



STATE OF ARIZONA
OFFICE OF THE GOVERNOR

DOUGLAS A. DUCEY
GOVERNOR

EXECUTIVE OFFICE

June 16, 2017

Scott Pruitt, Administrator
Environmental Protection Agency
USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 1101A
Washington, DC 20460

Re: State of Arizona Input on Proposed Revision to the Definition of "Waters of the United States" Final Rule, 80 Fed. Reg. 37,052

Dear Administrator Pruitt,

This letter is in response to your May 2017 request for input on the forthcoming proposal to revise the definition of waters of the United States (WOTUS) Final Rule, 80 Fed. Reg. 37,054 (June 29, 2015) and how states might respond to reduced federal jurisdiction under the Clean Water Act (CWA). I want to thank you for soliciting input before rule changes are drafted by US EPA.

In formulating our comments, we solicited input from our customers and stakeholders and several key principles emerged: protectiveness and consistency with the initial Congressional intent; a need for clarity; and a need for flexibility to allow implementation across the nation's wide range of ecological and hydrologic realities. Recommended elements of the rule to attain these key principles are described below.

Protectiveness and Consistency with Congressional Intent

It is Arizona's view that the original intent of Congress was not to use the Clean Water Act as a blanket regulation to cover all waters. Federal jurisdiction may extend beyond navigable waters to particular non-navigable water bodies and wetlands, but only in cases where water features affect navigable waters and are identifiable based on clear, objective characteristics.

Clarity

The Executive Order on reviewing the WOTUS rule directs both EPA and the Department of the Army to consider interpreting the term “navigable waters” in a manner consistent with Justice Scalia’s opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). Two of the main tenets of this opinion are that WOTUS must be “relatively permanent waters”, and that wetlands must have a “continuous surface connection” to a relatively permanent water to be considered a WOTUS.

Arizona believes that relatively permanent waters in Arizona include perennial and seasonal waters. Seasonal waters include any waters that flow at any time during the year as a result of factors other than storm flow. Seasonal waters that flow only as a result of storm events would not be included. Similarly, wetlands would only be considered a WOTUS if they have a continuous connection to a WOTUS, and the connection is at least seasonal.


Flexibility and State Regulation

The revised rule should also clearly identify that states have authority to determine waters regulated under the CWA within non-tribal state boundaries. Determinations of cross-state, tribal, and international waters should continue to be made by the Department of the Army with input from affected states or tribes.

In regard to a reduced scope of federal regulation under the CWA, Arizona recognizes and welcomes the need to protect non-WOTUS state surface waters. Changes to the federal rule will require us to evaluate how to protect waters that no longer fall under the CWA. For example, man-made lakes that are not connected to a WOTUS that are used for recreation and could pose human health risks.

The State of Arizona appreciates EPA’s emphasis on cooperative federalism, and looks forward to continued discussions with EPA and the Department of the Army as they evaluate rule amendments. Ongoing cooperation between states and federal agencies will ensure that the final rule provides needed clarity to allow for focused, defensible and protective implementation of CWA programs.

Sincerely,



Douglas A. Ducey
Governor
State of Arizona

cc: Douglas E. Lamont, P.E.

Senior Official Performing the Duties of the Assistant Secretary of the Army (Civil Works)