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June 20, 2017

Ms. Karen Gude
Tribal Program Manager, Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code: 4101M
Washington, DC 20460

Transmitted by electronic mail to: cwawotus@epa.gov; gude.karen@epa.gov

Subject: **Notice of Intent to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12532 (Mar. 6, 2017)**

Dear Ms. Gude:

The Tulalip Tribes provides this letter in response to the invitation for tribal "consultation and coordination" with the EPA and the USACE regarding the above-identified Notice.

The Tulalip Tribes is the successor in interest to the Snohomish, Snoqualmie, Skykomish, and associated dependent bands signatory to the 1855 Treaty of Point Elliott with the United States government. By this treaty, the Tulalip Tribes reserved certain inherent sovereign rights, including the right to fish at usual and accustomed grounds and stations in the Salish Sea region. These rights are essential to the cultural, economic, and subsistence activities of our tribal citizens, and central to our traditional Coast Salish lifeways. Pursuant to the US Government's Indian trust responsibility, EPA and USACE have an obligation to understand and protect our rights as a treaty tribe.

The Tulalip Tribes strongly objects to the present EPA and USACE process for "consultation and coordination" regarding this matter because this process is not sufficient for meaningful government-to-government consultation. This kind of unilateral process is wholly inappropriate, given the Tulalip Tribes' sovereign status and the trust relationship between the United States and federally recognized tribal nations. This letter should not be taken, therefore, to suggest that the Tulalip Tribes agrees with this consultation process or waives its right to true and meaningful government-to-government consultation on this rulemaking effort.

The Tulalip Tribes opposes in the strongest terms any rulemaking by EPA and the Corps that would decrease the reach of the Clean Water Act's (CWA) protections by narrowing the definition of "waters of the United States (WOTUS)." If the definition of WOTUS is contracted by EPA and the Corps, this would adversely affect numerous CWA programs within and upstream of tribal waters and could undermine protections for the resources on which the Tulalip Tribes and its citizens depend, and which support tribal treaty rights.

The President's recent Executive Order (EO) directs EPA and the Corps to (1) rescind the 2015 Clean Water Rule and (2) propose a replacement rule that "considers" defining WOTUS "in a manner consistent with the opinion of Justice Scalia in *Rapanos*[i]." Justice Scalia's definition, however, misunderstands the science, as further explained below. Justice Scalia, moreover, wrote only for a plurality of four justices. While Justice Kennedy supplied the fifth vote in support of the result in that case, he wrote a separate concurring opinion that took issue with most of Scalia's analysis, including on the two points elaborated below. As such, *Scalia's understanding on these points is not legally binding precedent, nor is it sound policy*. Also, as Kennedy pointed out, Scalia's definition is at odds with earlier Supreme Court precedent, which had held that jurisdiction under the CWA should turn on whether there is a "significant nexus" with waters more traditionally recognized to be a "navigable water" within the meaning of the CWA. Kennedy would have retained this "significant nexus" test. So, while EPA and the Corps cite the EO's direction that they "consider[]" Scalia's definition, the Tulalip Tribes strongly opposes any attempt to elevate this definition over what the science and the law require.

Specifically, Scalia's definition appears (1) to include only "relatively permanent, standing or flowing bodies of waters" – *but exclude* tributaries or streams with "occasional," "intermittent" or "ephemeral" flows; and (2) to include only wetlands that have a "continuous surface connection" with a traditional "water of the United States" that makes it "difficult to determine where the 'water' ends and the 'wetland' begins – *but exclude* wetlands with a mere "hydrological connection."

Scalia's definition is at odds with current scientific understanding. The streams and wetlands that Scalia would exclude are often hydrologically connected to – and perform critical functions related to the integrity of – downstream and other waters. This science is amply documented in the EPA's "*Connectivity Report*" – a 400+-page, peer-reviewed report on of the state of the science, published in 2015.[ii] As the *Connectivity Report* concluded, tributaries and streams are the dominant source of water to most rivers; individually or cumulatively, they exert a strong influence on the integrity of downstream waters.[iii] And wetlands provide functions that improve downstream water quality, by assimilating or trapping nutrient pollution and chemical contamination (including pesticides and metals); wetlands provide vital runoff storage and flood control; "these systems form integral

components of river food webs, providing nursery habitat for breeding fish and amphibians."[iv]

In the Salish Sea region, Scalia's narrow understanding likely omits waters (including ditches, pools, intermittent streams, and tributaries) that are crucial to the survival of salmon and other fish. For example, scientific studies document the importance of intermittent streams to coho salmon at various points in their lifecycles.[v] Coho spawn in the upper reaches of stream networks, where intermittent streams are common; intermittent streams are vital to coho smolts; and residual pools in intermittent streams provide a habitat that allows juvenile coho to survive during dry periods. Scalia's narrow view also likely excludes wetlands that function in myriad ways to ensure the overall health of the aquatic ecosystems, on which the health and well-being of the fish – and so, the fishing tribes – depend. This narrow construction of what constitutes waters of the United States is inconsistent with the mandate and purpose of the Clean Water Act, and detrimental to Indian treaty rights and the wellbeing of all citizens.

In the CWA, Congress had a holistic, functional understanding of what it would take to "restore and maintain the chemical, physical, and biological integrity" of the nation's waters.[vi] EPA and the Corps should not hobble the ability of tribes and others to ensure the integrity and health of our aquatic ecosystems by placing some of these waters beyond the jurisdictional reach of the CWA. The Tulalip Tribes is strongly opposed to any action by EPA and the Corps to this end.

Furthermore, EPA must provide a process for Tulalip and other tribes to provide meaningful input through government-to-government consultation before taking any action that may be detrimental to the Tribes' treaty-reserved legal rights and inconsistent with the US Government's treaty obligations.

Sincerely,

Marie Zackuse

Marie Zackuse,
Chairwoman, Tulalip Tribes Board of Directors

[i] *United States v. Rapanos*, 547 U.S. 715 (2006). Note that Justice Scalia wrote for only four justices; as such, this is a mere plurality opinion.

[ii] U.S. ENVIRONMENTAL PROTECTION AGENCY, CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE (Jan. 2015) [hereinafter CONNECTIVITY REPORT].

[iii] CONNECTIVITY REPORT, at ES-2.

[iv] CONNECTIVITY REPORT, at ES-2 to 4.

[v] See, e.g., P.J. Wigington, Jr., et al., *Coho Salmon Dependence on Intermittent Streams*, 4 ECOL. ENVIRON. 513 (2006).

[vi] 33. U.S.C. § 1251(a).