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Submitted via <https://www.regulations.gov> and emailed to OW-Docket@epa.gov

Re: National Tribal Water Council's Comments on Proposed WOTUS Rule 1, Docket ID No. EPA-HQ-OW- 2021-0602 – Updated Letter

The National Tribal Water Council (NTWC) submits the following comments on the Proposed Revised Definition of “Waters of the United States” (WOTUS) issued by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (together, Agencies). 86 Fed. Reg. 69372 (December 7, 2021).

Background

NTWC was formed by EPA to provide EPA and other federal entities with technical input from Indian Country to strengthen their coordination with tribes, and to allow them to better understand issues and challenges faced by tribal governments and Alaska Native Villages (referred to collectively in these comments as tribes) as they relate to EPA and other federal agency water initiatives.

Since 2007, NTWC has provided input and recommendations regarding the appropriate scope of the term WOTUS. In 2008, for example, NTWC submitted comments on the Agencies' *Rapanos* guidance, which provided direction on how to implement Justice Kennedy's significant nexus standard.¹ More recently, in 2019, NTWC submitted comments on the Agencies' proposed

¹ Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States &*



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revised definition of WOTUS in the Navigable Waters Protection Rule (NWPR). Among other things, NTWC highlighted the importance of water to tribal nations and federal obligations to protect it. NTWC also pointed out that the proposed NWPR would significantly diminish Clean Water Act (CWA) protection of tribal waters and argued that the Agencies improperly failed to consider the impacts of the proposal on tribal waters. Unfortunately, the final NWPR, 85 Fed. Reg. 22,250 (April 21, 2020), reflected little of the input received from NTWC, tribes, and many states.

NTWC appreciates the significantly greater opportunities for comment and consultation that the Agencies have provided in the current rulemaking. Most recently, on October 1, 2021, NTWC provided input in response to the Agencies' request for early feedback on the Agencies' plans for the current WOTUS rulemaking, and NTWC looks forward to the additional opportunities to provide feedback that have already been scheduled. We hope that the Agencies will give meaningful consideration to the comments and recommendations that we provide.

I. NTWC Supports Replacement of the NWPR

NTWC agrees with the Agencies that the NWPR “diminish[ed] the appropriate role of science and Congress’s objective in the Clean Water Act,” as stated in the proposed rule, 86 Fed. Reg. at 69373. *See also Pascua Yaqui v. EPA*, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021), at *5; *Navajo Nation v. EPA*, 2021 WL 4430466 (D.N.M. Sept. 27, 2021), at *3 (both vacating the NWPR). We also agree that the “reduction in the scope of protected waters” in the NWPR not only could, but did, “have a potentially extensive and adverse impact on the nation’s waters,” 86 Fed. Reg. at 69373. Indeed, the court in *Navajo Nation* held that “[t]he Agencies’ own findings thus demonstrate that ‘allowing the Rule to remain in place’ upon remand ‘would set back achievement of the environmental protection required by the CWA,’ thus presenting a very real possibility of serious environmental harm.” *Navajo Nation*, at *3; *see also Pascua Yaqui* at *5.

Tribes in general do not have the resources to regulate discharges to their waters, as many tribes explained in their comments on the proposed NWPR and as the Agencies recognize, *see* 86 Fed. Reg. at 69415 (“tribes overwhelmingly indicated that they lack the independent resources and expertise to protect their water and therefore rely on Clean Water Act protections”). As a result, the reduced water quality protections afforded under the NWPR were all the more harmful to tribal waters. At the same time, tribes place greater significance on protecting and maintaining water quality than the general population. *See* NTWC’s March 29, 2019 Comments on Proposed Revised Definition of “Waters of the United States” (2019 Comments) at 2 (incorporated by reference here, to avoid repetition). Tribes also rely on water and water-dependent resources for cultural and traditional purposes, in addition to other purposes shared by the general public. Moreover, many tribal lands are in arid areas where ephemeral streams predominate, and the NWPR had a disproportionate adverse effect on these water resources, *see* 86 Fed. Reg. at 69414; *see also Pascua Yaqui*, at *5; *Navajo Nation*, at *3 (both quoting Agencies’ statement that the reduction in jurisdiction under the NWPR has “been particularly significant in arid states.”).

II. NTWC Supports Using a Significant Nexus Analysis to Define a WOTUS

Carabell v. United States (Dec. 2, 2008), https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf

Pursuant to *Rapanos v. United States*, 547 U.S. 715, 780, 787 (2006) (Kennedy, J., concurring in judgment), the Agencies are required to use a significant nexus analysis to determine whether a water body is a WOTUS and so is protected under the CWA. *See* 86 Fed. Reg. at 69380. That standard was agreed to by a majority of the *Rapanos* Justices, and so it is binding. *See, e.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 17 (1983) (when five or more Justices in a fractured case agree on a point of law, the position becomes binding even if given in concurring or dissenting opinions).

