



# MAKAH TRIBAL COUNCIL

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Rhadika Fox  
Assistant Administrator, Office of Water  
Environmental Protection Agency  
1200 Pennsylvania Ave. NW  
Washington, DC 20460

Jaimie A. Pinkham  
Acting Assistant Secretary of the Army,  
Civil Works  
U.S. Department of the Army  
101 Army Pentagon  
Washington, DC 20310

September 30, 2021

Re: Makah Tribal Council Comments on Proposed Re-definition of Waters of the United States

Dear Assistant Administrator Fox and Assistant Secretary Pinkham:

The Makah Tribal Council is responding to your request for tribal input on the Environmental Protection Agency (EPA) and the U.S. Department of the Army's ("the agencies," hereafter) intent to revise the definition of the "Waters of the United States" (WOTUS). The Makah Tribal Council supports the agencies' efforts to re-examine and revise the 2020 WOTUS rule as directed by President Biden's Executive Order (E.O.) 13990. The Makah Tribe previously submitted extensive comments opposing the 2020 rule. We based this opposition on the following primary points:

- The 2020 WOTUS rule excludes waters that are crucial to salmonid species, many of which are protected under the Endangered Species Act in our region. Of particular concern was the exclusion of wetlands, pools, ephemeral streams, and ditches, as these provide vitally important seasonal habitat for salmonids at sensitive life stages<sup>1</sup>. As climate change reduces water availability for salmon habitat, federal protections are of critical importance. The 2020 rule ignored the interaction of climate change impacts to seasonal water supply and reduced federal protections for salmon habitat. The 2020 WOTUS redefinition causes negative impacts to our salmon and their habitat, and therefore the exercise of Makah treaty rights.
- The 2020 WOTUS revision inappropriately delegated federal trust responsibilities to the state or local level, negatively impacting federal protections of our waters in abrogation of the federal trust responsibility.
- The process to develop the 2020 WOTUS rule did not provide adequate opportunity for or incorporate feedback shared during government-to-government consultation with tribal governments and was in direct conflict with the agencies' own tribal consultation policies and E.O. 13175. Tribes were provided a very short early notification period with limited information on the proposal available. A single nationwide "Tribal Co-Regulators"

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<sup>1</sup> See, e.g., P.J. Wigington, Jr., et al., Coho Salmon Dependence on Intermittent Streams, 4 *ECOL. ENVIRON.* 513 (2006)

meeting was also held, but the agencies only invited 25 tribes, representing a mere 4% of the 573 federally recognized tribes nationwide.

- The 2020 WOTUS rule lacks scientific basis and contradicts EPA's own science-based conclusions as outlined in the 2015 EPA Connectivity Report.<sup>2</sup> The 2020 rule did not provide a comprehensive science-based explanation for the redefinition.
- By excluding important waters, the 2020 rule decreased the federal nexus to respond in the event of an oil spill in now-excluded waters. Since the promulgation of the 2020 WOTUS rule, we have seen this play out in real time in Washington State at the Custer BNSF spill, in which the crucial early hours of the response included discussions with EPA attorneys and the National Pollution Funds Center about whether the federal government could even assist with the response.

We appreciate the early outreach and opportunity for input and consultation at this early stage in the rule-making process. The Makah Tribal Council supports a redefined WOTUS rule that addresses our concerns with the 2020 rule as outlined above. A revised WOTUS rule should be inclusive of all types of salmon habitat, based in the best available science, developed in partnership with tribal governments through appropriate government-to-government consultation, protective of treaty resources, and consistent with the federal trust obligations to tribal governments.

We look forward to continuing to work with EPA to improve the protection of our treaty resources and the habitat they rely on through the development of a revised WOTUS rule. Please contact the Makah Tribal Council Secretary, JoDean Haupt-Richards (jodean.haupt-richards@makah.com or 360-645-3235), with any questions or if you would like additional information.

Sincerely,



Timothy J. Greene Sr.  
Chairman  
Makah Tribal Council

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<sup>2</sup> U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, 2015