



Main Office: 360.466.3163

Facsimile: 360.466.5309

# Swinomish Indian Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476  
\* 11404 Moorage Way \* La Conner, Washington 98257 \*

October 4, 2021

*Via email*

Rose Kwok  
[CWAwotus@epa.gov](mailto:CWAwotus@epa.gov)  
Environmental Protection Agency  
Office of Water (4504-T)  
1200 Pennsylvania Ave NW  
Washington, D.C. 20460

Stacy Jensen  
[usarmy.pentagon.hpda-asa-cw.mbx.as-cw-reporting@mail.mil](mailto: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: Notification of Tribal Consultation and Coordination on Revising the Definition of “Waters of the United States”; Docket ID No. EPA-HQ-OW-2021-0328; Comments of Swinomish Indian Tribal Community**

Dear Ms. Kwok and Ms. Jensen:

The Swinomish Indian Tribal Community (“Tribe”) submits these comments 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.”

The Swinomish Tribe is a federally recognized Indian tribe and political successor in interest to certain tribes and bands that signed the 1855 Treaty of Point Elliott, which among other things reserved fishing, hunting and gathering rights and established the Swinomish Reservation on Fidalgo Island in Skagit County, Washington. Since time immemorial, the Swinomish Tribe and its predecessors have occupied and utilized vast areas of land and water to support the Swinomish way of life. Fish and fish habitat are crucial to the cultural, spiritual, subsistence and commercial activities of the Swinomish Tribe, and the Tribe exercises Treaty-protected fishing rights in its usual and accustomed fishing areas, which include an extensive area of the Washington waters of the Salish Sea as well as the Skagit River.

The Swinomish Reservation sits at the mouth of the Skagit River, the largest river in Puget Sound and the only river in the Lower 48 states that still has all species of wild salmon spawning in its waters. Protecting water quantity and quality—as well as preserving the broader habitat that supports Skagit River salmon and steelhead through scientific research and related advocacy—has been a top Swinomish priority for more than forty years. The Swinomish Tribe is a guardian of the Skagit River basin and a leader in advancing habitat recovery and scientific understanding of the river and the salmon and other aquatic and terrestrial species that call it home.

Congress intended the Clean Water Act to function as a powerful tool for the protection of America’s waterways, including the Washington waters that are so central to the Tribe’s way of life. Consequently, the Tribe strongly supports the Agencies’ commitment to engage in rulemaking to “restore longstanding protections” guaranteed by the Clean Water Act.<sup>1</sup> As the Tribe’s federal trustee, the Tribe also expects the details of the Agencies’ rulemaking to live up to the Agencies’ promise. Now that the unlawful and damaging “Navigable Waters Protection Rule” (“Navigable Waters Rule” or “the Rule”) has been vacated,<sup>2</sup> 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.

## I. TRIBAL CONSULTATION MUST BE ROBUST AND MEANINGFUL.

For meaningful consultation to occur, the Agencies must have a thorough understanding of the inherent rights and interests of tribal stakeholders, including the Swinomish Tribe. These rights set forth in the United Nations Declaration on the Rights of Indigenous Peoples, treaties, federal statutes and case law. The Agencies should clearly establish for all their participants that the primary goal of an ongoing consultation on the rulemaking is to achieve consensus or consent, a good faith effort to reach common agreement on how to proceed, and what must be included in a rule. This must include processes for documenting the consultation, ensuring protection of culturally-sensitive information, complying with the Tribe’s laws and protocols governing consultation, and a certification process upon completion for both parties to agree that meaningful consultation has occurred.

It also requires the Agencies listening to and incorporating tribal knowledge and input. Tribes are vast resources of information regarding waters on which they rely, including waters outside the boundaries of a particular reservation. The Tribe’s members have vast amounts of cultural, historical, and geographical knowledge of their ancestral territory and practices, including sacred sites. That information must be obtained, understood, and internalized by the Agencies in order to ensure meaningful consultation and to ensure that any negative impact to the Tribe is avoided.

