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C.H. HUCKELBERRY
County Administrator

April 15, 2019

Michael McDavit
Oceans, Wetlands, and Communities Division, Office of Water (4504-T) Environmental
Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460;

Jennifer A. Moyer
Regulatory Community of Practice (CECW-CO-R), U.S. Army Corps of Engineers
441 G Street NW,
Washington, DC 20314

Re: **Docket EPA-HQ-OW-2018-0149 - Waters of the United States Proposed Rule
Revision**

As a governmental body, Pima County is responsible for the protection of the public's health, safety and welfare. Pima County owns and operates wastewater treatment facilities that discharge into the Santa Cruz River. We also have a municipal separate stormwater system. Our rivers also receive pollutants from mining and industrial areas, as well as releases from Mexico into the Santa Cruz River. We rely on the protection provided under the Clean Water Act (CWA) to protect public health and our water supply. Removing ephemeral streams, and interstate and international waters from the definition of the Waters of the United States (WOTUS) concerns us greatly since the Arizona Department of Environmental Quality (ADEQ) relies entirely on federal CWA regulations and rules for surface waters.

This proposed rule would jeopardize thousands of existing users protected today under the CWA. The Pima County Board of Supervisors urges the EPA to maintain a definition for WOTUS that would retain protections for headwaters, wetlands and intermittent and ephemeral streams according to the 2015 "Clean Water Rule".

Pima County staff has prepared the following specific comments on the proposed rule revision for your consideration.

1. Exclusion of ephemeral waters from class of tributaries subject to CWA Jurisdiction is arbitrary.

The proposed rule defines “tributary” to mean “a river stream or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a traditional navigable water or territorial sea in a typical year either directly or indirectly through other jurisdictional waters such as other tributaries” (84 Fed. Reg. at 4173). This definition requires a clear distinction between three flow regimes: 1) Ephemeral, 2) Intermittent, and 3) Perennial. The agencies propose to define “perennial” to mean “surface water flowing continuously year-round during a typical year” (*Id*). “Intermittent” is defined as “surface water flowing continuously during certain times of a typical year, not merely in direct response to precipitation, but when the groundwater table is elevated ... or when snowpack melts” (*Id*). “Ephemeral” is defined to mean, “surface water flowing or pooling only in direct response to precipitation such as rain or snow fall” (*Id*). Based on these stilted definitions, the agencies’ proposal excludes ephemeral streams from its definition of “tributary” and, therefore from regulation as Waters of the United States.

The agencies assert that providing these specific definitions will “ensure that the regulations is clear.” However, for the reasons stated below, attempting to institute a clear and permanent distinction between the three flow regimes, particularly in arid, western states, is unrealistic and virtually impossible. Attempting to do so will only complicate what is an already extremely complicated regulatory regime. In addition, blanket elimination of ephemeral streams from the definition is arbitrary and scientifically unsupportable.

2. Natural variability in flow regime precludes the creation of permanent distinctions between perennial, intermittent and ephemeral waters.

No national inventory exists that distinguishes ephemeral, intermittent and perennial flows from each other, and for good reason. Southern Arizona and California have the highest precipitation coefficient of variation in the continental US (Goodrich et al. 2018). This creates highly variable streamflow conditions. In summer, thunderstorms occur that can cause extreme events in one watershed, while an adjacent one may be minimally affected. Some winters, we receive Pacific frontal systems that can deliver rain or snow to large areas and can produce persistent runoff. Some years, tropical depressions can bring long-term runoff that can make otherwise ephemeral streams flow for months or years (Levick et al 2008).

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Compounding the year-to-year temporal variability in rainfall and runoff is the spatial variability of flow regimes. Nature is a continuum and there are many streams with ephemeral or intermittent reaches that occur in between reaches of stream that flow perennially. In Arizona and other semi-arid areas, *interrupted* stream flow is a natural, regular and reoccurring feature and drier reaches, which vary in length between seasons and from year to year, often separate perennially flowing segments. The location of these changes in flow regime often shifts because of sediment accumulation or losses during storm events and the rise and fall of local water tables. This natural variability in flow regime confounds the arbitrary or permanent distinctions among perennial, intermittent and ephemeral waters as defined in the proposed rule.

The agencies propose to define “certain times of a typical year” as “within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.” In order to classify streams to meet the proposed definitions, one would have to have long-term monitoring data to determine what a “typical year” is; however, available monitoring data is generally short-term in duration (field observations of a stream reach), or limited to a given point in space (generally a stream gage). Such data can fail to represent the true range of variability of flow regime over time and space, leading to later questions about whether the classification of the flow regime is appropriate. This is already a contentious and complex issue under the current regulatory regime, and this proposed rule will only exacerbate it.

3. Anthropogenic variability in flow regime precludes the creation of permanent distinctions between perennial, intermittent and ephemeral waters.

In many Western states, the flow regime is affected by surface water diversions, groundwater pumping and dams, which render perennial streams into intermittent or ephemeral ones. Additionally, alteration of the watershed by land use can also change flow regimes. It does not make sense to regulate or deregulate discharge of pollutants to streams based on changes in dam operations, wastewater discharge, groundwater pumping or diversions, which vary over time. Such would pose great challenges to the states.

Likewise, the proposed rule does not seem to recognize the condition of effluent-dependent rivers rendered perennial by virtue of treated wastewater. Under the rule, a perennial discharge to an otherwise unregulated ephemeral tributary would be regulated if it connected to a navigable water, but an intermittent pollutant discharge would not; this makes no sense. Where is the science that shows that an ephemeral or intermittent flow regime prevents pollutant transport downstream? Over and over again, various pollutants have been shown to move along ephemeral and intermittent tributaries to points downstream. This is one reason our Pima County Board of Supervisors has supported the 2015 Clean Water rule and opposes this 2019 proposal.

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4. Developing realistic distinctions between perennial, intermittent and ephemeral waters would require excessive and plainly unrealistic data requirements.

The data quality for drawing the distinctions based on flow regime has been and will continue to be very uneven, despite a state's best efforts, not only because the definitions must chase a moving target (a temporally and spatially variable flow regime), but also because funding for statewide monitoring does not exist. This is why the Corps has traditionally relied on project-level determinations, *not on statewide inventories*. While eliminating the significant nexus test would seem – on paper – to simplify things, the proposed rule would create the additional burden on the states to develop god-like knowledge of flows, and using that to classify all streams with a different filter (ephemeral vs. intermittent vs. perennial) than has traditionally been used.

