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Mr. Michael McDavit, Office of Water
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

**RE: Comments on Definition of Waters of the United States — Recodification of
Preexisting Rule, Docket ID No. EPA-HQ-OW-2017-0203**

Dear Mr. McDavit;

This letter is sent on behalf of the Tribal Caucus members of EPA Region 10's Tribal Operations Committee (RTOC). The Region 10 RTOC includes Tribes across Alaska, Washington, Idaho, and Oregon. 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 in response to the request for public comment regarding "Definition of 'Waters of the United States,'" Docket No. EPA-HQ-OW-2017-0203.

RTOC opposes the proposed rule. By claiming that the decision "does not have tribal implications," tribal representatives are not permitted to participate on par with others who are drafting the legal definition of water.¹ In fact, tribal water rights proceed the Clean Water Act.² Clean water is essential to many Tribes, not just as a source of sustenance, but is also cultural, medicinal, and spiritual. 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. Furthermore, clean water is necessary to fulfill the purpose of the reservations.³ Where the agencies have procedural authority to control the terms of debate, agencies ought to include tribal leaders as a matter of course when making decisions about water. RTOC is concerned about being excluded because RTOC considers tribal water rights as being essential for "restor[ing] and maintain[g] the

¹ *Definition of 'Waters of the United States'—Recodification of Preexisting Rule*, 83 Fed. Reg. 32227, 32251 (proposed July 12, 2018) (to be codified at 33 C.F.R. pt. 328).

² See *Winters v. United States*, 207 U.S. 564, 574, 28 S. Ct. 207, 210 (1908); (Establishing tribal water rights).

³ *Id.* at 577 ("The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied.").

chemical, physical, and biological integrity of the Nation's waters.”⁴

In addition to the exclusion of tribal participation, RTOC opposes limiting the hydrologic cycle. The 2015 rule explains why a holistic and regional understanding of water is necessary.⁵ Take vernal pools that exist in the west: “[n]on-glaciated vernal pools in western states are reservoirs of biodiversity and can be connected genetically and can be connected genetically to other locations and aquatic habitats through wind and animal mediated dispersal.”⁶ Such intermittent waters exist in many places in the West, and they constitute habitat for fish and other wildlife. Consider a river with a well-defined bed and bank that carries 15,000 cubic feet per second of flow for months but dries up every summer. Like the vernal pool, an intermittent stream does not flow all the time but may be a key component of healthy habitat. RTOC finds that the definition of water needs to recognize the role that intermittent water has upon the ecosystem generally.

In addition, the proposed rule must consider overlapping jurisdictions when evaluating the definition of water. The proposed rule cites Supreme Court case *Rapanos* which excludes “channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”⁷ In streamlining the definition of water, *Rapanos* may create administrative ease, but the concern is that less regulation will eventually leave the Tribes without clean water. In his dissent Justice Stevens cites the Los Angeles River, which “ordinarily carries only a trickle of water and often looks more like a dry roadway than a river.”⁸ Such depleted waters should not be dismissed as a lost cause. As clean waters become depleted, the *Rapanos* decision may omit failing sources of water, whereas the 2015 rule advocates for protecting damaged waterways that are important for communities today.

RTOC supports preventative regulations that curb environmental consequences in the future. Private owners of land are likely to resist regulation, but this can lead to dangerous mistakes. Recently a private landowner in Asotin, Washington installed a dam on the stream on his property and harmed endangered steelhead.⁹ Such private land decisions may have tribal implications where steelhead are less abundant in the Grande Ronde River. RTOC is concerned that a hasty placeholder rule from 1986 and 1988 will result in destroyed habitat as was the case in Asotin. Even if the older rules are streamlined for efficiency, substantial scientific work has been completed since the late eighties and such relevant science ought to be included.

In contrast to *Rapanos*, in *Riverside Bayview Homes* the Supreme Court stated that the regulation of water cannot depend on “artificial lines” and that “[w]ater moves in hydrologic

⁴ Clean Water Act (CWA), 33 U.S.C. § 1251(a).

⁵ See *U.S. v. Riverside Bayview Homes, Inc.*, 106 S.Ct. 455, 463, 474 U.S. 121, 133–34 (1985).

⁶ *Clean Water Rule: Definition of “Waters of the United States,”* 80 Fed. Reg. 37054, 37072 (proposed July 29, 2015).

⁷ *Id.*, 126 S.Ct. at 2225, 547 U.S. at 739.

⁸ *Rapanos v. U.S.*, 126 S.Ct. 2208, 2242, 547 U.S. 715, 769 (2006).

⁹ DEP’T OF ECOLOGY STATE OF WASHINGTON, 17-11-008, BONASA BREAKS RANCH DAM, DAM FAILURE AND HYDROLOGIC REPORT (2017).

cycles.”¹⁰ This is to say that ecological borders may extend past political boundaries or artificially narrow definitions. Those who are reconsidering legal definition of water should consult with the Tribes to understand what quality of water is needed protect certain designated uses. For example, salmon and steelhead in the Pacific Northwest and Alaska have certain requirement for temperature, toxics, and dissolved oxygen that warm water species in the Southwest lack.¹¹ Take the coho salmon for example—intermittent streams are ideal habitat for coho smolts.¹² Moreover, many of these fish populations are subject to protection under the Endangered Species Act. Accordingly, the definition of water must comply by acknowledging the tremendous impact of the proposed rule on culturally significant fish and other wildlife.

The EPA has been asked to reconsider the definition of water, but this is not a mandate.¹³ Certainly the Tribes can impose water codes on the reservation, but this does not account for the hydrologic cycle that connects tribal lands with waters under agency regulation. The RTOC encourages EPA to engage with tribes in Region 10 in government-to-government consultation to further understand the significance of this proposal. 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. The proposed rule defines policy as “something worked toward or aspired to”—tribal representatives ought to be a part of this effort.¹⁴

We appreciate your consideration of these comments.

Sincerely,



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

¹⁰ *U.S. v. Riverside Bayview Homes, Inc.*, 106 S.Ct. 455, 463, 474 U.S. 121, 133–34 (1985); See *Rapanos v. U.S.*, 126 S.Ct. 2208, 2212, 547 U.S. 715, 716 (2006) (*Riverside* mentioned in dicta but not overturned).

¹¹ See Lola Flores, et al., *The Value of Natural Capital in the Columbia River Basin: A Comprehensive Analysis*, EARTH ECONOMICS 4, 26 (2017); 33 U.S.C. § 1251(a)(2) (“[I]t is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983.”).

¹² P.J. Wigington Jr. et al., *Coho Salmon Dependence on Intermittent Streams* 4 ECOLOGY AND THE ENVIRONMENT 513, 513-18 (2006).

¹³ Exec. Order No. 13778, 82 Fed Reg. (Feb. 28, 2017); See (“In connection with the proposed rule described in section 2(a) of this order, the Administrator and the Assistant Secretary shall consider interpreting the term “navigable waters.”)

¹⁴ *Definition of ‘Waters of the United States’* at 32233.