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October 12, 2021

Via email

Rose Kwok

CWAwotus@epa.gov

Environmental Protection Agency
Office of Water (4504-T)
1200 Pennsylvania Ave NW
Washington, D.C. 20460

Stacey Jensen

usarmy.pentagon.hpda-asa-cw.mbx.as-cw-reporting@mail.mil

Office of Sec'y of Army for Civil Works
108 Army Pentagon
Washington, D.C. 20310

Re: Comments on Notification of Tribal Consultation and Coordination on Revising the Definition of “Waters of the United States” (Docket ID No. EPA-HQ-OW-2021-0328)

Dear Ms. Kwok and Ms. Jensen:

The Port Gamble S’Klallam Tribe (“PGST” or “Tribe”) is a federally-recognized Indian Tribe. These comments are submitted on behalf of the Tribe in response to U.S. Environmental Protection Agency (“EPA”) and the Department of the Army Corps of Engineer’s (“Corps”) (collectively the “Agencies”) August 4, 2021 solicitation of advice and counsel from federally-recognized tribes regarding the Agencies’ intent to revise the definition of “waters of the United States” (“WOTUS”). The Tribe generally supports the Agencies’ commitment to engage in rulemaking to “restore longstanding protections” guaranteed by the Clean Water Act.¹ Now that the unlawful and damaging “Navigable Waters Protection Rule” (“Navigable Waters Rule” or “the Rule”) has been vacated,² the Agencies should move forward promptly and with purpose to develop a new and robust rule that strengthens protections for all of our nation’s waters and furthers the Clean Water Act’s goals.

¹ 86 Fed. Reg. 41911 (Aug. 4, 2021).

² *Pasqua Yaqui Tribe, et al., v. U.S. EPA*, No. CV-20-00266-TUC-RM, 2021 WL 3855977, --- F. Supp. 3d --- (D. Az. Aug. 30, 2021).

I. THE AGENCIES MUST TAKE THE INTERPLAY BETWEEN CLEAN WATER ACT JURISDICTION AND PROTECTION OF TRIBAL RESOURCES INTO ACCOUNT AS IT DEVELOPS A NEW WOTUS DEFINITION.

The Port Gamble S’Klallm Tribe writes to emphasize the importance of protecting all waters within PGST’s treaty-protected usual and accustomed fishing areas, as well as to remind EPA and the Corps of the trust duties that federal agencies owe to tribes, including PGST, in their administration of federal statutes. Because the definition of “waters of the United States” affects Clean Water Act jurisdiction over, and therefore protection of, waters upon which tribal natural resources (including various life stages of salmonids) depend, the Tribe urges the agencies to adopt a robust and expansive WOTUS definition.

The Port Gamble S’Klallm Tribe is the successor in interest to Indian bands and tribes signatory to the 1855 Treaty of Point No Point, 12 Stat. 933. Article IV of the Treaty states:

The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands.

The Treaty reserved to PGST the right to take fish at all “usual and accustomed grounds and stations” (U&A)—an area roughly centered on Port Gamble Bay that includes all of Port Gamble Bay, most of the Hood Canal watersheds, and extends west along the Strait of Juan de Fuca to the Sekiu River, north to the San Juan Islands, east to Whidbey Island, and south through Hood Canal. Today, over 150 years after signing the Treaty of Point No Point, the Tribe retains deep cultural and economic ties to the surrounding waters and to their fisheries. Within these areas, PGST and other tribes that share the U&A are entitled to take half the harvestable fish and shellfish. More than ninety tribal members earn all or a portion of their livelihood working as commercial salmon fishermen. In addition, the Tribe conducts fisheries in its U&A to obtain fish for ceremonial use, and subsistence harvests from the Tribe’s U&A are a key element of the diet of many tribal members. Tribal customs and traditions reflect the historic and present day importance of the fisheries by proscribing waste, regulating distribution of the catch, and discouraging water pollution. For waters on its reservation and throughout its U&A, PGST is a resource that can provide cultural, historical, scientific, and geographical knowledge of the Tribe’s ancestral territory and practices, including sacred sites, knowledge that should be respected in this rulemaking and as jurisdictional determinations are made under the federal government’s trust responsibility and consultation obligations.

II. THE AGENCIES SHOULD PROPOSE A RULE THAT FOLLOWS THE LAW, IS BASED IN SCIENCE, PROTECTS THE INTERESTS OF THE TRIBE, AND ACCOUNTS FOR CLIMATE CHANGE.

