



EPA Region 10 RTOC
Regional Tribal Operations Committee

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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)

RE: Proposed Changes to Waters of the U.S. Rule

Dear Ms. Gude:

This letter is sent on behalf of the Tribal Caucus members of EPA Region 10's Tribal Operations Committee (RTOC). This letter is not sent on behalf of EPA Region 10 or any employees of EPA, but solely tribal government representatives of the RTOC. These comments are submitted on the proposal to rescind and replace the Waters of the U.S ("WOTUS") rule adopted pursuant to the Clean Water Act.

The Region 10 RTOC includes Tribes across Alaska, Washington, Idaho, and Oregon. Many of these Tribes have interest in implementing Clean Water Act programs. Clean water is essential to many Tribes, not just as a source of sustenance, but also for cultural, medicinal, and spiritual reasons. The ability of Tribes to control pollution and protect water quality is vital to the survival of Tribes. Almost no activity on the reservation has more potential for significantly affecting the economic and political integrity and the health and welfare of all reservation citizens than water use, quality, and regulation.

- **RTOC's Specific Comments**

While the RTOC is not a tribal government and these comments do not constitute any type of government-to-government consultation, the RTOC has identified the following issues that should be considered in the adoption of a final rule:

1. Trust Responsibility and Treaty-Reserved Rights.

The provided documents admit that if the WOTUS rule is rescinded “EPA expects that the number of waters protected under the Clean Water Act will decrease compared both to current practice and the scope of the 2015 Clean Water Rule.” The reduction of protection could adversely impact the environment, including the streams and rivers used by tribal members. Consistent with its trust obligations to Tribes and the protection of treaty-reserved resources, EPA must not take any actions that will adversely impact tribal resources.

Tribes in Region 10 utilize many culturally significant plants, fish, and animals that need to be taken into account when addressing EPA’s trust responsibilities and protection of our water. Tribal people have subsisted on these plants and animals for millennia, and continue to do so today. Tribes cannot lose protections for streams and wetlands, particularly when that loss will impact tribal resources.

It is the responsibility of EPA to provide protections to these important resources, to uphold its trust responsibilities, and work with tribal governments to protect tribal people and tribal ways of life.

2. Rule must be Grounded in Science.

In developing the current WOTUS rule, EPA analyzed 1,200 peer-reviewed studies in developing the rule, deciding which waters constituted navigable waters, interstate waters, or territorial seas. This effort was supported by hundreds of hearings and at least a million comments.

EPA must base any new rule on sound science designed to achieve the congressional goals of the Clean Water Act – making waters fishable and swimmable. Politics and economics should not drive any changes to the WOTUS rule.

3. Scalia Opinion is Confusing and Based on Economic Concerns.

EPA proposes to rescind and replace the current rule with a rule that is consistent with Justice Scalia's opinion in *Rapanos v. U.S.* Scalia’s interpretation of the CWA in *Rapanos* is confusing and 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 months in the spring and early summer, but dries up every summer, not be a “relatively permanent body of water?” Such intermittent streams exist in many places in the West, and they constitute an important part of the habitat for fish and wildlife.

The Scalia opinion is also driven by consider by considerations such as cost. The opinion contains several pages that discuss how expensive and onerous the wetlands permitting procedures are. The WOTUS rule must be driven by science and advance the congressional goals of the Clean Water Act.

4. Regional Specific Concerns

Any redraft of the WOTUS rule should consider regional standards that are necessary to protect certain designated uses. For example, salmon and steelhead in the Pacific Northwest and Alaska have certain requirements for temperature, toxics, and dissolved oxygen that warm water species in the Southwest lack. Moreover, many of these fisheries populations are subject to protection under the Endangered Species Act. Accordingly, the rulemaking must comply with the ESA by ensuring that agency consultation occurs to examine the impacts of the weakening of the WOTUS rule.

5. Consultation

The RTOC strongly believes that EPA must engage in meaningful consultation on a government-to-government basis with tribal governments to fully understand the impact of any rescission or redraft of the WOTUS rule on tribal communities and tribal resources. Webinars, comment letters, and phone calls are not consultation. EPA officials must meet face-to-face with tribal elected officials to comply with their obligations to consult. EPA should consider and provide responses to tribal leaders prior to taking any action.

To close, the RTOC strongly opposes efforts to rescind and replace the WOTUS rule. The RTOC appreciates your consideration of these comments.

Sincerely,



William (Billy) J. Maines
Region 10 RTOC, Tribal Caucus Co-chair

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