The significant nexus test not only is legally required but also, as demonstrated by the scientific record, it carries out the purpose of the CWA, which is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” CWA § 101(a), 33 U.S.C. § 1251(a). The Agencies found that “extensive scientific evidence demonstrat[ed] the interconnectedness of waters and their downstream effects,” 86 Fed. Reg. at 69382, which the significant nexus test recognizes. EPA’s 2015 report, “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence” (Science Report),² provided this scientific evidence. It “was prepared after years of effort and an exhaustive scientific literature review.” Science Report at xii-xviii, ES-6. Moreover, “additional published peer-reviewed scientific literature has strengthened and supplemented the report’s conclusions.” *Id.* at 69390; Technical Support Document § II.C.vi, at 89 (“It is evident that the conclusions of the Science Report have been bolstered by scientific advances published since 2014.”). Scientific support for the proposed rule, while not the only criterion, should be one of the most important factors that the Agencies consider, especially when considered together with their obligation to carry out the purpose of the CWA, which relies entirely on science. *See also* Exec. Order 13990, 86 Fed. Reg. 7037 (Jan. 25, 2021) (directing federal agencies to “listen to the science”).

The science makes clear the importance of ephemeral streams and upstream waters, including upstream tributaries and adjacent wetlands, to overall water quality. The case-by-case analysis which would take place under the significant nexus test also allows for regional differences to be accounted for, such as the prevalence of ephemeral waters in the arid west and southwest where many tribal lands are located, and the functions those waters serve in those watersheds. Examples from the Hoopa Valley Indian Reservation, Pyramid Lake Paiute Tribe Indian Reservation, and Ute Mountain Ute Tribe Reservation were provided in NTWC’s 2019 Comments at 7-14, and are incorporated by reference here. Navajo Nation waters provide an additional example. An individual river or stream on the Navajo Nation, such as the Little Colorado River (a major tributary to the Colorado River), may have perennial, intermittent, and ephemeral segments of flow within the same water body, and all of these segments are chemically, physically, and biologically connected and have significant water quality impacts on downstream waters. In fact, ephemeral and intermittent streams make up over 81% of all streams in the arid and semi-arid Southwest, where many tribes are located, according to the U.S. Geological Survey National Hydrography Dataset, and these streams are “often the headwaters or major tributaries of perennial streams.”³

² Available at <https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414>.

³ *The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest*, EPA (Nov. 2008), https://www.epa.gov/sites/production/files/2015-03/documents/ephemeral_streams_report_final_508-kepner.pdf, at iii.

Relying on science also is consistent with the Supreme Court’s decision in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), in which the Court recognized the connectivity of different water bodies, including through subsurface groundwater flow. *See also, e.g., id.* at 1470 (“Virtually all water, polluted or not, eventually makes its way to navigable water.”). The case confirms the need for certain decisions to be made on a case-by-case basis, depending on the specifics of the particular situation. *Id.* at 1476-77.

Further, reliance on science and the scientific record is required to protect tribal rights to their waters and other resources and honor federal obligations regarding them, such as treaty and other reserved rights and federal government trust obligations. As explained in our 2019 Comments at 3-6, the United States has a general trust responsibility to protect tribal lands, assets, and resources, and these include the water that flows over and through tribal lands and the natural resources that depend on that water. *See, e.g., Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (the seminal case on the federal trust responsibility).⁴ The United States also has specific treaty obligations to protect tribal treaty rights that are dependent on water, including treaty rights to fish, hunt, and gather, as well as the attendant water rights necessary to protect the habitat supporting these treaty rights. *See* NTWC 2019 Comments at 2 and citations included therein (incorporated here by reference). In this regard, tribal waters include not only waters within the exterior boundaries of reservations but also waters within the exterior boundary rights for hunting, gathering, and fishing that are included with the traditional territories of tribes in Alaska in the protection of subsistence rights granted in the Alaska Native Land Claims Act. Additionally, federal reserved water rights attach when a reservation is established for the benefit of an Indian tribe. *United States v. Winters*, 207 U.S. 564 (1908). Typically, waters that are appurtenant or adjacent to the reservation are the sources of water that satisfy these reserved water rights, and these are trust assets requiring federal protection. *See* NTWC 2019 Comments at 4-5 for further discussion and supporting references (incorporated by reference herein). The science supports the importance of these resources.

The significant nexus test, through its case-by-case analysis, also provides an opportunity for the Agencies to consider the effects of climate change on a regional level, as required by Executive Order 13990, *see* 86 Fed. Reg. at 69382. For example, Nevada and other arid southwest states are experiencing extreme weather patterns as a result of climate change. Extended periods of drought, decreases in mountain snowpacks, low soil moisture, and higher temperatures have contributed to lower lake and reservoir levels and lower flows in rivers, streams, springs, and wetlands. On the Pyramid Lake Indian Reservation, streams that were once perennial are becoming intermittent. Intermittent streams in turn are becoming ephemeral, and wetlands and springs are drying out. Climate change is literally changing the classification of waters.

