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November 12, 2014

Donna Downing
Jurisdiction Team Leader, Wetlands Division
U.S. Environmental Protection Agency
Water Docket, Room 2822T
Docket ID No. EPA-HQ-OW-2011-0880
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

Stacey Jensen
Regulatory Community of Practice
Docket ID No. EPA-HQ-OW-2011-0880
U.S. Army Corps of Engineers
441 G Street N.W.
Washington, DC 20314

Electronic filing: http://www.regulations.gov Docket ID No. EPA-HQ-OW-2011-0880

Email filing: ow-docket@epa.gov

Re: Gila County comments on the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers ("Corps") Proposed Rule on the Definition of "Waters of the United States" Under the Clean Water Act (CWA), Docket ID No. EPA-HQ-OW-2011-0880.

Dear Ms. Downing and Ms. Jensen:

Gila County has been a stakeholder in the efforts to develop and implement landscape scale forested ecosystems restoration; watersheds restoration; endangered and threatened fauna and flora protection; and, natural resources management for the last two decades. Gila County is actively involved as stakeholder, cooperating agency and coordinating local government in federal and state projects such as, among others, the nation's largest forested ecosystems restoration effort: the Four Forest Restoration Initiative; the ground breaking Arizona Watersheds Investment Fund; the Mexican Wolf

Recovery Program; and, numerous state or local scale natural resources management projects and natural resources-based economic development initiatives.

Counties are tasked with the heavy responsibility to protect the health, welfare, and safety of their citizens, as well as maintain and improve their quality of life. This includes protection of valuable water resources, whether as a regulated entity or regulator, to ensure that the nation's waters remain clean.

Gila County is concerned that the proposed rule would modify drastically existing regulations; expand significantly the scope of the Clean Water Act jurisdiction; and that Counties are likely to face major regulatory impacts as more waters become federally protected and subject to new rules or standards.

Specifically, Gila County would like to express the following concerns.

Agency Consultation with State and Local Partners

Gila County understands that EPA and the Corps are moving forward with a proposed rule, rather than a guidance document, as originally proposed. Gila County has concerns with the process used to create this proposal, and specifically whether impacted state and local governments were adequately consulted throughout the process.

The proposed rule raises federalism concerns and could impose direct and indirect costs.

Under Executive Order 13132 *Federalism*, federal agencies are required to work with state and local governments on proposed regulations that have substantial direct compliance costs. Since the agencies have determined that the definition of "waters of the U.S." imposes only "indirect" costs, the agencies state in the proposed rule that the new definition does not trigger Federalism considerations. However, the agencies' cost-benefits analysis: *Economic Analysis of Proposed Revised Definition of Waters of the U.S.* (March 2014), contradicts the notion that there are no federalism concerns. The economic analysis acknowledges that there may be additional implementation costs for a number of CWA programs and cautions that the data used and the assumptions made to craft the analysis may be flawed (p. 2).

Since states, local governments and their agencies implement and enforce CWA programs, Gila County believes that the "waters of the U.S." definitional change does have a substantial direct effect on these entities. The economic analysis agrees, stating that CWA "programs may subsequently impose direct or indirect costs as a result of implementation..." (p. 2).

The proposed rule should follow, not precede, the science report

In addition to the aforementioned issues, Gila County is concerned with the sequence and timing of the science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, and how it fits in the proposed "waters of the U.S." rulemaking process, especially since the document will be used as a scientific basis for the proposed rule. Releasing the proposed rule before the connectivity report is finalized seems premature and the agencies may have missed a valuable opportunity to review comments or concerns raised in the final report that would inform development of the proposed rule.

