



**PORT GAMBLE S'KLALLAM TRIBE**  
**NATURAL RESOURCES DEPARTMENT**  
31912 Little Boston Rd. NE – Kingston, WA 98346

June 20, 2017

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

SUBMITTED VIA EMAIL [cwawotus@epa.gov](mailto:cwawotus@epa.gov)  
[gude.karen@epa.gov](mailto:gude.karen@epa.gov)

**RE: Notice of Intent to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12532 (Mar. 6, 2017)**

Dear Ms. Gude:

Please accept this letter on behalf of Port Gamble S'Klallam Tribe in response to the invitation for tribal “consultation and coordination” with the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) on the above-referenced Notice, which contemplates a two-part rulemaking effort by these agencies. Port Gamble S'Klallam Tribe would like to note at the outset that EPA and the Corps have suggested that the “anticipated timeline for the consultation and coordination period is expected to extend from April 20, 2017, to June 20, 2017” and that, “[i]n addition, the coordination may extend through the end of the public comment on the second rulemaking.” However, Port Gamble S'Klallam Tribe takes issue with this crabbed understanding of the nature and scope of government-to-government consultation. It is inaccurate and inappropriate, given tribes’ sovereign status and given the relationship between the United States and federally recognized tribal nations. This letter should not be taken, therefore, to suggest that Port Gamble S'Klallam Tribe agrees with the EPA and the Corps on this understanding or waives its right to more robust consultation on this rulemaking effort.

Port Gamble S'Klallam Tribe is opposed to any rulemaking by EPA and the Corps that would decrease the reach of the Clean Water Act’s (CWA) protections by narrowing the definition of “waters of the United States (WOTUS).” If the definition of WOTUS is contracted by EPA and the Corps, this would adversely affect numerous CWA programs within and upstream of tribal waters and could undermine protections for the resources on which Port Gamble S'Klallam Tribe depends and to which it has treaty-secured rights, including rights to fish, hunt, and gather.



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The President's recent Executive Order (EO) directs EPA and the Corps to (1) rescind the 2015 Clean Water Rule and (2) propose a replacement rule that "considers" defining WOTUS "in a manner consistent with the opinion of Justice Scalia in *Rapanos*." Justice Scalia's definition, however, misunderstands the science. Justice Scalia, moreover, wrote only for a plurality of four justices. While Justice Kennedy supplied the fifth vote in support of the result in that case, he wrote a separate concurring opinion that took issue with most of Scalia's analysis, including on the two points elaborated below. As such, *Scalia's understanding on these points is not legally binding precedent*. Also, as Kennedy pointed out, Scalia's definition is at odds with earlier Supreme Court precedent, which had held that jurisdiction under the CWA should turn on whether there is a "significant nexus" with waters more traditionally recognized to be a "navigable water" within the meaning of the CWA. Kennedy would have retained this "significant nexus" test. So, while EPA and the Corps cite the EO's direction that they "consider[]" Scalia's definition, Port Gamble S'Klallam Tribe opposes any attempt to elevate this definition over what the science and the law require.

Specifically, Scalia's definition appears (1) to include only "relatively permanent, standing or flowing bodies of waters" – *but exclude* tributaries or streams with "occasional," "intermittent" 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."

Scalia's definition is at odds with current scientific understanding. The streams and wetlands that Scalia would exclude are often hydrologically connected to – and perform critical functions related to the integrity of – downstream and other waters. This science is amply documented in the EPA's "*Connectivity Report*" – a 400+-page, peer-reviewed report on the state of the science, published in 2015.<sup>ii</sup> As the *Connectivity Report* concluded, tributaries and streams are the dominant source of water to most rivers; individually or cumulatively, they exert a strong influence on the integrity of downstream waters.<sup>iii</sup> 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."<sup>iv</sup>

In the Pacific Northwest, Scalia's narrow understanding likely omits waters (including ditches, pools, intermittent streams, and tributaries) that are crucial to the survival of salmon and other fish. For example, scientific studies document the importance of intermittent streams to coho salmon at various points in their lifecycles.<sup>v</sup> Coho spawn in the upper reaches of stream networks, where intermittent streams are common; intermittent streams are vital to coho smolts; and residual pools in intermittent streams provide a habitat that allows juvenile coho to survive during dry periods. Scalia's narrow view also likely 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 so, the fishing tribes – depend. Scalia's hydrology is not the tribes' hydrology. Port Gamble S'Klallam Tribe understands 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.



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In the CWA, Congress had a holistic, functional understanding of what it would take to “restore and maintain the chemical, physical, and biological integrity” of the nation’s waters.<sup>vi</sup> EPA and the Corps should not hobble the ability of tribes and others to ensure the integrity and health of our aquatic ecosystems by placing some of these waters beyond the jurisdictional reach of the CWA. [inset Tribe] is strongly opposed to any action by EPA and the Corps to this end.

Sincerely,

Sam Phillips  
Environmental Scientist  
Port Gamble S'Klallam Tribe

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<sup>i</sup> *United States v. Rapanos*, 547 U.S. 715 (2006). Note that Justice Scalia wrote for only four justices; as such, this is a mere plurality opinion.

<sup>ii</sup> 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*].

<sup>iii</sup> *CONNECTIVITY REPORT*, at ES-2.

<sup>iv</sup> *CONNECTIVITY REPORT*, at ES-2 to 4.

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

<sup>vi</sup> 33. U.S.C. § 1251(a).