



December 13, 2017

RE: Comments from the National Tribal Water Council on the EPA and the Army Corp's Proposal to Amend the Effective Date of the 2015 Rule Defining "Waters of the United States"

On behalf of the National Tribal Water Council (NTWC), I write to provide the U.S. Environmental Protection Agency (EPA) with comments regarding Docket ID No. EPA-HQ-OW-2017-0644, a proposal to revise the applicability date of the 2015 Clean Water Rule to two years after the current final action.

The NTWC opposes the EPA's and the Department of the Army, Corps of Engineers' (together "the Agencies") proposal, published in the Federal Register on November 22, 2017, to add an applicability date of two years to the 2015 Clean Water Rule (currently not in effect, due to a stay) because the new proposed applicability date will not accomplish the goals that the Agencies seek, and will instead unnecessarily exacerbate confusion and uncertainty regarding the implementation of the definition of "Waters of the U.S." (WOTUS) rule, especially for WOTUS and other waters on tribal lands.

On June 6, 2017, the NTWC provided comments to EPA opposing the more recent proposed rulemaking mandated by a February 28, 2017 executive order, which would recodify the previous definition of WOTUS that would effectively rescind the 2015 Clean Water Rule. The NTWC stated therein that the Agencies' proposal to reinstate the regulatory definition consistent with the 2001/2003 SWANCC and 2007/2008 Rapanos decisions, will not provide clarity and predictability to the regulated community and public, but will instead provide legal gray areas where the courts will need to decide on a case-by-case basis whether the Clean Water Act applies.

On October 11, 2017, the Supreme Court heard arguments in a case brought by the National Association of Manufacturers to determine if the Sixth Circuit Court of Appeals has original jurisdiction over challenges to the 2015 Clean Water Rule. Though the 2015 Clean Water Rule became effective on August 28, 2015, it is currently stayed nationwide as a result of an order issued shortly thereafter, on October 9, 2015, by the Sixth Circuit Court of Appeals. Purportedly due to potential uncertainty, confusion, and inconsistency that could result from the Supreme Court's resolution of this question, the Agencies are proposing the addition of an applicability date to the 2015 Rule such that it will not be implemented until two years from the date of final action (published in the Federal Register).

The NTWC opposes the above applicability date proposal for the following reasons: 1) this proposal appears to be a preemptive counter action to the potential Court decision; 2) the Agencies have already proposed to reinstate the pre-2015 definition of WOTUS, which would make this proposal superfluous; 3) extension of the applicability date will not create certainty, consistency or reduce confusion in the event the nationwide stay is lifted – in fact, just the opposite will be true because the 2015 Clean Water Rule will be the operative regulation, but the Agencies would not enforce it and it is unclear which definition of WOTUS would control decision making; 4) the Agencies stated goal to rescind and replace the 2015 Clean Water Rule will likely take years, despite the effort to act quickly.

The NTWC believes that the Agencies' proposal to extend the applicability date for the 2015 Clean Water Rule, in anticipation of lifting of the national stay, court uncertainties, and efforts to rescind the rule, will provide less regulatory certainty about the definition of "waters of the United States". This uncertainty will be detrimental to the regulation and protection of all waters on tribal lands; thereby inhibiting the Agencies' ability to uphold Federal Trust Responsibility to protect treaty rights and tribal trust resources. Fifty-four (54) federally recognized tribes have "treatment as states" (TAS) status under the Clean Water Act to implement water quality standards and 401 certifications, and thus are the first line of regulators for WOTUS on tribal lands. The Agencies have the jurisdiction to enforce, implement, and regulate WOTUS on tribal lands for the remaining tribes. With delayed applicability of the 2015 Clean Water Rule, the uncertainty lies in which definition of WOTUS would either the TAS tribes or the Agencies apply to regulate and protect the WOTUS on tribal lands, and under which rules. WOTUS on tribal lands serve critical functions for tribal communities, including for domestic drinking water, subsistence, agriculture, recreation, treaty resources, and economic development, among other things, and this level of uncertainty is untenable.

WOTUS on Indian lands consists of fifteen percent of the wetlands and streams across the United States. These water bodies serve critical functions. Notably, a majority of tribal rural drinking water systems draw their water supplies from headwater, seasonal, or rain-dependent streams.

The NTWC appreciates the opportunity to provide our comments on the Agencies' proposal to extend the effective date of the 2015 Clean Water Rule. We look forward to continuing to work in partnership with the Office of Water to provide input on defining "Waters of the United States" as it evolves over the next two-years.

Sincerely,

A handwritten signature in black ink that reads "Ken Norton". The signature is written in a cursive, flowing style.

Ken Norton, Chairman
National Tribal Water Council