The agency's cost-benefit analysis assumptions and methodologies are flawed

As previously mentioned, while the agencies have performed cost-benefit analysis of the definitional changes on CWA programs, they have acknowledged that the data used and the assumptions made to craft the analysis may be flawed. Additionally, the methodologies used to determine economic costs and benefits to the proposed rule are misleading. In its economic cost analysis for the proposed rule, the agencies have indicated that 2.7% of new waters will be considered jurisdictional under the Section 404 program. However, the data used to compute the costs for Section 404 comes from submitted Section 404 permit applications for FY2009-2010. The economic analysis does not recognize that, under the proposal, additional waters, currently not jurisdictional, will become jurisdictional. Consequently, the analysis does not give a true accounting of the potential costs or benefits.

Critical proposed definitions and exemptions are unclear

As acknowledged in both Science Advisory Board (SAB) Panel for the Review of the EPA Water Body Connectivity Report *Comments to the chartered SAB on the Adequacy of the Scientific and Technical Basis of the Proposed Rule Titled "Definition of 'Waters of the United States' Under the Clean Water Act,"* and Science Advisory Board (SAB) *Consideration of the Adequacy of the Scientific and Technical Basis of the EPA's Proposed Rule titled "Definition of Waters of the United States under the Clean Water Act,"* key terms used by the "waters of the U.S." definition, such as "tributary", "adjacent waters", "riparian areas", "floodplains", "uplands" are inadequately explained and raise important questions.

Furthermore, as stated in the Science Advisory Board (SAB) Panel for the Review of the EPA Water Body Connectivity Report, *Comments to the chartered SAB on the Adequacy of the Scientific and Technical Basis of the Proposed Rule Titled "Definition of 'Waters of the United States' Under the Clean Water Act,"* "it was not clear whether the proposed rule would exclude: artificial lakes and ponds that have connections to downstream waters, underground storm water drainage, natural versus artificial swales, roadside ditches, storm water quality basins, bio swales, detention basins, industrial water processing and/or treatment facilities, desalination brine storage basins, cooling systems, oil and gas tank basins, fish farms, and rice paddies" (p. 8).

Ditches

The proposed rule excludes from jurisdiction ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow. In addition, the proposed rule excludes ditches that are not tributaries. However, the Science Advisory Board (SAB) Panel for the Review of the EPA Water Body Connectivity states in its report that "there was extensive discussion among panelists of the proposed exclusion of these ditches. Panelists generally agreed that many research needs must be addressed in order to discriminate between ditches that should be excluded and included" (p. 7).

Counties own and operate a number of public infrastructure ditches such as but not limited to roadside, flood control channels, drainage conveyances and storm water infrastructures. These ditches are used to safely funnel water away from homes, properties and roads to keep citizens protected. Based on the recommendations made by the Chartered Science Advisory Board, the proposed "waters of the U.S." regulation from EPA and the Corps is likely to have a significant impact on counties by potentially increasing the number of county-owned ditches that fall under federal jurisdiction.

Additionally, the EPA and the Corps state that the purpose of the rule is to provide clarity in the jurisdictional process. However, the definition is unclear. The proposed rule states that man-made conveyances, including ditches, are considered jurisdictional tributaries if they have a bed, bank and ordinary high water mark (OHWM) and flow directly or indirectly into a "water of the U.S.," regardless of perennial, intermittent or ephemeral flow. Since key terms like "uplands" and "contribute flow" are not defined, it is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a "water of the U.S." A public infrastructure ditch system, roadside, flood or storm water, is interconnected and can run for hundreds, if not thousands of miles. Ditches are not wholly in uplands nor do they strictly drain in uplands, since they are designed to convey overflow waters to an outlet.

Further, the Science Advisory Board (SAB) Panel for the Review of the EPA Water Body Connectivity states in its report that "one criticism discussed by Panel members was that not all tributaries will have ordinary high water marks (OHWM). The absence of OHWM is relatively common in ephemeral streams within arid and semi-arid environments or low gradient landscapes" (p. 5). Removing the requirement for ordinary high water marks and changing the "wording in the definition ... to "bed, bank, and other evidence of flow" (p. 5) could further extend jurisdiction over county-owned and operated public infrastructure ditch systems.

