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September 30, 2021

By email only to
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Rose Kwok
Office of Wetlands, Oceans, and Watersheds
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20406

Re: Initial consultation of Barona Band of Mission Indians on proposed revision to Definition of "Waters of the United States" under the Clean Water Act

Dear Ms. Kwok,

In his letter notice of August 16, 2021. John Goodin, the Director of the Office of Wetlands, Oceans, and Watersheds, informed tribes that he was extending until October 4, 2021 the period during which tribes could initiate consultation and make comments on the proposed rulemaking intended to revise the definition of "waters of the United States". The proposal is to issue a new rule, to replace the current 2015 Clean Water Rule that is currently in effect after the U.S. District Court for the District of Arizona vacated and remanded the 2020 Navigable Waters Protection Rule in *Pasqua Yaqui Tribe, et al. v. U.S. E.P.A, et al,* no. cv-20-22266-TUC-RM.

The Barona Band of Mission Indians (the "Tribe") is a federally-recognized Indian tribe with a great interest in this subject that wishes to initiate such consultation. The Tribe now submits its initial comments on the proposed rule defining "Waters of the United States" under by the Clean Water Act, as currently being considered by the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("ACE"). In these comments, "EPA" will also include the U.S. Army Corps of Engineers. As a formal new definition is proposed, the Tribe will make further comment and otherwise participate in the rulemaking process. These current comments will be organized as follows:

A. Nature and interest of the Tribe

B. Regarding tributaries, the proposed rule exceeds the power of Congress under the Commerce Clause

 1. The proposed rule proves too much.

 2. Even if *de minimis* effects on interstate commerce can be Aggregated, such aggregation is not appropriate here.

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3. The rule needlessly pushes the outer limits of Congressional power under the Commerce Clause without explicit authorization.

C. The Tribe suggests a paradigm for a more practical definition of "tributary".

A. Nature and Interest of the Tribe

The Barona Band of Mission Indians is a federally-recognized Indian tribe, governing itself and exercising its inherent sovereignty over the lands of the Barona Indian Reservation (now nearly 8,000 acres) located in rural San Diego County, California. The Tribe, along with the Viejas Band of Mission Indians, is also the successor to the Capitan Grande Band of Mission Indians as to the lands of the Capitan Grande Indian Reservation (approximately 17,000 acres), also in rural San Diego County, California. Through the Capitan Grande Indian Reservation flows the San Diego River, as well as tributary water courses and drainages of various characters, sizes, and flows. Similar small water drainages (ephemeral, intermittent, and seasonal) also are sometimes found on the Barona Indian Reservation, depending on rain. The Tribe believes that any rule that seeks to extend the scope of the jurisdiction of the EPA and the ACE under the Clean Water Act (the "CWA") beyond what the statute and the Commerce Clause allow, harming the sovereign interests of the Tribe, especially its sovereign right to control the use and development of the land of its federal Indian reservation.

In this context, he Tribe is most focused on any new definition of "tributary" that would include the ill-named Padre Barona Creek which flows (although only rarely, as noted below) through the Barona Indian Reservation. The Tribe does not necessarily oppose *any* definition that would include this "creek" in "tributary". But the Tribe does urge the EPA to adopt a definition of "tributary" that uses objective criteria, as set forth in the paradigm described at the conclusion of these comments. Under virtually any set of reasonable objective criteria, this so-called "creek" is not a "tributary" to waters of the United States. Sometimes, depending on rains, no water flows in it for years in a row. When it does flow, it flows *only* in direct response to rains, and, as soon as rain from a storm or cloudburst drains, the so-called creek stops flowing. For most of its life, sometimes years, it is completely dry, the most ephemeral of watercourses.

B. Any expansive definition of "tributary" exceeds the power of Congress under the Commerce Clause.

1. The proposed rule proves too much.

For purposes of these comments, the Tribe will assume that the EPA is considering a definition of "tributary" that resembles that of the 2015 Clean Water Rule, of which Section 328(c)(5) defines "tributary" expansively to include

> a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 C.F.R. 328.3(e) which contributes flow, either directly or through another

> water, to a water identified in paragraphs (a)(1) through (4) of this section. . . . A water that qualifies as a tributary under this section does not lose its status as a tributary if, for any length there are . . . one or more natural breaks . . . so long as a bed and banks and an ordinary high water mark can be identified upstream of the break.