Finally, any decision to narrow the scope of the WOTUS definition, for example by using only the relatively permanent standard and not the full significant nexus standard, would have to consider the environmental justice impacts from such a decision. This consideration also was mandated by Exec. Order 13990, *see* 86 Fed. Reg. at 69382. Since tribal governments rely to a much greater extent than states on EPA’s water pollution prevention programs to maintain and protect water quality on tribal lands, any narrowing of federal government jurisdiction would have

⁴ *See* NTWC 2019 Comments at 3 n. 1 for various federal statements regarding the trust responsibility.

a disproportionate impact on tribes. See NTWC 2019 Comments at 5-6, 19-21 for further discussion and supporting references (incorporated by reference here).

III. NTWC Comments on the Proposed Formulation of the Significant Nexus Test

The proposed rule provides for four categories of waters that would automatically be considered as WOTUS: (a)(1), traditionally navigable waters; (a)(2), interstate waters; (a)(6), the territorial seas; and (a)(4), impoundments of waters in the first three categories. For waters in the three other categories, that is, for “other waters” such as intrastate waters, (a)(3); tributaries of the four automatic categories, (a)(5); and wetlands adjacent to the first three automatic categories but not to impoundments, (a)(7), the Agencies propose that a water is a WOTUS if it meets either a “relatively permanent” standard or a significant nexus standard.

A. The Relatively Permanent Standard

The relatively permanent standard comes from Justice Scalia’s formulation in *Rapanos* of the test for a WOTUS. The standard used on its own was rejected as unreasonable by a majority of the Supreme Court Justices in *Rapanos*. It was found to be “inconsistent with the Act’s text, structure, and purpose,” *Rapanos*, at 776 (Kennedy, J., concurring in judgment), and, similarly, “without support in the language and purposes of the Act or in our cases interpreting it,” *id.* at 768 (Kennedy, J., concurring in judgment); *id.* at 800 (Stevens, J., dissenting). Multiple courts of appeals have found that it does not define the full scope of WOTUS.⁵ See also 86 Fed. Reg. at 69397 (“the relatively permanent standard is insufficient as the sole standard for geographic jurisdiction under the Clean Water Act as it is inconsistent with the Act’s text and objective and runs counter to the science”).

However, when used in the alternative, as the Agencies have proposed, the relatively permanent standard may provide a quicker option than use of the significant nexus standard, as long as it is understood that it represents a subset of the significant nexus standard rather than a separate standard. It addresses “a subset of waters that will virtually always have the requisite connection to downstream traditional navigable waters, interstate waters, or the territorial seas,” 86 Fed. Reg. at 69397, that is, that meet the significant nexus standard. This subset of waters would meet the significant nexus standard without requiring a lengthy analysis in a jurisdictional statement. As long as the relatively permanent standard is used in this way, as a subset of the significant nexus standard, NTWC believes it could be used without detriment in order to speed up the determination of a WOTUS, but otherwise it should not apply.

B. The Full Significant Nexus Standard

The proposed rule formulates the significant nexus standard as a requirement that the waters in question “either alone or in combination with similarly situated waters in the region,

⁵ *United States v. Donovan*, 661 F.3d 174, 183–84 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791, 798–800 (8th Cir. 2009); *United States v. Robison*, 505 F.3d 1208, 1221–23 (11th Cir. 2007); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999–1000 (9th Cir. 2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724–25 (7th Cir. 2006); *United States v. Johnson*, 467 F.3d 56, 64–66 (1st Cir. 2006); see also *Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng’rs*, 633 F.3d 278, 288 (4th Cir. 2011).

significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1), (2), or (6) [the automatic WOTUS categories other than impoundments].” See (a)(3)(ii) (other waters); (a)(5)(ii) (tributaries); (a)(7)(iii) (adjacent wetlands); see also CWA § 101(a) (the purpose of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”). NTWC believes the significant nexus standard is beneficial not only for the reasons discussed above in Part II of these comments but also because it provides a reliable science-based analysis of waters beyond traditional navigable waters. It sets up an evaluation process that may lead to the creation of additional automatic categories of WOTUS in subsequent WOTUS rules. Having more automatic categories would provide increased clarity for conducting jurisdictional decisions and would be easier to administer due to requiring fewer case-specific analyses to be performed.

NTWC also supports the Agencies’ proposal to include in the significant nexus standard the option to evaluate a water individually or in combination with other similarly situated waters. In addition, NTWC supports the proposed definition of “significantly affect” as meaning “more than speculative or insubstantial effects on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1), (2), or (6) of this section.” 33 C.F.R. § 328.3(g), 40 C.F.R. § 120.2(g). This proposed definition is consistent with Justice Kennedy’s opinion in *Rapanos* and based on CWA purpose in § 101(a). See also 86 Fed. Reg. at 69430.

