

United States Senate
WASHINGTON, DC 20510

February 11, 2016

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

Dear Administrator McCarthy,

We write regarding the Clean Water Act (CWA) and the regulation of forest roads.

As you know, the court in *Environmental Defense Center, Inc. v. U.S. EPA*¹ left it to the Environmental Protection Agency (EPA) to determine whether the agency is required to regulate stormwater discharge from forest roads. However, since the CWA only applies to the “waters of the United States,” any decision regarding the CWA and forest roads must be based on a clear understanding of what is jurisdictional under the CWA. Despite a recently promulgated rule to define the scope of the CWA², there remains significant uncertainty as to what constitutes the “waters of the United States.” We have serious concerns with the rule and find it particularly troubling that this rule fails to scientifically establish a connection between ephemeral and intermittent environmental events that are ubiquitous in Arizona.

We’re not the only ones troubled by this rule. The U.S. District Court for the District of North Dakota found the rule was “likely arbitrary and capricious.”³ Specifically, the court determined that because “[n]o evidence actually points to how these intermittent and remote wetlands have any nexus to a navigable-in-fact water,” the “[a]gencies have failed to establish a ‘rational connection’ between the facts found’ and the [r]ule as it will be promulgated.”⁴ Furthermore, the rule is currently stayed nationwide following the October 9, 2015 order by the U.S. Court of Appeals for the 6th Circuit.⁵

Forest health is a critical issue in Arizona and the ability to access forests is vital to restoration efforts. However, a number of issues have slowed the pace of restoration throughout Arizona’s overgrown National Forests and we are concerned that any unwarranted regulatory requirements could further slow restoration and directly contribute to an increased risk of catastrophic wildfires.

¹ 344 F.2d 832 (9th Cir. 2003)

² 80 FR 37054

³ *North Dakota et al., vs. EPA et al*, Memorandum Opinion and Order Granting Plaintiff’s Motion for Preliminary Injunction, Civ. No. 3:15-cv-59

⁴ *Id.*, 13

⁵ *Ohio et al., v United States Army Corps of Engineers et al.*, Civ. No. 15-3799/3822/3853/3887.

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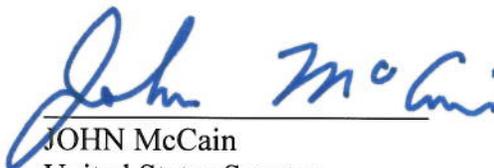
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We believe that, without a clear understanding of what is and what is not jurisdictional under the CWA, it would be impossible to evaluate what, if any, effect forest road stormwater runoff would have on jurisdictional waters. Therefore, we ask that EPA not move forward with any decision as to whether the agency is required or has discretion to regulate forest roads under the CWA. We would appreciate a timely written response to our concerns and ask that this matter be handled in strict accordance with agency rules, regulations, and ethical guidelines.

Sincerely,



JEFF FLAKE
United States Senator



JOHN McCain
United States Senator