Merely cataloguing our comments or concerns, or providing “opportunity to comment” with those comments disappearing into an agency void is *not* meaningful consultation. If the Tribe expresses specific comments or concerns in the course of participation in rulemaking or

---

<sup>1</sup> 86 Fed. Reg. 41911 (Aug. 4, 2021).

<sup>2</sup> *Pasqua Yaqui Tribe, et al., v. U.S. EPA*, No. CV-20-00266-TUC-RM, 2021 WL 3855977, --- F. Supp. 3d --- (D. Az. Aug. n8, 2021).

consultation and the Agencies do not fully resolve or address that feedback, the Agencies must clearly explain, in detail, their reasoning and how and why it does or does not conform to requirements for meaningful consultation.

## II. THE AGENCIES SHOULD PROPOSE A RULES THAT FOLLOWS THE LAW, IS BASED ON SCIENCE, PROTECTS THE INTERESTS OF THE TRIBE, AND ACCOUNTS FOR CLIMATE CHAGE.

On August 30, 2021, the Federal District Court for the District of Arizona vacated the Navigable Waters Rule.<sup>3</sup> As a result of the vacatur, the Agencies now can, 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 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. This has had a disproportionate effect on arid regions of the country: of more than 1,500 streams assessed in New Mexico and Arizona, nearly everyone has been stripped of Clean Water Act protections. 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.<sup>4</sup>

### 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.”<sup>5</sup> 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.*”<sup>6</sup> 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

---

<sup>3</sup> See *Id.*

<sup>4</sup> *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.

<sup>5</sup> 33 U.S.C. § 1251(a).

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

bodies, including main streams and their tributaries, for water quality purposes.”<sup>7</sup> Congress further recognized that “[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.”<sup>8</sup>

The Navigable Waters Rule incorrectly applied an approach outlined in Justice Scalia’s plurality 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.”<sup>9</sup> The Agencies cannot, however, simply choose to follow Justice Scalia’s test to abdicate their responsibilities under the Clean Water Act, particularly when five justices rejected that test as “inconsistent with the Act’s text, structure, and purpose.”<sup>10</sup>

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.<sup>11</sup> This is especially critical for tribes where their interests may be in the culturally significant headwaters of streams and rivers or where a reservation’s waters lie downstream of potential sources of pollution.

The Swinomish Tribe has learned the interconnectedness of local watershed through millennia of lived experience. As discussed above, the Swinomish Reservation sits at the mouth of the Skagit River, the largest river in Puget Sound and the only river in the Lower 48 states that supports all species of wild salmon. There are over 3,000 tributary streams and rivers that drain into the Skagit basin, including many that are intermittent streams. Without protection, these intermittent streams are vulnerable to adverse impacts, resulting in potential individual and cumulative adverse impacts to the perennial streams they flow into. These several hundred perennial streams, which in turn flow into the Skagit River, also need the water quality and quantity protections to ensure that viable populations of wild salmon—a pillar of the Tribe’s treaty rights—are protected and recovered for current and future generations. The Skagit River basin is a factually, scientifically, and hydrologically interconnected organism. Any regulatory scheme that does not proceed on this premise threatens the entire system.

## 2. Interstate Waters

---

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

<sup>8</sup> S. Rep. No. 92-414 at 77.

<sup>9</sup> 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).

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

<sup>11</sup> *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))).

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.<sup>12</sup> 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,<sup>13</sup> 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. As in 2015, 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.<sup>14</sup> As above, this finding is consistent with the Tribe’s traditional knowledge and reflected in the Skagit Basin’s dense network of tributaries.

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.<sup>15</sup> They have also observed, without quantification, that “[b]ecause ephemeral streams represent a larger percent of waters in the arid West, any change in jurisdiction related to ephemeral features may be greater there than in other portions of the country.”<sup>16</sup> In fact, widely available National Hydrology Dataset data reveals that “94%, 89%,”

---

<sup>12</sup> 80 Fed. Reg. 37,054 (June 29, 2015).

<sup>13</sup> The Tribe incorporates the Connectivity Report in these comments by reference.

<sup>14</sup> Connectivity Report at ES-2.

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

<sup>16</sup> EPA and Dep’t of the Army, *Resource and Programmatic Assessment for the Proposed Revised Definition of “Waters of the United States”* at 11.