The proposed rule states that some ditches would not be considered "waters of the U.S." if the ditches are excavated wholly in uplands, drain only uplands and have less than perennial flow OR ditches that do not contribute flow either directly or through another water. However, it is likely to be inordinately burdensome on counties to prove that ditches do not "contribute to flow," making the distinction between exempt ditches and jurisdictional ditches virtually impossible, especially when said ditches are located in close proximity to a "water of the U.S."

Section 404 Permits for ditch maintenance and storm water activities

Ditches are pervasive in counties across the nation and, until recently, were never considered to be jurisdictional by the Corps. Section 404 permits are now required for ditch maintenance activities such as cleaning out vegetation and debris.

While, in theory, a maintenance exemption for ditches exists, it is narrowly crafted and it is difficult for local governments to use the exemption. The federal jurisdictional process is not well understood and the determination process can be extremely cumbersome, time-consuming and expensive, leaving counties vulnerable to lawsuits if the federal permit process is not streamlined. Whether or not a ditch is regulated under Section 404 or not has significant financial implications for counties, especially those balancing small budgets against public health and safety needs.

Additionally, the Corps, which oversees the 404 permit program, is already severely backlogged in evaluating and processing permits. This often puts the counties and flood and storm water management agencies in a precarious position.

Since storm water management activities are not explicitly exempt under the proposed rule, Gila County is concerned that man-made conveyances and facilities for storm water management could now be classified as a "water of the U.S." Some counties and cities own Municipal Separate Storm Sewer System (MS4) infrastructure including ditches, channels, pipes and gutters that flow into a "water of the U.S." and are therefore regulated under the CWA Section 402 storm water permit program. There is a

significant potential threat for counties that own MS4 infrastructure because they would be subject to additional water quality standards (including total maximum daily loads) if their storm water ditches are considered a "water of the U.S." Not only would the discharge leaving the system be regulated, but all flows entering the MS4 would be regulated as well. Even if the agencies do not initially plan to regulate an MS4 as a "water of the U.S.," they may be forced to do so subsequently through CWA citizen suits, unless MS4s are explicitly exempted from the requirements.

This concern is validated with the Science Advisory Board (SAB) Panel for the Review of the EPA Water Body Connectivity stating in its report that "the Panel members noted that many of the exclusions in the proposed rule do not have strong scientific justification and, rather, reflect policy decisions that account for stakeholder concerns and / or historical practices" (p. 6).

Storm water management is often not funded as a water utility, but rather through a county general fund. If storm water costs significantly increase due to the proposed rule, not only will it potentially impact the counties ability to focus available resources on real, priority water quality issues, but it may also require that funds be diverted from other government services such as education, police, fire, etc.

By shifting the point of compliance for MS4 systems further upstream, the proposed rule could reduce opportunities for establishment of cost effective regional storm water management systems. Many counties and storm water management agencies are attempting to stretch resources by looking for regional and integrated approaches for managing storm water quality. The rule would potentially inhibit those efforts.

Green Infrastructure

Green infrastructure is often utilized as a storm water management tool to lessen flooding and protect water quality. Green infrastructure is not explicitly exempt under the proposed rule. The proposed rule could inadvertently impact a number of these county-maintained sites by requiring Section 404 permits for non-MS4 and MS4 green infrastructure construction projects.

Additionally, it is unclear under the proposed rule whether a Section 404 permit will be required for maintenance activities on green infrastructure areas once the area is established.

Water Reuse, Reclamation and Supply

Water reuse facilities are being built across the country to generate an additional water supply for irrigation purposes and sometimes drinking water. It is unclear how the proposed definitional changes would impact the pesticide general permit program, which is used to control weeds and vegetation around ditches, water transfer, reuse and reclamation efforts and drinking and other water delivery systems. Additional clarification is needed by the agencies.