On August 30, 2021, the Federal District Court for the District of Arizona vacated the Navigable Waters Rule.³ As a result of the vacatur, the Agencies can now, and must, move forward promptly to develop a new rule that will correct the grave mistakes of the Navigable Waters Rule that jeopardized so many of the nation’s waters and that has inflicted significant harm and risk of harm on tribes in particular. There is no need to expend precious agency and tribal resources on an extended repeal process.

As acknowledged in a June 8, 2021 memorandum entitled “Review of U.S. Army Corps of Engineers ORM2 Permit and Jurisdictional Determination Data to Assess Effects of the Navigable Waters Protection Rule,” the Agencies have seen an increase in determinations by the U.S. Army Corps of

³ See *id.*

Engineers (“the Corps”) that waters are non-jurisdictional, and an increase in projects for which Section 404 permits are no longer required, with particularly negative effects for tribes. The Agencies also acknowledge that *at least* 333 projects that would have been subject to Section 404 permitting requirements prior to the Rule’s promulgation no longer were.⁴

A. The Agencies Must Adopt a Rule that Broadly Protects all Waters.

1. *Congress Intended the Broadest Possible Interpretation of “Navigable Waters.”*

In the Federal Water Pollution Control Act of 1972 (the “Clean Water Act”) Congress’ stated purpose and intent was to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁵ The legislative history repeatedly points to the breadth of both the term “navigable waters” and the overall statutory scheme to protect all waters. With respect to the term “navigable waters” specifically, the Conference Report states: “the conferees fully intend that the term ‘navigable waters’ be given *the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.*”⁶ Congress made clear that in contrast to the old, pre-Clean Water Act legal definition of the term “navigable waters,” “this new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes.”⁷ Congress further recognized that “[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.”⁸

The Navigable Waters Rule incorrectly applied Justice Scalia’s opinion in *Rapanos v. United States*, limiting the Clean Water Act to only those waters with “relatively permanent, standing or continuously flowing bodies of water.”⁹ The agencies cannot, however, simply choose to follow Justice Scalia’s test to abdicate responsibilities under the Clean Water Act, when five justices rejected that test as “inconsistent with the Act’s text, structure, and purpose.”¹⁰

Controlling discharge of pollutants at their source necessarily means controlling discharges where they enter the aquatic system even if that is a small tributary upstream of a navigable-in-fact water.¹¹ This is especially critical for tribes where their interests may be in the culturally significant headwaters of streams and rivers, where a reservation’s waters lie downstream of potential sources of pollution, or where the tribe has federally protected fishing or water rights.

⁴ *Pasqua Yaqui Tribe*, 2021 WL 3855977 at *4-5; *see also* Decl. of R. Fox ¶¶ 12-14, *Pasqua Yaqui Tribe et al. v. U.S. EPA*, No. 4:20-cv-00266-RM (D. Az. Jul. 16, 2021), ECF No. 83-1; Decl. of J. Pinkham ¶¶ 11-14, *Pasqua Yaqui Tribe et al. v. U.S. EPA*, No. 4:20-cv-00266-RM (D. Az. Jul. 16, 2021), ECF No. 83-2.

⁵ 33 U.S.C. § 1251(a).

⁶ CWA Legislative History, Senate Consideration of the Rpt. Of the Conference Committee, Oct. 4, 1972, at 178 (emphasis added).

⁷ CWA Legislative History, House Consideration of the Rpt. of the Conference Committee, Oct. 4, 1972, at 250 (remarks of Rep. Dingell).

⁸ S. Rep. No. 92-414 at 77.

⁹ 547 U.S. 715, 739, 742 (2006); *see, e.g.*, 85 Fed. Reg. at 22,259-60 (relying on Executive Order 13,778); *id.* at 22,273 (relying on *Rapanos* to exclude ephemeral streams); *id.* at 22,309 (relying on *Rapanos* to define wetlands as only those with “continuous surface connections” to other jurisdictional waters).

¹⁰ *Rapanos*, 547 U.S. at 776 (Kennedy, J., concurring); *see id.* at 800 (Stevens, J., dissenting).

¹¹ *See, e.g., United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1187 (D. Ariz. 1975) (“For the purposes of this Act to be effectively carried into realistic achievement,” the Clean Water Act must cover discharges into tributaries, “including normally dry arroyos.”); *United States v. HVI Cat Canyon, Inc.*, 314 F. Supp. 3d 1049, 1062 (C.D. Cal. 2018) (“It is evident that any pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of navigable waters themselves.” (quoting *Orchard Hill Bldg. Co. v. Army Corps of Eng’rs*, 2017 WL 4150768, *6 (N.D. Ill. 2017))).

