Confederated Tribes *of the*
Umatilla Indian Reservation
Department of Natural Resources
First Foods Policy Program

46411 Timíne Way
Pendleton, OR 97801

www.ctuir.org carlmerkle@ctuir.org
Phone: 541-276-3165 Fax: 541-276-3095

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Karen Gude
Tribal Program Coordinator
Office of Water (4502-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, DC 20460
Gude.karen@epa.gov
CWAwotus@epa.gov
CWAwaters@epa.gov

Gib Owen
Office of the Assistant Secretary of the Army
for Civil Works
Department of the Army
104 Army Pentagon
Washington, DC 20310-0104
gib.a.owen.civ@mail.mil
USACE_CWA_Rule@usace.army.mil

RE: Comments of the Confederated Tribes of the Umatilla Indian Reservation Department of Natural Resources on "Intention to Review and Rescind or Revise the Clean Water Rule," FRL-9959-93-OW

Dear Ms. Gude and Mr. Owen:

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) Department of Natural Resources (DNR) offers the following comments to the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) regarding your announced intention to review and rescind or revise the Clean Water Rule[1] pursuant to Executive Order.[2] The CTUIR DNR supports the "2015 Rule"; we do not support rescinding or revising it.

Given the lack of clarity or certainty about the exact course either the EPA or the Corps may follow in addressing potential changes to the Rule (e.g., "review and rescind ***or*** revise . . ."), we suggest that it may be premature at best to seek comments at this time (if that is indeed what you are doing; see below). Furthermore, the fact that this issue continues to be the subject of protracted and ongoing litigation similarly suggests that launching additional administrative

[1] "Waters of the United States" (or "WOTUS") definition.

[2] Presidential executive orders are commonly numbered and identified by such numbers but that does not appear to consistently be the case here. The White House website displays the Order, https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic, without any apparent numerical designation. The *Federal Register* notice, https://www.epa.gov/sites/production/files/2017-02/documents/cwr_fr_notice_prepublication_version.pdf , similarly refers to the Order of February 28, 2017, without an identifying number.

The Executive Order is designated as 13778 in an apparent *Federal Register* entry linked to the Homeland Security Digital Library of the Center for Homeland Defense and Security (https://www.hsdl.org/?view&did=799149). The Library is sponsored by the U.S. Department of Homeland Security's National Preparedness Directorate, FEMA, and the Naval Postgraduate School Center for Homeland Defense and Security. These are probably not the first sources one would seek out to search for a document related to environmental matters generally or jurisdictional questions associated with administering the federal Clean Water Act specifically.

rulemaking processes could unnecessarily compound the confusion, complications, and uncertainties that have plagued this topic for multiple decades.[3]

Proper and meaningful consultation, on a government-to-government basis between the federal government and the CTUIR as sovereigns, on this proposed action has thus far not occurred. Such consultation is required by long-standing law and policies, including prior and existing executive orders. There was an "Informational Webinar for Tribes in Consultation [sic] and Coordination Process" on the "Definition of Waters of the U.S." on May 18, 2017 (Webinar) offered to tribes en masse. While somewhat helpful and appreciated in terms of basic information sharing among EPA and tribes (staff, for the most part), it was and is not a substitute for, or equivalent to, the aforementioned government-to-government consultation.

Additionally, neither the deadline for commenting on this "Intention" nor the address to file comments has been adequately, clearly, or consistently identified, publicized, or otherwise provided to the tribes or, apparently, to the general public. The *Federal Register* notice of March 6, 2017, does not contain a deadline nor does it list an address to transmit comments (only contacts "for further information"). It also does not, in fact, explicitly solicit comments. EPA's rulemaking portal website on this topic (https://www.epa.gov/wotus-rule) also does not clearly identify a deadline to comment or an address to send comments. (The Webinar did identify the deadline and addresses.)

Perhaps the aim of the published "Intention" in the *Federal Register* was merely that—to express the intent to conduct a future rulemaking process, and not specifically to seek comments at this stage. If, in fact, comments and input are now being sought, then the steps taken to notify the tribes (and evidently the public), and the clarity and openness with which they have been executed, have been insufficient.

The Webinar mentioned above did indicate that the agencies "are seeking . . . feedback about how our potential rulemaking might affect Tribes." In response, the CTUIR DNR would state as follows: **This potential rulemaking could cause great harm to tribes, tribal rights, and tribal interests. It would likely result in far less waterways, water bodies, and water sources over which the EPA could assert jurisdiction, and thus would greatly diminish the ability of EPA and the Corps to protect the health and integrity of those waters, both in the exercise of the agencies' Trust Responsibility to safeguard tribal resources and, more generally, for the benefit of the public pursuant to the stated goals of the federal Clean Water Act.** Further elaboration about the nature and the scope of the possible harm to tribes may be found in the comments of the Columbia River Inter-Tribal Fish Commission, which the CTUIR DNR adopts by reference.