Jurisdictional Concern

According to EPA, the report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, Office of Research and Development of the Environmental Protection Agency (EPA* is to be used as "the scientific basis needed to clarify Clean Water Act jurisdiction, including a description of the factors that influence connectivity and the mechanisms by

which connected waters affect downstream waters." Any and all regulatory "waters of the U.S." jurisdictional decisions will be based on the final report.

One of the report's major conclusions states that all streams, regardless of size and flow, are connected. Specifically, the report states that streams, whether "individually or cumulatively, exert a strong influence on ... downstream waters. All tributary streams, including perennial, intermittent, and ephemeral streams are physically, chemically, and biologically connected" to downstream waters and thus, impact water quality (1-3, 1-6, 6-1).

This conclusion is supported by both the Science Advisory Board (SAB) Panel for the Review of the EPA Water Body Connectivity report: "Nearly all Panel members agreed that even though connectivity occurs along a gradient, there is nonetheless strong scientific evidence that tributaries, as a group, have strong influence on the physical, chemical, and biological integrity of downstream waters, and therefore the available science supports making all tributaries jurisdictional under the Clean Water Act" (p. 2); and the Chartered Science Advisory Board (SAB) report: "There is strong scientific evidence to support the EPA's proposal to include all tributaries within the jurisdiction of the Clean Water Act. Tributaries, as a group, exert strong influence on the physical, chemical, and biological integrity of downstream waters, even though the degree of connectivity is a function of variation in the frequency, duration, magnitude, predictability, and consequences of physical, chemical and biological processes" (p. 2).

It is therefore likely that federal agencies may attempt to use the Report to provide the scientific basis to argue that all streams should be considered jurisdictional no matter the size or flow rate; and that EPA may use the connectivity report to propose new regulations with the Corps to interpret the scope of the CWA.

However, both boards noted, and the Chartered Science Advisory Board warned in its *Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* that "the Report often refers to connectivity as though it is a binary property (connected versus not connected) rather than as a gradient," and it recommended that "the interpretation of connectivity be revised to reflect a gradient approach that recognizes variation in the frequency, duration, magnitude, predictability, and consequences of those connections" (p. 2).

Gila County is concerned that the Report could allow federal agencies to assert jurisdiction in a blanket fashion over ephemeral and intermittent streams, based on a low connection gradient, rather than require federal agencies to identify a significant nexus for each non-navigable tributary with downstream navigable waters, per the significant nexus test established by the 2006 U.S. Supreme Court ruling in Rapanos v. United States, 547 U.S. 715, 62 ERC 1481 (2006).

Wetlands Definition Concern

Cowardin et al. (1979) define wetland according to three criteria:

1) is inundated or saturated at a frequency sufficient to support, at least periodically, plants adapted to a wet environment;
2) contains un-drained hydric soil; or
3) contains non-soil saturated by shallow water for part of the growing season.

The Energy and Water Development Appropriations Act of 1993 mandates that federal agencies use the Corps' Wetlands Delineation Manual (Jan. 1987) definition that generally requires that all three of Cowardin's criteria be present (Par. 26(c)).

The report, however, defines "wetland" as an "area that generally exhibits at least one of the following three attributes" (A22). There is no legitimate reason to use a less rigorous standard than the one outlined in the Corps' Wetlands Delineation Manual. There is even less reason for the report to discard any wetlands distinction when discussing riparian areas and floodplains (5-3 to 5-5).

Gila County, therefore, respectfully recommends that the definition of wetlands in the report be made consistent with existing law, and that the report wetlands analysis be reevaluated in light of this change.

Wetlands Classification Concern

The report divides wetlands into classes of "riparian," "flood plain," "geographically isolated," "bidirectional," and "unidirectional." However, none of these technical categories easily maps to the existing legal categories of "adjacent" and "non-adjacent" or "isolated" wetlands.

