Mon Jun 21 13:08:38 EDT 2021
EPAExecSec <EPAExecSec@epa.gov>
FW: Request for Government to Government Consultation, Re: WOTUS
To: "CMS.OEX" <cms.oex@epa.gov>

Reading file

From: Loving, John <JLoving@kilpatricktownsend.com>
Sent: Monday, June 21, 2021 10:03 AM
To: Regan, Michael <Regan.Michael@epa.gov>
Subject: Request for Government to Government Consultation, Re: WOTUS

Administrator Regan,

Good morning. Please find attached an electronic copy of a letter from the Stillaguamish Tribe to you requesting government to government consultation on the new rulemaking for WOTUS. Thank you.

John Loving
Senior Government Relations Advisor
Kilpatrick Townsend & Stockton LLP
Suite 900 | 607 14th Street, NW | Washington, DC 20005-2018
office 202 508 5826 | cell 202 714 0427 | fax 202 585 0035
jloving@kilpatricktownsend.com | My Profile | vCard
Government Relations Practice

Stillaguamish Tribe of Indians

PO Box 277 3322 236th St. NE
Arlington, WA 98223

June 10, 2021

Michael S. Regan
Administrator
U.S. Environmental Protection Agency
Office of the Administrator
Mail code: 1101A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Jaime A. Pinkham
Acting Assistant Secretary of
the Army for Civil Works
Office of the Assistant Secretary of the Army (Civil Works)
U.S Department of the Army
108 Army Pentagon
Washington, DC 20310-0108

Re: Stillaguamish Tribe's Support for the Administration's Decision to Revise the Definition of WOTUS and Intent to Initiate a New Rulemaking Process to Restore WOTUS Protections; Request for Government-to-Government Consultation to Ensure that the New Rule will be at least as protective as the 2015 Obama Clean Water Rule

Dear Administrator Regan and Acting Assistant Secretary Pinkham,

As Chairman of the Stillaguamish Tribe of Indians, let me be among the first of tribal leaders to thank you for your actions yesterday to revise the definition of WOTUS through initiating a new rulemaking to restore WOTUS protections:

https://www.epa.gov/wotus/intention-revise-definition-waters-united-states

We appreciate your thoughtful recognition that the current WOTUS rule suffers from many legal, scientific and policy defects. As both Acting Assistant Secretary Pinkham and Principal Deputy Administrator Fox stated in their declarations to the court yesterday in *Conservation Law Foundation, et al. v. EPA et al.,* the Administration has "substantial concerns about the lawfulness of aspects of the NWPR and the harmful effects of the NWPR on the nation's waters."

These concerns are very well founded. Less than 15 months ago, the EPA's own Science Advisory Board issued a scathing critique of the proposed NWPR, finding that the proposed Rule lacked scientific justification:

"In summary, current scientific understanding of the connectivity of surface and ground water, which has been reviewed by the SAB previously, is not reflected in the proposed Rule. Specifically, the proposed definition of WOTUS excludes groundwater, ephemeral streams, and wetlands which connect to navigable waters below the surface. The proposed Rule does not present new science to support this definition, thus SAB finds that the proposed Rule **lacks a scientific justification,** while potentially introducing new risks to human and environmental health". (Emphasis added; *SAB letter to EPA Administrator Wheeler of February 27, 2020,* attached herein).

The Stillaguamish Tribe also had serious concerns about the proposed rule, as did the Northwest Indian Fisheries Commission and the National Congress of American Indians; our comment letter and the NWIFC and NCAI letters are attached herein and we reiterate those concerns.

This new process will have serious implications for our treaty rights, our religion and culture, and the health and welfare of our people. We believe that the Obama Administration 2015 Clean Water Rule should be the starting point for discussions going forward. As our planet is increasingly imperiled, even greater protections are urgently needed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (the central purpose of the Clean Water Act, Section 1251(a) of Title 33, U.S. Code).

To that end, we respectfully request the initiation of government-to-government consultation with our Tribe. We would like to consult directly with you both and with Principal Deputy Assistant Administrator Fox, as soon as is practicable. Please contact me directly at syanity@stillaguamish.com, or at 425-359-7922 to arrange the consultation. Alternatively, you could contact John Loving, our Senior Government Relations Advisor, at JLoving@kilpatricktownsend.com, 202-714-0427, or Scott Mannakee, Tribal Attorney, at smannakee@stillaguamish.com, 360-572-3028.

Thank you very much for this important first step. Bold and comprehensive action is now needed to protect our Nation's waters. We look forward to a meaningful consultation.

Sincerely,

Shawn Yanity
Chairman

cc: Radhika Fox, Principal Deputy Assistant Administrator, Office of Water, U.S. EPA

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CONSERVATION LAW FOUNDATION, *et al.*, Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Defendants, CHANTELL SACKETT; MICHAEL SACKETT, Defendant-Intervenors.	Case No. 20-cv-10820-DPW

DECLARATION OF RADHIKA FOX

I, Radhika Fox, declare that the following statements are true and correct to the best of my knowledge and belief and are based on my personal knowledge, information contained in the records of the United States Environmental Protection Agency ("EPA" or "the Agency"), and information supplied to me by current EPA employees.

1. I am the Principal Deputy Assistant Administrator for the Office of Water in EPA. I have served in this position since January 2021.
2. As Principal Deputy Assistant Administrator, I am responsible for, and provide counsel to, the Administrator on policy, planning, program development and implementation, management, and control of the technical and administrative aspects of the Office of Water. I manage the Agency's programs under the Clean Water Act ("CWA"), Safe Drinking Water Act, and the Marine Protection, Research, and Sanctuaries Act.
3. Within EPA, the Office of Water has primary responsibility for the rulemaking process related to the CWA.

4. Within the Department of the Army ("Army"), the Office of the Assistant Secretary of the United States Army for Civil Works has primary responsibility for the rulemaking process related to the CWA.
5. These two offices have the responsibility of implementing the definition of "waters of the United States" regarding their respective CWA regulatory actions and programmatic activities.
6. In 2015, EPA and the Army (collectively "the agencies") promulgated a rule (the "Clean Water Rule") establishing a new definition of "waters of the United States"—a key term used to identify the jurisdictional scope of the CWA.
7. On April 21, 2020, the agencies, under the Trump Administration, promulgated the Navigable Waters Protection Rule (NWPR), which comprehensively revised regulations defining the term "waters of the United States."
8. The agencies, after completing a review of the NWPR, have decided to initiate another rulemaking to revise the term "waters of the United States." As described below, the Biden Administration's EPA and Army have substantial concerns about the lawfulness of aspects of the NWPR and the harmful effects of the NWPR on the nation's waters.
9. The agencies' review of the NWPR was at the direction of President Biden. On January 20, 2021, President Biden signed Executive Order 13990 ("EO 13990") on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis to pronounce the Administration's policy "to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce

greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals." EO 13990 directed all Federal agencies to "immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis." And "[f]or any such actions identified by the agencies, the heads of agencies shall, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding the agency actions." The order also specifically revoked Executive Order 13778 of February 28, 2017 (Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule), which had resulted in promulgation of the NWPR.

10. Pursuant to the direction in EO 13990, the agencies have carefully reassessed the administrative record for and the legal and scientific basis of the NWPR. The agencies have also thoroughly reviewed the challenges to the NWPR presented by the parties in the pending litigation. The agencies have completed this assessment and decided to initiate rulemaking to revise the term "waters of the United States." Among the factors that the agencies considered are: the text of the CWA; Congressional intent and the objective of the CWA; U.S. Supreme Court case law; the impacts resulting from the NWPR; concerns raised by stakeholders about the NWPR, including implementation-related issues; the principles outlined in EO 13990; and issues raised in ongoing litigation challenging the NWPR. As further described below, the agencies have identified substantial concerns with the NWPR and have determined that additional considerations should be given to certain aspects of the NWPR through notice-

and-comment rulemaking, including concern that when interpreting the jurisdictional scope of the CWA, the NWPR did not appropriately consider the effect of the revised definition of "waters of the United States" on the integrity of the nation's waters, as well as concern over the loss of waters protected by the CWA.

11. Congress enacted the CWA in 1972 with the statutory objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 1251(a) of Title 33, U.S. Code. One of the Act's principal tools in achieving the statutory objective is through its general prohibition on the discharge of pollutants to "waters of the United States," the statutory phrase that generally establishes the jurisdictional scope of the Act.

12. Certain statements in the NWPR preamble call into significant question whether the agencies' consideration of science and water quality impacts in developing the rule was consistent with these goals. For example, the agencies explicitly and definitively stated in numerous places in the NWPR administrative record that they did not rely on agency documents in the record that provided some limited assessment of the effects of the rule on water quality in determining the scope of the definition of "waters of the United States." *See, e.g.*, 85 Fed. Reg. at 22,332, 22,335 ("[T]he final rule is not based on the information in the agencies' economic analysis or resource and programmatic assessment.").

13. The agencies now believe that consideration of the effects of a revised definition of "waters of the United States" on the integrity of the nation's waters is a critical element in assuring consistency with the statutory objective of the CWA. *See, e.g.*, *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1468-69 (2020) ("*Maui*") (emphasizing the importance of considering the CWA's objective when determining the scope of the Act and finding that "[t]he Act's provisions use specific definitional language to achieve this result,"

including the phrase "navigable waters"). Based on a careful evaluation of the record of the NWPR, including the above-quoted statement, the agencies have substantial and legitimate concerns regarding the adequacy of consideration of the CWA's water quality goals in the development of the NWPR. As such, the agencies believe it is appropriate to reconsider these issues—and, in particular, the effects of the "waters of the United States" definition on the chemical, physical, and biological integrity of the nation's waters—in a new rulemaking.

14. In light of the text, structure, and legislative history of the Act, and *Maui* and other Supreme Court decisions, the agencies have concluded there must be some consideration of the effects of a revised definition of "waters of the United States" on the integrity of the nation's waters. Based on the record at the time the agencies promulgated the NWPR, significant concerns exist about the sufficiency of the agencies' consideration of the effects of the NWPR on the chemical, physical, and biological integrity of the nation's waters when determining the limits of the specific definitional language "waters of the United States" in the NWPR. For example, the agencies are concerned that the NWPR did not look closely enough at the effect ephemeral waters have on traditional navigable waters when the agencies decided to categorically exclude all ephemeral waters. New rulemaking will provide the agencies an additional opportunity to evaluate these issues and allow all interested stakeholders to contribute to this process through rulemaking comments and other public processes.

15. The agencies have also decided to initiate a new rulemaking in light of information regarding the impact of the NWPR on the scope of CWA jurisdiction informed by nearly a full year of implementation. Staff at EPA and the Army have reviewed approved jurisdictional determinations and identified indicators of a substantial reduction in waters covered under the NWPR compared to previous rules and practices. These indicators include an increase in

determinations by the Corps that waters are non-jurisdictional and an increase in projects for which CWA Section 404 permits are no longer required. The agencies have also found that preliminary jurisdictional determinations (through which applicants proceed with permitting as though all resources were jurisdictional) are much less common under the NWPR, indicating that fewer project proponents believe waters are jurisdictional from the start. Of the 40,211 individual aquatic resources or water features for which the Corps made approved jurisdictional determinations under the NWPR between June 22, 2020 and April 15, 2021, approximately 76% were found to be non-jurisdictional. Many of the non-jurisdictional waters are excluded ephemeral resources (mostly streams) and wetlands that are not adjacent under the NWPR. The agencies are aware of 333 projects that would have required Section 404 permitting prior to the NWPR, but no longer do under the NWPR. The agencies are also aware that this number is not the full universe of projects that no longer require Section 404 permitting under the NWPR, partly because to the extent that project proponents are not seeking any determinations for waters that the NWPR now excludes, such as ephemeral streams, the effects of such projects are not tracked in the Corps database. As a whole, the reduction in jurisdiction is notably greater than the deregulatory effects discussed in the rule preamble and the economic analysis case studies.

16. These changes have been particularly significant in arid states. In New Mexico and Arizona, for example, of over 1,500 streams assessed under the NWPR, nearly every one has been found to be a non-jurisdictional ephemeral resource, which is very different from the status of the streams as assessed under both the Clean Water Rule and the pre-2015 regulatory regime.[1]

[1] These non-jurisdictional ephemeral resources are predominantly ephemeral streams, but a small portion may be swales, gullies, or pools.