The proposal identifies specific factors that the Agencies will consider when assessing whether the effects of the water, either alone or in combination with similarly situated waters, are more than speculative or insubstantial: “(1) The distance from a water of the United States; (2) The distance from a water identified in paragraph (a)(1), (2), or (6) of this section; (3) Hydrologic factors, including shallow subsurface flow; (4) The size, density, and/or number of waters that have been determined to be similarly situated; and (5) Climatological variables such as temperature, rainfall, and snowpack.” NTWC comments that these factors include readily understood criteria when assessing stream connectivity, hydrologic, and climatic features. Their consideration can provide measurable indicators (e.g., nutrient recycling, runoff storage) that tie to the chemical, physical, or biological integrity of a categorical WOTUS, and their use is supported by the scientific literature. For example, the Science Report discusses “Factors Influencing Connectivity” and identifies, among other variables, climate-water characteristics and spatial distribution patterns as factors shaping the physical, chemical, and biological connections within river systems. Science Report at 2-30 to 2-31. The Science Report notes that “the occurrence of ephemeral and intermittent streams is greatest in watersheds with low annual runoff and highwater surplus seasonality, but also is influenced by watershed geologic and edaphic features.” *Id.* at 2-31 (citing Gleeson et al., 2011). The Report also looks at spatial relationships between waterbodies, such as distance influencing connectivity between streams, wetlands, and rivers, and suggests that “hydrologic connectivity between streams and rivers can be a function of the distance between the two water bodies.” Science Report at 2-38 (citing Bracken and Croke, 2007; Peterson et al., 2007). Furthermore, in its evaluation of the complex relationship between basin shape, stream network configuration, and connectivity, the Report identifies distance as a factor affecting connectivity between non-floodplain and riparian/floodplain wetlands and downstream waters. NTWC therefore supports the use of these factors.

IV. Wetlands

The proposed rule uses the 1986 definition of “adjacent” and largely uses the 1986 definition of “wetlands.” The preamble explains that inclusion of wetlands as WOTUS that are adjacent to impoundments and tributaries is supported by science because these wetlands have an effect on “the integrity of downstream traditional navigable waters, interstate waters, and territorial seas,” 86 Fed. Reg. at 69390, and NTWC agrees with that statement. The Technical Support Document included with the Science Report explains further: “Stream and wetland connections have particularly important consequences for downstream water integrity.” TSD § II.A.i., at 31. Moreover, “[t]he more recent literature (i.e., 2014-present) has strengthened the scientific evidence underpinning the findings that non-floodplain wetlands have demonstrable hydrologic and biogeochemical downstream effects, such as decreasing peak flows, maintaining baseflows, and performing nitrate removal, particularly when considered cumulatively.” TSD § II.C, at 62).

The proposal then provides that, with regard to wetlands that are adjacent to impoundments or tributaries, they will be considered WOTUS if they, “either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1), (2), or (6).” 33 C.F.R. § 328.3(a)(7)(iii), 40 C.F.R. § 120.2(a)(7)(iii). These waters are referred to as “adjacent wetlands” in the proposed rule. The Agencies should remember that every region’s geography is different and has differing water connectivity issues. When the Agencies make jurisdictional determinations as to wetlands (and other waters) within tribal lands, they should recognize that tribes know their own waters and are likely the best suited to assess them, as they know how they are connected and used. For example, some tribes, like the Fond du Lac, seasonal wetlands and perched boreal bogs are vital to wildlife (aquatic and terrestrial) and a rich source of medicinal plants, foods, and other traditional life uses important to their cultural way of life. The Agencies should seek to protect these wetlands under a WOTUS determination or in whatever way possible, for both the wildlife and for the traditional uses of the Indigenous people who depend upon them.

V. Tributaries

The Agencies propose that for a tributary to be WOTUS, it must be a tributary to a categorical WOTUS or to an impoundment that qualifies as a WOTUS. It is insufficient for the tributary to be “other water,” but the Agencies clarify that the tributary could itself qualify as an “other water.” 86 Fed. Reg. at 69421-22. The proposal deletes the 1986 rule’s cross-reference in the tributary provision to “other water” as being waters to which a tributary may connect and be determined WOTUS. As a result, under the proposal tributaries would itself be considered as “other water” and would require showing the tributary by itself has a relationship with a foundational water such that it meets either the relatively permanent or significant nexus test. 86 Fed. Reg. at 69372, 69421. The NTWC views this change as creating uncertainty for the protection of tributaries, if misunderstood or misapplied by the Agencies. The NTWC recommends that the Agencies clarify how they would assess tributaries to “other waters” under the relatively permanent or significant nexus standard in order to ensure that these tributaries may be assessed in combination with their connected “other waters,” rather than assessed in a manner that separates them from their connection with “other waters.” Furthermore, the proposal does not include a definition of “tributary,” but relies instead on the longstanding interpretation of the term. The proposal follows the 2008 *Rapanos* Guidance and past Agency jurisdictional determinations to

include natural, man-altered, or man-made water bodies that flow directly or indirectly into a traditional navigable water, interstate water, or territorial sea, or impoundment. 86 Fed. Reg. at 69422. The NTWC agrees with the longstanding interpretation of the term “tributary,” which does not differentiate between natural, man-altered, or man-made waters.

