts to streams before they enter Reservation boundaries. The Tribe also operates federally delegated Clean Water Act programs under sections 106, 319, and 401. The Tribe has been delegated authority to administer a Clean Water Act Section 303(c) water quality standards program and is in the general public comment process of adopting its standards. Once adopted, the Tribe will be submitting its standards to EPA for approval. Thus, Clean Water Act jurisdiction is a significant issue for the Tribe because it directly impacts the Tribe’s ability to protect waters within Reservation boundaries.

In 2019, the Tribe provided concerns about the revised definition of “Waters of the United States” (“WOTUS”) under the Navigable Waters Protection Rule (“the Rule” or “Rule”). The Tribe believes the EPA and the Corps should consider the below when revising the definition of WOTUS.

I. The definition of WOTUS in the Navigable Waters Protection Rule focuses on flow frequency as the basis for defining tributaries and, as such, leaves many waters on the Southern Ute Indian Reservation unprotected.

The Tribe currently has Treatment as a State (“TAS”) status for Clean Water Act Section 303 (c) water quality standards and Section 401 certification programs. The primary regulatory mechanism used by the Tribe to prevent impacts to water quality is the Section 401 certification program. Before receiving TAS status, EPA Region 8 exercised Section 401 certification authority on the Reservation. Currently, EPA administers the Clean Water Act Section 402 NPDES program on the Reservation and the Corps administers the Section 404 dredge and fill permitting program within the Reservation.

The current Rule reduces the number of projects that require a federal section 402 or 404 permit and, correspondingly, a tribal 401 certification. From 2014 to 2020, there were 93 projects within the Reservation that required a Section 401 water quality certification under the previous Rule. Of these, approximately 30 projects (32%) involved work in ephemeral streams or ditches. If these 30 projects were initiated today, they would not have WOTUS designation and they would not require Section 401 water quality certification from EPA. Additionally, the proponents of these 30 projects would not be required to complete the projects in a manner that prevents water quality standards exceedances through the implementation of appropriate Best Management Practices (“BMPs”), thereby preventing storm water discharges and minimizing impairments to the chemical and biological characteristics of the downstream receiving waters.¹

¹ Within the Reservation, Section 402 permits are issued for projects that disturb greater than one acre of land. These projects are required to follow the terms of EPA’s 2017 Construction General Permit for Indian Country in Colorado (COR12000I), which requires the development of a Stormwater Pollution Prevention Plan (SWPPP) to prevent stormwater discharges into WOTUS

When BMPs are not employed, projects in ephemeral streams within the Reservation have the capacity to impact downstream waters.

In 2018, the Tribe, through its Water Quality Program, worked with the Corps 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 the Corps due to its significant nexus to Navajo Reservoir. Without Clean Water Act protections for such ephemeral streams, the Tribe would not have been able to remedy the impact to the ephemeral stream and to the Navajo Reservoir. Further, without such Clean Water Act protections under the current Rule, the Tribe will not be able to prevent or remedy future impacts to ephemeral streams, which (as demonstrated by the sediment plume deposited into Navajo Reservoir) directly affect the physical, chemical, and biological integrity of downstream receiving waters.

II. The Navigable Waters Protection Rule does not adequately incorporate the findings from the EPA's draft report titled, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of Scientific Evidence."

The Rule no longer includes the significant nexus analysis in the definition of WOTUS in an attempt to separate the legal definition of WOTUS from the scientific implications of eliminating Clean Water Act protections. The justification for eliminating the significant nexus analysis, provided in the preamble to the proposed rule, is that doing so makes the Rule clear and easier to implement. The preamble also selectively borrows from the EPA's draft report, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of Scientific Evidence" ("Draft Connectivity Report") and the EPA Scientific Advisory Board's ("SAB") review of the Draft Connectivity Report to justify excluding the significant nexus analysis. In particular, the preamble provides that the SAB, "found perennial and intermittent streams have a greater probability to impact downstream waters compared to ephemeral streams."² However, the preamble does not acknowledge that the Draft Connectivity Report also clearly states that, "Many tributary streams to southwestern rivers are ephemeral, but they exert strong influences on the structure and function of rivers."³

The Draft Connectivity Report describes the scientific basis for the connectivity of streams and wetlands to large water bodies and how upstream waters affect downstream waters. The SAB's review of the Draft Connectivity Report supports the conclusion that streams and bidirectional floodplain wetlands are physically, chemically and/or biologically connected to downstream waters. However, according to the SAB, these connections should be considered in terms of a connectivity gradient. The SAB found that the Draft Connectivity Report as written

² See 84 FR 4176 (February 14, 2019).