17. The agencies have heard concerns from a broad array of stakeholders, including states, tribes, scientists, and non-governmental organizations, that the reduction in the jurisdictional scope of the CWA is resulting in significant, actual environmental harms. These entities have identified specific projects and discharges that would no longer be subject to CWA protections because the waters at issue would no longer be jurisdictional. In many cases permit applications have been withdrawn. For example, stakeholders have raised concerns about dredge and fill activities on large swaths of wetlands in sensitive areas, in the floodplains of jurisdictional waters, or even within several hundred yards of traditional navigable waters, that are proceeding without CWA regulatory protection or compensatory mitigation. Stakeholders have also identified for EPA many other wetlands and streams, newly deemed non-jurisdictional, which are likely to be filled for commercial and housing developments, mines, water pipelines, and other forms of development without CWA oversight.

18. Projects are proceeding in newly non-jurisdictional waters in states and tribal lands where regulation of waters beyond those covered by the CWA are not authorized, and, based on available information, will therefore result in discharges without any regulation or mitigation from federal, state, or tribal agencies. *See* Economic Analysis for the Navigable Waters Protection Rule: Definition of "Waters of the United States" at 40 (Jan. 22, 2020) (indicating that a large number of states do not currently regulate waters more broadly than the CWA requires, and are "unlikely to increase state regulatory practices" following the NWPR). One project that stakeholders have identified for EPA is the construction of a high-pressure oil pipeline that would cut through a drinking water well field, which is expected to result in discharges to nearly 100 ephemeral streams that appear to be no longer jurisdictional under

the NWPR; another project is the construction of a mine that would destroy hundreds of previously jurisdictional wetlands, deemed non-jurisdictional under the NWPR, next to a National Wildlife Refuge.

19. Tribes in arid areas have also indicated that they will disproportionately suffer from the reduction in protections, including tribal lands that intersect or are within the New Mexico state boundary. Some tribes have estimated that the NWPR removes more than 80% of stream miles within their jurisdictions from CWA protections, amounting to more than 1,400 miles of streams. These tribes lack the authority and the resources to independently regulate surface waters within and upstream of their reservations, and therefore cannot protect their scarce waters from upstream dischargers, such as uranium and coal mines.

20. Ephemeral streams, wetlands, and other aquatic resources provide numerous ecosystem services, and there could be cascading and cumulative downstream effects from impacts to these resources, including but not limited to effects on water supplies, water quality, flooding, drought, erosion, and habitat integrity.[2] The agencies have substantial concerns about the consideration of these effects on the chemical, physical, and biological integrity of the nation's waters in the NWPR rulemaking process.

[2] U.S. Environmental Protection Agency, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report), EPA/600/R–14/475F (Washington, DC: U.S. Environmental Protection Agency (2015)). https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414.

I declare under penalty of perjury that the foregoing is true and correct, based on my personal knowledge and on information provided to me by employees of the EPA.

Dated: 6/9/2021

Radhika Fox
Principal Deputy Assistant Administrator
Office of Water
U.S. Environmental Protection Agency

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CONSERVATION LAW FOUNDATION, *et al.*,

Plaintiffs,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Defendants,

CHANTELL SACKETT; MICHAEL SACKETT,

Defendant-Intervenors.

Case No. 20-cv-10820-DPW

DECLARATION OF JAIME A. PINKHAM

I, Jaime A. Pinkham, declare that the following statements are true and correct to the best of my knowledge and belief and are based on my personal knowledge, information contained in the records of the Office of the Assistant Secretary of the Army for Civil Works ("Civil Works" or "the Agency"), and information supplied to me by Civil Works employees under my supervision.

1. Currently, I am serving as the Acting Assistant Secretary of the United States Army for Civil Works. I have served in this position since April of this year.
2. As the Acting Assistant Secretary of the United States Army for Civil Works, my principal duty involves the overall supervision of the functions of the Department of the Army ("Army") relating to programs for conservation and development of national water resources, including flood control, navigation, shore protection, and related purposes. In particular, I establish policy direction for, and supervision of, Army functions relating to all aspects of the Civil Works program which is executed by the United States Army Corps of Engineers ("Corps").

3. Within the United States Environmental Protection Agency ("EPA"), the Office of Water has primary responsibility for the rulemaking process related to the CWA.
4. Within the Army, the Office of the Assistant Secretary of the United States Army for Civil Works has primary responsibility for the rulemaking process related to the CWA.
5. These two offices have the responsibility of implementing the definition of "waters of the United States" regarding their respective CWA regulatory actions and programmatic activities.
6. In 2015, EPA and the Army (collectively "the agencies") promulgated a rule (the "Clean Water Rule") establishing a new definition of "waters of the United States"—a key term used to identify the jurisdictional scope of the CWA.
7. On April 21, 2020, the agencies, under the Trump Administration, promulgated the Navigable Waters Protection Rule (NWPR), which comprehensively revised regulations defining the term "waters of the United States."
8. The agencies, after completing a review of the NWPR, have decided to initiate another rulemaking to revise the term "waters of the United States." As described below, the Biden Administration's EPA and Army have substantial concerns about the lawfulness of aspects of the NWPR and the harmful effects of the NWPR on the nation's waters.
9. The agencies' review of the NWPR was at the direction of President Biden. On January 20, 2021, President Biden signed Executive Order 13990 ("EO 13990") on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis to pronounce the Administration's policy "to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who

disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals." EO 13990 directed all Federal agencies to "immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis." And "[f]or any such actions identified by the agencies, the heads of agencies shall, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding the agency actions." The order also specifically revoked Executive Order 13778 of February 28, 2017 (Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule), which had resulted in promulgation of the NWPR.

10. Pursuant to the direction in EO 13990, the agencies have carefully reassessed the administrative record for and the legal and scientific basis of the NWPR. The agencies have also thoroughly reviewed the challenges to the NWPR presented by the parties in the pending litigation. The agencies have completed this assessment and decided to initiate rulemaking to revise the term "waters of the United States." Among the factors that the agencies considered are: the text of the CWA; Congressional intent and the objective of the CWA; U.S. Supreme Court case law; the impacts resulting from the NWPR; concerns raised by stakeholders about the NWPR, including implementation-related issues; the principles outlined in EO 13990; and issues raised in ongoing litigation challenging the NWPR. As further described below, the agencies have identified substantial concerns with the NWPR and have determined that

additional considerations should be given to certain aspects of the NWPR through notice-and-comment rulemaking, including concern that when interpreting the jurisdictional scope of the CWA, the NWPR did not appropriately consider the effect of the revised definition of "waters of the United States" on the integrity of the nation's waters, as well as concern over the loss of waters protected by the CWA.

11. Congress enacted the CWA in 1972 with the statutory objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 1251(a) of Title 33, U.S. Code. One of the Act's principal tools in achieving the statutory objective is through its general prohibition on the discharge of pollutants to "waters of the United States," the statutory phrase that generally establishes the jurisdictional scope of the Act.

12. Certain statements in the NWPR preamble call into significant question whether the agencies' consideration of science and water quality impacts in developing the rule was consistent with these goals. For example, the agencies explicitly and definitively stated in numerous places in the NWPR administrative record that they did not rely on agency documents in the record that provided some limited assessment of the effects of the rule on water quality in determining the scope of the definition of "waters of the United States." *See, e.g.*, 85 Fed. Reg. at 22,332, 22,335 ("[T]he final rule is not based on the information in the agencies' economic analysis or resource and programmatic assessment.").

13. The agencies now believe that consideration of the effects of a revised definition of "waters of the United States" on the integrity of the nation's waters is a critical element in assuring consistency with the statutory objective of the CWA. *See, e.g.*, *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1468-69 (2020) ("*Maui*") (emphasizing the importance of considering the CWA's objective when determining the scope of the Act and

finding that "[t]he Act's provisions use specific definitional language to achieve this result," including the phrase "navigable waters"). Based on a careful evaluation of the record of the NWPR, including the above-quoted statement, the agencies have substantial and legitimate concerns regarding the adequacy of consideration of the CWA's water quality goals in the development of the NWPR. As such, the agencies believe it is appropriate to reconsider these issues—and, in particular, the effects of the "waters of the United States" definition on the chemical, physical, and biological integrity of the nation's waters—in a new rulemaking.

14. In light of the text, structure, and legislative history of the Act, and *Maui* and other Supreme Court decisions, the agencies have concluded there must be some consideration of the effects of a revised definition of "waters of the United States" on the integrity of the nation's waters. Based on the record at the time the agencies promulgated the NWPR, significant concerns exist about the sufficiency of the agencies' consideration of the effects of the NWPR on the chemical, physical, and biological integrity of the nation's waters when determining the limits of the specific definitional language "waters of the United States" in the NWPR. For example, the agencies are concerned that the NWPR did not look closely enough at the effect ephemeral waters have on traditional navigable waters when the agencies decided to categorically exclude all ephemeral waters. New rulemaking will provide the agencies an additional opportunity to evaluate these issues and allow all interested stakeholders to contribute to this process through rulemaking comments and other public processes.

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the NWPR compared to previous rules and practices. These indicators include an increase in determinations by the Corps that waters are non-jurisdictional and an increase in projects for which CWA Section 404 permits are no longer required. The agencies have also found that preliminary jurisdictional determinations (through which applicants proceed with permitting as though all resources were jurisdictional) are much less common under the NWPR, indicating that fewer project proponents believe waters are jurisdictional from the start. Of the 40,211 individual aquatic resources or water features for which the Corps made approved jurisdictional determinations under the NWPR between June 22, 2020 and April 15, 2021, approximately 76% were found to be non-jurisdictional. Many of the non-jurisdictional waters are excluded ephemeral resources (mostly streams) and wetlands that are not adjacent under the NWPR. The agencies are aware of 333 projects that would have required Section 404 permitting prior to the NWPR, but no longer do under the NWPR. The agencies are also aware that this number is not the full universe of projects that no longer require Section 404 permitting under the NWPR, partly because to the extent that project proponents are not seeking any determinations for waters that the NWPR now excludes, such as ephemeral streams, the effects of such projects are not tracked in the Corps database. As a whole, the reduction in jurisdiction is notably greater than the deregulatory effects discussed in the rule preamble and the economic analysis case studies.

16. These changes have been particularly significant in arid states. In New Mexico and Arizona, for example, of over 1,500 streams assessed under the NWPR, nearly every one has been found to be a non-jurisdictional ephemeral resource, which is very different from the status

of the streams as assessed under both the Clean Water Rule and the pre-2015 regulatory regime.[1]

17. The agencies have heard concerns from a broad array of stakeholders, including states, tribes, scientists, and non-governmental organizations, that the reduction in the jurisdictional scope of the CWA is resulting in significant, actual environmental harms. These entities have identified specific projects and discharges that would no longer be subject to CWA protections because the waters at issue would no longer be jurisdictional. In many cases permit applications have been withdrawn. For example, stakeholders have raised concerns about dredge and fill activities on large swaths of wetlands in sensitive areas, in the floodplains of jurisdictional waters, or even within several hundred yards of traditional navigable waters, that are proceeding without CWA regulatory protection or compensatory mitigation. Stakeholders have also identified for EPA many other wetlands and streams, newly deemed non-jurisdictional, which are likely to be filled for commercial and housing developments, mines, water pipelines, and other forms of development without CWA oversight.

18. Projects are proceeding in newly non-jurisdictional waters in states and tribal lands where regulation of waters beyond those covered by the CWA are not authorized, and, based on available information, will therefore result in discharges without any regulation or mitigation from federal, state, or tribal agencies. *See* Economic Analysis for the Navigable Waters Protection Rule: Definition of "Waters of the United States" at 40 (Jan. 22, 2020) (indicating that a large number of states do not currently regulate waters more broadly than the CWA requires, and are "unlikely to increase state regulatory practices" following the NWPR). One

[1] These non-jurisdictional ephemeral resources are predominantly ephemeral streams, but a small portion may be swales, gullies, or pools.

project that stakeholders have identified for EPA is the construction of a high-pressure oil pipeline that would cut through a drinking water well field, which is expected to result in discharges to nearly 100 ephemeral streams that appear to be no longer jurisdictional under the NWPR; another project is the construction of a mine that would destroy hundreds of previously jurisdictional wetlands, deemed non-jurisdictional under the NWPR, next to a National Wildlife Refuge.

19. Tribes in arid areas have also indicated that they will disproportionately suffer from the reduction in protections, including tribal lands that intersect or are within the New Mexico state boundary. Some tribes have estimated that the NWPR removes more than 80% of stream miles within their jurisdictions from CWA protections, amounting to more than 1,400 miles of streams. These tribes lack the authority and the resources to independently regulate surface waters within and upstream of their reservations, and therefore cannot protect their scarce waters from upstream dischargers, such as uranium and coal mines.