The EPA proposes to use the final definitions as a basis for creating geospatial datasets that represent the current set of set of WOTUS. The proposal notes that they “are not aware of any map or dataset that accurately or within any precision portrays the scope of CWA jurisdiction at any point in the history of this complex regulatory program.” There is a good reason for that. Historically, WOTUS determinations were made only on those waterbodies within a project's boundaries using information provided by applicants. This was an expeditious approach, because applicants have a vested interest in obtaining the requisite information, and projects that would require 404 permits are small in footprint and generally are concentrated in certain areas of economic development.

The EPA proposal appears to shift the information burden from project proponents to the states and tribes, while at the same time expanding the scope of required information to places where permits may never be requested. It would require states to update information on WOTUS as field conditions change, rather than applicants providing that information only for sites where they propose to operate, or when they need their permits renewed.

In Arizona, ADEQ recently experimented with a WOTUS classification. ADEQ could not clearly identify whether most of the water bodies they currently regulate should be considered a WOTUS, and not simply because of a lack of definitions (ADEQ 2017a,b). It would require extensive and repeated field monitoring of flow lengths over large and remote areas to detect changing flow regimes due to climate and anthropogenic changes that might affect a WOTUS classification. A similar effort has been conducted for the Arid West (Jensen 2017), but noted that the National Hydrography Dataset is inadequate because ephemeral streams are mostly classified as either intermittent or are not mapped in most of the country.

Existing data is simply insufficient and not suitable for the significant task being proposed here. As an example, we reviewed the National Wetland Inventory (NWI) as it applies to Pima County (County). The [NWI for Arizona](#) was compiled in 2015 by the University of Arizona on contract to the ADEQ, relying on existing digital mapped wetland features and

data fusion. The resulting polygons were classified using the Cowardin classification system. The Cowardin system does not lend itself to a classification system for discriminating WOTUS from non-WOTUS water bodies. Classified polygons in the County include Central Arizona Project (CAP) recharge basins, areas of mesquite bosque, tailings ponds and piles, wastewater facilities, portions of the CAP canal and isolated ponds that are not WOTUS.

A comprehensive WOTUS geospatial dataset of the kind envisioned by the proposal is simply not achievable, and requiring states to develop such a dataset represents an unfunded mandate that would be imposed on the states and tribes.

5. The rule diminishes state and local ability to protect surface water quality.

The proposal categorically excludes ephemeral tributaries of traditional navigable waters from jurisdiction, despite the fact that ephemeral streams have been considered jurisdictional or potentially jurisdictional in Arizona since 1972 (ADEQ 2007). This significant departure from previous and current regulatory regime will wreak havoc with Arizona's ability to administer surface water quality protections.

This proposed rule would jeopardize thousands of existing users protected today under the CWA. Currently, the state's sole regulatory authority to protect water quality in waters of the state derives from its aquifer water quality regulations. Ephemeral, perennial and intermittent streams isolated from the sea or Colorado River play an important role in recharging the aquifer and purifying the infiltrating waters in Arizona; however, no rulemaking to protect those streams has been proposed (as of April 2019).

The longest perennial water body in Arizona is the Colorado River, which is shared by seven states and numerous tribes. It is questionable whether this water body would remain under CWA jurisdiction, since it is diverted from the sea at Morelos Dam. Regardless, most of its tributaries would not remain jurisdictional under the proposed definition. By removing CWA protections from ephemeral tributaries, this proposal would in effect trigger each of the seven states and various tribes in the Colorado Basin to contemplate imposing their own water quality rules for its tributaries or, in the alternative, allowing unregulated or marginally regulated discharges. It is hard to see how this would promote protection of Colorado River water quality, or adherence to international treaty standards.

The next longest stream in Arizona is the Gila River, which is an interstate stream that originates in New Mexico and only occasionally connects to the Colorado River. Under the provision envisioned in the rule, the "break" caused by ephemeral reaches of the lower Gila River would isolate the majority of the rest of the flowing river from the protection of the CWA (see Figure 1).

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The proposal to “break” CWA jurisdiction at ephemeral reaches would almost completely eliminate regulation of point or non-point source pollution in the Sun Corridor. Arizona’s largest and fastest growing counties are located in the heart of the mostly ephemeral Gila River watershed. There are currently many CWA Pollutant Discharge Elimination System (NPDES) permits located there associated with sewage treatment facilities and other uses. These permits regulate discharge of wastewater that are protective of aquatic life and body contact uses. Under these permits, point source dischargers have spent hundreds of millions of dollars to meet CWA standards that will no longer apply under this proposed rule. Without CWA protections, Arizona will, without creation of a new state regulatory system, be unable to require permits that are protective of these uses (ADEQ 2007).

Similar impacts would occur in the Santa Cruz River as significant reaches are either ephemeral or effluent-dependent. The County has expended substantial sums to improve effluent quality with a goal of providing biological habitat.

Jurisdictional determinations that would be made in accordance with the proposed rule would affect the state’s ability to benefit from and implement all CWA programs. According to ADEQ (2007), 96% of the state’s stream miles are non-perennial.

6. The proposed rule is unnecessary to promote federalism.

One of the professed motivations for this proposal is to increase state responsibilities for care of water bodies, and reduce the reach of the CWA’s national provisions and the paternalism of the EPA oversight. EPA has overlooked the fact that the Supreme Court’s decisions on isolated water and the imposition of the significant nexus test are already transferring responsibilities for many water bodies to the states. The proposed rule takes no note of the profound changes that are already occurring through Approved Jurisdictional Determinations by the U. S. Army Corps, and state reviews of jurisdiction.

For example, the ADEQ recently evaluated over 900 Arizona water bodies used for fishing, wading, agriculture, water supply, and other uses. The objective of ADEQ’s review, as expressed in a November 2016 memorandum to the Governor’s Office, was to “realign Arizona’s categories of navigable waters, taking into account U. S. Supreme Court decisions of the past 10 years”. An exemption from the Governor’s rule-making moratorium authorizes staff to “prepare the necessary studies to withstand the EPA’s scrutiny and gather information and supporting documentation on stakeholder’s views, especially as to aligning how Arizona categorizes WOTUS.”

A preliminary classification of WOTUS offered for the Governor’s Office proposed removing 47 lakes and 21 streams from Arizona’s CWA list based primarily on the significant nexus and isolated waters standards as defined by the U.S. Supreme Court. The same analysis identified 74 lakes and 336 streams that might not continue to be regarded as protected by

federal CWA authority based on current Corps standards (“significant nexus” test) and data available to its staff.

