United States Senate

WASHINGTON, DC 20510

May 6, 2014

The Honorable Gina McCarthy
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator McCarthy,

We write regarding the Environmental Protection Agency's (EPA) proposed rule regarding Clean Water Act (CWA) jurisdiction. We wish to raise several specific issues that stand to cause adverse impacts to landowners, businesses, and the economy of Arizona and the arid Southwest.

EPA's proposed definitions and jurisdictional assertions would conceivably extend federal jurisdiction far beyond what could credibly be considered Congress' intent. With questionable rationale, the proposal includes expanding the definitions of existing regulatory categories as well as adding vague terminology and new definitions regulating areas that have not been jurisdictional under current regulations. For example, the proposed rule assumes that *all* tributaries of traditional navigable or interstate waters have a significant nexus to such waters and are therefore subject to regulation under the CWA, regardless of distance, size, function, or amount and regularity of flow. In addition, EPA proposes to include for regulatory purposes "natural, man-altered, or man-made" in the new definition of tributary. It would appear that EPA is basing its categorical classification of tributaries as "waters of the U.S." and thus jurisdictional – regardless of their size, amount of flow and distance from a traditional navigable water – on the significant nexus test articulated by Justice Kennedy in his concurring opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). However, it is difficult to see how EPA's assumption that all tributaries have a significant nexus to a traditional navigable water, without any site-specific analysis, is consistent with his opinion. We have concerns about the breadth of regulation of interstate waters and their tributaries for similar reasons.

In Arizona, the vast majority of "waters" are desert washes that are part of ephemeral systems and often found at substantial distances from traditional navigable or interstate waters. Under this proposal, every small ephemeral system of limited function, remote from traditional navigable or interstate waters, and with no practical ability to influence the physical, chemical, or biological integrity of those downstream waters, would be regulated. These features are ubiquitous in the state's landscape and can apparently remain jurisdictional even if upstream of a natural or man-made break. In addition, unlike other states, Arizona is literally crisscrossed with man-made canals that are essential for critical water delivery. Under EPA's proposed assumptions, it is possible that every mile of these canals – including those that are not currently jurisdictional – will fall under CWA regulation. Taken together, it is easy to see the additional regulatory burden that the rule as proposed would create on industries that comprise the very backbone of the state's economy such as home building and construction, agriculture, ranching, mining, and water delivery. It is worth nothing that this regulatory burden for newly

jurisdictional waters would extend beyond wetlands permitting to all of the various CWA regulatory requirements.

We find EPA's attempt to limit federal jurisdiction by excluding gullies, rills, and swales from the definition of "waters of the U.S." encouraging, though more clarity is needed on what these exclusions actually encompass. We would find any distinctions drawn between such features and small ephemeral washes troubling. Due to the lack of vegetation resulting in clearer evidence of flow than would occur in more highly vegetated areas, similar features that may ultimately be considered by EPA swales or rills in other parts of the country would likely be determined to have an ordinary high water mark and therefore subject to regulation in the arid Southwest. In addition, we find it troubling that EPA is using a draft report, entitled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, as support for this proposed rule. Lastly, it would appear that the economic impact of this rule is underestimated. Clearly if the rule were finalized as purposed, additional projects and actions would fall under CWA regulatory requirements that would not have otherwise. Concerns have been raised that mitigation costs cited in the economic study do not appear to reflect the current reality in Arizona or the immense costs that permitting under the CWA can entail.

Like few places in the country, Arizonans know the need to protect and manage our precious water resources. Unfortunately, the current EPA proposal dramatically expands federal jurisdiction and will likely yield only the next step in an unnecessarily iterative process and create significant regulatory uncertainty. Troublingly, concerns unique to the arid Southwest in general and Arizona in particular have been given short shrift and merit additional analysis. Given the significant flaws in the proposed rule and supporting scientific analysis, we strongly urge EPA to abandon the current proposed rule and develop a meaningful proposal for evaluation that at a minimum limits federal jurisdiction and provides clarity and consistency for the regulated community. Should EPA proceed with a proposal, given the complexity and seriousness of the issue, the comment period will surely need to provide the full 180 days as provided by current law. Under such a circumstance, toward providing even a modicum of regulatory predictability, EPA needs to provide a clearly articulated grandfathering provision for projects and lands already delineated under existing standards.

We appreciate your attention to this matter, in strict accordance with all existing rules, regulations, and ethical guidelines. Should you have any questions, your staff should contact Brian Kennedy at (202) 224-4521 or Nick Matiella at (202) 224-2238.

Sincerely,

JEFF FLAKE
United States Senator

JOHN MCCAIN
United States Senator