
From: Wyatt Golding <wgolding@ziontchestnut.com>
Sent: Friday, April 1, 2022 3:31 PM
To: CWAwotus; usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@mail.mil
Cc: Haley Kennard; Garbow.Avi@epa.gov; Hoffer, Melissa; Brian Gruber
Subject: Makah Tribe WOTUS Letter
Attachments: Makah Tribe WOTUS letter 4.1.22.pdf

Please find attached a letter from the Makah Tribe concerning the proposed WOTUS rule.

The Tribe respectfully requests that the letter be considered as part of the ongoing rulemaking and as part of government-to-government consultation.

Thank you,

Wyatt Golding

Attorney for the Makah Tribe



MAKAH TRIBAL COUNCIL

P.O. BOX 115 • NEAH BAY, WA 98357 • 360-645-2201

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Via online submission at <https://www.regulations.gov>

March 31, 2022

Environmental Protection Agency
Damaris Christensen
Oceans, Wetlands and Communities Division
Office of Water (4504-T)
1200 Pennsylvania Ave NW
Washington, DC 20460

Department of the Army
Stacey Jensen
Office of the Assistant Secretary of the Army for Civil Works
108 Army Pentagon
Washington, DC 20310-0104

Re: Environmental Protection Agency and Department of the Army
proposed rule revising definition of “Waters of the United States
Docket ID No. EPA-HQ-OW-2021-0602

Dear Mr. Christensen and Ms. Jensen,

The Makah Indian Tribe (“Tribe”) submits the following comments on the proposed rule defining the scope of waters protected under the Clean Water Act as published in the Federal Register Vol. 86, No. 232 on December 7, 2021.

The Tribe supports the Environmental Protection Agency’s and Department of the Army’s proposal to revert to the pre-2015 interpretation of “waters of the United States” (“WOTUS”). As explained in the attached letter dated September 30, 2021, the Tribe opposed changes to the regulatory definition imposed during the prior administration and supported revisiting those changes as directed by President Biden’s Executive Order 13990. The Tribe also supports the ongoing effort to create a protective, durable, and implementable WOTUS definition based on the best available science and consultation with Tribes, including the Makah.

The Tribe is based on the northwest corner of the Olympic Peninsula in Washington State, an area the Tribe has inhabited for thousands of years. The Tribe and its ancestors have always relied on fish and other resources harvested from marine and fresh waters for subsistence, ceremonial, and commercial purposes.

The Tribe is a signatory to the Treaty of Neah Bay in 1855, which, among other rights, reserves and guarantees the Tribe a perpetual right to catch fish. This right extends to a right to protection of habitat sufficient to support fisheries that sustain a moderate standard of living. *See United States v. Washington*, 853 F.3d 946 (9th Cir. 2017).

A protective WOTUS definition is necessary to provide functional habitat for salmon and other fish, and in turn to honor the Tribe's Treaty rights.

Restoring the pre-2015 rule is beneficial in several critical ways of specific relevance to the Tribe. First, given the frequent seasonal rain on the Olympic Peninsula and elsewhere in Washington State, seasonal and ephemeral streams and wetlands have great importance for water quality and fish habitat. The Tribe supports clear direction that all tributary streams and associated wetlands are within WOTUS, regardless of the amount of time they contain water. Rather than an arbitrary cutoff based on time with water versus without, which changes annually, the Tribe supports inclusion based on the presence of an identifiable channel (for seasonal streams) or boundary (for seasonal wetlands).

Second, off-channel and side-channel habitat is very important for salmon rearing and refuge during high flows. Like seasonal streams, these areas may be wet only for short periods of certain years, but are still critical to water quality and fish abundance. The Tribe supports clear inclusion of channels connected to streams and rivers within WOTUS.

Third, as correctly noted in the Federal Register, Clean Water Act section 311 and the Oil Pollution Act (OPA) of 1990 authorize the Oil Spill Liability Trust Fund (OSLTF) to reimburse costs of assessing and responding to oil spills to "waters of the United States" or adjoining shorelines. The Tribe's Reservation is located on the Pacific Ocean and Strait of Juan de Fuca, where there is major shipping traffic and resulting risk of spills. We appreciate clear direction that wetlands and other areas directly or indirectly connected to marine waters are included within the WOTUS definition.

We sincerely hope that the agencies will restore the 2015 rule as a first step,

and then move quickly to develop a revised rule that is protective and durable.

Thank you.

Sincerely yours,

Makah Tribal Council

A handwritten signature in blue ink, appearing to read "Timothy J. Greene, Sr.", written over a horizontal line.

Timothy J. Greene, Sr.
Chairman



MAKAH TRIBAL COUNCIL

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

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

September 30, 2021

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

Dear Assistant Administrator Fox and Assistant Secretary Pinkham:

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

- The 2020 WOTUS rule excludes waters that are crucial to salmonid species, many of which are protected under the Endangered Species Act in our region. Of particular concern was the exclusion of wetlands, pools, ephemeral streams, and ditches, as these provide vitally important seasonal habitat for salmonids at sensitive life stages¹. As climate change reduces water availability for salmon habitat, federal protections are of critical importance. The 2020 rule ignored the interaction of climate change impacts to seasonal water supply and reduced federal protections for salmon habitat. The 2020 WOTUS redefinition causes negative impacts to our salmon and their habitat, and therefore the exercise of Makah treaty rights.
- The 2020 WOTUS revision inappropriately delegated federal trust responsibilities to the state or local level, negatively impacting federal protections of our waters in abrogation of the federal trust responsibility.
- The process to develop the 2020 WOTUS rule did not provide adequate opportunity for or incorporate feedback shared during government-to-government consultation with tribal governments and was in direct conflict with the agencies' own tribal consultation policies and E.O. 13175. Tribes were provided a very short early notification period with limited information on the proposal available. A single nationwide "Tribal Co-Regulators"

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

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

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

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

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

Sincerely,



Timothy J. Greene Sr.
Chairman
Makah Tribal Council

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