The validity and enforceability of existing NPDES permits for wastewater treatment facilities, mines, and other entities on such water bodies depends on the CWA, since Arizona has not adopted its water quality standards under state authority. Consequently, Arizona has reviewed the status of its Arizona Pollutant Discharge Elimination System (AZPDES) permits in relation to recent Corps determinations. ADEQ has terminated AZPDES permits where the applicant has received a determination that the water body is isolated or lacks significant nexus, and requests such a release (ADEQ letter to Pima County dated October 26, 2017).

7. State-imposed limitations on surface water quality regulation limit flexibility to respond to this change in the Clean Water Act.

Retaining the significant nexus test as the basis for WOTUS designations would not only respect the state’s existing work done under the current regulatory regime, it would also give states more leeway in complying with state stringency prohibitions (ELI 2013). Over two-thirds of U.S. states, 36 in all, have laws that restrict the authority of state agencies or other localities to regulate waters left unprotected by the definition of WOTUS (ELI 2013). These restrictions take the form of absolute or qualified prohibitions that require state law to be “no more stringent than” federal law, property rights limitations, or a combination of the two. In some instances, such provisions constrain or eliminate the authority of state or local regulators to protect aquatic resources whose CWA coverage has disappeared or been rendered uncertain as a result of Supreme Court decisions. The CWA has provided a floor of protection to which individual states could add such requirements as needed to protect the public values and uses of water; state stringency requirements like Arizona’s turn that floor into a ceiling, limiting the state’s ability to promulgate additional regulations.

The state of Arizona also has no wetland protection program, nor any other regulatory program addressing the physical, chemical or biological integrity of wetland systems. Arizona has historically relied upon the Section 401 water quality certification associated with Section 404 to gain a measure of state influence over changes to the physical character of its waters, and discharges of pollutants to her streams and wetlands. If the majority of the state’s ephemeral streams or wetlands are not protected as WOTUS, there is no safety net, in this regard.

8. Significant economic impacts are likely to result from the implementation of the proposed rule.

Many streams in the Arid Southwestern US would likely lose protection under the Clean Water Act (Jensen 2017). Implementing the proposed rule will cause adverse economic impacts from pollution by mines, wastewater treatment plants, and other facilities that would no longer be regulated due to self-imposed state stringency limitations mentioned above, as

well as the proposed rule's additional requirements for expensive monitoring of flow regime conditions by the state or tribes. These costs have not been analyzed.

The rule passes the cost of removing pollutants on to those users downstream. This cost has not been analyzed. Temporary watercourses provide many services, including water provision and purification that contribute substantially to security water quantity and quality (Nadeau and Rains 2007, Acuna et al. 2014, Datry et al., 2017). Fifty-eight percent of all waterways that provide drinking water to the continental United States are temporary or headwater streams (EPA 2017). Relieving ephemeral headwaters from any regulation will result in the contamination of downstream perennial reaches, where many cities receive their water supplies. This is because in Arizona, as in many other Western states, there are no requirements for protecting surface water bodies that are not WOTUS. Arizona has specifically rejected the idea of developing such rules during its current rule-making process due to the uncertainties in the definitions of WOTUS (ADEQ 2017a).

The severe reduction of jurisdiction would affect all federal funding tied to the CWA, including the flood control benefits provided by the U. S. Army Corps of Engineers. Much of the bank stabilization in Pima County was funded by the Corps based on the premise that the Rillito River and its tributaries are WOTUS. Pima County has received millions of dollars from the Corps, the Bureau of Reclamation, and the U. S. Environmental Protection Agency based on the premise that federal jurisdiction extended to streams in the County. The reduction in federal assistance to states across the Western U. S. would be profound. States would also lose federal funding for NPDES permit administration and for financing under WIFA.

Other impacts to Arizona resulting from the proposed WOTUS redefinition include:

- a. Probable elimination of the Section 208 program.
- b. Potential loss of ADEQ funding for inspection, compliance, and stream assessment activities through EPA block grants.
- c. Significantly reduced incentives to apply latest and most appropriate water treatment technology when wastewater plants are expanded and upgraded due to loss of surface water standards, permits, and stream assessment programs.
- d. Nonpoint pollution would increase.
- e. Farmers would not be protected from adverse pollution from biosolids, as biosolids generated by many wastewater reclamation facilities would no longer be regulated under 40 CFR, Part 503.

9. Shifting responsibility for protecting surface water quality to states has already proven ineffective.

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Prior to the enactment of the CWA, the primary responsibility for regulating water pollution resided with the states. In 1965, Congress called for states to implement water quality standards for interstate waters. This regulatory paradigm was doomed to fail, because even if every state had submitted acceptable water quality standards, enforcement would have been difficult, as the government would have had to prove a particular polluter was responsible for a violation of federal standards (Andreen W.L. 2013). The repeated failures of the states to manage pollution led to the CWA of 1972, which imposed a set of technology-based performance standards for different categories of dischargers.

CWA programs have resulted in decreases of municipal and industrial discharges, reductions in wetland losses, and improvements in water quality without causing significant economic harms (Andreen W.L. 2013). In turning back to state-by-state, tribe-by-tribe regulation of the vast majority of Western streams, the EPA proposal risks disaster. The problem is exacerbated by the state limitations discussed above, and the proliferation of new chemical compounds each year, which enter the effluent stream. The infrastructure for treating municipal wastewater is aging, and years of inadequate support have compromised EPA's ability to study emerging contaminants and update technology-based effluent limitations. A national framework is needed more than ever.

10. The Clean Water Act should recognize that discharges to surface water affect groundwater.

Revisions to the CWA regulations should take into consideration the potential for discharges to surface waters affecting groundwater. The proposed rule's exclusion of groundwater including underflow would seem to require the agencies to determine which perennial streams are groundwater and which are surface water. In much of the US, groundwater discharges partially or entirely support base flows in streams and wetlands. It is unrealistic to expect agencies to perform or rely on studies that would segregate groundwater discharges to the surface from runoff when there is a natural continuum between the two that varies over time and space.

Consideration of discharges to surface water that may affect groundwater is extremely important for many reasons, including public health. Although Arizona does have an aquifer protection statute, its applicability is very limited, in part because Arizona has relied on the CWA to regulate discharges of pollutants to streams. Tucson's drinking water supplies have been affected by past, unregulated surficial discharges of pollutants, such as tritium, trichloroethylene, nitrate, boron, and others that have reached the aquifer and contaminated the water supply. These legacies affect local perspectives on the importance of protecting water quality, as evidenced by repeated resolutions of the County Board of Supervisors to protect surface water quality as a means of protecting our aquifer.