88%, and 79% of the streams in Arizona, Nevada, New Mexico, and Utah, respectively, are intermittent or ephemeral.”<sup>17</sup> 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.”<sup>18</sup> 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.”<sup>19</sup>

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.<sup>20</sup> Shallow subsurface flows can connect rivers to floodplain wetlands during both high-flow and low-flow periods.<sup>21</sup> For example, wetlands both inside and outside of floodplains can store floodwater, effectively acting like sponges on the landscape during floods.<sup>22</sup> Sediment released from wetlands during a flood can help shape a river’s channel and therefore affect its physical integrity.<sup>23</sup> One of the most important functions of wetlands is to intercept contaminants by filtering them through the roots of wetland plants.<sup>24</sup> 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 and is a particular problem in areas where mining and fossil fuel extraction are prevalent on or near tribal lands. The Waste Treatment Exclusion is a huge loophole that must be eliminated to protect the rights of tribes.

---

<sup>17</sup> D.C. Goodrich et al., *Southwestern Intermittent and Ephemeral Stream Connectivity*, Journal of the American Water Resources Association, 1-23 (2018).

<sup>18</sup> EPA, *Why Are Wetlands Important?*, <https://www.epa.gov/wetlands/why-are-wetlands-important>.

<sup>19</sup> Connectivity Report at ES-2, and 4-1 *et seq.*, especially 4-39.

<sup>20</sup> *Id.* at 4-39.

<sup>21</sup> *Id.* at 2-12, 4-7.

<sup>22</sup> Connectivity Report at ES-3, 4-20, 4-38; *id.* at 4-1, 6-4.

<sup>23</sup> *Id.* at 4-39.

<sup>24</sup> *Id.* at 4-11, 4-14.

C. The Agencies Must Further Environmental Justice.

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.”<sup>25</sup> 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...”<sup>26</sup> EPA guidance notes that “it is critical that EPA rule-writers consider environmental justice (EJ) when developing a regulation.”<sup>27</sup> 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.”<sup>28</sup> This can arise not only when a regulation would “[c]reate new disproportionate impacts,” but also when it would “exacerbate[e] existing disproportionate impacts.”<sup>29</sup> The Guidance directs rule-writers to begin the assessment by “first understand[ing] what an action is accomplishing and why it is necessary.”<sup>30</sup>

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.<sup>31</sup> The Corps has made specific commitments to indigenous peoples through its Army Corps of Engineers Tribal Policy Principles<sup>32</sup> (noting that “[h]istory has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results.”).

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

---

<sup>25</sup> 59 Fed. Reg. at 7629, § 1-101 (Feb. 16, 1994).

<sup>26</sup> *Id.* at 13.

<sup>27</sup> EPA, *Guidance on Considering Environmental Justice During the Development of Regulatory Actions* at 1 (May 2015) (“EPA EJ Guidance”).

<sup>28</sup> *Id.* at 9.

<sup>29</sup> *Id.* at 10.

<sup>30</sup> *Id.*

<sup>31</sup> 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”).

<sup>32</sup> Corps, Tribal Nations, <https://www.usace.army.mil/Missions/Civil-Works/Tribal-Nations/> (last visited April 9, 2019).

of perennial streams will become intermittent or ephemeral due to the effects of climate change.<sup>33</sup> At the same time, in the northeastern and Midwestern U.S., precipitation levels are projected to rise.<sup>34</sup> 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.<sup>35</sup> The effects of climate change will exacerbate these problems unless greater protections are implemented. Climate change dictates the broad protection of all waters.

### III. 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 Swinomish Indian Tribal Community joins its voice with fellow tribes and other commenters in urging the Agencies to develop a new and robust rule that protects all waters based upon best available scientific information and after the completion of meaningful consultation.

Sincerely,



Steve Edwards, Chairman  
Swinomish Indian Tribal Community

---

<sup>33</sup> Thibault Datry et al., *Challenges, developments and perspectives in intermittent river ecology*, *Freshwater Biology*, 1171-1180 (2016).

<sup>34</sup> 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).

<sup>35</sup> 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.