Taken literally, this standard would define most of the land area of the United States as "waters of the United States." Much rain that falls is not immediately absorbed into the ground and, instead, runs off and is collected through ever-increasing courses, from trickles, to runnels, to rivulets, to gullies, to rills, to brooklets, to streamlets, to brooks, to creeks, to streams, and to rivers that empty into the ocean. During and after rains, such flows (except for natural sinks, such as the Salton Sea), even if only occasional, all drain into the ocean and other indisputably jurisdictional waters, from the smallest drainage feature to the largest, through a network of tributaries of tributaries of tributaries, etc.

Each of these drainage features, from the smallest to the largest, from the most occasional and ephemeral to the most massive and continuous, contributes to the flow of water into some navigable water or ocean. Presumably, a drop of rain falling on the west edge of the continental divide in Colorado that is not absorbed or diverted will eventually find its way into the Colorado River and thence into the Pacific Ocean. Presumably, that drop could also carry a molecule of a pollutant, a grain of sediment, etc. from the continental divide into the Pacific Ocean. While the effect of that single drop on interstate commerce may be *de mnimis*, the Tribe will assume that the cumulative effects of many such drops may be aggregated to produce a significant effect.

That single drop of water, along with others like it, will have a cumulative significant effect on the physical, biological, and chemical integrity of the indisputably jurisdictional waters into which they eventually flow. That is the thrust of the Connectivity Report. But the mere fact that such a cumulative effect may exist does not, in itself, justify the regulation of that drop of water from the very first point, near the continental divide, where it first enters the most evanescent, ephemeral, and tiny drainage with a bed, banks, and OHWM, especially if that confluence of characteristics immediately ceases and does not reappear for many miles. If this conclusion did follow, then virtually the entire land mass of the United States could become "waters of the United States". At some point, virtually every drop of rain that is not absorbed or diverted will enter something that qualifies as a "tributary". From that point onward, even if there is a no further confluence of bed, banks, and OHWM for any indefinite distance, the land over which that drop passes on its way to the sea will be "waters of the United States", thereby expanding the jurisdiction of the EPA and ACE under the Clean Water Act from not just "waters of the United States" to "lands of the United States".

Such an all-encompassing result exceeds the power of Congress under the Commerce Clause by seeking to regulate a non-economic activity. In *U.S. v. Lopez*, 514 U.S. 549 (1995) the Supreme Court held that Congress exceeded its authority under the Commerce Clause in enacting a statute prohibiting possession of a firearm in a school zone. The test for the permissible scope of the Commerce Clause was "activities that substantially affect interstate commerce." *Id.*, 514 U.S. at 559. The Supreme Court noted that this act "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those

terms." *Id.,* at 561. But more determinative was the government's claim that such possession affects interstate commerce in various indirect ways.

> We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuous they relate to interstate commerce [cit.om.] Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of §922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.
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> *U.S. v. Lopez,* 514 U.S. 549, 564 (1995)

So, too, here. The same drop of water falling at the crest of a peak, passing a point that has a bed, bank, and OHWM, then proceeding for many miles, far from any of those features, before it passes the same confluence again, has nothing to do with commerce or any sort of economic enterprise. That same drop of water may pick up a molecule of a pollutant. Unless absorbed or diverted, that drop may eventually carry that molecule to a true flowing river, or the ocean. But, during the indeterminate time between when the drop first passes a bed, bank, and OHWM, flows indiscriminately for an unlimited distance, and then passes a bed, bank, and OHWM again, and even thereafter while it passes over parched land that seldom sees any molecule of water, it is not having a substantial effect on commerce. Until that drop of water reaches a truly significant point of inflection (i.e., justified by objective factors such as volume of flow, frequency of flow, duration of flow, distance to a navigable water, etc.), its intrastate effect simply does not substantially affect commerce in the legal sense of *Lopez* for the reasons stated in *Lopez.* That effect is simply too attenuated to be legally substantial, as *Lopez* requires..

