

Region 10 EPA Tribal Consortium (RTOC)
2206 W. Sherman St. Spokane, WA 99203
Phone: (509) 251-1424
policy.analyst@region10rtoc.net
www.region10rtoc.net



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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

**SENT VIA EMAIL (OW-Docket@epa.gov; wotus-outreach@epa.gov;
CWAwotus@epa.gov; gude.karen@epa.gov; kwok.rose@epa.gov)**

RE: Comments on Docket ID No. EPA-HQ-OW-2018-0149 (Waters of the U.S. Proposal)

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. This letter provides comments on Docket ID No. EPA-HQ-OW-2018-0149 (Waters of the U.S. Proposal).

EPA Region 10 includes Tribes across Alaska, Washington, Idaho, and Oregon. 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.**

EPA documents provided early in the rulemaking admit that if the WOTUS rule is rescinded “EPA expects that the number of waters protected under the Clean Water Act will decrease compared both to current practice and the scope of the 2015 Clean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.

EPA has indicated to the RTOC that there are no maps or other information that indicate how this rule will impact tribal waters or tribal resources. Moreover, there is insufficient information about the impact of this rule on tribal treaty-reserved rights including fishing rights that may be impacted by adverse changes to water quality resulting from the lessening of protections.

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.

EPA also assumes that any loss of protection to waters can be addressed by Tribes exercising their inherent sovereignty. However, this ignores that Tribes are often unable to enact tribal water protection laws because: (1) financial resources are extremely limited and/or (2) jurisdictional challenges limit the ability of Tribes to enact such laws because of legal threats to the Tribe’s sovereignty or reservation boundaries by hostile state or local governments. Federal protection is essential to ensure that all waters of the U.S. are protected – it is not sufficient to “punt” responsibility to Tribes or other governmental entities.

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.

2. Rule must be Grounded in Science.

In developing the previous 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. The current proposal fails to properly analyze the impacts to streams and waterways and lacks any credible science that demonstrate that it meets the requirements of the Clean Water Act.

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

EPA proposal appears to adopt Justice Scalia's opinion in *Rapanos v. U.S.* However, 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.

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. It does not appear that this proposal has complied with ESA requirements.

5. Cultural Resource Protection

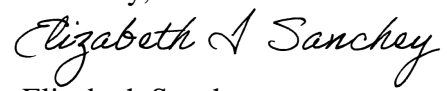
By removing federal protection for a significant number of waters, EPA is also removing cultural resource protections under the National Historic Preservation Act that would be applicable to federal actions, such as the issuance of Clean Water Act § 404 permits. The rule and its supporting documents fail to adequately consider how the removal of federal protections will impact cultural resources, which are often within riparian areas or, even within, waterways (such as historic fishing weir sites). Moreover, limiting the scope of WOTUS has a corresponding limitation on the applicability of the National Environmental Policy Act – which will result in significantly less consideration of environmental impacts associated with projects within a waterway or in adjacent riparian areas.

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 the proposed 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 the proposed WOTUS rule. The RTOC appreciates your consideration of these comments.

Sincerely,

A handwritten signature in cursive script that reads "Elizabeth A. Sanchey".

Elizabeth Sanchey
Region 10 RTOC, Tribal Caucus Co-chair