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## INDIAN PUEBLO

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Ms. Karen Gude  
United States Environment Protection Agency  
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Washington, DC 20004  
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*Re: Santa Clara Pueblo Comments to EPA and US Army Corps of Engineers Waters of the United States Definition.*

Dear Ms Gude:

Santa Clara Pueblo is in favor of the move to restore the WOTUS definition that was in place before 2015. As noted in many tribal comments to EPA and the USACE, the current rule weakens Clean Water Act (CWA) protections for tribal waters by removing protections to ephemeral and intermittent surface water pathways in the Southwest US, such as arroyos and monsoon tributaries. The rulemaking Agencies did not honor and meet their trust obligations to protect trust water and land resources in establishing this rule and did not follow established tribal consultation procedures mandating government-to-government collaboration prior to taking actions affecting tribal governments and tribal lands. Significant gaps in protection from pollution, affecting tribal lands and surrounding non-Indian communities could result in negative consequences which is an issue of Environmental Justice.

Santa Clara Pueblo provides the following responses to the Overarching Questions to stir thought and generate discussion between the EPA and tribes on a Government to Government basis.

- *What worked and what didn't work for significant nexus analyses under the pre-2015 regulatory regime and the 2015 Clean Water Rule?*

- *Do you have recommendations for how to identify “similarly situated waters” in a given “region” that should be considered together in the analysis? For instance, under the Rapanos Guidance, a stream segment and its adjacent wetlands were considered together (aggregated); in the Clean Water Rule, certain aquatic resources inside a watershed that drains to a traditional navigable water, interstate water, or the territorial seas were aggregated by type.*

The main objective of the Clean Water Act (CWA) is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The 2015 Rule used a science-based understanding of hydrologic connectivity within a watershed to define WOTUS. It is this watershed approach that recognizes the contribution of ephemeral and intermittent streams, and wetlands to maintain the chemical, physical, and biologic integrity of our waters.

USEPA publications recognize that in areas where "ephemeral and intermittent streams are the defining characteristic" of watersheds, they should not go without recognition or federal protection. And that "ephemeral and intermittent streams provide the same ecological and hydrological functions as perennial streams by moving water, nutrients, and sediment throughout the watershed." The nexus is scientifically demonstrated in the 2015 EPA Connectivity Report. This report could be reviewed internally by EPA staff to determine the sections where confusion and uncertainty have been expressed regarding jurisdiction over the years. Outreach to stakeholders and proper tribal consultation could result in detailed identification of “similarly situated waters”.

- o *How could the agencies make analysis of a significant nexus more consistent and transparent?*

Intermittent arroyos are common place in this region and when flowing, transport materials to perennial water bodies which are used for habitat, irrigation, recreation and traditional purposes. Regional differences regarding water protection are better served with a broader definition of Waters of the United States. Consideration of these differences is a valid approach and reduces the “cookie cutter” approach that can result in both overreach and reduced jurisdiction.

- *What worked and what didn't work for the typical year analyses under the Navigable Waters Protection Rule?*
  - o *Is the concept of “typical year” useful?*
  - o *Does typical year adequately take a changing climate into account? If not, could it be modified to do so?*
  - o *Is the Antecedent Precipitation Tool sufficient for states/tribes in calculating a typical year, or are other resources often necessary?*

This is a highly technical question but even the general public is noticing that the season to season differences in precipitation and water flows flow are varying in intensity over a relatively short time span. The calculation for a “typical year” may have to be adjusted over a smaller time frame to account for local climate and other factors.

- *Are there implementation successes and challenges in assessing specific types of sites?*
- *What types of implementation assistance would be most helpful to states and tribes?*

Challenges to assessing areas are the variances in areas on a statewide basis. As an example, most of New Mexico benefited from a generous monsoon season however fragments of the state did not receive as much rain and remain in D3 Extreme Drought conditions. This is reflected in the drying of bosque wetlands and reduced flow in the Upper Rio Grande.

#### *Interstate waters*

- *What are effects for states and tribes if waters that cross, intersect or form a part of a state border are jurisdictional, particularly for waters that would not otherwise be jurisdictional?*
- *How should the agencies approach tribal or international boundaries?*

As stated before, waterbodies lacking jurisdiction that flow into tribal perennial waters greatly increase the threat of pollution of water resources vital to tribes. The approach to tribal waters should be through clear delineation of state and federal jurisdiction. Where a tribe has authority of a water program EPA then supports the protection of those waters through resources and technical assistance as a trustee.

