Tolowa Dee-ni' Nation

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June 15, 2017

Karen Gude
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Comments on the federal action to rescind and revise the definition of "Waters of the United States"

Dv-laa-ha~ Ms. Gude,

On behalf of the Tolowa Dee-ni' Nation, a federally recognized Indian Tribe, with aboriginal lands and territory throughout coastal Northern California and Southern Oregon, and organized pursuant to the duly adopted Constitution of the Tolowa Dee-ni' Nation, and in response to the invitation to consult and coordinate dated April 20, 2017, with the U.S. Environmental Protection Agency regarding the proposed federal action to rescind and revise the definition of "Waters of the United States" based on the February 28, 2017 Presidential Executive Order 13778 "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States' Rule" we wish to submit comments on the federal action.

The Tolowa Dee-ni' Nation (TDN or Tribe) opposes the Environmental Protection Agency (EPA)and U.S. Army Corps of Engineers(ACOE) efforts to rescind the 2015 Clean Water Rule and proposal to revise the definition of "Waters of the United States".

As a Tribe with designated water rights and trust assets associated with the Smith River and coastal aboriginal lands we are active in ocean and marine management and cultural resource protection, and have a demonstrated interest and concern regarding the waters of the United States. The Tribe views EPA and ACOE's decision to follow a two-step rulemaking approach to repeal and replace the 2015 Clean Water Rule as weakening of the Clean Water Act (CWA) protection to tribal waters and poses an imminent threat to the health and welfare of tribal communities.

The Tribe believes that EPA and ACOE have not provided a sound reason for repealing the Clean Water Rule. The grounds for repeal would come up against the extensive scientific record that the rule is based on. A technical regulation, the rule is meant to clarify which streams and wetlands fall under federal clean water protections. The agency's proposal to reinstate the regulatory definition consistent with the 2003 and 2008 SWANCC and Rapanos decisions, will not provide clarity and predictability to the regulated community and public, but instead provide legal gray areas where the courts will need to decide on a case-by-case basis whether the CWA applies.

The Tribe does not support EPA and ACOE's consideration to interpret the term "navigable waters" in a manner consistent with Supreme Court Justice Scalia's opinion in Rapanos. EPA and ACOE's reliance on Justice Scalia's opinion in Rapanos, provides protection to wetlands only if they had a "continuous surface connection" to navigable waterways and extended protection to streams only if they were "relatively permanent". The shift to Scalia's narrow interpretation would cover far few waterways- leaving out 60 percent of the nation's streams that don't flow year-round unprotected.

Under this weaker rule, enforcement will be unpredictable, polluters could take advantage of the limited protection for headwater streams and waterways. As long as there's ambiguity about where the CWA applies, it would be harder for citizen groups, tribes, or Department of Justice to bring a case against companies and/or individuals dumping chemical or other pollutant into smaller bodies of water upstream.

Tribes in California face degradation to their seasonal waters, where applications for medical and recreational cannabis cultivation has grown exponentially. The risk of fertilizer, pesticide and herbicide runoff into intermittent and ephemeral streams threaten drinking water sources for many tribes. Lessening CWA protection to these waterways pose a significant risk to the health and welfare to tribes and their culture.

Fortunately, the rule cannot just be repealed through executive order, the ACOE and EPA will have to go through the federal rulemaking process to replace it. Proposing a new rule that's supported by extensive scientific and legal arguments, opening up the proposal for public comments, responding to these comments, and then defending the final rule in court as a superior approach is a process that could that years.

The Tribe supports EPA and ACOE using the 2015 Clean Water Rule as a technical reference, providing guidance to which types of waters bodies are important in sustaining aquatic ecosystems and therefore deserve protection, leaning towards the Justice Kennedy's opinion. Justice Kennedy argued that CWA protections applies to wetlands that "significantly affected the chemical, physical, and biological integrity of other covered waters".

Federal courts have typically embraced Justice Kennedy's more expansive interpretation of the CWA rather than Scalia's, and any rollback of the rule would still leave plenty of legal entanglements where the courts will need to decide on a case-by-case basis whether the CWA applies. In all likelihood, a new rule, if it actually gets finished before 2020 –will end up before the Supreme Court, addressing a complex process that could take many years to figure out.

We thank you for your attention to this important matter and commitment to Indian Country. To further discus our concerns regarding the proposal to rescind and revise the definition of "Waters of the United States", please contact Chief Governance Officer Briannon Fraley at (707) 487-9255 ex 1125 or Briannon.Fraley@tolowa.com.

Shu' shaa nin-la,

Scott D. Sullivan
Chairperson on behalf of Tribal Council

OSG/bkf