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October 4, 2021

THE SUQUAMISH TRIBE

PO Box 498 Suquamish, WA 98392-0498

Via email

Rose Kwok
CWAwotus@epa.gov
Environmental Protection Agency
Office of Water (4504-T)
U.S. Environmental Protection Agency
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Office of Sec'y of Army for Civil Works
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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**

Dear Ms. Kwok and Ms. Jensen:

The Suquamish people lived, gathered food, ceremonial and spiritual items, and hunted and fished for thousands of years in western Washington State. The Suquamish Tribe is a federally recognized Indian Tribe and pursuant to the 1855 Treaty of Point Elliott, the Tribe reserved the right to fish and gather shellfish at its “usual and accustomed” (U&A) fishing grounds and stations in Puget Sound. **The Suquamish Tribe’s U and A extends well beyond Reservation boundaries** and includes marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River in Canada, including Haro and Rosario Straits, the streams draining into the western side of Puget Sound and also Hood Canal. The U and A of the Suquamish Tribe also extends west into Jefferson County, and south into Mason County. The Tribe seeks protection of all treaty-reserved natural resources through avoidance of impacts to habitat and natural systems within the Suquamish Tribe’s U&A.

Tribal Consultation

EPA still is not following its own policies regarding Tribal Consultation and Coordination.

<https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf>. EPA developed consultation policies to comply with the Presidential Memorandum (Memorandum) issued November 5, 2009, directing agencies to develop a plan to implement fully Executive Order 13175 (Executive Order). The Executive Order specifies that each Agency must have an accountable process to ensure meaningful and timely input by Tribes in the development of regulatory policies that have tribal implications.

This includes but is not limited to:

- i. Where possible, defer to Indian tribes to establish standards.
- ii. In determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.
- iii. The agency, prior to the formal promulgation of the regulation, consulted with tribal officials early in the process of developing the proposed regulation;
- iv. Sec. 5. Consultation. (a) Each 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.

Meaningful consultation continues to be elusive, yet again on September 28, 2021 (less than one week from the comment deadline) EPA sent notice of a Tribal forum that will occur on October 28, 2021. This forum for dialogue with Tribes regarding the proposed rule revision will occur several weeks AFTER the comment deadline of October 4, 2021. Merely providing an “opportunity to comment” with those comments disappearing into an agency void is *not* meaningful consultation.

Proposed Rulemaking

On August 30, 2021, the Federal District Court for the District of Arizona vacated the egregious Navigable Waters Rule. As a result of the vacatur, the Agencies are able to move forward and develop a new rule that will correct the severe errors 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 Tribal Treaty reserved resources.

The Suquamish Tribe has traditionally harvested and consumed fish and shellfish from the Puget Sound and intends to do so in the future. The Tribal Treaty right to fish and gather are property rights of the Tribes and are protected under the Fifth Amendment of the U.S. Constitution. In failing to protect habitat the federal government will also fail their trust responsibilities to Tribes. The Tribe requests that the federal agencies honor their obligations to the Tribes and the treaties they signed by applying more stringent standards to habitat protection than what has been implemented in the past.

The Tribal Treaty Rights at Risk document examined Tribal Treaty Rights and determined that Tribal culture, communities, and economies are at risk due to a lack of habitat protection. The net decline in habitat demonstrates the federal government’s failure to protect Tribes treaty-reserved rights by allowing destruction of habitat faster than it can be restored.

<http://nwifc.org/w/wp-content/uploads/downloads/2011/08/whitepaper628finalpdf.pdf>

The federal courts have recognized four basic values associated with treaty-reserved rights of the Tribes.

- Conservation of the resource,
- Ceremonial, religious and spiritual values,
- Subsistence, and
- Commercial

The federal role in protecting the resources on which federally-recognized tribes depend is an important one, governed by the unique trust relationship between the federal government and the tribes. EPA and the Corps should not hobble the ability of tribes and their federal partners to ensure the integrity of our aquatic ecosystems by placing some of these waters beyond the jurisdictional reach of the CWA. Projects permitted by regulatory agencies that impact the habitat necessary to support reserved natural resources are in violation of rights reserved in the Treaty of Point Elliot. Therefore, the Suquamish Tribe strongly requests that adequate protections be provided and Tribal input be incorporated to any rule or definition established.

Wetlands

The Suquamish Tribe does not support the exclusion of any wetlands. In 1987, the National Wetlands Policy Forum was sponsored by the U.S. Environmental Protection Agency to advance protection of wetlands in the United States and to address major policy concerns relative to wetlands protection and management. The end result was a series of recommendations for improving wetlands protection that were agreed upon by the lawmakers, farmers, environmentalists, business leaders, and academics who participated in the forum. The major goal articulated by this group was "to achieve no net loss of the nation's overall wetlands base" and "to increase the quantity and quality of the nation's wetlands resource base" through voluntary and regulatory efforts in the long term. And unless it can be shown that site specific and cumulative impacts of past activities have resulted in no net loss we recommend that more protective rules be put in place. This is especially important considering the preservation of Tribal Treaty resources.

