**CONFEDERATED TRIBES OF**
**COOS, LOWER UMPQUA AND SIUSLAW INDIANS**
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May 8, 2017

Karen Gude
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code: 4101M
Washington, DC 20460

Comments submitted to: cwawotus@epa.gov & gude.karen@epa.gov

*Re: Consultation on EPA Proposal to Rescind and Replace "Waters of the U.S." Rule*

Dear Ms. Gude:

These comments are sent on behalf of the Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians (Tribe) regarding the consultation process for EPA's proposal to rescind and replace the current "Waters of the U.S." (WOTUS) rule under the Clean Water Act (CWA). While the Tribe appreciates your request for comments, the Tribe does not believe that solicitation of comment letters by itself satisfies the requirement for government-to-government consultation. Therefore, this letter should not be read as a waiver of the Tribe's right to a more complete and bilateral consultation process.

The Tribe is extremely concerned by this proposal. As admitted in the consultation letter sent to us, EPA "expects that the number of waters protected under the CWA will decrease compared both to current practice and the scope of the 2015 Clean Water Rule" if the WOTUS rule is rescinded. The Tribe is concerned that decreasing the number of rivers protected will in turn decrease both the quality of our environment and the ability of tribes to protect the health of their members.

Before discussing our substantive worries, however, it is important to note that the federal trust responsibility must permeate through EPA's decision making process here. The federal trust responsibility is triggered any time that the government is taking an action where tribal trust interests are at stake. The U.S. Supreme Court has stated that the trust responsibility requires "the most exacting fiduciary standard".[1] Agency decisions have been invalidated when that agency "fails to demonstrate an adequate recognition of [the] fiduciary duty".[2]

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[1] *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).
[2] *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252, 257 (D. D.C. 1972)

This duty does not merely involve a consideration of tribal interests, but instead requires agencies to act in the best interests of tribes.[3] The U.S. Claims Court has recognized water rights as a trust property, and therefore the government, as trustee, has a duty to protect this resource.[4] Moreover, in *United States v. Washington*, a federal district could held that tribes are entitled to protection of aquatic resources from anthropogenic harm.[5] While that case dealt with off-reservation fishing rights, the same logic could easily be applied to the water quality of those bodies within and connected to a reservation.

With this overarching trust responsibility in mind, the Tribe wishes to voice its concern that decreased protection will adversely impact the environment, including the streams and rivers used by tribal members for various uses. The Tribe holds many water-based plants, fish, and animals as culturally significant. Tribal people have subsisted on these plants and animals for millennia and continue to do so today. We cannot relinquish protections for them by abandoning protections for our streams and wetlands. With each piece of the ecosystem lost, we forever lose elements of our culture. The survival of these organisms is deeply intertwined with the survival of our identity as a people and must be taken into account when EPA is considering this proposal.

Streams and wetlands that are not permanently connected to navigable rivers also provide rearing habitat for our salmon and other fish species. Moreover, these natural systems act both as a filters to clean our water of pollutants and as recharge suppliers for our aquifers. It is the responsibility of EPA to provide protections to these important resources, to uphold its trust obligation, and work cohesively with the Tribe to protect our people and our way of life.

The current WOTUS rule has a strong foundation in science and public support. EPA analyzed 1,200 peer-reviewed studies in developing the rule, deciding which waters constituted navigable waters, interstate waters or territorial seas. EPA determined which waters comprised lakes, ponds, wetlands or other small bodies that could only be defined on a case-by-case basis. Hundreds of hearings were held and at least a million comments were submitted leading up to the final WOTUS rule.

EPA proposes to rescind and replace the current rule with a rule that in consistent with Justice Scalia's opinion in *Rapanos v. U.S.* Scalia's interpretation of the CWA in *Raponos* was completely new—he read the Act in a manner that no court, agency, or legislator had ever considered—and in so doing significantly curtailed the scope of EPA's definition of "waters of the United States" that had been in place for decades. His opinion is internally inconsistent. He concluded that intermittent streams were not covered by the Act, but also states that seasonal rivers are. Seasonal rivers are by definition intermittent. How can a river with a well-defined bed and bank (a geographic feature) that carries 15,000 cubic feet per second of flow (a torrent) for most of the year, only drying up during the summer season, not be a "relatively permanent body of water?" Such intermittent streams exist in many places in the West and constitute an important part of the Nation's hydrology. Despite this prevalence and importance, one can read

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[3] Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471, 1498-1505.