20. Ephemeral streams, wetlands, and other aquatic resources provide numerous ecosystem services, and there could be cascading and cumulative downstream effects from impacts to these resources, including but not limited to effects on water supplies, water quality, flooding, drought, erosion, and habitat integrity.[2] The agencies have substantial concerns about the consideration of these effects on the chemical, physical, and biological integrity of the nation's waters in the NWPR rulemaking process.

[2] U.S. Environmental Protection Agency, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report), EPA/600/R–14/475F (Washington, DC: U.S. Environmental Protection Agency (2015)). https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414.

I declare under penalty of perjury that the foregoing is true and correct, based on my personal knowledge and on information provided by employees under my supervision.

Dated: June 9, 2021

Jaime A. Pinkham
Acting Assistant Secretary of the Army
for Civil Works
U.S. Department of the Army

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C. 20460

OFFICE OF THE ADMINISTRATOR
SCIENCE ADVISORY BOARD

February 27, 2020

EPA-SAB-20-002

The Honorable Andrew R. Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Subject: Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act

Dear Administrator Wheeler:

Establishing a sound, consistent, scientifically supported and clear definition of "waters of the United States" (WOTUS) is a critical component of implementing the United States Federal Water Pollution Control Act (1972), more commonly known as the Clean Water Act (CWA). The Act itself does not provide such a definition. Achievement of the Act's overall objective "to restore and maintain the chemical, physical and biological integrity of the Nation's waters" requires a clear definition of the geographic and hydrologic scope of these waters. On February 14, 2019, the EPA and the Department of the Army, Corps of Engineers published a new proposed rule defining the scope of waters federally regulated under the Clean Water Act (84 FR 4154).[1] At the EPA Science Advisory Board (SAB) meeting on June 5-6, 2019, the SAB discussed the scientific and technical underpinnings of the proposed WOTUS rule. The Board concluded that the proposed WOTUS rule does not incorporate best available science and as such we find that a scientific basis for the proposed Rule, and its consistency with the objectives of the Clean Water Act, is lacking. The SAB voted to provide a commentary to the Agency outlining the nature of this inconsistency.

Process Used by the SAB to Develop This Commentary

The SAB established a WOTUS Work Group to develop an initial draft of this commentary. The draft commentary was then reviewed and approved by the full SAB at a public teleconference

[1] Available at: https://www.govinfo.gov/content/pkg/FR-2019-02-14/pdf/2019-00791.pdf

held on January 24, 2020.[2] Four SAB members indicated that they did not concur with the commentary.[3] The SAB WOTUS Work Group consisted of Drs. Alison Cullen (chair), Bob Blanz, John Guckenheimer, Michael Honeycutt, Clyde Martin, Robert Merritt, Robert Puls, and Tara Sabo-Attwood. The SAB Work Group considered the proposed rule's content, supporting materials and documents, a previous fact-finding teleconference with EPA, comments from EPA staff at the June 5-6, 2019 SAB meeting, and the deliberation of the entire chartered SAB at this meeting in developing the draft commentary.

Commentary on Revised Definition of "Waters of the United States" (84 FR 4154)

The SAB finds that the proposed revised definition of WOTUS (84 FR 4154) (hereafter, the proposed Rule) decreases protection for our Nation's waters and does not provide a scientific basis in support of its consistency with the objective of restoring and maintaining "the chemical, physical and biological integrity" of these waters. At the June 5-6, 2019 SAB meeting, the Board offered to support EPA in the application of more recent scientific advances to increase clarity and consistency for CWA needs. EPA representatives responded that the agency has chosen to interpret the CWA and subsequent case law as constraining them to limiting the definition of WOTUS to the language of the proposed Rule. The SAB acts under no such constraint in its advisory capacity and is in fact obligated by statute to communicate the best available science on this topic. The following key elements amplify this finding.

- The proposed Rule does not fully incorporate the body of science on connectivity of waters reviewed previously by the SAB and found to represent a scientific justification for including functional connectivity in rule making: EPA's 2015 Connectivity Report (U.S. EPA 2015),[4] Rains (2011),[5] and Rains et al. (2016).[6] The EPA's 2015 Connectivity Report emphasizes that functional connectivity is more than a matter of surface geography. The report illustrates that a systems approach is imperative when defining the connectivity of waters, and that functional relationships must be the basis of determining adjacency. The proposed Rule offers no comparable body of peer reviewed evidence, and no scientific justification for disregarding the connectivity of waters accepted by current hydrological science.

- In the proposed Rule the EPA and Department of the Army specifically requested comment on "if and under what circumstances subsurface water connections between wetlands and jurisdictional waters could be used to determine adjacency." The SAB

[2] The SAB notes that on January 23, 2020, subsequent to the development of the SAB draft commentary, the EPA and the Department of the Army finalized the rule defining "waters of the United States."

[3] Drs. Bob Blanz, Donald van der Vaart, Richard Williams, and Stanley Young indicated that they did not concur. Comments from Dr. van der Vaart are available at: https://yosemite.epa.gov/sab/sabproduct.nsf//BA0F9868EC1BD0FF8525850D0063CE9F/$File/van+der+Vaart+comments+SAB+WOTUS.pdf

[4] U.S. EPA. 2015. *Connectivity of streams and wetlands to downstream waters: a review and synthesis of the scientific evidence technical report.* EPA/600/R-14/475F. U.S. Environmental Protection Agency, Washington, D.C.

[5] Rains, M.C. 2011. Water Sources and Hydrodynamics of Closed-Basin Depressions, Cook Inlet Region, Alaska. *Wetlands* 31:377-387.

[6] Rains, M.C., S.G. Leibowitz, M. J. Cohen, I.F. Creed, H.E. Golden, J.W. Jawitz, P. Kalla, C.R. Lane, M.W. Lang, and D.L. McLaughlin. 2016. Geographically isolated wetlands are part of the hydrological landscape. *Hydrological Processes* 30:153-160.

submits that there is a solid body of scientific evidence regarding the existence of these connections documented in EPA's 2015 Connectivity Report, and reviewed by the SAB, which provide a basis for answering this request for comment.

- There is no scientific justification for excluding connected ground water from WOTUS if spring-fed creeks are considered to be jurisdictional. The proposed Rule neglects the connectivity of ground water to wetlands and adjacent major bodies of water with no acknowledgement of watershed systems and processes discussed in EPA's 2015 Connectivity Report. The SAB's previous review found a scientific justification for the conclusion that chemical or biological contamination of ground water may lead to contamination of functionally connected surface water. Ground water may also contribute to intermittent flow of jurisdictional tributaries. Further, shallow ground water may directly connect wetlands or other bodies of water that only occasionally flow to adjacent major bodies of water.

- The proposed Rule excludes irrigation canals from the definition of WOTUS. Biological and chemical contamination of large-scale irrigation canals presents a documented and serious risk to public health and safety (Allende and Monaghan 2015).[7] The presence of *E. coli* in leafy vegetables is often traceable to irrigation water contaminated by animals in feed lots or pastures adjacent to the canals. Water associated with confined animal feeding operations has also been shown to contain chemical contaminants, such as steroids, that are associated with public health concerns (Allende and Monaghan 2015; Bartelt-Hunt et al. 2011; Gall et al. 2014).[8,9,10]

- The definition of jurisdictional waters in the proposed Rule excludes adjacent wetlands that do not abut or have a direct hydrologic surface connection to otherwise jurisdictional waters. This definition is inconsistent with previous SAB review which justified scientifically the inclusion of these wetlands (U.S. EPA Science Advisory Board 2014).[11] No new body of peer reviewed scientific evidence has been presented to support an alternative conclusion.

- The proposed Rule does not present a scientific basis for adopting a surface water based definition of Waters of the U.S. The proposed definition is inconsistent with the body of science previously reviewed by the SAB, while no new science has been presented. Thus the approach neither rests upon science, nor provides long term clarity.

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[7] Allende, A. and J. Monaghan. 2015. Irrigation Water Quality for Leafy Crops: A Perspective of Risks and Potential Solutions. *International Journal of Environmental Research and Public Health*, 2015 Jul. 12(7): 7457-7477.

[8] Ibid.

[9] Bartelt-Hunt, S., D.D. Snow, T. Damon-Powel, and D. Miesbach. 2010. Occurrence of steroid hormones and antibiotics in shallow groundwater impacted by livestock waste control facilities. *Journal of Contaminant Hydrology* 123(3-4):94-103. doi: 10.1016/j.jconhyd.2010.12.010. Epub 2011 Jan 4.

[10] Gall, H.E., S.A. Sassman, B. Jenkinson, L.S. Lee, and C.T. Jafvert. 2015. Comparison of export dynamics of nutrients and animal-borne estrogens from a tile-drained Midwestern agroecosystem. *Water Research* 72:162-73. doi: 10.1016/j.watres.2014.08.041. Epub 2014 Sep 6.

[11] U.S. EPA Science Advisory Board. 2014. *Science Advisory Board (SAB) Consideration of the Adequacy of the Scientific and Technical Basis of the EPA's Proposed Rule titled "Definition of Waters of the United States under the Clean Water Act."* EPA-SAB-14-007. U.S. EPA Science Advisory Board, Washington, D.C.

In summary, current scientific understanding of the connectivity of surface and ground water, which has been reviewed by the SAB previously, is not reflected in the proposed Rule. Specifically, the proposed definition of WOTUS excludes ground water, ephemeral streams, and wetlands which connect to navigable waters below the surface. The proposed Rule does not present new science to support this definition, thus the SAB finds that the proposed Rule lacks a scientific justification, while potentially introducing new risks to human and environmental health.

Sincerely,

/s/

Dr. Michael Honeycutt, Chair
Science Advisory Board

Enclosure

NOTICE

This report has been written as part of the activities of the EPA Science Advisory Board (SAB), a public advisory group providing extramural scientific information and advice to the Administrator and other officials of the Environmental Protection Agency. The SAB is structured to provide balanced, expert assessment of scientific matters related to problems facing the Agency. This report has not been reviewed for approval by the Agency and, hence, the contents of this report do not necessarily represent the views and policies of the Environmental Protection Agency, nor of other agencies in the Executive Branch of the Federal government, nor does mention of trade names of commercial products constitute a recommendation for use. Reports of the SAB are posted on the EPA Web site at http://www.epa.gov/sab.

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Dr. Margaret M. MacDonell,* Department Head, Argonne National Laboratory, Lemont, IL

Dr. Robert E. Mace, Interim Executive Director, Chief Water Policy Officer, Professor of Practice, The Meadows Center for Water and the Environment, Texas State University, San Marcos, TX

Dr. Clyde F. Martin, Horn Professor of Mathematics, Emeritus, Department of Mathematics and Statistics, Texas Tech University, Crofton, MD

Dr. Sue Marty, Senior Toxicology Leader, Toxicology & Environmental Research, The Dow Chemical Company, Midland, MI

Mr. Robert W. Merritt, Independent Consultant, Houston, TX

Dr. Larry Monroe, Independent Consultant, Braselton, GA

Dr. Thomas F. Parkerton, Senior Environmental Scientist, Toxicology & Environmental Science Division, ExxonMobil Biomedical Science, Spring, TX

Dr. Robert Phalen, Professor, Air Pollution Health Effects Laboratory, School of Medicine, University of California-Irvine, Irvine, CA

Dr. Kenneth M. Portier, Independent Consultant, Athens, GA

Dr. Robert Puls, Owner/Principal, Robert Puls Environmental Consulting, Bluffton, SC

Dr. Kenneth Ramos, Executive Director, Institute of Biosciences and Technology, Texas A&M University, Houston, TX

*Did not participate in developing this commentary.