Also, NTWC agrees with the Agencies’ proposal that waters may be considered tributaries regardless of their flow regime. In contrast, the NWPR excluded ephemeral streams, and as a consequence it significantly reduced protections of tribal waters. In NTWC’s September 27, 2021 Comments on the Agencies’ Notice of Consultation and Coordination on Revising the Definition of “Water of the United States,” we drew upon the Science Report to explain tribal concerns about this exclusion of ephemeral waters, especially in the arid West and in many headwater regions, where ephemeral streams predominate. NTWC requested that the Agencies take into consideration the factors outlined in the Science Report, such as: the area that is tributary to runoff-driven ephemeral flow for the reach in question; groundwater conditions; the magnitude, frequency, and duration of flows in the reach; the associated riparian flora and fauna (macro to micro); connectivity; and the associated ecosystem-hydro-system processes. As the Science Report indicated, these factors help define important effects of ephemeral streams on the integrity of downstream rivers and other waters. These factors support the inclusion of ephemeral tributaries in the proposed rule.

NTWC nevertheless believes it would be useful for the final WOTUS Rule 1 to include at least some tributaries as an automatic category of WOTUS, consistent with the principles discussed above. Although the proposed rule discusses the functions that tributaries serve and the impacts they have on foundational waters, 86 Fed. Reg. at 69390, it does not provide a jurisdictional category for tributaries but instead calls for a site-specific evaluation of whether a tributary meets either the relatively permanent or significant nexus standards. NTWC supports use of the significant nexus standard only in situations where the tributary would fall outside the automatic WOTUS category, perhaps when it is an ephemeral water. Such waters would be regulated as tributaries with appropriate regional considerations of hydrology, geology, and climatic variation.

Additionally, NTWC suggests that ditches should be considered in the jurisdictional category of tributary. The term ditch is not well-defined, in part because naturally flowing streams have been altered by human activities, and from a scientific perspective the constructed ditch often functions as a tributary with effects on stream networks similar to those of a naturally occurring stream. Often what is being termed a ditch may be a modified or relocated stream, or a human-made feature that is constructed in an upland and that is functioning as a tributary, conveying materials downstream to a WOTUS. For example, the Winnebago Tribe has noted that many ditches that drain farm fields end up flowing into a stream or creek that is a WOTUS or a tributary to a WOTUS. These waterways supply valuable water, but also store pollutants. They provide valuable habitat to aquatic species that the tribe values. Similarly, ditches are common in Alaska, where they often are the result of road construction. They frequently allow for fish and wildlife passage. At the same time, they may provide conduits for trapping salt and other winter-time road treatment from entering coastal waters, as well as become more accessible to wildlife, and it is important to be able to control this source of pollution.

For these reasons, NTWC supports the inclusion of ditches as a category of tributary, and we strongly encourage the Agencies to consider a jurisdictional approach that blends the functionality, origin, and impact of ditches on tributary systems and downstream traditional navigable waters. Under this blended approach, tidal ditches would continue to be considered WOTUS. Non-tidal ditches could only be WOTUS if they have a bed and bank and another indicator of flow (that is, have the physical characteristics of a tributary), connect directly or indirectly through other tributaries to a categorical WOTUS, and have at least one of the following four characteristics: 1) the ditch is a natural stream that has been altered, such as channelized, straightened, or relocated; 2) the ditch has been excavated at least partially in a WOTUS, including wetlands; 3) the ditch holds at least intermittent flow or standing water; or 4) the ditch connects two or more jurisdictional WOTUS. This approach would consider ditches with characteristics more likely to result in impacts to the stream network being evaluated as tributaries, while ditches lacking those characteristics would not be identified as tributaries.

VI. NTWC Supports Listing Interstate Waters as an Automatic Category of WOTUS

NTWC supports listing interstate waters as an automatic category of WOTUS, consistent with the 1986 regulations. We also agree with the Agencies' interpretation that interstate waters include all types of water bodies, including rivers, streams, lakes, ponds, and wetlands. *See* 86 Fed. Reg. at 69418. As the Agencies explain, "the degradation of water resources in one state may cause significant harms in states other than that in which the pollution occurs," *id.* at 69417, and for that precise reason "the consequent need for federal regulation [,] is particularly clear," *id.* at 69418. Federal regulation is needed to protect the water quality of a downstream state that has more stringent water quality requirements. It also is instrumental in avoiding interstate litigation, as the Agencies pointed out, citing *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981). *Id.*

For the same reasons, interstate waters should include waters that flow across or form a boundary between a tribe and a state, and also across or between two tribes.⁶ As noted in NTWC's 2019 Comments at 16-17 (incorporated by reference here), tribal lands have significant stream and river flows that either travel through tribal lands or along tribal land boundaries. *See Streamflow Contributions from Tribal Lands to Major River Basins of the United States* (PLoS ONE 13(9): e0203872. <https://doi.org/10.1371/journal.pone.0203872>). In each case, and with variation from place to place, significant fractions of the total flow through tribal lands or along tribal land boundaries originate upstream from the tribe.

In fact, federal regulation is all the more important for interstate waters that involve tribes, because no tribes have their own CWA permitting programs and the vast majority of tribes also do not have federally approved water quality standards, largely due to resource issues discussed above and below and in NTWC's prior comments. Moreover, federal regulation is necessary to implement the federal trust responsibility and comply with treaty and reserved rights tied to water quality, discussed above at 3; states are not subject to these commitments, and may not have made commitments of their own to protect tribal water quality or allow for tribal input into water quality decisions. Further, pollution from generally more industrially developed states that impacts

⁶ There are relatively few situations where two tribes are adjacent to each other and might trigger this provision, but two examples are the Navajo and the Hopi Reservations and the Winnebago and the Omaha Reservations.

neighboring tribes raises environmental justice concerns that should be examined by the regulating federal agency.