³ U.S. EPA. *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (External Review Draft)*. U.S. Environmental Protection Agency, Washington, D.C., EPA/600/R11/098B, September 2013, p. 4-69.

uses language that often suggests that connectivity is a binary property – something either present or absent, rather than a gradient. This binary perspective seems to imply that any connectivity must significantly affect the biological, physical, or chemical integrity of downstream waters. The SAB states that this is not always the case. The SAB points out that, “although connectivity is known to be ecologically important even at the lower end of the gradient, the frequency, duration, predictability, and magnitude of connectivity will ultimately determine any consequences to downstream waters.”⁴ Connectivity has the greatest impact on the physical, chemical, and biological components of said waters and, therefore, revisions to the Rule should allow the EPA and the Corps to consider scientific evidence of connectivity between ephemeral streams and wetlands when determining Clean Water Act jurisdiction.

III. The revised definition of WOTUS should include ephemeral streams and should include additional factors beyond flow frequency in order to protect waters in the arid West.

In the Navigable Waters Protection Rule, a tributary is defined as, “a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow,” to a water that is currently used, or used in the past, or that may be susceptible to use in interstate or foreign commerce. Perennial is defined as, “surface water flowing continuously year-round during a typical year.” Intermittent is defined as, “surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation.” Typical year is defined as, “the normal range of precipitation over a rolling thirty-year period for a particular geographic area.” Ephemeral waters, defined as, “water flowing or pooling only in direct response to precipitation,” are not included in the definition of tributaries and, therefore, are not considered WOTUS under the Rule.

This definition of tributaries leaves many waters in the arid west, particularly on the Southern Ute Indian Reservation, without Clean Water Act protections. Although this approach to defining WOTUS may be appropriate for the Eastern United States, it is inappropriate in the arid West where there are very 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 flow frequency as the basis for defining tributaries, small perennial streams in the Eastern United States remain regulated as WOTUS, but large washes and arroyos in the arid West do not. As such, the arid West, where the Southern Ute Indian Tribe and numerous other

⁴ Letter to Gina McCarthy. October 17, 2014. SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of Scientific Evidence.” p. 9.

tribes are located, are disproportionately impacted, and less protected under the current Rule. Therefore, we recommend including in the revised Rule, and the revised definition of WOTUS, tributaries and other factors such as peak flow, watershed size, the frequency and duration of subsurface flows, the presence of an ordinary high-water mark, and the presence of a continuous surface connection to traditionally navigable waters. The Tribe proposes the following definitions:

Tributary. The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes perennial, intermittent, or ephemeral 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 or through water features defined in paragraph (b) of this section so long as those water features convey perennial, intermittent, or ephemeral 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, intermittent, or ephemeral 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.

Ephemeral. The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (*e.g.*, rain or snow fall) and is characterized by peak flow, watershed size, frequency and duration of subsurface flows, presence of an ordinary high water mark, and presence of a continuous surface connection that indicates volume, frequency, and duration of flow sufficient to reach waters identified in paragraphs (a)(1) through (6) of this section.

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) and is characterized by peak flow, watershed size, frequency and duration of subsurface flows, presence of an ordinary high water mark, and presence of a continuous surface connection that indicates volume, frequency, and duration of flow sufficient to reach waters identified in paragraphs (a)(1) through (6) of this section.

Perennial. The term *perennial* means surface water flowing continuously year-round during a typical year and is characterized by peak flow, watershed size, frequency and duration of subsurface flows, presence of an ordinary high water mark, and presence of a continuous surface connection that indicates volume, frequency, and duration of flow sufficient to reach waters identified in paragraphs (a)(1) through (6) of this section.