> We conclude . . . that the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce.
>
> *Id.,* 514 U.S. at 559

> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce clause to a general police power of the sort retained by the States.
>
> *Id.,* 514 U.S. at 567

This same reasoning was the basis for the Supreme Court's holding that the civil remedy in the Violence Against Women Act was insufficiently related to interstate commerce to support

its enactment under the Commerce Clause. It concluded that, even aggregating the effect of all such crimes was insufficient, at least for such a non-economic activity,

> Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effect of any non-economic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation only where that activity is economic in nature. . . .
>
> We accordingly reject the argument that Congress may regulate non-economic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce.
>
> *U.S. v. Morrison*, 529 U.S. 598, 613, 617 (2000)

Under this reasoning, any proposed rule defining tributaries expansively, as above, cannot find support in the Commerce Clause. As one district court observed long ago,

> Congress has jurisdiction under its authority to regulate "commerce with the foreign nations and among the several States." Does that apply to immediate tributaries, and if it applies to immediate tributaries, does it apply to tributaries to tributaries, and if so, where is the end?
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> *Grand River Dam Authority v. Going,*
> 29 F.Supp. 316, 323 (N.D.Okla., 1939)

Any such proposed rule is thus hopelessly broad and subjective. Such an expansive proposed rule would make no mention of objective, measurable features such as the volume of flow, seasonality, frequency or duration of flow, or distance to a navigable water. Instead, for such an expansive definition of "tributary", all that seems to be required for even the slightest and most occasional ephemeral drainage feature to be a covered "tributary" is a discernable, and not continuous, OHWM and a bed and bank. The tiniest and most evanescent absolutely dry wash, with only a very brief and small flow during rain once in many years, is a covered "tributary" if there can be located even the most isolated OHWM, plus a bed and bank, at *any* upgradient location, no matter how far (presumably many miles) from another such indicator. So as not to be so impermissibly attenuated from commerce as in *Lopez*, any proposed definition of "tributary" must take other factors into account, such as volume of flow, seasonality, duration of flow, capacity and likelihood for carrying pollutants, and distance to a covered water body.

Therefore, the proposed rule's definition of "tributary" is so attenuated from traditional navigable waters and commerce as to suffer from the same infirmity as in *SWANCC*. Read in this way, "tributary" pushes the outer boundary of the extensive power of Congress under the Commerce Clause and, for that reason alone, should be avoided.

2. *Even if* **de minimis** *effects on interstate commerce can be aggregated, such aggregation is not appropriate here.*

The above discussion assumes that the *de minimis* effect on interstate commerce of a single intrastate activity can be aggregated to produce a cumulatively substantial[1] effect. The Supreme Court has held in *Lopez* and *Morrison, supra*, that possession of a firearm in a school zone and a civil remedy for violence against women are non-economic activities and their effect on interstate commerce is simply too attenuated to support such legislation under the Commerce Clause. In doing so, the Supreme Court held that, without more, the *de minimis* effects of an intrastate non-economic activity cannot be aggregated to produce a cumulative significant effect:

> We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.
> *U.S. v. Morrison*, 529 U.S. 598, 617 (2000)

While the Supreme Court has not identified what else might be needed to aggregate such *de minimus* effects, the Firth Circuit has. After a lengthy and thorough analysis, it held that the Endangered Species Act ("ESA") was economic in nature, so that *de minimus* intrastate effects on interstate commerce could be aggregated to produce the required significant economic effect:

> ESA is an economic regulatory scheme; the regulation of intrastate takes of the Cave Species is an essential part of it. Therefore, Cave Species takes may be aggregated with all other Cave Species takes. . . . In sum, application of ESA's take provision to the Cave Species is a constitutional exercise of the Commerce power.
> *GDF Realty Investments, Ltd. V. Norton,*
> 326 F.3d 622, 640-641 (5th Cir., 2003)

GDF is the leading analysis of this point regarding the ESA. The opinion fully considers *Lopez* and *Morrison, supra.* In reaching its conclusion that the ESA is economic in nature regarding the take provisions of the ESA, the Fifth Circuit considered several factors. The relevant factor for present purposes is the requirement that the *de minimis* intrastate activity must be an "essential" part of the overall regulatory scheme. *Id.*, 326 F.3d at 639, quoting *Lopez, supra.*[2] Aggregation of the *de mnimis* intrastate effects of federal regulation was appropriate in *Lopez* and *GDF* because the activity was determined in both cases to be economic and essential to the larger regulatory scheme.