NTWC also thinks that the definition of interstate waters, in order to be legally correct, should account for the boundaries associated with all categories of Indian country; that is, a water would be interstate if it crossed or formed the boundary between state land and formal reservation, tribal trust land outside the formal reservation, allotted land outside the reservation, or dependent Indian community. Indian country, as defined at 18 U.S.C. § 1151, delineates the boundary between tribal and state jurisdiction, which is the question being addressed, and therefore the full definition of Indian country should be incorporated into the definition of interstate waters. *See, e.g., Alaska v. Native Village of Venetie*, 523 U.S. 520 (1998) (definition of “Indian country” in § 1151 is a codification of federal case law and, while found in the criminal code, applies to questions of tribal civil jurisdiction). If the Agencies adopt a concept of stream order to define the extent of an interstate water, as discussed immediately below, any confusion that might otherwise arise in checkerboard areas would be minimized.

NTWC also supports the Agencies’ proposal that the extent of a river or stream that is considered interstate or intertribal should be the entire length that the water is of the same stream order. Lakes, ponds, and wetlands should be considered in their entirety. *See* 86 Fed. Reg. at 69418. It would be much easier to implement the WOTUS rule if the entire length of the river that is of the same stream order were considered an interstate water, rather than having the water potentially switch back and forth between WOTUS categories.

VII. NTWC Supports Considering Regional Variability in the Definition of WOTUS, and Proposes Including “Waters of the Tribe” as an Automatic Category of WOTUS

The Agencies suggest various ways of considering regional characteristics when determining whether a water body has a significant nexus to a WOTUS. *See, e.g.,* 86 Fed Reg. at 69437, 69439-40. NTWC supports considering regional characteristics for this purpose, which would more fully carry out the purposes of the CWA, as demonstrated by the findings of the Science Report. *See* NTWC’s October 1, 2021 Early Comments on Revised Definition of WOTUS at 4-5. NTWC would have the Agencies go farther, however, and create a separate automatic category of WOTUS that would include all waters that a tribe designates under its own authorities as “Waters of the Tribe” (WOTT). *See id.*; NTWC September 18, 2019 Supplemental Comments on Proposed Definition of WOTUS at 2.

NTWC acknowledges that some waters designated as WOTT may not meet the significant nexus standard. Nevertheless, the Agencies have special obligations to tribes that would not be fully satisfied by limiting the definition of WOTUS to that standard. As discussed above at 3 and in our 2021 Early Comments at 4-5, the Agencies have a special trust obligation as well as specific obligations to protect tribal treaty and reserved water rights, and these are not confined to waters that meet a somewhat limited specific nexus standard.⁷ Furthermore, providing a separate category for WOTT would recognize “the very important role” that *tribes* play in achieving the CWA’s

⁷ For example, some wetlands on the Fond du Lac Reservation, discussed in Part IV above, may not meet the significant nexus standard, yet they are vital to numerous aquatic species and significant tribal resources. They would be protected under a WOTT category.

objective. *See* CWA § 101(b); 86 Fed. Reg. at 69400. The Agencies would not be precluded from creating this special category, as none of the WOTUS cases to date have considered tribal rights in the context of a WOTUS definition.

VIII. Waste Treatment Systems Should Not be Categorically Excluded from the Act’s Reach.

The Agencies seek comments on their proposal to delete the suspended sentence limiting the waste treatment system exclusion to manmade bodies of water. 86 Fed. Reg. at 69427. Doing so would exclude all bodies of water used for waste treatment systems from protections of the Clean Water Act. 86 Fed. Reg. at 69427. Categorically excluding waters that have been used for wastewater treatment systems is not only unlawful, but also allows waters of the United States to be turned into waste dumps. This is not what Congress had in mind when enacting the Clean Water Act.

The Waste Treatment System categorical exemption is unlawful.

In 1980, EPA limited the exclusion to “manmade bodies of water” that “neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States.”⁸ When industry objected, obviously desirous of using the Nation’s waters for free waste disposal, EPA suspended the language limiting the exclusion to manmade systems, without opportunity for public comment, but explaining that the *suspension was temporary* and that EPA would “promptly” amend the rule or “terminate the suspension.” 45 Fed. Reg. 48620, 48620 (July 21, 1980) (emphasis added). It never did, and the Agencies now treat the suspension of the limiting language as a settled matter.

