

Douglas A. Ducey
Governor

ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY



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Director

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Michael S. Regan, Administrator
Environmental Protection Agency
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RE: State of Arizona Input on Proposed Revision to the Definition of "Waters of the United States", Docket ID No. EPA-HQ-OW-2021-0328

Dear Administrator Regan,

This letter is in response to the June 9, 2021, announcement that it is the Administration's intent to revise the definition of Waters of the United States (WOTUS) and repeal the Navigable Waters Protection Rule (NWPR). I would like to thank you for soliciting feedback from the States before drafting any rule changes by the USEPA.

While the NWPR did impact Arizona's regulatory landscape, the EPA press release from June 9, 2021, is not entirely accurate in suggesting the majority of waters in Arizona were at risk because of the Navigable Waters Protection Rule (NWPR). In fact, the statement, "the EPA and Department of the Army have determined that this rule is leading to significant environmental degradation" is confusing to us as the only evidence provided was the number of waters that were no longer regulated. Equating lack of regulation to environmental degradation is not completely accurate.

In this discussion it is also critical to distinguish between a "water" or "stream" and a "water way" or "drainage". The statement that "New Mexico and Arizona, where nearly every one of over 1,500 streams assessed has been found to be non-jurisdictional" inaccurately presumes that waterways or drainages that flow only as a result of precipitation and for a limited time should be regulated the same as relatively permanent waters. This extreme interpretation of WOTUS, and the legitimate debate surrounding whether or not this aligns with the original Congressional intent, *is the root cause of the wasteful 30-year debate and seemingly unending litigation.*

In response to implementation of the NWPR, the State of Arizona recognized the importance of a 'local control approach' at the state level to protect Arizona's precious water resources no longer considered WOTUS. Prior to the NWPR becoming effective in 2020, ADEQ had already

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initiated a stakeholder process to create a local control approach, which culminated in the Arizona Surface Water Protection Program (SWPP). This program was signed into law by Arizona Governor Doug Ducey on May 5, 2021 and will become effective on September 29, 2021 with final rulemaking for the program completed by December 2022. We are justifiably proud of this state effort to protect important waters no longer considered WOTUS.

The lack of a durable definition of WOTUS has created a tremendous amount of waste for those States on the front lines of administering the Clean Water Act (CWA). In the first year after the NWPR became effective, ADEQ estimates we have spent more than \$2 million dollars to implement the rule. This includes a significant portion of staff time taken away from mission critical activities, such as sampling and monitoring pollutants in Arizona waters, implementing projects to reduce pollutant impacts to Arizona waters, and permitting and compliance activities.

On August 30, 2021, a federal court judge in Tucson vacated the NWPR. In light of this order, Arizona is once again forced to change course and adapt to a new set of circumstances. The continued shifting of the WOTUS definition in recent years creates uncertainty and confusion for thousands of Arizona residents, businesses and regulators. The lack of a durable definition has the potential for impacting ADEQ's mission; to protect and enhance public health and the environment in Arizona.

As you and your team at USEPA undertake this important effort, please recognize the important and unique perspective the States have as the primary regulators of the CWA. Our efforts to implement the now vacated NWPR and to create and implement a new State program have given ADEQ unique insights. We have outlined below some design principles that we believe are needed.

Maps create clarity

Arizona's new State program benefits from a clearly defined list of lakes, rivers, streams and other water bodies covered under the Clean Water Act and SWPP. The new Arizona program requires that list be maintained and updated with stakeholder input, as needed, to protect human health and the environment. This feature allows ADEQ to map the waters subject to our permitting authority and allows our groundbreaking permitting and compliance portal, myDEQ, to issue protective general permits to thousands of Arizona customers. Any new or revised rule should also provide sufficient clarity that a list of waters regulated by the Clean Water Act is easily maintained. USEPA should invest the necessary resources in order to create a similar map of those waters considered to be WOTUS.

Consider an impact-based approach

A WOTUS definition rulemaking that balances regulatory burden with environmental and human health protection by accounting for the ultimate impacts to the environment is consistent with the CWA intent and with Arizona's needs. EPA should consider the impact of the discharge or activity on waters considered WOTUS in its forthcoming WOTUS definition rulemaking. Not

all discharges or activities need be covered by a NPDES permit in order for the intent of the Clean Water Act to be achieved. And not all waterways should fall under federal jurisdiction.

EPA has made similar impact-based determinations in regulations regarding stormwater discharges. For example, in Municipal Separate Storm Sewer System permits, discharges of potable water, firefighting-related waters and other sources need only be considered if they are identified as sources of pollutants. A second example is that construction sites under one acre do not need a construction NPDES permit. Regulating the most important and impactful discharges will allow States to maintain the improvement made by the Clean Water Act over the years while focusing resources on the most important improvements that still must be made.

Consider truly modernizing the rule

Processes for probability estimation and modeling have long been a material part of EPA's risk assessments in other programs. Similar processes for probabilistic risk estimation, coupled with data science, and satellite imagery, all undergirded by the acceptance that not every waterway and drainage should fall under federal jurisdiction, is a solid ingredient list for a durable definition of WOTUS.

Give States the tools to implement any new definition of WOTUS before implementation

EPA should ensure that any tools required for the implementation of a revised definition are released well in advance of the effective date of that new definition. The tools required to implement NWPR were not delivered in a timely fashion to the States; both the Streamflow Duration Assessment Methodology and Typical Year tools were released for end users without sufficient training, input and feedback from end users. This created waste for ADEQ, USEPA and the Army Corp of Engineers.

Fund the work of States to perform the science necessary to make WOTUS determinations

The science behind WOTUS determination is expensive and requires knowledge, skills, and abilities that States will need to maintain. USEPA should support that effort by providing funds directly to state agencies through increased grant funding with agreed upon deliverables in commitments related to that funding.


A Durable Definition of Waters of the United States

A durable definition of WOTUS may not be feasible solely from a regulatory perspective; Congress should act to clearly define its intent and the reach of the Clean Water Act. We understand that this suggestion is beyond the stated scope of your stakeholder effort; that does not diminish its necessity, however. It is Arizona's suggestion that a broad consensus can only come from the expressed intent of Congress and may be the only path that can truly create a durable definition of WOTUS.

The fact is that de minimis discharge or exposure thresholds are present in many of our key environmental laws. The Clean Air Act, Resource Conservation and Recovery Act, The Emergency Planning and Community Right to Know Act, the Safe Drinking Water Act, and the recent Lautenberg Chemical Safety Act all have de minimis discharge or exposure thresholds below which there is no regulation. It is not an accident that we have not had a 30-year debate and three Supreme Court cases arguing the “the air of the US”.

Again, my sincere thanks for being open to input on this extremely important undertaking for both of our organizations.

Sincerely,



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