Dr. Tara L. Sabo-Attwood, Associate Professor and Chair, Department of Environmental and Global Health, College of Public Health and Health Professionals, University of Florida, Gainesville, FL

Dr. Mara Seeley, Unit Chief – Exposure Assessment, Environmental Toxicology Program, Bureau of Environmental Health, Massachusetts Department of Public Health, Boston, MA

Dr. Anne Smith, Managing Director, NERA Economic Consulting, Washington, DC

Dr. Richard Smith, Professor, Department of Statistics and Operations Research, University of North Carolina, Chapel Hill, NC

Dr. Jay Turner, Professor and Vice Dean for Education, Department of Energy, Environmental and Chemical Engineering, McKelvey School of Engineering, Washington University, St. Louis, MO

Dr. Brant Ulsh, Principal Health Physicist, M.H. Chew & Associates, Cincinnati, OH

Dr. Donald van der Vaart, Senior Fellow, John Locke Foundation, Raleigh, NC

Ms. Carrie Vollmer-Sanders, Director, Agriculture Engagement Strategy, Efroymson Conservation Center, The Nature Conservancy , Indianapolis, IN

Dr. Kimberly White, Senior Director, Chemical Products and Technology Division, American Chemistry Council, Washington, DC

Dr. Mark Wiesner, Professor, Department of Civil and Environmental Engineering, Director, Center for the Environmental Implications of NanoTechnology (CEINT), Pratt School of Engineering, Nicholas School of the Environment, Duke University, Durham, NC

Dr. Peter J. Wilcoxen, Laura J. and L. Douglas Meredith Professor for Teaching Excellence, Director, Center for Environmental Policy and Administration, The Maxwell School, Syracuse University, Syracuse, NY

Dr. Richard A. Williams, Retired Economist (Food and Drug Administration), Independent Consultant, McLean, VA

Dr. S. Stanley Young, Chief Executive Officer, CGStat, Raleigh, NC

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SCIENCE ADVISORY BOARD STAFF

Dr. Thomas Armitage, Designated Federal Officer, U.S. Environmental Protection Agency, Washington, DC

Stillaguamish Tribe of Indians

PO Box 277 3322 236th St. NE
Arlington, WA 98223

April 15, 2019

Mr. Michael McDavit
Oceans, Wetlands and Communities Division
Office of Water (4504-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, D.C. 20460

Ms. Jennifer Moyer
Regulatory Community of Practice
(CECW-CO-R)
U.S. Army Corps of Engineers
441 G St. NW
Washington, D.C. 20314

Attention: Docket ID No. EPA-HQ-OW-2018-0149

Re: Stillaguamish Tribe comments on the proposed revision to the definition of the "Waters of the United States".

Dear Mr. McDavit and Ms. Moyer,

The Stillaguamish Tribe is comprised of descendants of the Stoluck-wa-mish Tribe, signatory of the 1855 Point Elliot Treaty. Since time immemorial the Tribe has served as stewards of the natural resources in the Stillaguamish Watershed. The Point Elliot Treaty secured the Tribe's right to fish, hunt, gather and harvest traditional foods and resources in perpetuity. This Treaty Right was affirmed in the *U.S. v. Washington* court case, now commonly referred to as the 'Boldt decision', and subsequently by the U.S. Supreme Court. The proposed revision to the definition of "waters of the United States" (WOTUS) as written threatens these Treaty Rights of the Stillaguamish Tribe and the other Treaty Tribes of Washington State. The U.S. Government has a trust responsibility to protect these Treaty Rights. As such, we request revisions to the proposed "waters of the United States" definition in order for the U.S. Government to fulfill its trust obligation to the Stillaguamish Tribe and other Treaty Tribes in Washington State.

The following are comments the Stillaguamish Tribe formally make on key aspects of the proposed revision to the definition of WOTUS.

Wetlands

Wetlands are an essential component to healthy aquatic systems. Wetlands are sponges that hold water during high flows to reduce the impacts of localized flooding. They augment low stream flows by the slow release of water to surface water. They are sinks that provide a natural form of treatment to pollutants. The mere presence of wetlands in a basin raises the water table and allows for more surface water flow during low flow periods. This provides more habitat for ESA and Treaty protected species such as salmon and the increased flow reduces pollutant concentrations and impacts aquatic life and human health through dilution. In the Stillaguamish Watershed, wetlands have already been reduced by 81 – 96% from historic levels due to land use alterations such as filling and draining and by the trapping and removal of beavers (Pollock and Pess 1998). Wetland loss has had drastic impacts on the Stillaguamish Watershed already through the loss of salmon habitat, reduction of summer stream flows and increases in peak flow. The proposed definition of "waters of the United States" will further degrade wetlands by failing to protect wetlands that do not have a surface water connection to "jurisdictional waters." Wetlands that might not have an overland hydrological connection with jurisdictional waters in a typical year are still physically connected via groundwater and still significantly impact the physical, chemical, and biological integrity of downstream jurisdictional waters. We would like to propose that wetlands continue to be protected using the significant nexus standard. This will allow for protection of wetlands that are disconnected via surface water but still provide important structure and function to aquatic systems.

EPA and the USACOE request input on which wetlands should be considered jurisdictional. Since the times of settlement in Washington State wetlands have been artificially disconnected from surface waters through the construction of roads, berms, dams, railroads, etc… as settlers transformed the land to allow transportation, farming, and development. These wetlands that were at one point hydrologically connected at the surface to jurisdictional waters should still be considered 'adjacent' as they continue to provide significant impact to the physical, chemical, and biological integrity to jurisdictional waters.

Tributaries

The Stillaguamish Tribe would like to stress that all tributaries (ephemeral, intermittent, and perennial) should be considered as jurisdictional under the definition of WOTUS. All channels that carry flow regardless of duration can also potentially carry pollution to larger streams. As a result, all three stream types should be protected under the Clean Water Act. The Stillaguamish Tribe is not in favor of limiting tributaries to only perennial and intermittent streams because ephemeral streams provide necessary structure and function to the stream network. In Washington State, ephemeral streams, even ones that only flow due to rainfall, provide necessary habitat to ESA and Treaty reserved salmonids. Salmonids will seek out these stream channels for refuge during periods of high flow, the same periods of time when rain driven ephemeral streams flow. We request that ephemeral, intermittent, and perennial streams be included in the definition of tributaries.

Treaty Rights

One of the discussion points in the proposed definition of the WOTUS is to provide more flexibility to states and tribes to determine how to best manage water in their boarders. Although this statement is valid, it does leave out an important component to the Treaty Tribes of

Washington State. Treaty Tribes, including the Stillaguamish Tribe, have adjudicated Usual and Accustomed (U&A) areas that give Tribes a geographic location to exercise their Treaty Rights. These U&A's encompass large areas beyond Tribal Trust Land or Reservations. EPA has admitted that the proposed rule will likely reduce the amount of waters protected under WOTUS. The reduction will likely affect Tribes that rely on those waters. EPA and the USACOE need to be consistent with their trust obligations to not adversely affect those waters that fall within the Tribe's U&A. Many aspects of the proposed rule would lessen protection of waters in Tribal U&A's. We recommend a modification to the revision of the WOTUS to explicitly describe how the agencies will work with Treaty Tribes to protect their Treaty reserved resources throughout their U&A's.

Economics

The February 2017 Executive Order entitled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule" that spurred this proposed revision to WOTUS wishes to "help sustain economic growth and reduce barriers to business development." If this is the case, then **all business** should be considered. Oftentimes salmon fisheries are cast aside as a legitimate or valued economic venture, when in fact it is a multi-billion-dollar industry. One of the sticking points of fisheries, however, is that fish need quality habitat to create numerous enough populations to be harvestable. Tribes have relied on fisheries not only for their sustenance and cultural and religious importance, but also for their economic livelihood. The proposed rule will hurt the salmon fishery industry by reducing quality habitat necessary to produce harvestable salmon.

The purpose of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The proposed revision to the definition of the Waters of the United States does not work in cooperatively with the Clean Water Act. The proposed revision will reduce protection of the WOTUS by removing the amount of waters that would be jurisdictional which will not restore nor maintain the chemical, physical, and biological integrity of said waters. In order to meet the standards of the Clean Water Act and to fulfill the trust responsibility of the U.S. Government for the Stillaguamish Tribe and other Treaty Tribes the proposed revision to WOTUS must not be implemented without significant modifications.

In closing, the Stillaguamish Tribe supports the comment letter sent by the Northwest Indian Fisheries Commission on April 12, 2019. Finally, given the importance of this issue and the long term effects changing the WOTUS definition could have on Tribal Treaty resources, we request a 120-day extension for comments and to allow time for the Tribe to have actual and meaningful government-to-government consultation with the EPA and the USACOE.

Sincerely,

Shawn Yanity
Chairman
Stillaguamish Tribe of Indians

Literature Cited:

Pollock, M. M. and G.R. Pess. 1998. The Current and Historical Influence of Beaver (*Castor Canadensis*) on Coho (*Oncorhynchus kisutch*) Smolt Production in the Stillaguamish River Basin. Prepared for: Pat Stevenson, Stillaguamish Tribe of Indians. 30pp.

Northwest Indian Fisheries Commission

6730 Martin Way E., Olympia, Washington 98516-5540
Phone (360) 438-1180 www.nwifc.org FAX # 753-8659

April 12, 2019

Mr. Michael McDavit
Oceans, Wetlands and Communities Division
Office of Water (4504-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, DC 20460

Ms. Jennifer Moyer
Regulatory Community of Practice
(CECW-CO-R)
U.S. Army Corps of Engineers
441 G St. NW
Washington, DC 20314

Re: Docket ID EPA-HQ-OW-2018-0149; FRL-9988-15-OW/Waters of the U.S. Revised Definition

Dear Mr. McDavit and Ms. Moyer:

Please accept these comments on the above-referenced revised definition of the Waters of the Unites States (WOTUS) on behalf of the Northwest Indian Fisheries Commission (NWIFC).[1] The 20 member tribes of the NWIFC[2] are beneficiaries of a trust relationship with the United States, the Trustee,[3] with constitutionally protected, treaty-reserved rights to harvest, consume, and manage fish and shellfish in their usual and accustomed areas.[4] These comments are submitted in view of the need to ensure protection and restoration of these and other reserved rights, resources, and habitats, and to safeguard the health, livelihoods, and well-being of tribal members.

The United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps), collectively referred to as the "Agencies," published a proposed WOTUS redefinition which suffers from several fatal defects that render the proposed rule unwarranted. First, the proposed rule potentially diminishes federal protections for species listed under the Endangered Species Act (ESA), and subject to the treaty rights of the tribes to harvest fish and other natural resources. Second, the Agencies' tribal engagement effort is inadequate when considering the magnitude of the rule's impacts on treaty rights and resources. Third, the proposed rule ignores current scientific understandings. Finally, the proposed rule is untethered from binding legal precedents.

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[1] The NWIFC member tribes are the Lummi, Nooksack, Swinomish, Upper Skagit, Sauk-Suiattle, Stillaguamish, Tulalip, Muckleshoot, Puyallup, Nisqually, Squaxin Island, Skokomish, Suquamish, Port Gamble S'Klallam, Jamestown S'Klallam, Lower Elwha Klallam, Makah, Quileute, Quinault, and Hoh.

[2] These general comments should not be construed as conflicting with any specific comments from NWIFC member tribes, which the Commission will acknowledge and consider with deference.

[3] *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

[4] *See U.S. v. Wash.*, 853 F.3d 946, 967 (9th Cir. 2017), *aff'd*, *U.S. v. Wash.*, 138 S.Ct. 1832 (2018).

I. The Proposed Rule Potentially Diminishes Federal Protections of Treaty Resources

If the definition of WOTUS is contracted by EPA and the Corps as proposed, this could decrease the reach of the Clean Water Act's (CWA) permitting and other requirements within, upstream, and downstream of waters with a treaty nexus, and thus could undermine federal protections for tribal rights and resources. The federal role in protecting the resources on which NWIFC's member tribes depend is an important one, governed by the unique trust relationship between the federal government and the tribes.

The Agencies propose, without reference to intervening facts, to reverse decades of reliance on the Supreme Court's "significant nexus" test for jurisdictional waters[5] in favor of a new categorical rule based on a nonbinding Court opinion,[6] pursuant to an executive order to so promulgate the new rule.[7] The Agencies' insistence on adherence to the nonbinding court opinion regardless of the facts, science, and impacts on treaty rights represents an arbitrary exercise of administrative authority resulting in prejudice against affected Indian tribes.

In the Pacific Northwest, Justice Scalia's narrow understanding likely omits protection for waters (including ditches, pools, channel migration zones, ponds, intermittent and ephemeral streams, and tributaries) that are crucial to the survival of salmon and other fish. For example, scientific studies document the importance of intermittent and ephemeral streams to coho salmon at various points in their lifecycles.[8] Coho spawn in the upper reaches of stream networks where intermittent and ephemeral streams are common.[9] Intermittent streams are vital to coho smolts and residual pools in intermittent streams provide habitat that allows juvenile coho to survive during dry periods. With autumn rains coho relocate from main channels of streams into off-channel ponds, sloughs, wetlands, intermittent streams, and

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[5] *See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 167 (2001) (SWANCC) (citing *U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 135 n. 9 (1985)).

[6] *Rapanos v. U.S.*, 547 U.S. 715 (2006) (Scalia, J., plurality opinion). *See infra* notes 47-48 and accompanying text.

[7] Exec. Or. 13778, 82 Fed. Reg. 12497 (March 3, 2017).