In United States v. Riverside Bayview Homes, Inc., 474 U.S .12 1 (1985), the Supreme Court upheld part of the agencies' "adjacent wetlands" jurisdiction based on the "reasonableness" of the purported ecological connection between navigable waters and their adjacent wetlands. The Riverside Bayview's analysis was based on a scenario where wetlands physically abut water, i.e., one cannot distinguish the end of land from the beginning of water (Rapanos, plurality opinion, 547 U.S. at 74 1-42).
The report appears to presume that wetlands within a river's floodplain could have such a degree of connectedness. But it does not follow, as the report also appears to suppose, that such flood plain wetlands necessarily have such connectedness, hence the failure of the report to map to existing legal categories.

Gila County, therefore, respectfully recommends that the report explain how its technical wetland vocabulary maps to existing legal terminology.

Isolated Wetlands Concern

The report's depiction of "isolated" wetlands (1-2, 3-39) seems to infer that the agencies seek to change the meaning of "isolated" wetlands. This inference is further supported by the report's apparent claim that few if any wetlands are truly "isolated" due to geographically isolated wetlands purportedly still affecting downstream waters through hydrologic, chemical, or biological connectivity (1-14).

Indeed, the report strongly implies that "isolated wetlands" do not exist:

- "Even hydrologically isolated wetlands can influence downstream rivers by preventing water and other materials from entering the river network" (5-2);
- "Even unidirectional wetlands that are considered to be geographically isolated (i.e. completely surrounded by uplands), can have surface water outflows that connect them to other water bodies" (5-22);
- "Thus, the tern 'geographically isolated' should not be used to infer lack of hydrologic, chemical, or biological connectivity" (5-36).

Whether correct or not, this assertion has little if any relevance to new rule-making. Even the "isolated" waters in Solid Waste Agency of Northern Cook County v. US. Army Corps of Engineers, 53 1 U.S. 159 (2001) (SWANCC), were not truly isolated, in that they had an ecological connection via migratory birds to other aquatic systems. Rather, by "isolated," SWANCC meant "not adjacent," that is, not physically abutting.

The existing law stands for the proposition that non-adjacent waters fall outside of the Clean Water Act jurisdiction, regardless of the on-the-ground degree of connection they may have to other waters. Hence, the report's discussion of isolation could lead to a pernicious misunderstanding of existing law.

This concern is validated by both the Chartered Science Advisory Board and the Science Advisory Board (SAB) Panel for the Review of the EPA Water Body Connectivity Report emphasizing that "First and foremost, the panel members agreed that any definition or determination of adjacency should be based on functional relationships, not distance" (Science Advisory Board Panel, p. 3).

Gila County, therefore, respectfully recommends that the report be revised to eliminate discussion of the relative rarity of "isolated" wetlands, and instead focus the connectivity discussion in terms of the relative degree of interconnectedness among the various classes of wetlands.

Groundwater Concern

The report repeatedly notes the importance of groundwater interactions among wetlands, streams, and large waters (5-2, 5-23 to 5-25, 5-41) and seems to infer that the agencies seek to regulate groundwater as such, which would be a significant change from existing law.

This concern is validated by both the Chartered Science Advisory Board and the Science Advisory Board (SAB) Panel for the Review of the EPA Water Body Connectivity Report emphasizing that "the science indicates that regional groundwater sources can strongly affect connectivity" (Science Advisory Board Panel, p. 3).

However, Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962,964-66 (7th Cir. 1994) held that the Clean Water Act does not regulate discharges to groundwater. Hence, the report's discussion of groundwater could lead to a pernicious misunderstanding of existing law.

Gila County, therefore, respectfully recommends that the report's discussion of groundwater be eliminated.

