



EPA Region 10 RTOC
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U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Submitted via www.regulations.gov

RE: Definition of Waters of the United States - EPA-HQ-OW-2017-0480

Dear Madam or Sir:

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 United States Environmental Protection Agency ("EPA") and Department of Defense, Department of the Army, Corps of Engineers ("Corps") on the Definition of Waters of the United States - EPA-HQ-OW-2017-0480

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.

The RTOC previously provided comments in support of the 2015 Waters of the United States Rule ("WOTUS"). It is apparent the EPA received an overwhelming number of comments in support of the existing rule. Because the development of the WOTUS rule was based on the review of case studies from every region of the United States, it established the importance of smaller streams and wetlands with a significant nexus to navigable waters and the likely improvements to water quality throughout the U.S. as a result of the new regulatory structure.

The RTOC urges the EPA to reinstate the rule as promulgated. Countless hours of research and data analysis were conducted by the EPA and the Army Corps of Engineers prior to the promulgation of WOTUS. By expanding Clean Water Act coverage for contiguous headwater streams and wetlands, the federal government set forth in WOTUS clear new rules to significantly improve protections for water supplies.

The key to ensuring clean, safe and reliable water is protecting water sources – headwater streams, groundwater recharge and wetland filtration. Abandoning protections at the source will lead to disruptions in water supplies, loss of water quality, threats to human health, sacrifice of recreational opportunities and the economy that depends on them, including tribal resources.

The RTOC believes WOTUS is necessary to implement EPA's obligations under the Clean Water Act. The RTOC again urges you to retain this rule and ensure protection of water quality and the tribal resources.

- **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. EPA must follow the Administrative Procedures Act.**

Under the APA, EPA is required to “provide reasoned explanation” for its action, and “must show that there are good reasons” for withdrawing the rule and replacing it with the previous definition of “waters of the United States.”¹ EPA must also demonstrate that its action is a “permissible construction” of the CWA, i.e. that it is not “arbitrary, capricious, or manifestly contrary to the statute.”² EPA is also required to provide a “reasoned explanation” for “disregarding facts and circumstances that underlay or were engendered by” the rule.³ This proposal fails to meet these requirements.

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.

- 2. Trust Responsibility and Treaty-Reserved Rights.**

¹ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

² *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

³ *FCC v. Fox Television Stations, Inc.*, 556 U.S. at 516.

EPA has admitted 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.

Tribe 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 we continue to do so today. We cannot lose protections for our 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 us to protect our people and our way of life.

3. The Clean Water Act contemplates a Broad Definition of Waters of the U.S.

The objective of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” and the Act is a comprehensive water quality statute designed” to achieve that objective.⁴ Accordingly, Congress provided that the CWA to applies to all “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). The Conference Report accompanying the CWA indicates that Congress intended for the phrase “waters of the United States” to “be given the broadest possible constitutional interpretation.”⁵

Consistent with Congressional intent, the EPA (1973) and the Corps (1977) adopted regulations further defining “waters of the United States” for the purposes of the CWA to include broad categories of waters beyond those protected by traditional navigability tests.⁶ When the Corps adopted its definition of “waters of the United States” in 1977, it recognized that “[t]he regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on all waters that together form the entire aquatic system.”⁷ These regulations included, “Other waters are also used in a manner that makes them part of a chain or connection to the production, movement, and/or use of interstate commerce even though they are not interstate waters or part of a tributary system to navigable waters of the United States. The condition or quality of water in these other bodies of water will have an effect on interstate commerce.”⁸

This basic approach to broadly defining “waters of the United States” has been in place since the mid-1970s, and is consistent with the intent of Congress announced in 1972. This is well reflected in the current WOTUS rules

⁴ 3 U.S.C. § 1251(a).

⁵ S. Rep. No. 92-1236, p. 144 (1972).

⁶ 38 Fed. Reg. 10834 (1973); 42 Fed. Reg. 37122 (1977).

⁷ 42 Fed. Reg. 37128.

⁸ 42 Fed. Reg. 37127-37128.

4. 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 Nation's hydrology.

The Scalia opinion is also driven by considerations such as cost. The opinion contains several pages to a discussion of 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.

5. Regional Specific Concerns

Any redraft of the WOTUS rule must 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 -- EPA must conduct ESA consultation and complete an EIS under NEPA to properly assess the impact of any rule change.

6. Consultation

The RTOC strongly believes that EPA must engage in 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.

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

Sincerely,



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