The EPA publication Science in Action states:

"There is ample evidence that many wetlands and open waters located outside of riparian areas and floodplains, even when lacking surface water connections, provide physical, chemical and biological functions that could affect the integrity of downstream waters. Some potential benefits of these wetlands are due to their isolation rather than their connectivity."

https://transportation.house.gov/imo/media/doc/documents/CONNECTIVITY-US-WATERS-FACT_SHEET_1.PDF

The U.S. Fish and Wildlife Service states: "Many wetlands considered isolated from the landscape or geographic perspective are connected hydrologically via groundwater to other wetlands and to rivers and streams."

<https://www.fws.gov/wetlands/Documents%5CGeographically-Isolated-Wetlands-A-Preliminary-Assessment-of-their-Characteristics-and-Status-in-Selected-Areas-of-the-United-States-NI.pdf>

Downplaying the importance of smaller seemingly isolated wetlands is also problematic. Although the values and functions provided by small isolated wetlands may seem marginal when considered individually, cumulatively, and especially at the regional and watershed scale, these wetlands provide significant ecological, hydrological, and water quality functions. Smaller wetlands provide migratory corridors for a variety of species (including but not limited to amphibians and reptiles) that are dependent on these types of habitats for some or all of their life stages. Eliminating small wetlands reduces habitat connectivity and species biodiversity (Semlitsch and Bodie. 1998. *Are Small Isolated Wetlands Expendable?* Conservation Biology, Pages 1129-1133).

Streams

Washington Administrative Code (WAC) 100-220 was established for the protection of fish life and defines "Watercourse" and "river or stream" as any portion of a channel, bed, bank, or bottom water ward of the ordinary high water line of waters of the state, including areas in which fish may spawn, reside, or pass, and tributary waters with defined bed or banks, which influence the quality of fish habitat downstream. **This includes watercourses which flow on an intermittent basis** or which fluctuate in level during the year and applies to the entire bed of such watercourse whether or not the water is at peak level. This also includes ditches that convey natural flow that can be identified by flow patterns and/or historical drainage patterns.

Kitsap Water Resource Inventory Area (WRIA 15) contains approximately 582 streams, all of which are small, non-glacial fed streams. Only 12 or so streams have drainage areas greater than 10 square miles with most being less than 1 square mile. Many of these have reaches that are seasonal. Despite their small size, these streams collectively produce 65 to 70 percent of the natural production of Coho salmon in Hood Canal. Coho salmon utilize small streams and headwater areas during their freshwater residence, which can be up to 1.5 years. Several streams in the Kitsap Basin produce a major portion of early run chum salmon, a unique stock

in Puget Sound and almost all of the streams, many of which are designated Critical Habitat under the Endangered Species Act, in Kitsap County could be utilized by (ESA) listed Steelhead (Instream Resources Protection Program Kitsap Water Resource Inventory Area 15, June 1981, WA Dept. of Ecology). Steelhead can be anadromous and spend one to three years in freshwater before migrating to marine waters or they can remain exclusively in freshwater making them even more vulnerable to stream habitat losses. *See Puget Sound Steelhead East Kitsap DIP Recovery Plan, 2020, Suquamish Tribe.* Despite recovery efforts Steelhead in Puget Sound are declining. Recent abundance of Puget Sound steelhead has been estimated at only 1%-4% of historic levels. *See Chico Watershed Assessment, 2014, Suquamish Tribe.*

Omitting and/or limiting jurisdictional authority over ephemeral and intermittent waters (often vitally important headwater areas) that are crucial to the survival of salmon and other fish has the potential to significantly impact fish populations listed under the Endangered Species Act. For example, scientific studies document the importance of intermittent streams to Coho salmon, which utilize some of the same habitat as ESA listed steelhead trout and Chinook salmon, at various points in their lifecycles (P.J. Wigington, Jr., et al., 2006. *Coho Salmon Dependence on Intermittent Streams*, 4 ECOL. ENVIRON). Coho spawn in the upper reaches of stream networks, where intermittent streams are common; intermittent streams are vital to coho smolts; and residual pools in intermittent streams provide habitat that allows juvenile coho to survive during dry periods.

Continuing to allow impacts to ephemeral or intermittent streams can also significantly impact both the habitat and hydrology of downstream habitat areas. The EPA publication Science in Action states:

“The scientific literature unequivocally demonstrates that streams, regardless of their size or frequency of flow, are connected to downstream waters and strongly influence their function.”

https://transportation.house.gov/imo/media/doc/documents/CONNECTIVITY-US-WATERS-FACT_SHEET_1.PDF

For the reasons listed above the Suquamish Tribe requests that EPA not merely hold the line with the current restored rule but develop a new and robust rule that strengthens protections for all of our nation’s waters and furthers the Clean Water Act’s goals. Please keep us informed of all project related updates. We look forward to future meaningful consultation opportunities.

Sincerely,
Alison O’Sullivan
Senior Biologist

Cc: Karen Gude, Tribal Program Manager, Office of Water, U.S. Environmental Protection Agency