[8] See, e.g., P.J. Wigington, Jr., et al., *Coho Salmon Dependence on Intermittent Streams*, 4 ECOL. ENVIRON. 513 (2006).

[9] The Washington Department of Ecology previously advised the Corps of the physical, biological and chemical value of ephemeral and intermittent streams in Washington. See Washington Department of Ecology, Comments on Seattle District 2017 Nationwide Permit General Regional Conditions and Specific Regional Conditions 3 ("Ephemeral and intermittent streams comprise a large proportion of the drainage network in many parts of Washington State. As tributaries to larger rivers these play a significant role in the transport and processing of debris, sediment and other materials at the watershed scale. Fish streams may or may not have flowing water all year; they may be perennial or intermittent. Coho spawn in the upper portions stream networks, where intermittent streams are common. Residual pools in intermittent streams provide a refuge for juvenile Coho during dry periods; smolts that overwintered in intermittent streams were larger than those from perennial streams. Movement of juvenile Coho into intermittent tributaries from the mainstem illustrates the importance of maintaining accessibility for entire stream networks. Ephemeral and intermittent streams are also habitat for amphibians including salamanders listed as priority species in Washington. Furthermore, non-natal rearing of juvenile Chinook salmon is documented in intermittent tributaries. During winter floods, juvenile Chinook move into flooded side channels, floodplains, and small, intermittent streams").

tributaries that may not have been accessible during dry summer months.[10] Floodplain side channel and off-channel areas protected under the 2015 WOTUS rule provide habitat that shelters juvenile salmon during critical life stages.[11] These hydrologic features also provide critical habitat for the ESA listed Puget Sound Chinook salmon.[12] The proposed rule excludes wetlands that function in myriad ways to ensure the overall health of the aquatic ecosystems on which the health and well-being of the fish – and our tribes – depend upon.

Federal jurisdiction over tributaries that are ditched needs to continue,[13] as well as ditches that provide habitat for ESA-listed species.[14] The same rationale holds for including jurisdiction over intermittent and ephemeral streams, especially when relied upon for habitat by fish species listed under the ESA or with a nexus to a tribal treaty right. Ephemeral streams that possess discernable physical indicators of geographical features, including a bed and banks and an ordinary high water mark, should be included in the definition of jurisdictional tributaries to the extent that they contribute any flow, or to the chemical, physical and biological integrity of traditional navigable waters.[15] In addition, a lapse in agricultural use for prior converted farmland should restore wetlands jurisdiction. Farmland subjected to frequent tidal inundation and salt-water intrusion and thus no longer viable for agriculture is surely no longer viable for uses other than habitat.[16] The Agencies should retain these protections in any WOTUS rule revision.

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[10] Thomas P. Quinn, THE BEHAVIOR AND ECOLOGY OF PACIFIC SALMON AND TROUT 195, 203 (2005).

[11] NOAA NMFS, Endangered Species Act – Section 7 Consultation Final Biological Opinion for Implementation of the National Flood Insurance Program in the State of Washington, Phase One Document – Puget Sound Region (Sept. 22, 2008); Sarah A. Morley, et al., Juvenile Salmonid *Oncorhynchus* spp.) Use of Constructed and Natural Side Channels in Pacific Northwest Rivers 2811, Canadian Journal of Fisheries and Aquatic Sciences (December 2005).

[12] "[A]ll federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of [the ESA]." 16 U.S.C § 1531(c)(1).

[13] The proposed rule should clarify that ditches are artificial and were not previously tributary streams, whether intermittent, perennial or ephemeral, nor were they previously adjacent wetlands. Modified streams, tributaries, and wetlands warrant continuing jurisdiction.

[14] Because this proposed rule has the potential to result in harm to ESA-listed species and habitat, as described herein, the agencies need to engage with the National Marine Fisheries Service and U.S. Fish & Wildlife Service for consultation under Sec. 7 of the ESA. *See* 16 U.S.C. § 1536 (a)(2) ("Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species").

[15] Although Justice Scalia found these geographical features important, *Rapanos*, 547 U.S. at 732 (Scalia, J., plurality opinion), the Agencies fail to explain a rationale for excluding jurisdiction for ephemeral streams that possess these physical characteristics – bed, banks and ordinary high water mark – of geographical features that are relatively permanent.

[16] "[M]any estuary habitats in North America were drained and converted into agricultural areas. . . . Pollution is probably the most important threat to water quality in estuaries. Poor water quality affects most estuarine organisms, including commercially important fish and shellfish. National Oceanic and Atmospheric Administration Ocean Service Education webpage, available at https://oceanservice.noaa.gov/education/kits/estuaries/estuaries09_humandisturb.html (last visited on March 20, 2019)

The federal government invests in levee removal to restore wetlands, estuaries and floodplains, and to improve the quality of navigable waters.[17] The proposed rule could undermine these federal investments by categorically deeming levees as a break in the continuity of jurisdictional waters.[18] These investments in floodplain restoration are prudent since "a string of hurricanes — Harvey, Irma and Maria — highlighted the fiscal stress on the [National Flood Insurance] program. Claims in 2017 exceeded $8.7 billion, with more claims from last year's storms expected to be filed in 2018. The National Flood Insurance Program has more than $20 billion in public debt on its books; an additional $16 billion was canceled last year to avoid a $30 billion ceiling on the program's borrowing."[19] Wetlands, floodplains, estuaries, intermittent and ephemeral streams, and other waters are not liabilities: These waters are assets that provide flood control, sustainable navigation, drinking water, recreation, and habitat for fish and wildlife. The Agencies, instead of weakening protections for WOTUS through this proposed rule, should redouble its pursuit of the national "goal of water quality which provides for the protection and propagation for fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983."[20]

The tribes executed treaties with the United States that reserved a right to harvest fish at usual and accustomed places.[21] These treaties are the supreme law of the land.[22] The Agencies are operating under an order that the WOTUS rule "shall be implemented consistent with applicable law."[23] The WOTUS rule revision should not be promulgated nor implemented in a manner that harms habitat that supports the treaty right to harvest fish.

II. The Agencies' Tribal Engagement for the Proposed Rule Is Inadequate

"Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments."[24] Among these responsibilities, the Agencies have an obligation for sovereign-to-sovereign consultation with individual tribes, upon request, for implementing policies with tribal implications.

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[17] The levee system in much of the country "is now so full of holes that many [locals] ruefully describe it as 'Swiss cheese.'" *See* Mitch Smith and John Schwartz, 'Breaches Everywhere': Flooding Bursts Midwest Levees, and Tough Questions Follow, New York Times (March 31, 2019).

[18] *See*: https://response.restoration.noaa.gov/about/media/darrp-contributes-salmon-restoration-and-flood-control-project-washington-state.html (last visited April 5, 2019).

[19] Mike DeBonis, Congress Passes Flood Insurance Extension, Again Punting on Reforms, The Washington Post (July 31, 2018).

[20] 33 U.S.C. § 1251(a)(2). Over thirty-five years later, this goal remains unrealized by the Agencies.

[21] *See* Treaty of Point Elliot, 12 Stat 927, Article V (1859); Treaty of Medicine Creek, 10 Stat. 1132, Article III (1854); Treaty of Point No Point, 12 Stat. 933, Article IV (1859); Treaty of Olympia, 12 Stat. 971, Art III (1855); and Treaty of Neah Bay, 12 Stat. 939, Art. IV (1855).

[22] U.S. Const. art. VI § 2.

[23] Exec. Or. 13778, 82 Fed. Reg. 12497 (March 3, 2017).

[24] Exec. Or. 13175, Consultation and Coordination with Tribal Governments, 65 Fed. Reg. 67249 (Nov. 9, 2000).

Shortcomings in the Agencies' tribal engagement demonstrate a need for EPA and the Corps to extend that period for public comments and tribal consultation.

As an afterthought, the Agencies added a tribal information forum on their WOTUS rule on April 3, 2019, less than two weeks from the deadline for comment. At this forum, the Agencies demonstrated a lack of concern for tribal self-governance by demanding that tribes, many of which were not even present on April 3, submit any requests for consultation to the Agencies before April 15 – providing less than 13 days for a tribal council to make a decision on sovereign-to-sovereign consultation.[25] The Seattle Co-Regulator Forum was scheduled in conflict with previously scheduled North of Falcon salmon fishery management meetings between other federal agencies and tribal leaders. In addition, a list of discussion and data questions for the Seattle Co-Regulator Forum was distributed less than one week in advance of the meeting, preventing participants from obtaining input from tribal stakeholders, and inconsistent with EPA's obligations to provide transparency and sufficient access to public documents.[26] This process falls short of the "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."[27] Given this absence of meaningful tribal engagement, the Agencies are obligated to extend the comment period to the extent necessarily to fulfill their obligations for meaningful tribal engagement.

The conversation during the April 3 Seattle WOTUS tribal forum demonstrated an unmet need for an analysis by the Agencies regarding the effect of the proposed rule on treaty rights, even though the Agencies acknowledged that "[t]his action may have tribal implications."[28] Before the rulemaking progresses further, the western Washington treaty tribes of the NWIFC request a supplemental notice of proposed rulemaking explaining the impacts of the draft rule on treaty rights and resources, and further request meaningful engagement with the Agencies regarding

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[25] EPA's WOTUS rulemaking record includes notifications from tribal governments that consultation efforts to date remain inadequate. *See* Letter to Administrator Scott Pruitt from the Suquamish Tribe (June 12, 2017) (The Agencies' expedited process to rescind and revise the WOTUS definition "will not provide meaningful consultation with federally-recognized tribes with treaty-reserved rights and resources directly affected by this proposed rulemaking"); Letter to EPA Office of Water Tribal Program Manager Karen Gude from the Quinault Indian Nation (June 20, 2017) (In the context of the Agencies' failure to fulfill their obligations for government-to-government consultation, the Tribe's correspondence in the record should not be construed as concurrence on any assertion that adequate consultation has occurred, nor that the Tribe waives any right to more robust consultation through this rulemaking effort); Letter to EPA Office of Water Tribal Program Manager Karen Gude from the Tulalip Tribes (June 20, 2017) (same). Likewise, this letter from NWIFC may not be construed as concurrence that adequate consultation among sovereigns has occurred, nor that any Indian nation has waived its sovereign right to meaningful consultation. In addition, a tribal forum consisting of staff-level contacts does not fulfill the federal obligation for government-to-government consultation.

[26] Exec. Or. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations § 1-1, 59 Fed. Reg. 7629.

[27] Exec. Or. 13175, Consultation and Coordination with Tribal Governments § 5, 65 Fed. Reg. 67249, 67250 (Nov. 9, 2000).

[28] 84 Fed. Reg. 4203. The lack of forethought for the Seattle forum was demonstrated by the Agencies inability to explain the proposed rule's impact on treaty rights, which in turn demonstrates that this attempt at tribal engagement was short of meaningful.

the true impacts of the proposed rule on rights enshrined in treaties with the United States. Given the constitutional implications of executive branch impairment of treaty rights, these requests for treaty impact analyses and engagement are reasonable. Likewise, a request for additional time to consider and respond to analyses of these treaty impacts is reasonable. In order to provide sufficient time for meaningful engagement and consultation with affected tribes, we request that EPA extend the comment period for at least 120 additional days, but ideally an additional 200 days is warranted and consistent with the comment opportunities provided for the 2015 WOTUS rule.

III. The Proposed Rule Ignores Current Scientific Understandings

Just as Justice Scalia misunderstands scientific facts in *Rapanos*, so too does the proposed Agency rule.[29] Specifically, Justice Scalia's definition of WOTUS appears (1) to include only "relatively permanent, standing or flowing bodies of waters" – *but exclude* tributaries or streams with "occasional," or "ephemeral" flows; and (2) to include only wetlands that have a "continuous surface connection" with a traditional "water of the United States" that makes it "difficult to determine where the 'water' ends and the 'wetland' begins – *but exclude* wetlands with a mere "hydrological connection." Because the nonbinding plurality decision's categorical wetland delineations lack a basis in fact, they are insufficient to support the Agencies' WOTUS rule.