We are still discovering new kinds of contaminants that have passed from the land surface into the groundwater, despite the fact that most streams are ephemeral and the water table is generally 100 or more feet below the land surface. This year, Tucson and Marana reported detections of elevated concentrations of perfluorinated compounds in wells along the Santa Cruz River, the Rillito River, in the Tucson Airport Remediation Project wells, and near Davis-Monthan Air Force base (Tucson Water 2018). Perfluorinated compounds are used in stain-resistant products. They are also used in a type of firefighting foam.

The Clean Water Act should recognize that aquifer recharge is an existing use of intermittent and ephemeral streams in regions such as ours.

11. Eliminating interstate waters as separate jurisdictional category is inconsistent with CWA history and the "Commerce Clause."

Agencies should respect longstanding practice to include interstate waters as WOTUS. It is hard to see how dismantling a nationally unified set of standards will otherwise benefit interstate commerce. Interstate and international waters like the Colorado, Gila, and Santa Cruz Rivers should be treated equally under the law. The Commerce Clause in the U. S. Constitution grants Congress power "(t)o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8, clause 3.

In 2002, the Los Angeles District of the Corps provided public notice determining that water which physically flows across state, tribal, or international borders affects interstate commerce (Corps Pub. Notice 2002-01296-RJD, attached). In that document, the Corps created a partial list of interstate waters based on U. S. Geological Survey 7.5 minute quadrangles. The list contained 31 named streams and 605 unnamed streams in Pima County alone. At the state level, there would be thousands of such streams.

With the agencies' newly proposed approach to interstate waters, federal jurisdiction would be eliminated for nearly all of the listed streams. Regulation of the streams would be left to the various states, with differing standards depending on which side of the border one stands. Upstream state controls would impact downstream state water quality and, therefore, biology, with minimal recourse. Such an approach is inconsistent with the intent of the Commerce Clause.

12. The proposed rule inappropriately adopts late Justice Scalia's standard for WOTUS.

The proposed rule adopts late Justice Antonin Scalia's "continuous surface water connection" standard outlined in the plurality opinion for *Rapanos v. United States*¹ rather than with the far more widely used "significant nexus" standard as described in Justice

¹ 547 U.S. 715 (2006).

Anthony Kennedy's concurring opinion. This goes against the vast bulk of post-*Rapanos* court opinions and agency guidance developed to clarify the definition of WOTUS.

In the preamble to the proposed rule, the agencies admit that "Many courts ... rely exclusively on Justice Kennedy's significant nexus test, or have held that jurisdiction can be established under either the plurality or concurring opinions" (Prop. Rule. at 4167). However, this statement places much more emphasis on the "continuous surface water connection" standard than is deserved.

Subsequent to the *Rapanos* case, seven federal appellate courts have heard the issue of which *Rapanos* test is controlling. The U.S. Court of Appeals for the 7th, 9th and 11th Circuits have all held that Kennedy's "significant nexus" standard test is controlling.² The 1st and 8th Circuits have held that either standard may be used,³ and the 5th and 6th Circuits have avoided the question altogether.⁴ Only a single lower court has held that Scalia's "continuous surface water connection" is controlling.⁵ Similarly, post-*Rapanos* agency guidance strongly favors the "significant nexus" standard and directs agencies to use it when making fact-specific determinations about CWA jurisdiction; this guidance includes no mention of Justice Scalia's standard.⁶

All of these cases have considered the *Rapanos* plurality and concurring opinions, yet the proposed rule offers no examination of why the "significant nexus" test has been so heavily favored by the courts and agencies in real-world situations. Instead, it focuses heavily on assessing Supreme Court decisions that precede *Rapanos* such as the Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (*SWANCC*) decision, which has only limited – if any – relevance today. Beyond the fact that the *SWANCC* decision only addresses isolated waterways that clearly have no "significant nexus" to WOTUS, the proposed rule admits that "the Federal government has interpreted and applied the *SWANCC* decision narrowly, focusing on the specific holding in the case as rejecting federal jurisdiction over the isolated ponds and mudflats at issue in that case based on their use of migratory birds" (84 Fed. Reg. at 4167). It is unclear why so much attention is paid to this relatively irrelevant court decision that precedes *Rapanos*, while court decisions that have directly examined the *Rapanos* decision are not considered at all.

² *U.S. v. Gerke*, 464 F.3d 723 (7th Cir. 2006); *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007); *U.S. v. Robison*, 521 F.3d 1319 (11th Cir. 2008).

³ *U.S. v. Johnson*, 467 F.3d 56 (1st Cir. 2006); *U.S. v. Bailey*, 571 F.3d 791 (8th Cir. 2009).

⁴ *U.S. v. Lucas*, 516 F.3d 316 (5th Cir. 2008); *U.S. v. Cundiff*, 555 F.3d 200 (6th Cir. 2009).

⁵ *U.S. v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006).

⁶ See Environmental Protection Agency and U.S. Army Corps of Engineers, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*," Dec. 2, 2008.

What is lost in the agencies' discussion is the fact that Justice Kennedy's concurrence was limited to the result, *i.e.*, remand because the Corps exceeded its jurisdiction. However, Justice Kennedy's decision did not turn on the Plurality's "continuous surface water connection" standard. Instead, he believed the Corps had not sufficiently shown a significant nexus existed in either of the consolidated cases (*Rapanos* at 787).

In their Preamble, the agencies try to bootstrap parts of Justice Kennedy's opinion into the Plurality's argument by suggesting a two-part test: "the determination must be made using a basic two-step approach that considers: (1) The connection of the wetland to the tributary; and (2) the status of the tributary with respect to downstream traditional navigable water." (Prop. Rule at 4167). This focus on the physical connection ignores Justice Kennedy's (and the Dissent's) argument that the CWA's objective is to "'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" 33 U.S.C. § 1251(a)' (*Rapanos* at 759 and 787). From this, it is clear that Justice Kennedy and the Dissent (a majority) favored more expansive agency authority than the simple physical connection approach suggested by the Plurality. Merely relying on identification of a physical connection does not meet the majority standard nor does it comport with the CWA objective.

Further, Justice Scalia's "continuous surface water connection" standard is rarely used because it relies on the agencies' ability to draw bright lines where none exist. Under the "continuous surface water connection" standard, CWA jurisdiction would extend to "only those relatively permanent, standing or continuously flowing bodies of water ... described in ordinary parlance as streams, oceans, rivers, and lakes...The phrase does not include channels through which water flows intermittently or ephemerally or channels that periodically provide drainage for rainfall." ⁷ This standard does not even allow for the possibility that intermittent (much less ephemeral) waterways may (and often do in the arid west) have significant effects on navigable-in-fact waterways, a bright line that even this proposed rule rejects considering that intermittent waterways are included in the proposed definition of "tributary."