The CWA is certainly a comprehensive regulatory scheme. But defining "tributary" expansively is not essential to that regulatory scheme. The point at which a flow of water becomes a regulated "tributary" could be identified at any number of points, e.g., where a bed, banks, *and* OHWM first appear irrespective of any breaks; where a bed *or* banks, plus an

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[1] "We conclude . . . that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *U.S. v. Lopez,* 514 U.S. 549, 559 (1995).

[2] "Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." 514 U.S. at 561.

OHWM appears; where some minimal volume of flow first occurs; where a stated frequency of flow occurs; where the flow first joins a navigable water, where a certain level of pollutant is first carried, etc. Naming the point where a "tributary" first acquires a bed, banks, and OHWM, not counting breaks, is just one choice that could be made by the EPA in the proposed regulation. Any of these other points would equally suffice. Therefore, the choice made in the 2015 Clean Water Rule is not *essential* to the overall CWA regulatory scheme. Because it is not *essential* under *Lopez,* aggregation of *de minimis* intrastate effects to produce a significant effect cannot occur.

3. Any expansive definition of "tributary" needlessly pushes the outer limits of Congressional power under the Commerce Clause without express authorization.

One bedrock principle of the Supreme Court's jurisprudence regarding the CWA is that the Court will not accept an administrative interpretation of the statute that pushes the outer limits of Congressional power under the Commerce Clause without at least an express statement that such is truly the intent of Congress.

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. [cit.om.] This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. [cit.om.] This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. [cit.om.] Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." [cit.om.]
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> *SWANCC v. Army Corps of Engineers,*
> 531 U.S. 159, 172-173 (2001)

Relying on this holding from *SWAANC,* the Fifth Circuit has refused to uphold a pre-*Rapanos* effort to regulate all "tributaries", holding that *SWANCC* controls and does not permit an administrative reading of the Clean Water Act that pushes the outer limits of Congressional power under the Commerce Clause. *In re Needham*, 354 F.3d 345, n. 8 (5th Cir., 2003).

Any expansive definition of "tributary" would similarly and impermissibly vastly expand the regulatory jurisdiction of the EPA, again pushing the outer limits of the Commerce Clause power without Congressional sanction. Such an expansive approach would extend "waters of the United States" to untold areas of land that are completely dry virtually always, and carry water sometimes only once in several years, and then only in small quantities for brief periods if a bed, bank, and OHWM can be found at even the most remote upgradient location. Such a

slender reed is insufficient to support the exercise of the outer limits of Congressional power under the Commerce Clause.

This Constitutional infirmity, identified by *SWANCC*, is compounded by its intersection with another Constitutional infirmity. Such agency jurisdiction over land that is almost always dry amounts to federal control over local land use, a traditionally state and local function.[3] The CWA itself disclaims any intent to divest local governments (such as the Tribe in this case[4]) of their authority over the use and development of land. In the CWA Congress declared its intent to "recognize, preserve, and protect the primary responsibilities of States . . . to plan the development and use . . . of land and water resources" (33 U.S.C. §1251(b)). Any expansion of federal regulatory jurisdiction into local control of the use and development of dry land on which rain only rarely falls and flows similarly pushes the outer limits of Congressional power under the Commerce Clause, again without express Congressional sanction. It is particularly and needlessly abrasive in the federal scheme due to the special nature of the land in question. The beds of tributaries are the sovereign property of states. The current strained effort to regulate the use of such land "implicates special [state] sovereignty interests". *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 281 (1997). A state's control over such lands is of Constitutional dimensions:

> In consequence of this rule, a state's title to these sovereign lands arises from the equal footing doctrine and is "conferred not by Congress but by the "Constitution itself." [cit.om.]
> *Id.*, 512 U.S. at 283