#### *Tributaries*

- *Were the NWPR's specific definitions of "perennial," "intermittent," and "ephemeral" helpful? Were these flow classifications more or less difficult to implement than the Rapanos characterization of flow classifications (i.e., relatively permanent tributaries need to have flow at least seasonally (e.g., typically three months; such relatively permanent tributaries are perennial or seasonally intermittent))?*
- *Are ditches that meet the requirements to be a tributary appropriately regulated as tributaries? What worked and what didn't about previous approaches to regulating ditches?*
- *What were state and tribal experiences implementing the different rules regarding jurisdiction over ephemeral streams? Do those experiences vary in different regions of the country? Agency practice under Rapanos was to perform a significant analysis for such streams.*

In regards to regional experiences, the current rule definitions reduced protections so changes should be made to allow for protections in areas such as the Southwest. As noted by the State of New Mexico in their April 2019 comments to the current rule, "A little less than 7% of New Mexico's streams and rivers are perennial, with the remaining 93% being intermittent or ephemeral. Furthermore, many perennial and intermittent waters are "interrupted" (i.e., not continuous) or go subsurface as they flow downstream such that the surface connection to proximate jurisdictional waters ("traditionally navigable waters" and "tributaries") is lost." Flow classifications need to consider the connectivity of these arid southwest water transportation features to the limited perennial water bodies.

During the public comment sessions in August and September, ditches were a common source of confusion. Clarity and flexibility should be considered in any new approaches regarding ditches.

#### *Adjacent Wetlands*

- *What were state and tribal experiences implementing the different definitions of adjacency under the pre-2015 regulatory regime, the 2015 Clean Water Rule, and under the NWPR? Are there aspects of adjacency where the agencies should look to provide additional clarity?*
- *Are there additional implementation tools or resources that states and tribes need to assess the jurisdictional status of wetlands?*

Past work by the US Army Corps of Engineers to channelize the Rio Grande included the construction of berms along the riverbanks which ended meandering and created a physical barrier between the Rio and the Bosque wetlands. The current rule WOTUS definition eliminated the wetlands from protection. The 2015 Rule provided for better protection and monitoring of scarce wetlands important for habitat and cultural resources.

#### *Exclusions – General*

- *Were there any challenges with implementing exclusions as laid out in the 1986 regulations, whereby those regulations include just two exclusions and the preamble includes a list of other features that were “generally not jurisdictional waters”?*

#### *Exclusions – PCC*

- *Was the pre-NWPR implementation of prior converted cropland appropriate under the Clean Water Act, easy to understand, and implementable? What about the NWPR definition of prior converted cropland?*
- *How important is consistency with USDA’s definition of prior converted cropland?*

#### *Exclusions – WTSE*

- *Was the waste treatment system exclusion as defined under the NWPR appropriate under the Clean Water Act, easy to understand, and implementable? What about the waste treatment exclusion as defined under previous regulations?*

#### *Regional, State, and Tribal interests*

- *Are there certain waters that could or should be addressed by regionalized approaches? For instance, are there regionally specific implementation approaches that would be appropriate to include in any revised rule? Are their specific challenges that you face in your region when implementing the definition?*
- *Are there key issues important to your state or tribe that the agencies have not addressed in these questions or in our August 4, 2021 Federal Register notice?*

Addressed in earlier comments.

#### *Other*

- *Would states or tribes like to identify specific environmental justice interests the agencies should be aware of?*
- *How can the agencies consider a changing climate in implementation approaches described in any new rulemaking? What are some important considerations in your region for how WOTUS definitions might intersect with climate?*

Meaningful and interactive consultation is what makes for a proper tribal and federal government to government relationship. The Waters of the United States can benefit from a proper implementation of the trust responsibilities of the US EPA and US Army Corps of Engineers. Engaging tribes will ensure that these resources remain protected for used by all now and in the future.

The Pueblo looks forward to further discussion regarding the allocation and GAP guidance to improve the program and demonstrate the strides tribes have made to protect the environmental resources that provide sources of habitat, subsistence and cultural use.

If you should have any questions on these responses please do not hesitate to contact Bernardino Chavarria, Environmental Director at (505) 753 7326 x1239 or [dinoc@santaclarapueblo.org](mailto:dinoc@santaclarapueblo.org).

**Sincerely,**

*J. Michael Chavarria*

**J. Michael Chavarria, Governor**

Cc: File

Environmental

JoAnne Chase, US EPA HQ AIEO