U.S. Supreme Court decisions, peer-reviewed science, and practical experience have all demonstrated that to achieve the purpose of the CWA, the term "Waters of the U.S." must not only include those waters considered "navigable in fact," but must also include any upstream waters, including headwaters, tributaries, and wetlands directly or indirectly connected to traditionally navigable waters that have the potential to affect the chemical, physical, and biological integrity of those waters, and this necessarily may include ephemeral waterways, particularly in the arid west. Courts and agencies, when grappling with real-world implementation have repeatedly chosen to use Kennedy's "significant nexus" standard rather than Justice Scalia's "continuous surface water connection" standard precisely

⁷ *Rapanos* at 739.

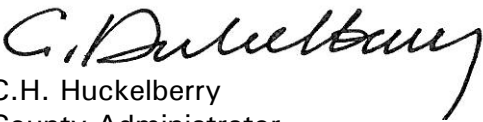
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because it makes room for the inherent ambiguity in attempting to distinguish between those waterways that may impact navigable-in-fact waterways and those that may not.

In contrast to Justice Scalia's standard, Justice Kennedy's standard does not preclude finding jurisdiction for ephemeral waters, and this is one of the primary reasons that Justice Kennedy's standard, and not Justice Scalia's, has served as the basis for all agency guidance subsequent to *Rapanos*, and has been the prevailing standard in virtually all court rulings since *Rapanos*. Justice Kennedy's standard has the advantage of having been tested in court and in practice. Unlike the "continuous surface water connection" standard, the "significant nexus" standard has wide acceptance from both the courts and the agencies, and it continues to be used when implementing CWA protections today.

Thank you for the opportunity to comment on this important matter.

Sincerely,



C.H. Huckelberry
County Administrator

CHH/mp

Attachments: ADEQ Streams map, annotated
Corps of Engineers Public Notice for Interstate Waters

c: Carmine DeBonis, Deputy County Administrator for Public Works
Suzanne Shields, Director Regional Flood Control District
Linda Mayro, Director Sustainability and Conservation

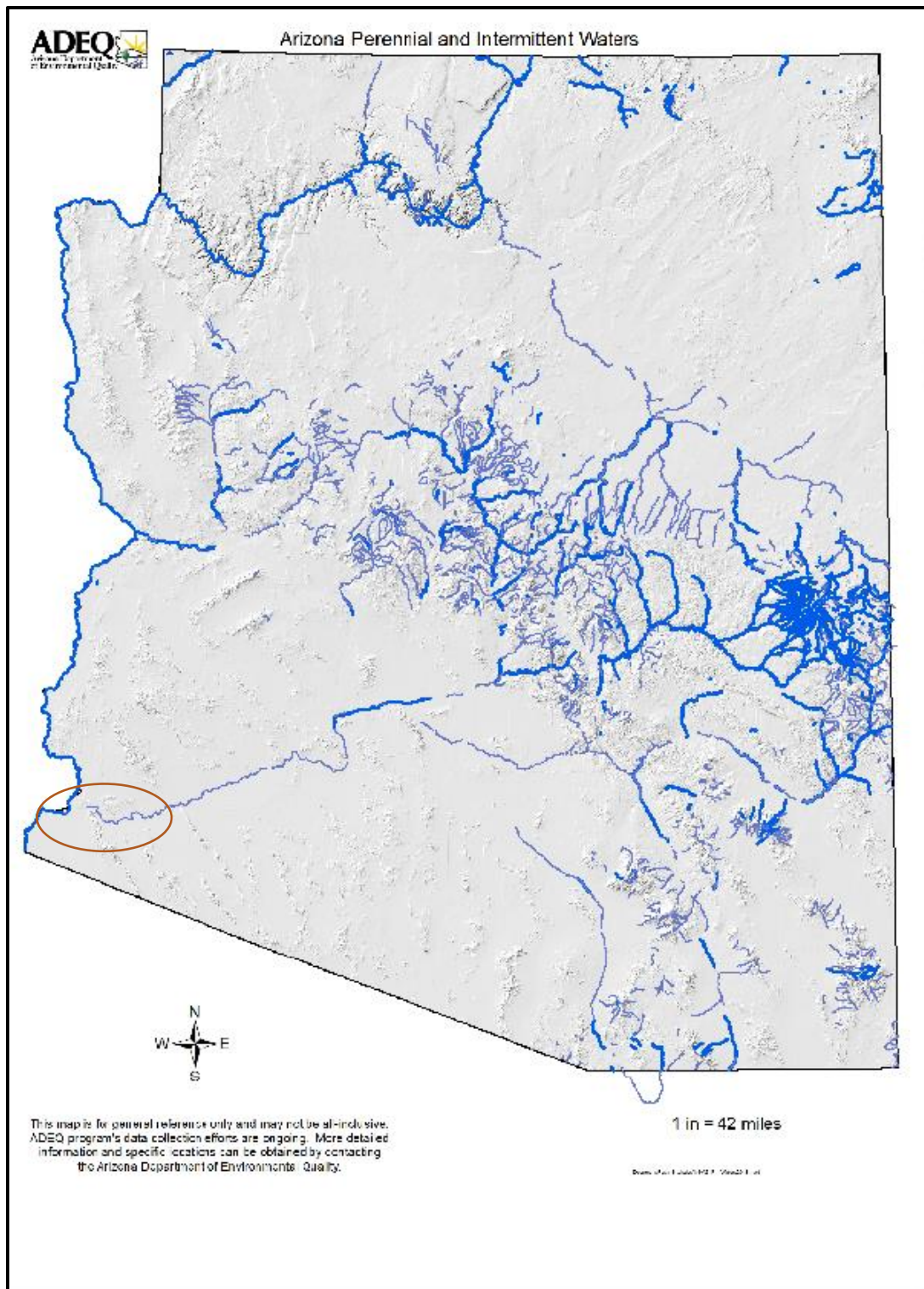
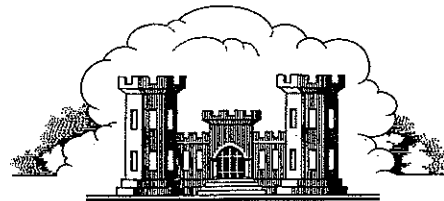


Figure from ADEQ, with added ellipse showing ephemeral break in Gila River near its terminus with the Colorado River. This feature would render most of Arizona's water exempt from the Clean Water Act under the proposed rule.

