



September 30, 2021

Rose Kwok, Environmental Scientist
Office of Wetlands, Oceans, and Watersheds
Environmental Protection Agency
William Jefferson Clinton Building West
1301 Constitution Ave. NW
Washington, DC 20229

RE: IAC Comments for the record - Proposed Rule: Revised Definition of “Waters of the United States,” Docket ID No. EPA-HQ-OW-2018-0149

Dear Ms. Kwok:

On behalf of the Intertribal Agriculture Council (IAC) and its Native Farm Bill Coalition, we appreciate the opportunity to comment on the Environmental Protection Agency’s (EPA) rulemaking process as the EPA seeks to change its definition of “Waters of the United States” (WOTUS). The IAC represents federally recognized Tribal Nations and the interests of over 80,000 agricultural producers across Indian Country. Clean, protected water is essential to Tribal communities and their producers, as well as to Tribes for whom these waterways hold significant cultural and subsistence purposes. We support the efforts of the EPA to return to a pre-2015 definition of WOTUS, and offer comments to guide the EPA in its adjustment of this definition.

The 2019 Navigable Waters Protection Rule¹ excluded an extensive network of waterways of significance to Tribes. While the Clean Water Act (CWA) allows for states and Tribes to set stricter water quality and pollution standards than those required at the federal level, states do not always choose to do this. This has severely adverse effects on those Tribes who are not located at the headwaters for a source which flows through their Reservation or lands. Unlike the federal government, states have no trust responsibility to Tribes, and do not always protect headwaters in the ways that protect them for Tribal needs and beneficial uses. Despite using these waters for drinking water, fishing, irrigation, or sacred and cultural activities, Tribes cannot always encourage states to adopt water quality standards upstream which facilitate their safe use by Tribes downstream. While Tribes can set their own water quality standards, these standards are

¹ The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 FR 22250 (2020). Accessed at: www.federalregister.gov/documents/2020/04/21/2020-02500/the-navigable-waters-protection-rule-definition-of-waters-of-the-united-states.



only enforceable with Clean Water Act funding if those waterways fit the definition of WOTUS. In addition, without the more protective 2015 Clean Water Rule, Tribes had difficulty protecting their beneficial uses off Reservation but within their ancestral lands.

The 2019 Navigable Waters Rule also erased protections for “ephemeral” or “intermittent” waterways, and limited the protections for wetlands to include only those adjacent to major bodies of water. As much as 60% of U.S. waterways are considered “ephemeral” or “intermittent,” and that number leaps to 81% in the Southwest.² According to the 2017 Census of Agriculture, over 37% of American Indian/Alaska Native producers are located in the Southwest region.³ Thus, the 2019 definition of WOTUS represented a major decrease in federal protections for a significant number of Tribal producers who rely on such “ephemeral” and “intermittent” sources for drinking and irrigation water.

Hence, the new definition for WOTUS must allow for sufficient federal jurisdiction as to protect bodies of water used by Tribes, even if those headwaters originate outside of Tribal lands. This, accompanied with provisions which allow Tribes to identify waterways of significance, even if they originate outside of Tribal lands, will be necessary to advancing and upholding Tribes’ sovereignty and right to self-determination.

Where the 2019 Rule did not afford our waterways enough protections at the federal level, the 2015 Clean Water Rule⁴ was too narrow in its approach. The 2019 rule drew considerable criticism from the agriculture industry. While the Intertribal Agriculture Council tends to lean towards a more protective definition than what other agriculture organizations might request, we must still keep the needs of our producers in mind. As an organization representing over 80,000 Tribal producers, we request that the new definition allow for enough leniency to ensure that our producers can focus their time on their agricultural efforts rather than on applying for permits

² Levick, L., et al. The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest. U.S. Environmental Protection Agency and USDA/ARS Southwest Watershed Research Center, EPA/600/R-08/134, ARS/233046, page 48. Accessed at: www.epa.gov/sites/default/files/2015-03/documents/ephemeral_streams_report_final_508-kepner.pdf

³ 2017 Census of Agriculture Highlights: American Indian/Alaska Native Producers. U.S. Department of Agriculture, ACH17-7 (2019). Accessed at: www.nass.usda.gov/Publications/Highlights/2019/2017Census_AmericanIndianAlaskaNative_Producer_s.pdf.

⁴ Clean Water Rule: Definition of “Waters of the United States,” 80 FR 37053 (2015). Accessed at: www.federalregister.gov/documents/2015/06/29/2015-13435/clean-water-rule-definition-of-waters-of-the-united-states.



and the like. With all of this taken into consideration, we want to ensure that the definition allows for adequate “normal farming” activity exemptions under Section 404 of the Clean Water Act.

Food and agriculture represent substantial sectors of economic development and potential for Tribal communities. According to the 2017 Census of Agriculture nearly 80,000 Tribal producers are operating on over 59 million acres of land and generating over \$3.5 billion in economic activity.⁵ Across all sectors, Tribal agriculture is the only place where all numbers of production are increasing from the previous census numbers in 2012. When the waterways our producers use come under threat from pollution, it hurts our Tribal economies. At the same time, a definition of WOTUS which does not allow for Tribes to determine which waterways within their lands should constitute such waters, is a threat to Tribal sovereignty and a miscarriage of the EPA’s 1984 Indian Policy, which states in section two that “Tribes will set the standards.”⁶ The EPA must trust that Tribes can determine for themselves how best to protect their waters, while also allowing for farming, ranching, and other forms of agriculture on Tribal lands.

The Environmental Protection Agency should adopt a definition of “Waters of the United States” which simultaneously affords Tribes the greatest federal protections, while also allowing Tribes to determine what those waterways are, even if those waterways have their headwaters outside of Tribal lands. We trust that the EPA’s consultation with Tribes and their producers on this matter will not end with the receipt of these comments, and look forward to future consultation opportunities.

Sincerely,

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⁵ 2017 Census of Agriculture Highlights: American Indian/Alaska Native Producers. U.S. Department of Agriculture, ACH17-7 (2019). Accessed at: www.nass.usda.gov/Publications/Highlights/2019/2017Census_AmericanIndianAlaskaNative_Producers.pdf.

⁶ Accessed at: www.epa.gov/sites/default/files/2015-04/documents/indian-policy-84.pdf.