2. *Interstate Waters*

The Agencies must restore the longstanding protections for this jurisdictional category. The removal of protections for interstate waters resulted in the lowest common denominator driving down protections for waters that cross state lines or that form a border between states, with the less-protective states controlling the regulation and protections, or lack thereof, for those waters. Tribal resources and interests routinely cross state borders and often involve interstate waters. Full protection of tribal resources, guaranteed by treaty, requires restoration of these protections across state lines. The Agencies must ensure interstate waters are protected in any new rule.

B. The Agencies Must Follow the Science.

When the Agencies promulgated the 2015 Clean Water Rule, they relied on a report that included a comprehensive review of the scientific literature and advice from experts in biology, hydrology, geology, oceanography, and soil science.¹² The report, titled “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence” (hereinafter the “Connectivity Report”), EPA-HQ-OW-0880-20858,¹³ described the many vital connections between tributaries, wetlands, and downstream waters and found extensive evidence that tributaries and wetlands play critical roles in maintaining the physical, chemical, and biological integrity of downstream waters. The Agencies must follow the latest scientific data when developing any new waters of the U.S. rule.

1. *Tributaries*

The Agencies must ensure that any new rule contains broad protections for tributaries, as Congress intended. Tributaries serve as the lifeblood and conduits for all of our nation’s waters and the health of those waters. The Connectivity Report found unequivocal consensus evidence that all tributaries—including perennial, intermittent, and ephemeral streams—“exert a strong influence on the integrity of downstream waters,” and that all tributaries have a significant nexus to navigable-in-fact waters, interstate waters, and the territorial sea.¹⁴

The Agencies are well aware that the majority of streams in the country are ephemeral or intermittent. In EPA’s 2018 rulemaking docket for the Agencies’ proposed repeal of the 2015 Clean Water Rule, the Agencies included an EPA slide that calls ephemeral and intermittent streams the “workhorses of the watershed,” and shows that, nationwide, 59% of stream miles are either ephemeral or intermittent.¹⁵ Ephemeral and all intermittent streams must be protected in a new rule.

2. *Wetlands*

Wetlands naturally absorb flood waters, filter pollutants, and recharge groundwater reserves, as well as provide habitat for fish, amphibians, insects, birds, and mammals. Wetlands have been a source of food and materials for tribes for thousands of years. Because they attract a diversity of species and provide many kinds of food, EPA has called wetlands “biological supermarkets.”¹⁶ The Connectivity Report found clear evidence that wetlands and open waters in floodplains are “highly connected” to tributaries and rivers “through surface water, shallow groundwater, and biological connectivity.”¹⁷

¹² 80 Fed. Reg. 37,054 (June 29, 2015).

¹³ PGST incorporates the Connectivity Report in these comments by reference.

¹⁴ Connectivity Report at ES-2.

¹⁵ EPA, Materials Shared at Outreach Meetings for Docket EPA-HQ-OW-2017-0203 at 332.

¹⁶ EPA, Why Are Wetlands Important?, <https://www.epa.gov/wetlands/why-are-wetlands-important>.

¹⁷ Connectivity Report at ES-2, and 4-1 *et seq.*, especially 4-39.

The connections between wetlands and other waters may not always be visible, but they must be protected nonetheless for those chemical and biological connections are there.¹⁸ Shallow subsurface flows can connect rivers to floodplain wetlands during both high-flow and low-flow periods.¹⁹ For example, wetlands both inside and outside of floodplains can store floodwater, effectively acting like sponges on the landscape during floods.²⁰ Sediment released from wetlands during a flood can help shape a river's channel and therefore affect its physical integrity.²¹ One of the most important functions of wetlands is to intercept contaminants by filtering them through the roots of wetland plants.²² And since 2015, scientific studies have only reiterated the importance of upstream waters like ephemeral tributaries and wetlands to the integrity of larger, downstream waters. There is no dispute in the science that wetlands, even without visible surface connections, are important, are connected to rivers and streams, and tribal knowledge and expertise shows their importance. That science must inform any new rule.

3. *Waste Treatment Exclusion*

The so-called waste treatment exclusion must be eliminated. It is directly contrary to the language, purpose, and intent of the Clean Water Act, because it allows natural waters to be used as waste dumps. This is absolutely contrary to the Tribe's interests in clean, safe water. The Waste Treatment Exclusion is a huge loophole that must be eliminated to protect the rights of tribes.