SPECIAL PUBLIC NOTICE

Proposed Interstate Waters for the State of Arizona



**US Army Corps of Engineers
Los Angeles District
Arizona Section**

Public Notice No.: 2002-01296-RJD

Comment Period: August 21, 2002 through September 20, 2002

This special public notice proposes a list of interstate waters for the State of Arizona and the small area of extreme southeastern California where waters are tributary to the Colorado River.

The U.S. Army Corps of Engineers (Corps) define "waters of the United States" at 33 C.F.R. §328.3. Specifically, 33 C.F.R. §328.3(a)(2) defines waters of the United States to include all interstate waters including interstate wetlands. The Constitution of the United States describes interstate commerce as "(t)o regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." The determination of the Corps is that a water, which physically flows across state, tribal, or international borders, affects interstate commerce. Therefore, waters that flow across state, tribal, or international borders affect interstate commerce and should be categorized as interstate waters.

The State of Arizona shares a border with the states of California, Nevada, Utah, Colorado, and New Mexico. Within Arizona there are 21 Federally recognized Indian tribes living on 20 Federally recognized reservations. These reservations comprise 27.4% of the land area within the State of Arizona. The State of Arizona also shares an international border with Mexico.

This special public notice lists the named interstate waters in Arizona which flow across state, tribal, or international borders. This list is only a partial list of interstate waters within the State of Arizona. It includes only those waters given a name on the United States Geological Survey's (USGS) standard 7.5 minute quadrangle maps at the point where the water flows across a state, tribal, or international border. USGS maps have not named all waters. Also due to mapping limitations, not all waters or wetlands are shown on the standard 7.5 minute quadrangle maps. If the interstate status of a water is questioned and the water is not included in this list of interstate waters, the Corps will make a case-specific determination. To compile the list of interstate waters, the border of the State of Arizona and the borders of each of the 20 recognized Indian reservations within the state were examined and each of the named waters crossing a state, tribal, or international border was added to this list. The list includes a count of the unnamed waters that the USGS standard 7.5 minute quadrangle maps show crossing a state, tribal, or international border. For each of the 15 counties in Arizona and portions of 3 counties in California, the following lists of named interstate waters are organized alphabetically for each of the 18 counties. The hydrologic unit code, established by the USGS, has also been included for each of the named waters to aid in correctly identifying the watercourse. A description of hydrologic unit codes developed by USGS can be found at <http://water.usgs.gov/nawqa/sparrow/wrr97/geograp/geograp.html>. Additional information for each hydrologic unit code is also available at <http://www.epa.gov/surf/>.

This special public notice is also posted at <http://www.spl.usace.army.mil/regulatory>. Comments can be e-mailed to robert.j.dummer@usace.army.mil or mailed to:

**U. S. Army Corps of Engineers
ATTENTION: Regulatory Branch
3636 North Central Avenue, Suite 760
Phoenix, Arizona 85012-1936**

Additional Information:

Corps' regulations define seven categories of waters subject to regulation under Section 404 of the CWA (33 C.F.R. §328.3(a)(1-7)). This public notice does not offer any guidance or recommendations as to the regulatory status of waters defined as intrastate, impoundments, tributaries, territorial seas, or adjacent wetlands (33 C.F.R. §328.3 (a)(3-7)).

The Supreme Court's decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99-1178 (January 9, 2001) did not affect the Corps' regulation of traditionally navigable waters or interstate waters (33 C.F.R. §328.3(a)(1,2)). However, it increased the importance of determining what is a traditionally navigable or an interstate water. The only traditional navigable water within the State of Arizona is the Colorado River and no additional traditionally navigable waters are proposed. To assist the public in determining the waters subject to Section 404 regulation as interstate waters, the Corps proposes the following list of waters as interstate waters. The Corps previously had not made an official determination of interstate waters for the State of Arizona.

For additional information please call Robert J. Dummer at (602) 640-5385 x 224. The Chief, Regulatory Branch, issues this public notice.

State of ArizonaApache County

<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>	<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>
Aguaje Draw	15020003	Oak Spring Wash	14080105
Beclabito Wash	14080105	Puerco River	15020006, 15020007
Black Creek	15020006	Red Lake	15020006
Black River	15060101	Red Wash	14080105
Blackrock Wash	14080105	Reservation Creek	15060101
Blanco Canyon	15020003	Romero Creek	15040004
Bonito Wash	15020006	San Francisco River	15040004
Cane Valley Wash	14080205	Sanostee Wash	14080106
Canovas Creek	15020001	Sherlock Draw	15060102
Carrizo Wash	15020003	Shoe Game Wash	14080105
Chinle Creek	14080204	Slick Rock Wash	15020006
Cottonwood Canyon	15020003	Steele Flat Creek	15040004
Cottonwood Canyon	14080105	Stone Creek	15040004
Coyote Creek	15020001	Thompson Creek	15060101
Crazy Creek	15020007	Tohache Wash	14080201
Crystal Creek	14080204	Tolapai Draw	15020007
Dahstini Wash	14080201	Trout Creek	15040004
Dead Wash	15020007	Tsitah Wash	14080201
Deep Cienega	15060101	Twin Buttes Wash	15020006
Digger Wash	15020007	Venadito Draw	15020004
Gothic Creek	14080201	West Fork Black River	15060101
Gypsum Creek	14080205	Wheatfields Creek	14080204
Hardscrabble Wash	15020004	Whiskey Creek	14080204
Hosteen Tso Canyon	14080204	White Spring Wash	15020006
Jaralosa Draw	15020004	Whitewater Arroyo	15020006
Lithodendron Wash	15020007	Zuni River	15020004
Little Blanco Canyon	15020003		
		Unnamed Intermittent Streams (488)	Various

Cochise County

<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>	<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>
Baker Canyon	15080302	Owl Creek	15040006
Cave Canyon	15050202	Powers Canyon	15040006
Copper Canyon	15050202	San Pedro River	15050202
Cottonwood Creek	15080302	San Simon River	15040006
Deer Creek	15040006	School Canyon	15050202
Doubtful Canyon	15040003	Silver Creek	15080302
Estes Canyon	15080302	Skeleton Canyon	15040006
Gold Gulch	15080301	Steins Creek	15040006
Guadalupe Canyon	15080302	Sycamore Creek	15080302
Little Doubtful Canyon	15040003	Whitewater Draw	15080301
Millsite Canyon	15040003	Wood Canyon	15040003
Montezuma Canyon	15050202	Yaqui Canyon	15050202
Old Horseshoe Canyon	15040003		
		Unnamed Intermittent Streams (207)	Various