[3] In 2015 the Sixth Circuit stayed the 2015 Rule (which remains in effect), and then determined that it had jurisdiction to hear substantive challenges. That decision was appealed to the Supreme Court, which is scheduled to consider the case in the fall of 2017, over the objections of the current administration and its agencies which sought, unsuccessfully, to hold the proceedings in abeyance because of the Executive Order.

By way of background, we should note that the CTUIR is a federally-recognized Indian tribe, with a reservation in Northeast Oregon and ceded, aboriginal and usual and accustomed areas in Oregon, Washington, Idaho, and other Northwest states. In 1855, predecessors to the CTUIR—ancestors with the Cayuse, Umatilla, and Walla Walla Tribes—negotiated and signed the Treaty of 1855 with the United States. The Treaty is a contract between sovereigns and is "the supreme Law of the Land" under the United States Constitution. In the Treaty the CTUIR ceded millions of acres of land to the federal government, and in exchange received assurances that various pre-existing tribal rights would be protected, and our interests would be respected, in perpetuity. A paramount objective in the Treaty was protecting and maintaining our tribal First Foods—water, fish, big game, roots, and berries—and the habitats and environmental conditions that support and sustain them, then, now, and forever. That remains a paramount objective of the CTUIR.

EPA, the Corps, and all federal agencies have a duty to honor and uphold the Treaty of 1855 and all Indian treaties and to act as stewards and trustees to ensure that the terms and commitments of such treaties can fulfilled. In implementing the many federal environmental laws, agencies can and should always remain attentive to how such laws and its treaty-based obligations must be read in tandem to be mutually supportive and reinforcing. Rules and regulations should not be changed in such a manner as to diminish federal agencies' or departments' ability to honor and uphold Indian treaties and their related Trust Responsibility to tribes.

The Treaty of 1855 explicitly guarantees the right of "taking fish." Associated with that right is the implicit, concurrent assurance that there will be fish to take—they will exist—and that those fish will be safe to eat—they will be contaminated by pollution. Agency rules should not be revised or rescinded or otherwise modified if it would increase the likelihood that fish populations of significance to the tribes would cease to exist, or that contamination of such populations from pollution would increase. Unfortunately, many fish have already gone extinct, and many populations are already contaminated to various degrees in many locations. Further retreats from protecting them should not be contemplated.

The CTUIR DNR supports agency rules that are fair, clear, effective, and strong enough to protect existing resources and lay the groundwork for restoring resources where they have been damaged or degraded. We oppose changes to rules that would do the opposite, that would weaken or eliminate them. Rules can and should be modified to reflect and incorporate the latest science and technology—scientific principles, studies, data, and evidence that has been generated by independent scientists and subject to peer-review. Rules should not be altered based on so-called "scientific" input generated individuals, industries, or other entities with a vested, potentially biased interest in the ultimate outcome of the regulation, in order to reap short-term financial gain at the expense of environmental health.

The latest climate science should also be an element of any consideration of the jurisdiction of the federal government in protecting the nation's waters. Rules should reflect the almost universally-accepted fact that Climate Change is real, is already occurring, and will be an undeniable and inescapable factor in all future resource management and protection actions.

A potential change in the WOTUS Rule would not be the result of any new scientific or technical data or information, but rather would reflect nothing more than a change in policy, prompted by a presidential directive. The CTUIR DNR objects to and opposes such a change in policy in this instance. The agencies assert a right to make policy changes, which we do not contest with this letter, but we question the wisdom of such changes when they are based in no small part on false or misleading information. For example, it has been claimed that the existing WOTUS Rule has cost "hundreds of thousands" of jobs. There is no evidence for this claim.[4] It has been claimed that "puddles" are regulated. This is false; so-called "puddles" are explicitly exempted from regulation.[5]

Should the agencies proceed with further efforts to reconsider the WOTUS Rule, the CTUIR DNR suggests that they identify and address:

- Overall effects and implications on human health and ecosystem health (air, water, land, all living organisms) that diminished jurisdiction would lead to;
- Whether or not more toxic substances would enter or would be disseminated into the nation's waters with diminished jurisdiction; and
- Whether the ability to respond to Climate Change effects would increase or decrease with diminished jurisdiction.

Thank you for your consideration of the CTUIR DNR's comments on "Intention to Review and Rescind or Revise the Clean Water Rule." We look forward to further discussion and engagement with you in the proper government-to-government context as sovereign entities, pursuant to Presidential Executive Orders and agency policies.

Sincerely,

Carl Merkle
Acting Manager, First Foods Policy Program
Department of Natural Resources
Confederated Tribes of the Umatilla Indian Reservation

Cc: Fish and Wildlife Commission
Tribal Water Commission

[4] https://www.washingtonpost.com/news/fact-checker/wp/2017/03/02/trumps-claim-that-waters-of-the-united-states-rule-cost-hundreds-of-thousands-of-jobs/?utm_term=.d193b5f08224 ("The focus of our fact-check is whether the rule cost "hundreds of thousands of jobs," and there is no evidence to support that.")
[5] *Id.*