C. The Agencies Must Further Environmental Justice and Adhere to the Trust Responsibility.

In any new rule, the Agencies must not only consider, but prioritize, the furtherance of environmental justice and the protections of the Tribes' interests.

Executive Order 12,898 makes "each Federal agency" responsible for "identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."²³ EPA aims to "[i]nstitutionalize environmental justice in rulemaking," including performance of "rigorous assessments of environmental justice analyses in rules," in order to "deepen environmental justice practice within EPA programs to improve the health and environment of overburdened communities" and to "ensure environmental justice is appropriately analyzed, considered, and addressed in EPA rules..."²⁴ EPA guidance notes that "it is critical that EPA rule-writers consider environmental justice (EJ) when developing a regulation."²⁵ The Guidance defines an "environmental justice concern" as including "the actual or potential lack of fair treatment or meaningful involvement of ... tribes, and indigenous peoples in the development ... of environmental ... regulations."²⁶ This can arise not only when a regulation would "[c]reate new disproportionate impacts," but also when it would "exacerbat[e] existing disproportionate

¹⁸ *Id.* at 4-39.

¹⁹ *Id.* at 2-12, 4-7.

²⁰ Connectivity Report at ES-3, 4-20, 4-38; *id.* at 4-1, 6-4.

²¹ *Id.* at 4-39.

²² *Id.* at 4-11, 4-14.

²³ 59 Fed. Reg. at 7629, § 1-101 (Feb. 16, 1994).

²⁴ *Id.* at 13.

²⁵ EPA, *Guidance on Considering Environmental Justice During the Development of Regulatory Actions* at 1 (May 2015) ("EPA EJ Guidance").

²⁶ *Id.* at 9.

impacts.”²⁷ The Guidance directs rule-writers to begin the assessment by “first understand[ing] what an action is accomplishing and why it is necessary.”²⁸

Further, the United States, including its agencies, owes a trust responsibility to federally recognized tribes. *United States v. Kagama*, 118 U.S. 375, 383-84 (1886). Federal agencies must follow “the most exacting fiduciary standards” in dealing with the tribes. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (declaring that “[i]n carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party . . . [I]t has charged itself with moral obligations of the highest responsibility and trust”); *Parravano v. Babbitt*, 70 F.3d 539, 546 (9th Cir. 1995). Moreover, they are obligated to protect Indian health, *see, e.g.*, 25 U.S.C. § 602, and tribal rights, resources, and traditional ways of life. *See, e.g.*, Cohen’s Handbook of Federal Indian Law § 18.02 (2012 ed.) (discussing the variety and scope of treaty-protected fishing rights); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 (1968) (describing the “essence” of the treaty as the protection of the tribe’s ability to “maintain . . . their way of life which included hunting and fishing”).

EPA and the Corps have long recognized these duties. *See, e.g.*, EPA, *Policy for the Administration of Environmental Programs on Indian Reservations* (Nov. 8, 1984), available at <http://www.epa.gov/sites/production/files/2015-04/documents/indian-policy-84.pdf>; EPA *Policy on Consultation and Coordination with Indian Tribes* at 3 (May 4, 2011), available at <http://www.epa.gov/tp/pdf/cons-and-coord-with-indian-tribes-policy.pdf> [hereinafter *EPA Consultation Policy*] (“EPA recognizes the federal government’s trust responsibility, which derives from the historical relationship between the federal government and Indian tribes as expressed in certain treaties and federal Indian law.”); Corps, *Tribal Consultation Policy and Related Documents* (2013), available at https://www.spk.usace.army.mil/Portals/12/documents/tribal_program/USACE%20Native%20American%20Policy%20brochure%202013.pdf (“Where agency actions may affect Indian lands or off-reservation treaty rights, the trust duty includes a substantive duty to protect these lands and treaty rights ‘to the fullest extent possible.’”). In fact, in commemorating and reaffirming the 30th Anniversary of its 1984 Indian Policy, EPA stated, “EPA programs should be implemented to enhance protection of tribal treaty rights and treaty-covered resources when we have discretion to do so.” EPA Administrator McCarthy, *Memorandum Commemorating the 30th Anniversary of EPA’s Indian Policy* at 1 (Dec. 1, 2014), available at <http://www.epa.gov/sites/production/files/2015-05/documents/indianpolicytreatyrightsmemo2014.pdf>.