Coconino County

<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>	<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>
Antelope Canyon	14070006	Jud Hollow Wash	14070007
Aztec Creek	14070006	Kanab Creek	15010003
Babbitt Wash	15020015	Lake Powell	14070006
Begashibito Wash	15020018	Lee Canyon	15020016
Blue Pool Wash	14070006	Little Coyote Canyon	15010004
Campbell Francis Wash	15020016	Little Roden Wash	15020016
Canyon Diablo	15020015	Lockwood Canyon	15020016
Cataract Creek	15010004	Lost Spring Wash	15010003
Cedar Canyon	15020016	Maries Canyon	14070007
Cedar Wash	15020016	Moenkopi Wash	15020018
Coal Mine Wash	15020018	Narrow Wash	15020018
Coconino Wash	15010004	National Canyon	15010002
Colorado River	14070006	Oraibi Wash	15020012
Cow Canyon	15020008	Padre Canyon	15020015
Coyote Wash	14070007	Paria River	14070007
Dinnebito Wash	15020017	Pasture Wash	15010004
Driftwood Canyon	15010004	Prairie Wash	15010004
Eightmile Gap Wash	15010003	San Francisco Wash	15020015
First Canyon	14070006	Sandstone Wash	15010004
Ha Ho No Geh	15020018	Seaman Wash	15010003
Havas Creek	15010004	Straight Canyon	15020016
Heather Wash	15010004	Tappan Wash	15020016
Honey Draw	14070006	Tsagieto Canyon	14070006
Horse Canyon	14070007	Wetherill Canyon	14070006
Horse Canyon	14070006	White Sage Wash	15010003
Jackrabbit Canyon	14080205	Yellow Jacked Canyon	15020015
Jacob Canyon	15010003	Youngs Canyon	15020015
Johnson Wash	15010003	Unnamed dry lake	15020008
		Unnamed Intermittent Streams (407)	Various

Gila County

<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>	<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>
Arrastra Gulch	15040007	Phillips Canyon	15060103
Ashurst Creek	15060103	Pringle Wash	15060103
Black River	15060101	Ramboz Wash	15040007
Bladder Canyon	15060103	Ranch Creek	15040007
Cammerman Wash	15040007	Rock House Creek	15060103
Campbell Creek	15060103	Salt River	15060103
Canyon Creek	15060103	Sevenmile Wash	15040007
Corral Creek	15040007	Sheep Wash	15060103
Dick Spring Canyon	15050100	Sloan Creek	15060103
Ellison Creek	15060103	Spring Branch Creek	15040007
Gentry Canyon	15060103	Tanks Canyon	15060103
Hells Canyon	15060103	Upper Corral Canyon	15060103
Horse Canyon	15060103	Well Camp Canyon	15060103
Lacey Forks Canyon	15060103	Willow Spring Canyon	15060103
Lost Tank Canyon	15060103		
Mescal Creek	15050100	Unnamed Intermittent Streams (121)	Various

Graham County

<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>	<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>
Bear Canyon	15040005	Little Bear Canyon	15060101
Bear Wallow Creek	15060101	McKinney Canyon	15040005
Black Canyon	15050203	Middle Fork Goodwin Canyon	15040005
Black River	15060101	Middle Prong Creek	15040005
Black Rock Wash	15040005	North Fork Goodwin Canyon	15040005
Bonita Creek	15040005	Packwood Canyon	15040005
Cottonwood Canyon	15040005	Rose Creek	15060101
Deer Creek	15050203	Roundup Grounds Canyon	15040005
Dry Prong Creek	15040005	Rustler Park Canyon	15040005
Eagle Creek	15040005	Salt Creek	15040005
Fifteenmile Canyon	15040005	Sheep Wash	15040005
Garden Creek	15050203	South Smith Canyon	15040005
Gila River	15040005	Sycamore Canyon	15040005
Goodwin Wash	15040005	Telegraph Wash	15040005
Hawk Canyon	15050100	Telegraph Wash	15050203
Helen Canyon	15060101	Tule Creek	15040005
Holdup Canyon	15040005	Wet Prong Creek	15040005
		Unnamed Intermittent Streams (132)	Various

Greenlee County

<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>	<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>
Antelope Creek	15040004	Long Canyon	15040004
Apache Creek	15040002	Mother Hubbard Canyon	15040004
Banjo Canyon	15040004	Mud Spring Canyon	15040004
Beaver Canyon	15040004	Muddy Canyon	15040004
Bitter Creek	15040002	Noland Creek	15040004
Blue River	15040004	Olney Well Draw	15040002
Buchanan Canyon	15040004	One Horn Canyon	15040004
Bullard Canyon	15040004	Pace Creek	15040004
Buzzard Canyon	15040004	Railroad Wash	15040002
Campbell Blue Creek	15040004	Round Mountain Draw	15040002
Carlisle Canyon	15040002	San Francisco River	15040004
China Camp Canyon	15040002	Sand Wash	15040002
Citizen Canyon	15040004	Snare Canyon	15040004
Coal Creek	15040004	Thompson Draw	15040002
Devils Den Canyon	15040004	Tige Canyon	15040004
Gila River	15040002	Tillie Hall Canyon	15040002
Goat Camp Canyon	15040002	Wampoo Wash	15040002
Harden Cienega Creek	15040004	Webster Canyon	15040004
Iron Canyon	15040002	Willow Springs Canyon	15040002
Johnson Canyon	15040004	Winchester Canyon	15040002
Keller Canyon	15040004	Unnamed Intermittent Streams (87)	Various

La Paz County

<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>
Bouse Wash	15030105
Colorado River	15030104, 15030105 15030106, 15030204
Gonzales Wash	15030104
Kaiser Wash	15030106
La Paz Wash	15030104
Osborne Wash	15030104
Seventy Wash	15030104
Tyson Wash	15030106
Unnamed Intermittent Streams (18)	Various

Maricopa County

<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>
Kohatk Wash	15050306
Malpais Canyon	15060203
Salt River	15060103, 15060106
Sycamore Creek	15060203
Vekol Wash	15050303
Verde River	15060203
Unnamed Intermittent Streams (197)	Various