For example, the streams and wetlands the Agencies propose to exclude are often hydrologically connected to – and perform critical functions related to the "chemical, physical and biological integrity"[30] of – downstream and other waters. This science is amply documented in EPA's "*Connectivity Report*" – a 400+-page, peer-reviewed report on the state of the science, published in 2015.[31] As the *Connectivity Report* concluded, tributaries and streams are the dominant source of water to most rivers; individually or cumulatively, they exert a

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[29] Citing a typical example of Justice Scalia's misunderstanding of the scientific facts underpinning the CWA, he writes that "'dredged or fill material' . . . is typically deposited for the sole purpose of staying put, does not normally wash downstream, and thus does not normally constitute an 'addition ... to navigable waters' when deposited in upstream isolated wetlands." *Rapanos*, 547 U.S. at 744 (Scalia, J., plurality opinion). However, a majority of the justices recognized that, "[a]s the dissent points out, this proposition seems questionable as an empirical matter. It seems plausible that new or loose fill, not anchored by grass or roots from other vegetation, could travel downstream through waterways adjacent to a wetland; at the least this is a factual possibility that the Corps' experts can better assess than can the plurality. Silt, whether from natural or human sources, is a major factor in aquatic environments, and it may clog waterways, alter ecosystems, and limit the useful life of dams." *Id.* at 774-75 (Kennedy, J., concurring in the judgment) (internal citations omitted). EPA acknowledges as much, listing the burdens of water-borne sediment as including "costs associated with losing aquatic species, dredging navigation channels, and cleaning sediment out of municipal storm sewers." EPA, Stormwater Best Management Practice: Silt Fences 1 (April 2012).

[30] 33. U.S.C. § 1251(a).

[31] U.S. ENVIRONMENTAL PROTECTION AGENCY, CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE (Jan. 2015) [hereinafter CONNECTIVITY REPORT].

strong influence on the integrity of downstream waters.[32] And wetlands provide functions that improve downstream water quality, by assimilating or trapping nutrient pollution and chemical contamination (including pesticides and metals); wetlands provide vital runoff storage and flood control; "these systems form integral components of river food webs, providing nursery habitat for breeding fish and amphibians."[33]

Illustrating the apparent "significant nexus" between floodplains and navigable waters, the peer reviewed *Connectivity Report* explains:

> The integral connectivity between rivers and their floodplains and riparian areas is a central tenet of stream hydrology and ecology, as is the substantial influence that this bidirectional exchange has on the physical form, hydrology, chemistry, and biology of the river system. For example, the flood pulse concept . . . is a fundamental paradigm in river ecology, depicting the lateral expansion and contraction of the river in its floodplain and the resulting exchange of matter and organisms. The influence of riparian/floodplain wetlands on downstream waters is especially notable because of the potential magnitude and spatial extent of their interactions with rivers and their locations within river networks.[34]

Other federal agencies agree with this "significant nexus" between floodplains and navigable waters. "Surface water, ground water, floodplains, wetlands and other features do not function as separate and isolated components of the watershed, but rather as a single, integrated natural system. Disruption of any one part of this system can have long-term and far-reaching consequences on the functioning of the entire system."[35] Reversal of the 2015 Clean Water rule's protections for associated wetlands could undermine investments by states, tribes and the federal government in restoring natural functions of floodplains and wetlands, and negatively affect waters and wetlands that support treaty fisheries.[36]

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[32] CONNECTIVITY REPORT, at ES-2.

[33] CONNECTIVITY REPORT, at ES-2 to 4.

[34] CONNECTIVITY REPORT at 4-6 (internal citations omitted).

[35] James M. Wright, FLOODPLAIN MANAGEMENT PRINCIPLES AND CURRENT PRACTICES, 8-1 (2007), available at FEMA Emergency Management Institute: https://training.fema.gov/hiedu/aemrc/courses/coursetreat/fm.aspx (last visited on March 19, 2019).

[36] *See, e.g.,* Federal Emergency Management Agency Floodplain and Stream Restoration program ("The floodplain of a riverine or stream system provides capacity for storing storm water runoff, reducing the number and severity of floods, and minimizing non-point source pollution. Restoring floodplains and wetlands and their native vegetation are integral components of stream restoration efforts"), available at https://www.fema.gov/media-library-data/1487161136815-ecad1c0312eda2111ffa28735a4d06ad/FSR_Fact_Sheet_Feb2017_COMPLIANT.pdf (last visited on March 20, 2019). *See also* U.S. Dept. of Agriculture Natural Resources Conservation Service Floodplain Easement Program (acquiring rights to restore the flow and storage of floodwaters, and control erosion to help reduce threat to life and property), available at https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/financial/ewp/?cid=nrcs143_008225 (last visited on March 20, 2019).

Floodplains and streams are dynamic systems, changing shape over type based on hydraulic, physical, and ecological factors. For example,

> Channel migration is the natural process that describes how a stream or river channel moves over time. Channel migration can occur gradually, such as when a stream erodes away one bank and deposits sediment along the opposite side. It can also occur quite quickly during floods or high water events. While channel migration provides important habitats and natural diversity, this process can also damage or destroy homes and infrastructure located within these ever-changing zones. For existing communities near rivers and streams, it is important to know where channel migration zones exist and plan accordingly. Communities can manage these higher risk areas by guiding development away from channel migration zones. This strategy helps reduce flood and erosion hazards and costly repairs while preventing the loss of crucial floodplain habitat.[37]

Justice Scalia misunderstands this when he purports, without citation to legal authority or scientific literature, that the definition of WOTUS is "found in 'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical features.' All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows."[38]

The Agencies repeat this error by suggesting a hydrologic disconnection between a river and its floodplain.[39] Justice Kennedy exposes the folly of this false assertion, pointing out that "a full reading of the dictionary definition precludes the plurality's emphasis on permanence: The term 'waters' may mean 'flood or inundation,' events that are impermanent by definition."[40] The *Connectivity Report* makes clear that Justice Kennedy's "significant nexus" test aligns with scientific fact, while Justice Scalia's nonbinding plurality opinion and the Agencies' WOTUS rule do not. Floodplains are geographical and hydrological features that may have a significant nexus with jurisdictional waters.[41]

The Agencies' failure to base the WOTUS rule on factual science is also illustrated by their attempt to distinguish ephemeral from intermittent tributaries with the latter being dependent on the melting of snowpack while the former results from rainfall. However, the federal

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[37] Washington Department of Ecology, Stream Channel Migration Zones webpage, available at https://ecology.wa.gov/Water-Shorelines/Shoreline-coastal-management/Hazards/Stream-channel-migration-zones (last visited on March 20, 2019).

[38] *Rapanos*, 547 U.S. at 733 (Scalia, J., plurality opinion) (internal citations omitted).

[39] 84 Fed. Reg. at 4186 (2019).

[40] *Rapanos*, 547 U.S. at 770 (Kennedy, J., concurring in the judgment) (internal citations omitted).

[41] *See supra*, note 17-19 and accompanying text.

government has documented that snowpack is diminishing over time.[42] In the Skagit basin in western Washington, glaciers feed 24% less water to the river system than in 1959.[43] Without the ability to apply a case-by-case "significant nexus" test, intermittent streams could become ephemeral, and ephemeral streams could become intermittent along with changing snowpack and glaciation regimes, but the jurisdiction of these tributaries could be categorically and erroneously fixed under the Agencies' rule.[44] Justice Scalia's folly is extended by the Agencies' attempt to craft a categorical rule to cover dynamic features that are better addressed through scientific application of the "significant nexus" test. The Agencies should not categorically remove jurisdiction from ephemeral streams that were previously intermittent, nor for ephemeral or intermittent streams that influence tributaries, navigable waters, or habitat for treaty resources or species listed under the ESA.

The 2015 Clean Water rule was founded upon the exhaustive scientific analysis set forth in the *Connectivity Report*. The proposed rule would replace the 2015 Clean Water rule, yet provides no discussion of the science and offers no reasons for ignoring the facts and expert analyses that undergirded the 2015 Clean Water rule, as contained in the *Connectivity Report* and other documents supporting that rulemaking. The Agencies claim authority to rescind and revise the definition of WOTUS by emphasizing the change in policy priorities with the change in administrations, citing *FCC v. Fox Television Stations, Inc.*, and *Nat'l Ass'n of Home Builders v. EPA*.[45] However, as *Nat'l Ass'n of Home Builders* reminds, an agency's "re-evaluation of which policy would be better" must be undertaken "*in light of the facts.*"[46] A change in administration does not shield agencies from the need to provide a reasoned explanation, nor from the constraint that rules not be arbitrary and capricious. Nor does such a change permit agencies to promulgate a rule that flies in the face of the facts, simply by recasting the issue as a matter of policy rather than science. The Agencies' WOTUS rule lacks a basis in fact or science, thereby failing to meet the requirements of *Nat'l Ass'n of Home Builders v. EPA*.

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[42] *See* National Aeronautics and Space Administration Earth Observatory webpage at https://earthobservatory.nasa.gov/world-of-change/SierraNevada . *See also* U.S. Dept. of Agriculture press release at https://www.usda.gov/media/press-releases/2015/03/11/record-low-snowpack-cascades-sierra-nevada (last visited on March 20, 2019).

[43] *See* Jon Lyle Riedel and Michael Allen Larrabee, Impact of Recent Glacial Recession on Summer Streamflow in the Skagit River, Northwest Science, 90(1):5 (2016) ("[T]he presence of glaciers in the Skagit may be why it hosts all five native species of Pacific salmon. Glaciers in the North Cascades have been significantly diminished") (internal citations omitted).

[44] The Agencies' assertion that a categorical rule will facilitate administrative convenience and certainty among the regulated community is disingenuous given the Agencies' acknowledgement that wetland delineation will proceed on a case-by-case basis through examination of "all three wetland delineation criteria (*i.e.,* hydrology, hydrophytic vegetation, hydric soils)." 84 Fed. Reg. 4188 et seq. Adjacency and intermittency determinations will also require a case-by-case review. The proposed rules' continued reliance on case-by-case jurisdictional waters determinations demonstrates that the Agencies lack a reasoned basis for their redefinition of WOTUS.

[45] 84 Fed. Reg. 4169 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), and *Nat'l Ass'n of Home Builders v. EPA,* 682 F.3d 1032 (D.C. Cir. 2012).

[46] 682 F.3d at 1038 (emphasis added).

IV. The Proposed Rule Ignores Binding Legal Precedents

The Agencies err by relying on a nonbinding plurality opinion of the United States Supreme Court to advance the proposed rule that would eliminate federal jurisdiction and protection for some streams that deliver flows to traditional navigable waters, and ponds and wetlands with a significant chemical, physical, or biological nexus to traditional navigable waters.[47] Because Justice Kennedy's concurrence in the judgment articulates a narrower jurisdictional waters test than the overly-broad categorical rule invented by Justice Scalia's plurality opinion, the Agencies and lower courts properly have followed Justice Kennedy's guidance while implementing the CWA.[48]

Justice Kennedy's "significant nexus" test is not a legal innovation, but is grounded in prior binding decisions of the Supreme Court.[49] "It was the *significant nexus* between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*."[50] After the *Rapanos* decision, the Agencies implemented the CWA, in part, by evaluating non-navigable, intermittent and ephemeral tributaries for this jurisdictional "significant nexus."[51] "A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters. Significant nexus includes consideration of hydrologic and ecologic factors."[52]

> For example, wetlands that are not flooded by adjacent waters may still tend to drain into those waters. In such circumstances, the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water, and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion. In addition, adjacent wetlands may "serve significant natural biological functions, including food chain production, general

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[47] Chief Justice Roberts expressed regret that "no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act." *Rapanos v. United States*, 547 U.S. 715, 758 (2006) (Roberts, J., concurring in the judgment).

[48] *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'") (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976)) (opinion of Stewart, Powell, and Stevens, JJ.).

[49] *See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 167 (2001) (SWANCC).

[50] *Id.* (citing *U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 135 n. 9 (1985)) (emphasis added).

[51] Justice Scalia acknowledges that the CWA definition of navigable waters "is broader than the traditional understanding of that term." *Rapanos*, 547 U.S. at 731 (Scalia, J., plurality opinion) (citing SWANCC, 531 U.S. at 167; *Riverside Bayview Homes*, 474 U.S. at 133).

[52] U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* 1 (June 5, 2007).

> habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species."[53]

The Agencies fail to explain their departure from this well-established corpus of legal and administrative direction. Any reliance on the nonbinding *Rapanos* plurality opinion is misplaced. For example, *Rapanos* fails to provide a reasonable basis for the Agencies to exclude intermittent or ephemeral montane tributaries from CWA protection, because *Rapanos* considered only the lowland Great Lakes wetlands and tributaries of southeast Michigan,[54] with inadequate consideration of ephemeral streams or arid-region arroyos. Nor does the Supreme Court's *SWANCC* decision provide legal cover for the Agencies' sweeping jurisdictional pivot, because *SWANCC* only concerned the validity of the Migratory Bird Rule's application to isolated wetlands in a former sand and gravel quarry.[55] The limited facts in these Supreme Court decisions fail to support a legal basis for the proposed categorical national rule that undermines Congress' intent in enacting the CWA.[56] The Agencies' proposed definition for WOTUS is inconsistent with applicable laws and precedents.