IV. The revised WOTUS definition should include adjacent wetlands that do not have a continuous surface connection to traditional navigable waters.

The Navigable Waters Protection Rule, as written, only recognizes wetlands that are adjacent, abut or have a direct hydrological surface connection (intermittent or perennial flow) to

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“other waters of the United States” in a typical year. This eliminates those wetlands that are physically separated from jurisdictional waters where the surface connection is removed. Wetlands that are not directly connected via hydrologic connection should still be recognized as WOTUS as they play an integral role in supporting biologic function in otherwise upland geography. This includes Prairie Potholes, Sandhill Depressions and other isolated features. Within the Southwest region of the United States, isolated wetlands, including hill side seeps and other isolated special aquatic sites that meet the criteria of a wetland should retain the protections provided to WOTUS as they provide ecological support in otherwise arid landscapes that lack water resources.

V. **The revised WOTUS definition should re-balance federal and tribal roles and responsibilities in a way that no longer disadvantages the Reservation because, on the Reservation, only EPA has undisputed authority to regulate all Reservation waters.**

In the Navigable Waters Protection Rule, the EPA and Corps emphasize they do not view the purpose of the Rule as determining which water resources warrant environmental protection and which do not, but rather as drawing the boundary between water resources that are subject to Clean Water Act jurisdiction and those water resources that states and tribes are free to manage under their independent authorities. Due to the checkerboard nature of land ownership on the Reservation, there is a complex division of jurisdiction among the Tribe, the federal government, and the state government. For many years, the Tribe, State of Colorado, and EPA have disagreed on the relative scope of the State’s authority (and, correspondingly, the scope of the Tribe’s authority) to regulate water quality within the Reservation. The scope of EPA’s authority, however, has not been in dispute. Unlike some states where waters that are not classified as WOTUS can be protected by state-only water quality laws, the checkerboard nature of the Reservation and the division of jurisdiction means the Tribe’s water quality laws alone might not be effective at protecting water quality within the entire Reservation. In other words, unlike states, the Tribe cannot easily enforce a definition of “tribal waters” that is broader than the EPA and Corps’ definition of WOTUS and any attempt to do so could trigger lengthy and expensive jurisdictional litigation. Therefore, given the jurisdictional uncertainties of the scope of the Tribe and the State of Colorado’s independent authority to protect all waters of the Reservation, the EPA and Corps’ current, more narrow definition of WOTUS disadvantages the Reservation and leaves certain Reservation waters unprotected.

VI. **Without federal backup and funding, the Tribe is not equipped to develop and administer either delegated Clean Water Act permitting programs or Tribe-only 402 or 404-like water quality programs.**

The EPA and Corps have the experience, expertise, and resources for regulating water quality on the Reservation. Historically, the Tribe has relied on EPA to permit point source discharges on the Reservation under the Clean Water Act’s Section 402 NPDES permitting program, on EPA to administer the Clean Water Act’s Section 303(d) impaired waters program, and on the Corps to permit discharges of dredged and fill material under the Clean Water Act’s

Section 404 permitting program. Without federal support, the Tribe lacks the capacity (i.e., staff, funding, clear enforcement capability) to fill the regulatory gap left by the reduced scope of federal Clean Water Act jurisdiction under the current Rule. Given the size of the Reservation and the number of 402 and 404 permits issued annually for on-Reservation discharges, we are doubtful a Reservation-only program would be financially self-sustaining.

Conclusion

The Tribe supports the EPA and Corps' efforts to revise the definition of WOTUS. The current Navigable Waters Protection Rule's definition of WOTUS is not protective enough. The Rule dramatically reduced the scope of federal Clean Water Act jurisdiction, allowing more pollution into waters on the Reservation. Even if the Tribe wanted to assert more control over all waters on the Reservation (which it does), the Tribe lacks the staff and funding needed to develop Clean Water Act Section 402 and 404-like programs and, as explained above, federal Clean Water Act authority is the clearest and most reliable source of regulatory authority on the Reservation.

For the reasons described above, we request the EPA and Corps consider the included suggestions during the revision of the definition of WOTUS. Thank you for your consideration.

Sincerely,



Melvin J. Baker, Chairman
Southern Ute Indian Tribal Council