Certainly, any valid exercise of Congressional power under the Commerce Clause overcomes whatever effect it may have on this local retained power over land use. Similarly, the United States certainly has a navigational servitude over all such state lands within the beds of navigable rivers and other navigable waters. *Kaiser Aetna v. U.S.*, 444 U.S. 164, 175 (1979). Such state-owned lands below this servitude are subject to it. Tributaries that actually flow in some quantity for an appreciable time are certainly subject to the federal commerce power, although not to the navigational servitude. But, under *SWANCC*, neither the Commerce Clause nor the navigational servitude overcomes the above Constitutionally-based right of local governments to control land use when such federal control pushes the outer limits of the Commerce Clause based solely on administrative interpretation, rather than express Congressional directive. As the Supreme Court has summarized this limitation on the Commerce Power: "The Constitution requires a distinction between what is truly national and what is truly local." *U.S. v. Morrison*, 529 U.S. 598, 617 (2000). Any expansive reading of "tributary" obliterates this distinction by its overbreadth and thus is forbidden under *SWANCC*. As in *SWANCC*, there is no need here to strain to expand the definition of "tributary" to the point where it raises the same kinds of Constitutional issues, especially when a less needlessly aggressive and more objective definition would avoid such issues.

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[3] ". . . regulation of land use [is] a function traditionally performed by local government." *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994)

[4] ". . . Congress had in mind a distribution of jurisdiction which would make the tribal government over the reservation more or less the equivalent of a county or local government in other areas within the state . . .", *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 663 (9th Cir., 1975)

C. The Tribe suggests a paradigm for a more practical definition of "tributary".

Another major provision of the CWA deals with regulation of pollutants from "point sources." All sources of such pollutants must be either point sources or non-point sources, but only "point source" is defined. A "point source" is

> any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. [33 U.S.C. §1362(14)]

There is no definition for non-point source, largely because, by its nature, it is so diffuse as to defy useful definition:

> Stormwater that is not collected or channeled and then discharged, but rather runs off and dissipates in a natural and unimpeded manner, is not a discharge from a point source as defined by §502(14). As we wrote in *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren,* 309 F.3d 1881, 1884 (9th Cir., 2002):
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> > Although nonpoint source pollution is not statutorily defined, it is widely understood to be the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source. Because it arises in such a diffuse way, it is very difficult to regulate through individual permits.
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> *Northwest Environmental Defense Center v. Brown,*
> 640 F.3d 1063, 1070 (9th Cir., 2011)

Point sources and non-point sources are thus the two ends of a spectrum of discharges that, at some intermediate point, switches from one to the other. In this way, they are similar to the water spectrum of trickle, rivulet, rill, gully, brooklet, streamlet, brook, creek, stream, river, and ocean. As the Ninth Circuit has recently noted in this regard,

> However, when stormwater runoff is collected in a system of ditches, culverts, and channels and then is discharged into a stream or river, there is a "discernable, confined and concrete conveyance" of pollutants, and there is therefore a discharge from a point source. In other words, runoff is not inherently a nonpoint or point source of pollution. Rather, it is a nonpoint or point source under §502(14) depending on whether it is allowed to run off naturally (and is thus a nonpoint) or is collected, channeled, and discharged through a system of ditches, channels, culverts, and similar conveyances (and is thus a point source discharge).
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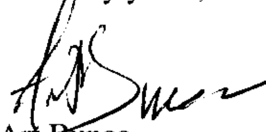
> *Id.*

The point of inflexion of the pollutant source spectrum is the point at which runoff becomes confined into a ditch, channel, culvert, or similar structure and is thus segregated from natural free-ranging flow. The 2015 Clean Water Rule sets this point of inflexion for "tributaries" at the point where a rill or gully first acquires an OHWM and either a bed or a bank. The impracticality of and Constitutional problems with this definition are noted above. Instead, the Tribe suggests that the EPA set the point of inflexion for "tributary" in the water course spectrum at a point that can be identified by objective and measurable factors (e.g., volume of flow, duration of flow, time of year of flow, likelihood of and capacity for carrying a significant quantity of pollutants, actual quantity and nature of pollutants and/or sediment, seasonality, distance to a navigable water, etc.).

Such a point of inflexion with objective criteria is (1) far easier to administer, (2) much less likely to generate legal challenges, (3) predictable for the benefit of the regulated public, and (4) not presenting the kinds of constitutional issues that the current proposal raises. The Tribe will leave it to the EPA to consider this suggestion, in the hope that the above advantages will induce it to abandon a definition of "tributary" that needlessly causes the problems noted above, in favor of one that equally serves the purposes of the CWA without endlessly prolonging the conflicts engendered by *Rapanos*.

Sincerely yours,



Art Bunce
Tribal Attorney

cc: Raymond Welch, Chairman