V. Conclusion

The Agencies' proposed WOTUS rule lacks a basis in scientific fact and binding law, based instead on a nonbinding plurality opinion in *Rapanos v. United States*. Justice Scalia's view is at odds with that of tribal scientists, whose understanding of hydrology has been honed over millennia. NWIFC and its member tribes understand that our waters are all connected, that aquatic ecosystems function as wholes, and that the health of the whole will be undermined if its capillaries are cauterized and its organs removed. Prior legal precedent and guidance by the Agencies acknowledge these truths. The Agencies' proposed WOTUS rule revision lacks a

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[53] *U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 134-135 (1985)) (citing 33 CFR § 320.4(b)(2)(vii) (1985); §§ 320.4(b)(2)(iv) and (v); and § 320.4(b)(2)(i). Nonadjacent wetlands perform similar, if not identical, functions as adjacent wetlands. *Riverside Bayview* did not preclude jurisdiction over nonadjacent wetlands. The Supreme Court considered the "significant nexus" to determine whether a jurisdictional connection exists between wetlands and navigable waters.

[54] *See Rapanos*, 547 U.S. at 729 ("In these consolidated cases, we consider whether four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditional navigable waters, constitute "waters of the United States" within the meaning of the Act").

[55] *See Rapanos*, 547 U.S. at 726 ("In *SWANCC*, we considered the application of the Corps' 'Migratory Bird Rule' to 'an abandoned sand and gravel pit in northern Illinois'"). *See also SWANCC*, 531 U.S. at 162 (The "Corps has interpreted § 404(a) to confer federal authority over an abandoned sand and gravel pit in northern Illinois which provides habitat for migratory birds. We are asked to decide whether the provisions of § 404(a) may be fairly extended to these waters, and, if so, whether Congress could exercise such authority consistent with the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3. We answer the first question in the negative and therefore do not reach the second").

[56] *See* 33 U.S.C. § 1251(a) (The objective of the chapter is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"). The fact that 33 states filed an amici brief in the *Rapanos* litigation in support of clean water policies demonstrates that the Agencies' federalism arguments lack merit. *See Rapanos*, 547 U.S. at 777 ("[A]mici note, among other things, that the Act protects downstream States from out-of-state pollution that they cannot themselves regulate") (Kennedy, J., concurring).

reasoned basis in scientific fact to justify the reversal of protection for waters with a "significant nexus" to navigable waters. The facts demonstrate that the proposed rule will affect aquatic habitat for treaty-reserved resources and ESA-listed salmonids, contrary to the Agencies' trust obligations. In light of the foregoing, the Agencies should retract their WOTUS rule revision. If the Agencies' rulemaking moves forward, then the Agencies should issue a supplemental notice of rulemaking relative to the impact of the proposed rule on treaty rights, and the period for public comment and tribal engagement should be extended, accordingly.

We look forward to opportunities for meaningful engagement, and consultation among sovereigns upon request by individual tribes, regarding this WOTUS rule revision. Meanwhile, please feel free to contact me, or Michael Martinez (mmartinez@nwifc.org) from my staff, with any comments or questions regarding this feedback, submitted in furtherance of the common federal and tribal interest in preservation of the trust natural resource assets reserved through treaties with the United States.

Sincerely,

Justin R. Parker
Executive Director

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

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EXECUTIVE DIRECTOR
Jacqueline Pata
Tlingit

NCAI HEADQUARTERS
1516 P Street, N.W.
Washington, DC 20005
202.466.7767
202.466.7797 fax
www.ncai.org

April 15, 2019

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

The Honorable R.D. James
Assistant Secretary of the Army of Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 20310-0108

Re: NCAI Comments in Response to Docket ID No. EPA-HQ-OW-2018-0149 – Proposed Revised Definition of "Waters of the United States"

Dear Administrator Wheeler and Assistant Secretary James:

On behalf of the National Congress of American Indians (NCAI), the oldest and largest national organization made up of American Indian and Alaska Native tribal nations and their citizens, I write to oppose finalization of the U.S. Environmental Protection Agency (EPA) and U.S. Army Corp of Engineers' (ACE) proposed rule revising the definition for the "Waters of the United States" under the Clean Water Act (CWA) (Revised Rule) and request that the comment period be extended 200 days. As discussed in detail below, extending the comment period is appropriate to allow for meaningful tribal consultation to address the substance of our comments herein.

Background and Overview

Water is vital to provide a sustainable homeland for tribal nations – and its quality is a critical concern for the health, security, welfare, self-governance, and existence of tribal nations on and off-reservation. Rivers, lakes, ponds, streams, and wetlands supply and cleanse drinking water; provide essential habitat and ecosystem services for fish and wildlife; enable physical flood protections for communities; and are vital to tribal spiritual and cultural practices.

The CWA, as the primary federal statute that regulates protection of the nation's water, recognizes the manifold[1] importance of water quality. It specifically prohibits "the discharge of any pollutant by any person," except in express circumstances.[2] A "discharge of a pollutant" includes "any addition of any pollutant to navigable waters from any point source," and the statutory term "navigable waters," in turn, means "the waters of the United States" (WOTUS).[3]

While WOTUS is undefined, the courts and agencies – most recently under the 2015 Clean Water Rule – have traditionally interpreted this term broadly in accordance with the CWA's goal of preventing, reducing, and eliminating pollution in order to

[1] 33 U.S. Code §1251(a)(2) (referencing fish, shellfish, wildlife, and recreation).
[2] Id. at §1311(a).
[3] Id. At §1362(12); §1362(7).

"restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[4]

The Revised Rule departs from this precedent, contravening the CWA's express recognition of the interconnectivity of water resources by narrowing the scope of protected waters. As explained below, this drastic change would unduly affect tribal nations and raise jurisdictional issues related to fulfillment of the federal trust responsibility, treaty compliance, and violations of reserved rights.

A. The United States Has a Duty to Safeguard Tribal Waters and Water-Dependent Resources

Federally recognized tribal nations have a unique legal and political relationship with the United States that is defined by the U.S. Constitution, history, treaties, statutes, and court decisions.

i. The Federal Government Has Fiduciary Obligations Towards Tribal Nations

The Constitution grants Congress plenary and exclusive authority to legislate on tribal affairs.[5] Supreme Court case law has long recognized that tribal nations are distinct political entities that pre-date the existence of the United States and that have retained inherent sovereignty over their lands and people since time immemorial.[6] Tribal nations' status has been described as domestic nations within a nation, and they are beneficiaries of a fiduciary relationship with the federal government.[7]

Unless expressly authorized by Congress, states have no jurisdiction over tribal matters. In exchange for ceding certain tribal resources, the United States obligated itself to act as a trustee for tribal rights, land and water resources, and assets. In fulfillment of this tribal trust relationship, the United States "charged itself with moral obligations of the highest responsibility and trust" toward tribal nations.[8] The EPA and ACE, as federal agencies, are obligated to fulfill this legally enforceable trust responsibility.

In recognition of the federal trust responsibility, Executive Order 13175 and agency policies require the EPA and ACE to engage in full and meaningful consultation regarding actions that may impact tribal nations.[9] Further, both EPA and ACE policy mandates consideration of tribal treaty rights in agency decision-making. Thus, "if a treaty reserves to tribes a right to fish in the water body, then

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[4] Id at §1251(a).
[5] *U.S. v. Lara*, 541 U.S. 193, 200 (2004)(explaining that "[t]his Court has traditionally identified the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, and the Treaty Clause, Art. II, § 2, cl. 2, as sources of that [plenary and exclusive] power.").
[6] *Worcester v. Georgia*, 31 U.S. 515 (1832).
[7] *Cherokee Nation v. Georgia*, 20 U.S. 1 (1831).
[8] *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).
[9] "ACE Tribal Consultation Policy and Related Documents" https://www.spk.usace.army.mil/Portals/12/documents/tribal_program/USACE%20Native%20American%20Policy%20brochure%202013.pdf; "1984 EPA Policy for the Administration of Environmental Programs on Indian Reservations" https://www.epa.gov/sites/production/files/2015-04/documents/indian-policy-84.pdf; "EPA Policy on Consultation and Coordination with Indian Tribes" https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf.

EPA should consult with tribes on treaty rights, since protecting fish may involve protection of water quality in the watershed."[10]

In addition to the trust responsibility, Executive Order 12898 mandates that federal agencies and EPA policy address the environmental justice impact of their actions. The EPA's implementing policy provides that tribal communities should have meaningful involvement in "the administrative review process, and any analysis conducted to evaluate environmental justice issues."[11]

1. Treaty Rights Could be Violated By Water Quality Degradation

Treaties between tribal nations and the United States establish contractual obligations and regulate political relations between sovereigns. The Supreme Court has held that treaties were "not a grant of rights to the Indians, but a grant of rights from them – a reservation of those [rights] not granted."[12] Under the Constitution, treaties, like statutes, are the "supreme law of the land."[13] Federal agencies are thus obligated to comply with treaties and to protect tribal resources pursuant to their trustee responsibilities.[14]

Treaties frequently include hunting, gathering, and fishing rights on and off-reservation and the Supreme Court has held that tribal nations possess aboriginal water rights that are necessary to exercise these reserved protections.[15] Use of a water dependent treaty right, such as a fishing right, or a hunting and gathering right, or other subsistence right, is integrally connected to water quality. Degradation of water quality which interferes or constructively prevents the exercise of such a treaty right may be subject to legal action for a treaty violation and breach of the federal government's fiduciary responsibilities.

2. Federally Reserved Rights May be Impaired by Diminished Water Quality

Indian federally reserved water rights exist when a reservation has been created whether by treaty, executive order, or through statute and can cover groundwater and perennial, ephemeral, and intermittent surface waters.[16] The priority date and quantity for these rights are affected by the purposes of the reservation, its date, and method of creation. Reserved water rights are protectable even when unquantified.[17]

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[10] "EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights" https://www.epa.gov/sites/production/files/201602/documents/tribal_treaty_rights_guidance_for_discussing_tribal_treaty_rights.pdf

[11] "Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples" https://www.epa.gov/sites/production/files/2017-10/documents/ej-indigenous-policy.pdf.

[12] *U.S. v. Winans*, 198 U.S. 371, 378 (1905).

[13] U.S. Const. art. VI, cl. 2.

[14] *Umatilla v. Alexander*, 440 F. Supp. 553 (D. Or. 1977); *N.W. Sea Foods, Inc. v. U.S. Army Corp of Eng'rs*, 931 F. Supp. 1515 (W.D. Wash. 1996); *Wash. v. Wash. State Comm. Passenger Fishing Vessel Assn*, 443 U.S. 658 (1979); *Menominee v. U.S.*, 391 U.S. 404 (1968).

[15] *Winans*, 198 U.S. 371 (holding that tribal water rights were necessarily and impliedly reserved by tribal nations in order to give effect to their treaty rights); *Wash. v. U.S.*, 138 S. Ct. 1832 (2018) (fishing rights include prevention of off-reservation degradation of salmon habitat); *U.S. v. Adair*, 723 F.2d 1394 (9th Cir. 1983); *Baley v. U.S.*, 134 Fed.Cl. 619 (2017).

[16] *Winters v. United States*, 207 U.S. 564, 577 (1908); *Adair*, 723 F.2d at 1414.

[17] *Winters*, 207 U.S. 564 (affirming injunction restraining appellants from diverting water away from Fort Belknap Indian Reservation based on the unquantified tribal reserved rights); *Kittitas Reclamation Dist. v. Sunnyside Valley Irr.*

While water rights are typically focused on quantity, degradation of water quality can impact the exercise of a federally reserved water right. In an Arizona case concerning a decades-old decree apportioning the Gila River, a federal court found that the San Carlos Apache Tribe had a right to natural flows from the Gila River because return flows were inferior due to degraded water.[18]

As shown below, the Revised Rule will reduce federal baseline protections for waterways affecting tribal communities. As a result, a company would not require a permit to discharge fracking waste into an ephemeral stream on forest service land that feeds into, or otherwise supplies water for domestic or agricultural use by downstream tribal nations. In such case, the domestic or agricultural use of a federally reserved water right would be obstructed and a tribal nation could have a legal cause of action for the resulting harm. Despite the likelihood of these harms, the Revised Rule contains no evaluation of the proposal's impact on fulfillment of the agencies' federal trust responsibilities and its intersection with legally enforceable federally reserved rights.