EPA’s and the Corps’ role as trustee carries with it the duty and power to protect Indian tribes and tribal members from the negative effects of water pollution to their health, culture, subsistence, and economies. EPA itself has described its “fundamental objective in carrying out its responsibilities in Indian country” as “to protect human health and the environment.” *EPA Consultation Policy* at 3. And it has affirmed that treaty rights carry with them an implicit right to a certain level of environmental quality.

Some treaties explicitly state the protected rights and resources. For example, a treaty may reserve or protect the right to ‘hunt,’ ‘fish,’ or ‘gather’ a particular animal or plant in specific areas. Treaties also may contain necessarily implied rights. For example, an explicit treaty right to fish in a specific area may include an implied right to sufficient water quantity or water quality to ensure that fishing is possible. Similarly, an explicit treaty right to hunt, fish or gather may include an implied right to a certain level of environmental quality to maintain the activity or a guarantee of access to the activity site.

²⁷ *Id.* at 10.

²⁸ *Id.*

EPA, *EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights* at 3, available at https://www.epa.gov/sites/production/files/2016-02/documents/tribal_treaty_rights_guidance_for_discussing_tribal_treaty_rights.pdf. One way the Agencies can ensure these solemn duties are met is to engage in robust, timely, and meaningful consultation. Both the EPA and the Corps also have an obligation to consult with tribes when they formulate policies that have tribal implications, as with this rulemaking.²⁹

The WOTUS definition promulgated by the Trump Administration limited Clean Water Act protection to a much smaller subset of waters upon which treaty-protected resources, including salmonids, depend than is either allowable under the Clean Water Act or consistent with the federal trust responsibility. PGST therefore urges the agencies to expeditiously develop an expansive definition, consistent with the goals of the Clean Water Act and their trust responsibility to tribes. The Tribe appreciates the Agencies' consultation with tribes during this portion of the rulemaking, and requests that consultation opportunities be made available at the draft rule stage, as well as in the course of the Corps making jurisdictional determinations within PGST's U&A going forward.

D. The Agencies Must Account for Climate Change.

The Agencies must incorporate the effects of climate change in any new rule. Climate change has and will continue to substantially affect the flow conditions, pollution levels, and temperatures of waters in the United States, which will in turn affect the extent of adverse ecological and economic effects of any jurisdictional rule. The effects of climate change render any rule based on stream flow volumes especially suspect. Scientists predict increasing numbers of perennial streams will become intermittent or ephemeral due to the effects of climate change.³⁰ At the same time, in the northeastern and midwestern U.S., precipitation levels are projected to rise.³¹ These predicted changes to average annual precipitation are not insignificant; therefore, a jurisdictional definition of tributaries that relies on past precipitation averages will inevitably not reflect the current, on-the-ground circumstances and would result in jurisdictional determinations that can quickly become outdated and incorrect.

Finally, the Agencies must consider and address the additive adverse ecosystem effects caused by removing Clean Water Act protections for any waters at a time when waters are already facing grave threats due to climate change.³² The effects of climate change will exacerbate these problems unless greater protections are implemented. Climate change dictates the broad protection of all waters.

CONCLUSION

The Agencies must not repeat the mistakes of the Navigable Waters Rule and its extensive and irreversible effects on communities and the environment. The Tribe urges the Agencies to develop a new and robust rule that protects all waters, and especially those upon which tribal resources rely.

²⁹ *E.g.*, Executive Order 13,175, Consultation and Coordination With Indian Tribal Governments, 65 Fed. Reg. 67,249, 67,250 (Nov. 6, 2000) (requiring that “[e]ach agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications”); Corps, Tribal Policy Principles, <https://www.usace.army.mil/Missions/Civil-Works/Tribal-Nations/> (last visited October 12, 2021).

³⁰ Thibault Detry et al., *Challenges, developments and perspectives in intermittent river ecology*, *Freshwater Biology*, 1171-1180 (2016).

³¹ Eleonora M.C. Demaria et al., *Regional climate change projections of streamflow characteristics in the Northeast and Midwest U.S.*, *Journal of Hydrology: Regional Studies*, 309-323 (2016).

³² U.S. Global Change Research Program, 2018: *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II*, Ch. 3, at 146-157.

Sincerely,

A handwritten signature in black ink that reads "Jane Steadman". The signature is written in a cursive style with a large initial 'J' and a long horizontal stroke at the end.

Jane Steadman
Counsel for the Port Gamble S'Klallam Tribe

cc

Paul McCollum
Director, PGST Natural Resources Department