Mohave County

<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>	<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>
Art Canyon	15010003	Lake Mead	15010005
Atkinville Wash	15010010	Lake Mohave	15030101
Azure Ridge Draw	15010006	Lizard Wash	15010010
Beaver Dam Wash	15010010	Lost Creek	15010005
Big Springs Canyon	15010006	Milkweed Canyon	15010005
Bitter Seeps Wash	15010003	Million Hills Wash	15010006
Black Wash	15010006	Mokaac Wash	15010010
Castle Cliff Wash	15010010	Parashont Canyon	15010009
Cedar Pockets Wash	15010010	Pipe Valley Wash	15010003
Cedar Wash	15010006	Potter Canyon	15010003
Colorado River	15010005, 15030101 15030103, 15030204	Reference Point Creek	15010005
Cottonwood Canyon	15010009	Rosy Canyon	15010009
Cottonwood Creek	15010003	Sand Hollow Wash	15010010
Dutchman Wash	15010009	Sandy Canyon	15010003
Faught Canyon	15010007	Short Creek	15010009
Fort Pierce Wash	15010009	Skunk Canyon	15010009
Garden Wash	15010006	Topock Marsh	15030101
Grapevine Canyon	15010005	Truxton Wash	15010007
Hurricane Wash	15010009	Virgin River	15010010
Kanab Creek	15010003	Welcome Creek	15010010
Lake Havasu	15030101	West Water Canyon	15010005
		Unnamed Intermittent Streams (399)	Various

Navajo County

<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>	<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>
Beshbito Wash	15020014	Mitchell Butte Wash	14080205
Black Mesa Wash	15020018	Moenkopi Wash	15020018
Black River	15060101	Neskahi Wash	14080205
Buckskin Canyon	15060104	Nokai Canyon	14080205
Carrizo Creek	15060104	Oljeto Wash	14080205
Coal Mine Wash	15020018	Oraibi Wash	15020012
Cottonwood Wash	15020011	Owl Valley Wash	15020017
Dinnebito Wash	15020017	Piute Canyon	14080205
East Fork Bull Flat Canyon	15060103	Polacca Wash	15020013
East Fork Copper Canyon	14080205	Red Slide Peak Wash	15020017
Fern Feather Wash	15020011	Salt Seeps Wash	15020011
Forestdale Canyon	15060104	Tse Chizzi Wash	15020013
Ha-whi-yalin Wash	15020014	Wagon Wheel Canyon	15060103
Horse Pasture Canyon	14080205	Wepo Wash	15020013
Humpty Wash	15020011	West Fork Bull Flat Canyon	15060103
Jeddito Wash	15020014	West Fork Copper Canyon	14080205
Leroux Wash	15020009	West Fork Phoenix Park Canyon	15060104
Little Colorado River	15020008	West Gypsum Creek	14080205
Mackelprang Wash	15020011	Whiskey Canyon	15060104
Many Sheep Valley Wash	15020017	Wind Whistle Canyon	15020013
Middle Fork Bull Flat Canyon	15060103	Yucca Flat Wash	15020018
		Unnamed Intermittent Streams (276)	Various

Pima County

<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>	<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>
Aguajita Wash	15080102	La Osa Wash	15080200
Aguirre Wash	15050305	Mammoth Wash	15050305
Alambre Wash	15050304	Mendoza Wash	15050304
Arroyo del Sasabe	15080200	Pescadero Wash	15050305
Brawley Wash	15050304	Presumido Canyon	15080101
Canoa Wash	15080200	Ryans Canyon	15070101
Cantina Wash	15080200	San Simon Wash	15080101
Chukut Kuk Wash	15080101	Santa Cruz River	15050301
Cocio Wash	15050304	Sauceda Wash	15070101
Davidson Canyon	15080102	Sikort Chuapo Wash	15070202
El Gato Wash	15080101	Smugglers Canyon	15080101
El Tiro Wash	15050305	Solano Wash	15050304
Fresnal Wash	15080200	Tat Momoli Wash	15050305
Gunsight Wash	15070203	Vamori Wash	15080101
House Wash	15050305	West Branch Santa Cruz River	15050301
Kuakatch Wash	15070203	Unnamed Intermittent Streams (605)	Various

Pinal County

<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>
Ash Creek	15050100
Bates Canyon	15050100
Eskiminzin Wash	15050203
Gila River	15050100
Green Lantern Wash	15050203
Greene Wash	15050303
McClellan Wash	15050100
Piper Springs Wash	15050203
Roach Wash	15050203
Santa Cruz Wash	15050303, 15050100
Santa Rosa Wash	15050306
Silver Reef Wash	15050306
Vekol Wash	15050303

Unnamed Intermittent
Streams (217) Various

Santa Cruz County

<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>	<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>
Alamo Wash	15080200	Nogales Wash	15050301
Barranca Honda	15050301	Parker Canyon	15050301
Bodie Canyon	15050301	Pena Blanca Canyon	15050301
Bonita Canyon	15080200	Pesquiera Canyon	15050301
Calabasas Canyon	15050301	Potrero Canyon	15050301
Duquesne Wash	15050301	San Antonio Canyon	15050301
El Oso	15050301	Santa Cruz River	15050301
Ephraim Canyon	15050301	Sierra Canyon	15080200
Holden Canyon	15080200	Sycamore Canyon	15080200
Las Cuevitas	15050301	Tonto Canyon	15080200
Los Lagunitas	15080200	Tres Bellotas Canyon	15080200
Mariposa Canyon	15050301	Walker Canyon	15050301

Unnamed Intermittent Streams (96) Various

Yavapai County

<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>
Granite Creek	15060202
Nelson Canyon	15010007
Slaughterhouse Gulch	15060202
Verde River	15060202
Yampai Canyon	15010007
Unnamed Intermittent Streams (10)	Various

Yuma County

<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>
Colorado River	15030104, 15030107 15030108, 15070201
Gila River	15070201
Imperial Reservoir	15030104
La Jolla Wash	15080103
Unnamed Intermittent Streams (61)	Various

State of California

Imperial County

<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>
Araz Wash	15030107
Bard Lake	15030107
Bee Wash	15030107
Colorado River	15030107
Haughtelin Lake	15030107
Picacho Wash	15030107
Unnamed Wash	15030107
Unnamed Intermittent Streams (23)	Various

Riverside County

<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>
Big Wash	15030104
Slaughter Tree Wash	15030104
Unnamed Intermittent Streams (20)	Various

San Bernardino County

<u>Interstate Waterway</u>	<u>Hydrologic Unit Code</u>
Arch Creek	15030104
Bennett Wash	15030104
Piute Wash	15030102
Vidal Wash	15030104
Unnamed Intermittent Streams (48)	Various

DEPARTMENT OF THE ARMY
LOS ANGELES DISTRICT
CORPS OF ENGINEERS
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