[4] *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 426 (1991), aff'd, 64 F.3d 677 (Fed. Cir. 1995).

[5] 506 F. Supp. 187, 203 (W.D. Wash. 1980), vacated in part by 759 F.2d 1353 (9th Cir. 1985).

Scalia's opinion to conclude that such water bodies are not protected by the CWA because Congress' use of the term "water" in the definition.

The Scalia opinion is also not based on science or meeting the Congressional purpose of the CWA, but is driven by considerations such as cost. His opinion contains several pages discussing how expensive and onerous the wetlands permitting procedures are. Nowhere in the CWA's "Declaration of Goals and Policy" or in its statutory mandate to the EPA is financial cost listed as an important consideration.[6]

Furthermore, if "waters of the U.S." are to be defined in a manner consistent with the opinion of Justice Scalia, the definition would also have to clarify the Justice's definition of "permanent" and "continuous." A wetland that continually floods annually and then dries up towards the end of every summer seems to be permanent because it predictably has standing water every season. The site contains soil composition and vegetation of wetlands -- these differ dramatically compared to other sites. Converting a wetland for developmental purposes is costly in the long term (i.e. foundation subsidence, flood insurance, etc.). In addition, wetlands are essential for the survival of migratory birds and aquatic life, including salmonid species (many of which are listed as threatened or endangered under the Endangered Species Act), as well as permanent residential wildlife. They also dissipate stream energy, store water and maintain surface water flow, filter sediments and contaminants, and store carbon.

Redefining the definition of "waters of the U.S." will also affect the implementation of Clean Water Act programs on Tribal lands and upstream of Tribal waters. Again, the number of waters protected under the Clean Water Act will likely decrease as a result of the rule, which will in turn diminish the number of water bodies that tribes have regulatory jurisdiction over. This would be a *de facto* reduction in tribal sovereignty and governmental powers. Water quality regulation has been described by EPA itself as a "core government function, whose exercise is critical to self-government".[7]

Moreover, federal courts have agreed with EPA and tribes that this exercise of jurisdiction involves "some direct effect on the political integrity, the economic security, or the health or welfare of the tribe", satisfying the second prong of the *Montana v. United States* test to allow for regulation of nonmember fee land within the reservation.[8] Federal courts have also held that tribes have the ability, via EPA enforcement, to compel upstream polluters to abide by their water quality standards.[9] These very rare exceptions to the rule that precludes tribes from exerting regulatory jurisdiction over nonmember fee land and extra-reservation activity is demonstrative of the government's understanding that a tribe's authority over water quality is "essential to its survival".[10] By narrowing the number of water bodies protected by the CWA, EPA would be narrowing tribes' sovereign rights to protect these vital resources.

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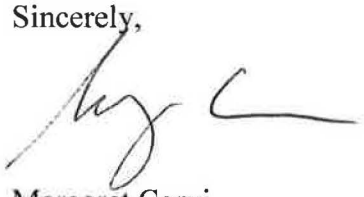
[6] 33 U.S.C.A. § 1251-1252(a).
[7] Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,876–01.
[8] *State of Mont. v. U.S. E.P.A.*, 941 F. Supp. 945, 958 (D. Mont. 1996), aff'd, 137 F.3d 1135, 1141 (9th Cir. 1998).
[9] *City of Albuquerque v. Browner*, 97 F.3d 415, 424 (10th Cir. 1996).
[10] *Wisconsin v. E.P.A.*, 266 F.3d 741, 750 (7th Cir. 2001).

In conclusion, water bodies should continue to be considered "waters of the U.S." even if they are not connected to relatively "permanent" water via a continuous surface connection. Wetlands and lakes are navigable to some degree and help to promote economic growth when they are free of pollutants. They also play an integral role in watersheds and provide invaluable ecosystem services. Limiting the number of water bodies covered under the CWA would degrade water quality in these newly unprotected water bodies and affect the health and economic vitality of surrounding communities. Tribes in the Pacific Northwest would be particularly affected, given the vast number of streams and wetlands found in the region. Protection for all of the waterbodies that do not have a surface connection, but do have a "significant nexus" to navigable waters, must continue.

Thank you for allowing the Tribe the opportunity to comment in this process. We formally request that EPA engage in a more complete and balanced government-to-government consultation process prior to taking any action resulting in either the rescission or replacement of the current WOTUS rule.

The Tribe appreciates your consideration of these comments.

Sincerely,



Margaret Corvi
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