The Agencies have also affirmed an interpretation of the exclusion that authorizes new impoundments of natural waters, such as streams and wetlands, so that they can be pressed into service as industrial waste dumps. When EPA promulgated the exclusion in 1980, it explained that the Clean Water Act “was not intended to license dischargers to freely use waters of the United States as waste treatment systems,”⁹ and that the exclusion was limited to manmade waters “to ensure that dischargers did not escape treatment requirements by impounding waters of the United States and claiming the impoundment was a waste treatment system, or by discharging wastes into wetlands.”¹⁰ Then, when EPA suspended the language limiting the exclusion to manmade systems, the agency said it was responding to complaints that the limitation would otherwise cover “existing waste treatment systems . . . which had been in existence for many years.”¹¹ It is now fully apparent that the act of “suspending” the original limiting language in the Waste Treatment System Exclusion is nothing more than a subterfuge; the Agencies have abandoned all pretense that the suspension is temporary, or that they intend to correct the problem through rulemaking.

⁸ 45 Fed. Reg. 33290, 33424 (May 19, 1980).

⁹ 45 Fed. Reg. at 33298.

¹⁰ 45 Fed. Reg. at 48,620.

¹¹ *Id.* (emphasis added). For some time following the temporary suspension, the exclusion was not interpreted to authorize newly created waste impoundments in natural waters. *See W. Va. Coal Ass’n v. Reilly*, 728 F. Supp. 1276, 1289-90 (S.D. W. Va. 1989) (deferring to EPA’s interpretation that treatment ponds were regulated “impoundments,” not excluded “waste treatment systems”). Over time, however, the Agencies adopted a new interpretation that allowed newly created waste impoundments in natural waters. *See Ohio Valley Env’tl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 211-16 (4th Cir. 2009) (upholding the Agencies’ interpretation in the context of a permit challenge).

Congress spoke clearly: the Clean Water Act would apply to “the waters of the United States,”¹² regardless of how those waters were used. The law contains no exceptions to that rule, much less for natural water bodies artificially converted into repositories for industrial waste. Indeed, that is the very practice Congress meant for the Clean Water Act to end.¹³ The Waste Treatment System Exclusion violates the plain language of the Clean Water Act. Nowhere does the Clean Water Act empower the Agencies simply to remove waters of the United States from its protections.¹⁴

The Agencies have never explained why the Waste Treatment System Exclusion is necessary or appropriate, assuming for the sake of argument that it could comply with the Clean Water Act. As explained above, when this issue was subject to notice and comment in 1980, EPA limited the exclusion to “manmade bodies of water.” If some sort of lagoon or pond is needed as a waste treatment system, there is no reason such a system cannot be constructed outside of natural waters. If natural waters are prevalent and difficult to avoid in the area, it is possible to use diversions and liners constructed of clean fill material to create a wholly human-made feature segregated from natural waters of the U.S. It is simply not necessary to use waters of the U.S. as waste treatment systems.

Even if the Agencies were to find it necessary to locate waste treatment systems in waters of the U.S. in some circumstances, and again assuming for the sake of argument that it is lawful to do so, this option ought to be used only as a last resort. If the Rule is going to permit such an option, the Rule should make clear that every effort must be made to avoid waters of the U.S., including the use of human-made systems, diversions, and liners. The Army Corps or state agencies with delegated 404 authority should only be allowed to grant the needed permits for a waste treatment system in waters of the U.S. if the applicant can prove that all other alternatives have been exhausted.

The proposed Waste Treatment System exemption is inconsistent with other aspects of the Proposed Rule.

The NTWC believes that permanently adopting the Waste Treatment System Exclusion without the language limiting it to manmade systems is arbitrary and capricious. The NTWC views the exclusion to be contradictory to the Agencies’ own statements in the Proposed Rule that impoundments of waters of the United States emphatically remain waters of the United States, based on their significant nexus to foundational waters.¹⁵ As the Supreme Court confirmed, and

¹² 33 U.S.C. § 1362(7).

¹³ See S. Rep. No. 92-414 at 7 (“The use of any river, lake, stream or ocean as a waste treatment system is unacceptable.”).

¹⁴ Cf. *Nat’l Ass’n of Mfrs. v. Dep’t of Labor*, 159 F.3d 597, 600 (D.C. Cir. 1998) (“There is, of course, no such ‘except’ clause in the statute [at issue in that case], and we are without authority to insert one.”); *NRDC v. Costle*, 568 F.2d at 1377 (invalidating a rule on the basis that, under the Clean Water Act, EPA lacked discretion to exempt entire categories of point sources from certain permitting requirements).

¹⁵ 86 Fed. Reg. 69385.

the Agencies recognized in the Proposed Rule, a water of the United States does not lose its federal status by being diverted and impounded.¹⁶

The agencies' attempt to veil the significance of the exclusion with assurances that, even though discharges from a source into an impoundment will not be regulated, any discharge *from* the impoundment *to* a water of the United States would require compliance with NPDES provisions.¹⁷ The Agencies cannot say this, while at the same time affirming Congress's recognition "that Clean Water Act jurisdiction must extend broadly because "[w]ater moves in hydrologic cycles and it is essential that [the] discharge of pollutants be controlled *at the source*."¹⁸

The Proposed Rule's inconsistency in its treatment of impoundments, generally, and impoundments for "waste treatment systems," is most striking in its discussion of scientific research justifying the protection of impoundments. In the same breath, the Proposed Rule states that "[a]sserting Clean Water Act jurisdiction over impoundments also aligns with the scientific literature, as well as the agencies' scientific and technical expertise and experience, which confirm that impoundments have chemical, physical, and biological effects on downstream waters through surface or subsurface hydrologic connections,"¹⁹ while also stating that an impoundment may be removed from federal jurisdiction by the mere act of naming it a "waste treatment system" and obtaining a section 404 permit.²⁰ Yet, the Agencies fail to provide any reason, scientific or otherwise, that makes waste treatment impoundments any different than other impoundments in how they are inextricably connected to downstream waters. Nor do the Agencies provide any support for the premise that the act of granting a 404 permit somehow severs an impoundment's surface or subsurface hydrological connections with downstream waters.