Cumulative Effects

The report repeatedly asserts that every wetland or stream considered singly or in the aggregate, substantially affects the physical, chemical, and biological integrity of downstream waters:

- "Streams, individually or cumulatively, exert a strong influence on the character and functioning of downstream waters" (1-6);
- "The contribution of material by a particular stream and wetland might be small, but the aggregate contribution by an entire class of streams and wetlands (e.g., all ephemeral streams in the river network) might be substantial" (1-14);
- "Our review supports the need for a landscape perspective of connectivity in which the effects of small water bodies in a watershed are evaluated in aggregate" (6-3);

- "Small streams [such as] first-order streams contribute approximately 60% of the total mean annual flow to all northeastern U.S. streams and rivers" (4-1);
- "First-order streams conservatively make up half of the nation's total stream length" (4-2);
- "When drainage area and stream length of headwater streams are combined ... they can represent most of the river catchment and network" (4-2).

It stands to common sense that every surface-water input to an aquatic system is significant in the aggregate. Justice Kennedy's Rapanos concurrence nevertheless strongly implies that, even with new rule-making, the Clean Water Act could only encompass regulation of certain classes of "major tributaries," or "specific tributaries;" not every tributary (547 U.S. at 780-81).

Justice Kennedy was aware as well that "isolation" is a matter of degree (782), yet nevertheless concluded that certain classes of wetlands and other features must be held to be legally "isolated" notwithstanding a minor connection: "Under the analysis described earlier ... mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood" (784-85).

The report, however, seems to ignore this important built-in limitation of the Clean Water Act scope. The report states: "Although an individual low-order stream can have less connectivity than a high-order stream, a river network has many more low-order streams, which can represent a large portion of the watershed ... thus, the magnitude of the cumulative effect of these low-order streams can be significant" (3-41). This statement contradicts Justice Kennedy's point that the agencies' existing regulations are infirm precisely because they cover such low-order streams carrying only "low volumes of water." Although Justice Kennedy's concurrence does anticipate the aggregation of wetlands (Rapanos, 547 U.S. at 780) it does not for tributaries (780-81).

Gila County, therefore, respectfully recommends that the report's discussion of cumulative effects be limited to wetlands, and that the report's discussion of tributaries be refocused on identifying characteristics of "major tributaries" based on their volume of flow, proximity to navigable waters, or other relevant considerations.

Summary

The Clean Water Act jurisdiction is complex, and clarification either from Congress or the agencies is necessary (Sackett v. EPA, 132 S. Ct. 1367, 1375-76 (2012) (Alito, J., concurring); Rapanos, 547 U.S. at 757-58 (Roberts, C.J., concurring); Rapanos, 547 U.S. at 811-12 (Breyer, J., dissenting).

EPA acknowledges that its connectivity report is the first step in promulgating new regulations. However, unfortunately, elements of the report seem to indicate that any new regulations based thereon will complicate, rather than improve, the law and jurisdiction of the Clean Water Act.

Gila County, therefore, respectfully recommends that to avoid this result, the Board adopt the recommendations set forth above as well as in comments from other stakeholders.
These recommendations will help ensure that the new rule-making will conform with existing constraints from the Act and case law, as well as provide meaningful guidance to the regulated public "feeling their way" through this difficult area of the law (Sackett, 132 S. Ct. at 1370).

Gila County respectfully submits that the above comments and recommendations are substantive in nature and warrant careful consideration and adoption by the EPA. Contrary to the agencies assertions, the proposed rule does not provide the advertised clarifications and certainties.

Gila County respectfully urges the EPA and the Corps to remand the proposed rule until all concerns are addressed, and to re-release a revised rule based on the concerns raised by state and local government stakeholders, among others.

Gila County is committed to partner with the EPA to design, execute and monitor an ecologically, economically and socially responsible implementation of the Clean Water Act, while preserving the custom, cultures, economic well-being, health and safety of the County's residents and visitors.

Thank you for your consideration.

Respectfully submitted,

Michael A Pastor — 11/12/14

Michael Pastor
Chairman
Gila County Board of Supervisors

Date

ATTEST

Marian Sheppard — 11-12-14

Marian Sheppard
Clerk of the Board
Gila County Board of Supervisors

Date