3. Tribal nations will be forced to protect their rights in biased state venues

In general, NCAI opposes any resulting delegation to states over important water resource regulations. The Revised Rule, as advertised, would leave states and tribal nations "free to manage [their waters] under their independent authorities."[19] However, tribal nations and states are often at odds on how best to manage shared resources, such as water. The broad sweeping reduction in federal protections for water features, such as wetlands, ephemeral streams, and other hydrologically connected resources will require tribal nations to seek protections under state laws that often do not adequately consider tribal interests.

Further, the federal government maintains a fiduciary duty to tribal nations to preserve and protect tribal lands, natural resources, and historic, sacred and cultural sites. These duties are enshrined in the Constitution, federal statutes, executive orders, treaties, Supreme Court precedents, and other law. State governments do not have this duty to tribal nations and, even if well-intentioned, do not have local statutes and regulations in place that are commensurate with federal statutes and regulations to provide strong protections for tribal interests. Put simply, the fiduciary duties owed tribal nations necessitate serious discussion and consideration of how tribal interests can be protected under any Revised Rule, but with particular attention to regions where tribal nations and states have historically fought over water resources.

B. Meaningful Consultation Should Occur on the Revised Rule and the Comment Period Should be Extended

i. Meaningful Consultation Has Not Occurred on the Revised Rule

Despite the significant ramifications of the Revised Rule, the EPA and ACE have not conducted meaningful consultation with tribal nations on its content, which was just released on February 14,

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Dist., 763 F.2d 1032, 1034–35 (9th Cir. 1985) (affirming district court's order requiring that water be released from a reservoir in order to preserve nests of salmon eggs based on unquantified tribal fishing rights); *Baley*, 134 Fed.Cl. 619.

[18] *U.S. v. Gila Valley Irrigation Dist.*, (Gila III), 920 F. Supp. 1444 (D. Ariz. 1996).

[19] 84 Fed. Reg. 4154.

2019. To date, some individual consultations and just four half-day discussions have occurred in Kansas City, Albuquerque, Seattle, and Atlanta on the Revised Rule.

The agencies largely claim to have satisfied their consultation obligations by having communicated with tribal nations about the *possibility* of revising the 2015 Clean Water Rule in a two-step process. The agencies' own summary of these "consultations" document that tribal nations expressed a series of substantive and procedural concerns, the latter of which relate to the non-disclosure of the proposed rule and the lack of scientific data on the impacts of reducing WOTUS coverage.[20]

The omission of such critical information is the antithesis of full and meaning consultation as required by the agencies' consultation policies. Further, agency policies require that they consult with tribal nations *before* taking action or implementing decisions that may impact them. Here, the agencies have not adequately consulted with tribal nations on the Revised Rule as documented by the neglect of Regions 9, 8, 5, 3, 2, and 1 after the release of the Revised Rule. In accordance with agency policy, full and meaningful consultation should occur with tribal nations prior to issuance of the final rule. Further, because full consultation has not occurred on the Revised Rule, NCAI's comment letter hereby incorporates by reference all tribal concerns that were raised in Step 1[21] and Step 2[22] of the proposed WOTUS revision process and requests that they be incorporated into the Revised Rule record and adequately addressed before issuance of a final rule.

ii. The 60-Day Comment Period Does Not Provide an Opportunity for Meaningful and Informed Public Comment

The comment period on the proposed Revised Rule should be extended to 200 days to enable meaningful consultation and careful analysis by affected tribal nations and communities. The 2015 Clean Water Rule received more than one million comments during its 200-day comment period and reflects the significant effect that re-defining WOTUS jurisdiction has on communities.

Further, an extension of the comment period is especially merited because of the non-disclosure of scientific data showing the impact of the Revised Rule on affected watersheds. A 60-day comment period is insufficient to allow for a thorough analysis of the proposed rule. Relatedly, tribal hearings should be held to gather input on this proposed rule which – as presently proposed – would have disparate impacts on tribal nations that rely on waters slated to lose jurisdictional protections. Lastly, the comment period should be extended, because as explained below, it is unclear whether it satisfies the requirement that the public have an opportunity for "meaningful and informed" comment on federal rulemaking.

C. The Proposed Rule Will Degrade The Water Quality of Tribal Communities

The Revised Rule would make the following subject to CWA protection: (1) Traditional Navigable Waters (TNWs), (2) some tributaries of TNWs, (3) some drainage channels ("ditches"), (4) lakes and

[20] "Summary Report of Tribal Consultation and Engagement for the Proposed Rule: Revised Definition of 'Waters of the United States' Proposed Rule." https://www.epa.gov/wotus-rule/tribal-consultation.
[21] Federal Register Docket: EPA-HQ-OW-2017-0203.
[22] Federal Register Docket: EPA-HQ-OW-2018-0149.

ponds that flow perennially or intermittently into categories (1) – (5); (5) impoundments of the above, and (6) wetlands directly adjacent to the above.[23]

Excluded from protection under the Revised Rule are: (1) all waters not expressly identified above; (2) groundwater, including water that is hydrologically interconnected with surface water; (3) ephemeral streams that flow after precipitation; and (4) non-navigable interstate waters.

i. Non-Disclosures of Environmental Effects May Violate the APA, NEPA, and ESA

Presently, the agencies have claimed that they lack adequate data to assess the impact of the Revised Rule on the nation's waterways.[24] The rushing of this rulemaking, without adequate scientific review, may constitute arbitrary and capricious conduct in violation of the Administrative Procedures Act (APA).[25] Relatedly, the scarcity of data raises APA concerns as the public lacks information necessary for submission of meaningful and informed comments.[26]

Moreover, the inadequate scientific review may violate the National Environmental Protection Act (NEPA) and the Endangered Species Act (ESA). NEPA requires federal agencies to prepare an Environmental Impact Statement (EIS) for all "major Federal actions significantly affecting the quality of the human environment."[27] While the CWA exempts the EPA from types of NEPA compliance, the ACE has no similar exemptions.[28]

The ESA requires federal agencies to engage in consultation with the Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") (the Services), as appropriate, to ensure that rulemaking does not jeopardize an endangered or threatened species or reduce critical habitats.[29]

As shown below, EPA's prior analysis illustrates that a reduction in WOTUS coverage would significantly affect human-, fish-, and wildlife-dependent waters, which would require the preparation of an EIS and an ESA consultation. Despite this impact, ACE did not complete an EIS and the Revised Rule contains no reference to NEPA and does not even explain whether a baseline Environmental Assessment was performed.[30] Likewise, neither the EPA nor the ACE engaged in an ESA consultation. It is unclear how the agencies can credibly assert they lack data to evaluate the impact of the Revised Rule but simultaneously determine their proposed action would have no significant effect on the human environment or endangered species.

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[23] 84 Fed. Reg. 4154.
[24] Id.
[25] *Motor Vehicle Mfrs. Ass'n of U.S., v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (holding that [a]n agency's view . . . may change. . . . But an agency changing its course must supply a reasoned analysis.").
[26] *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530-31 (D.C. Cir. 1981) ("An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary."), cert. denied, 495 U.S. 835 (1982); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 55 (D.C. Cir.) (proposed rule must provide sufficient information to permit informed "adversarial critique"), cert. denied, 434 U.S. 829 (1977).
[27] 42 U.S.C. § 4332(C).
[28] 33 U.S.C. § 1372(c)(1).
[29] 16 U.S.C. § 1536(a)(2).
[30] 84 Fed. Reg. 4154.

ii. Existing Data Shows the Revised Rule Will Reduce Environmental Protections for Watersheds

The agencies' assertions that they lack scientific data to assess the environmental impact of the Revised Rule is contradicted by their prior analysis. Agency records show that at least 18 percent of stream miles and 51 percent of wetlands nationwide would lose CWA protections if a narrower definition is adopted.

Similarly, agency data shows that within the arid West, an estimated 35 percent of streams will lose federal protection.[31] Likewise, the EPA's prior data shows that the drinking water of more than 117 million Americans could be imperiled because they receive water from public systems that draw supply from headwater, seasonal, or rain-dependent streams that are slated to lose jurisdictional coverage.[32]

Most waters flowing through or adjacent to tribal lands originates elsewhere and may be a mixture of ephemeral waters that hydrologically interconnect to perennial water. The reduction in federal protection for streams, wetlands, and ephemeral waters will significantly impact tribal communities. Wetlands are essential to a healthy watershed and provide pollution filtration, groundwater recharge, flood protection, and vital ecosystem services for fish and wildlife. Similarly, protection of upstream headwaters, particularly those supplied by ephemeral streams is a critical source of drinking water for downstream communities, provides needed water for agricultural uses, and provides critical habitat for fish and wildlife. Further, the Revised Rule's requirement that intermittent streams continuously flow during certain periods of a year may result in some intermittent waters being reclassified as non-protected ephemeral streams. To this point, such streams are even more vital in the arid West, home to many large land-based tribal nations, where drought impacts are more severe and where ephemeral streams are a critical component of the local water cycle. These identified impacts, based on prior agency data, illustrate that degradation of tribal waters will result from the Revised Rule to the detriment of tribal drinking water, agricultural water, cultural resources, and other tribal water-dependent resources such as fish and wildlife.

iii. The Revised Rule Harms Tribal Regulation of Water Resources

Tribal water resources are disproportionately impacted by the removal of a baseline standard for the nation's waters because tribal lands are more likely to abut other federal lands. The Revised Rule ignores this fact and instead cursorily states, as noted earlier, that waters will not lose environmental protection under the proposal because "States and Tribes are free to manage [their waters] under their independent authorities."[33] This sentence oversimplifies a jurisdictionally complex regulatory structure and does not address tribal treatment as a state authority under Section 518 of the CWA.

Tribal nations are authorized to receive a "treatment as a state" designation to implement sections of the CWA on their trust lands only for waters that constitute WOTUS. Tribal standards can go above

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[31] "GIS Geographic Information Systems Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams in the U.S." https://www.epa.gov/cwa-404/geographic-information-systems-analysis-surface-drinking-water-provided-intermittent; "Breakdown of Flow Regimes in NHD Streams Nationwide" https://www.eenews.net/assets/2018/12/11/document_gw_05.pdf
https://www.eenews.net/assets/2018/12/11/document_gw_05.pdf

[32] Id.

[33] 84 Fed. Reg. at 4169.

the federal baseline standard, but TAS cannot convey federal jurisdiction where it has otherwise been excluded. The process for receiving this designation and running a CWA program is administratively costly. While only a few tribal nations have implemented TAS for water quality standards, the EPA acknowledges that "at the present, no tribes administer the section 402 or 404 programs."[34]

Presently all tribal nations rely on the EPA to ensure compliance with applicable tribal or federal water quality standards prior to the issuance of a 402 or 404 permit. Narrowing the WOTUS definition cedes important jurisdictional coverage to states because the EPA can only approve a TAS designation for waters defined as WOTUS. Thus, fewer permits will be issued for pollutant discharges resulting in increased pollution to waterways and impairment and violation of tribal water quality standards because of the Revised Rule.

A tribal nation exercising its inherent sovereignty to regulate its waters could not substitute for the extensive protections and inter-governmental operating structure provided by TAS. Further, the extent to which a tribal nation can exercise its inherent regulatory authority to prevent off-reservation harm is jurisdictionally unclear. If the Revised Rule is implemented, a company could lawfully discharge mining waste into a previously protected isolated wetland that filters tribal drinking water without the need for federal approval. A tribal nation would be left with no clear legal recourse to protect its water resources since it would be required to assert jurisdiction over a non-tribal entity for off-reservation conduct that violates a tribal standard, but under a state law framework that has historically worked against tribal interests.

D. Conclusion

For the aforementioned reasons, NCAI cannot support the Revised Rule in its current form. All available data shows that the Revised Rule will overburden tribal nations and likely violate the federal trust responsibility, treaties, and impair the exercise of reserved water and water dependent rights. Accordingly, NCAI requests that any definitional change to WOTUS include a comprehensive evaluation of EPA and ACE's federal trust responsibility, impacts to treaty rights, reserved rights, and other trust resources including those of Alaska Native tribes and Alaska Native villages; and evaluate cumulative impacts to tribal jurisdiction, economies, tribal government(s) and environmental resources. Further, NCAI requests that prior to the issuance of a final rule, full and meaningful tribal consultation occur on the Revised Rule and that the comment period be extended 200 days to accomplish this requirement.

In closing, we thank you for your time and consideration, and please feel free to contact Fatima Abbas, NCAI Policy Counsel, at fabbas@ncai.org or (202) 466-7767, if you have any questions.

Sincerely,

Jefferson Keel
NCAI President

[34] 84 Fed. Reg. at 4157.