Mining in Alaska

In southeast Alaska, Alaska Native Villages were dealing with similar issues from mining, drainage from the mines are generally mitigated by two methods: one creating a drainage well and the other method is a holding pond. Most of these ponds that are developed become manmade lakes. Take the Mount Polley Tailing Dam in Canada that released about 6.3 billion gallons of tailings and wastewater that released metals into the waters that threatened the endangered chinook and coho stock and affected the traditional food sources of Native communities, the homes and lodges downstream of the Frazer River that were abandoned and closed due to the toxic and elevated mercury in the waters. Not to mention the environmental impact of the wetlands but the

¹⁶ *Id.* at 69420 ("The Supreme Court has confirmed that damming or impounding a "water of the United States" does not make the water non-jurisdictional. *See S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370, 379 n.5 (2006) ("[N]or can we agree that one can denationalize national waters by exerting private control over them.") . . . The Ninth Circuit has similarly found that "it is doubtful that a mere man-made diversion would have turned what was part of the waters of the United States into something else and, thus, eliminated it from national concern." *United States v. Moses*, 496 F.3d 984, 988 (9th Cir. 2007), *cert. denied*, 554 U.S. 918 (2008).")

¹⁷ *Id.* at 69427.

¹⁸ *Id.* at 69389 (quoting S. Rep. No. 92414, at 77 (1971), *as reprinted* in 1972 U.S.C.C.A.N. 3668, 3742 (emphasis added).

¹⁹ *Id.* at 69421 ("Indeed, berms, dikes, and similar features used to create impoundments typically do not block all water flow. Even dams, which are specifically designed and constructed to impound large amounts of water effectively and safely, generally do not prevent all water flow, but rather allow seepage under the foundation of the dam and through the dam itself.")

²⁰ *Id.*

obvious impact to the entire ecosystem of the region. This degradation to the earth and to Native Alaskan communities continues. The Mount Polley mine has applied for an application to open again and it was given the green light to proceed by the granting agencies. Similar examples include the Douglas Indian Association on the Taku River where a smaller mine in Canada was allowing its holding pond to leach into the Taku where sampling showed significant mercury and arsenic in the water that impacted the health of the salmon. In northwest Alaska a Native owned mine called the Red Dog Mine has 10 more years of life left and the village downstream is rejecting their salmon streams and their berry patches because of toxic substances. That mine provides \$50 million in revenue to the Corporation, but there are villages in that area that are still without adequate water and sewage treatment. The NTWC requests that the Agencies begin addressing these concerns impacting Native communities by not excluding waste treatment systems from Clean Water Act protections.

IV. Tribes Need Additional Resources to Protect their Waters

The Agencies appear to rely on tribes being able to implement their own more protective programs, commenting that “states and tribes retain authority to implement their own programs to protect the waters in their jurisdiction more broadly and more stringently than the Federal government.” 86 Fed. Reg. at 69376. This statement sounds fine in the abstract, but tribes nationwide need substantially more funding to fulfill this goal. Tribes are short of staff and other resources, and many struggle just to respond to requests for feedback from outside agencies (federal, state, and local), let alone develop and implement their own programs. Often there are only one or, if lucky, two individuals in a tribal water quality program. Tribes need the resources to develop CWA programs to truly protect their own waters. Moreover, tribes should not be forced to compete against each other for the scarce funding that is available.

NTWC is aware of funding available for broader water resource study and protection, such as under the Bipartisan Infrastructure Law. These funds are available for programs to consider the effects of long-term drought, restoration of wetlands for flood attenuation, desalination, water reclamation, and climatic resiliency, for example, and NTWC suggests that the Agencies actively assist interested tribes with applying for such funds. Although the Biden administration recently released a guidebook on the subject, overworked tribal staff would benefit greatly from direct assistance, perhaps through the Agencies’ regions and districts. We are also aware that EPA has been granted an additional \$55 billion dollars for water infrastructure, and that funding is also available to address regional and geographic restoration projects, such as the Puget Sound, Columbia River Basin Programs, and the Great Lakes Restoration Initiative. These programs are all important to protecting water quality, but they do not replace tribes’ needs for staffing, developing, and implementing basic CWA programs. Nor do they obviate the need for a legal and science-based WOTUS definition.

The NTWC appreciates the opportunity to submit comments as EPA considers revising the definition of *Waters of the United States*.

Sincerely,

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

Ken Norton, Chair
National Tribal Water Council

Cc: Karen Gude, USEPA Office of Water