

United States Senate
WASHINGTON, DC 20510-0309

March 10, 2023

The Honorable Michael Regan
Administrator
Environmental Protection Agency
Washington, D.C. 20460

The Honorable Michael Connor
Assistant Secretary (Civil Works)
U.S. Army Corps of Engineers
Washington, D.C. 20310

Dear Administrator Regan and Secretary Connor,

We write regarding the final rule published by the U.S. Army Corps of Engineers (USACE) and the Environmental Protection Agency (EPA) on January 18, 2023 to revise the definition of Waters of the United States for the purpose of identifying the bodies of water subject to water quality protections established under the Clean Water Act. While we appreciate the work done by USACE and EPA to establish a durable definition for Waters of the United States (WOTUS), we remain concerned that if improperly implemented, this revised definition could create significant uncertainty for regulated parties in Arizona or fail to account for Arizona's unique hydrological conditions.

As you know, Arizona, and the entire desert southwest, has an arid climate which creates unique water supply and water quality challenges. Our region is in the midst of a decades-long drought, and ongoing shortages along the Colorado River have already led to water delivery cuts for some Arizona water users, with further reductions possible. Given these water scarcity challenges, Arizonans understand how critical it is to protect the water quality of our scarce sources of drinking water, which protections from the Clean Water Act help to enable.

At the same time, Arizona's arid and drought-prone climate means the vast majority of identified waterways are intermittent or ephemeral. In fact, the U.S. Geological Survey reports that of the 432,728 miles of waterways in Arizona, 98 percent are intermittent or ephemeral. While some of these waterways undoubtedly have an impact on the downstream water quality, many do not.

This makes the definition of what constitutes a Water of the United States incredibly important to Arizona. Defined too narrowly, critical sources of drinking water for Arizona could be left unprotected. But defined too broadly, hundreds of thousands of dry riverbeds, washes, arroyos, and ditches are subjected to strict federal regulations, despite never carrying water into a navigable waterway or source of drinking water.

We appreciate that the process undertaken by USACE and EPA over the past two years has sought to understand the geographic differences with regard to water resources that are

characteristic to different regions, as a means to inform the ongoing implementation of WOTUS. In particular, we appreciate that the agencies held a regional roundtable with a diverse range of stakeholders from Arizona and New Mexico, which was hosted by the Arizona Farm Bureau.

We recognize the efforts undertaken by the agencies to establish a durable definition of WOTUS in the final rule published in January 2023. While the rule is an improvement over prior WOTUS rulemakings conducted in 2015 and 2020, we note that this latest WOTUS definition continues to rely on the “relatively permanent” standard and the “significant nexus” standard for determining whether creeks, streams, rivers, lakes, ponds, ditches, impoundments, and adjacent wetlands are subject to Clean Water Act regulations. These standards, which have been utilized dating back to the 2006 *Rapanos v. United States* case before the Supreme Court, have unfortunately too often been applied broadly by USACE and EPA when making regulatory determinations. This has the unfortunate consequence of subjecting ephemeral and intermittent waterways in Arizona to the same regulatory standards of waterways in other parts of the country that have significantly different hydrological conditions.

If these standards are applied in a similarly broad manner as the agencies begin to implement this new WOTUS rule, we are concerned that Arizona communities, farms, and small businesses will be subject to new and costly regulatory burdens, without seeing a material water quality benefit to our precious sources of drinking water.

Therefore, we strongly encourage EPA and USACE to develop clear, consistent, and regionally-specific implementation guidance, based on the best available science and accounting for the geographic differences of water resources which are unique to different regions. We also ask that you respond, in writing, to the following questions:

1. What actions have been taken or will be taken as this new WOTUS rule is implemented to establish clear responsibilities, and ensure coordination between EPA regional offices and USACE regional offices on issues related to WOTUS? How will both USACE and EPA work with the U.S. Department of Agriculture on WOTUS issues?
2. We understand that EPA and USACE plan to develop a jurisdictional determination form and instructional guidebook to ensure consistent implementation of the WOTUS final rule.
 - a. Have these resources already been developed and shared with regional offices? If not, what is the timeline for developing and deploying these resources?
 - b. What control mechanisms are being established at EPA and USACE headquarters to ensure regional offices are utilizing these new resources appropriately, and applying consistent jurisdictional determinations across the country?
 - c. To what extent do the jurisdictional determinations form and guidebook rely upon repeatable, objective scientific models? Does EPA intend to use previously developed evaluation frameworks, like the beta Streamflow Duration Assessment Method for the Arid West (released in 2021), in making jurisdictional determinations?

3. What efforts will the agencies undertake to ensure that outside stakeholders, like landowners, local communities, or farmers can understand, without undergoing a formal process associated with acquiring a 401 or 404 permit, whether an ephemeral or intermittent waterway would be regulated under the new definition of WOTUS?
4. Water flow modelling and pollution transport modelling tools have advanced significantly since the mid-2000s, and can provide a much clearer picture of whether a tributary is hydrologically connected to downstream, regulated bodies of water. How are the agencies planning to leverage new and more accurate models when making jurisdictional determinations on the regional level?
5. Arizona is home to 22 Tribal Nations. What steps will the agencies take to prioritize tribal consultation and tribal requests in making jurisdictional determinations?
6. How will the agencies define “prior converted cropland” for the purposes of determining exclusions from the WOTUS definition? And what resources will the agencies make available to farmers to confirm cropland meets the WOTUS exclusion?

We look forward to receiving your response, and appreciate your continued collaboration as we work to ensure federal resources are appropriately used to protect public health and our precious sources of drinking water.

Sincerely,



Mark Kelly
United States Senator



Kyrsten Sinema
United States Senator