



April, 13, 2018

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Submitted via [CWAwotus@epa.gov](mailto:CWAwotus@epa.gov)

Re: National Tribal Water Council's Comments on the Environmental Protection Agency's "Draft Summary of Potential Effects to Clean Water Act Programs for Tribal Waters"

To Whom It May Concern:

The National Tribal Water Council (NTWC) is pleased to submit these comments for consideration on the U.S. Environmental Protection Agency's (USEPA/EPA) "Draft Summary of Potential Effects to Clean Water Act Programs for Tribal Waters," ("Draft Summary"). The NTWC understands that the purpose of the Draft Summary is to assist the EPA in consideration of the tribal water programs in light of the proposed rulemaking to revise the definition of "Waters of the United States" (WOTUS) under the Clean Water Act (CWA).

In general, NTWC notes that the Draft Summary is successful in highlighting potential implications of the proposed rulemaking on six CWA regulatory programs including: Sections 303 Water Quality Standards, 303(d) Impaired Water Listing and Total Maximum Daily Load (TMDLs), Section 311 Oil Spill Response Program, Section 401 Water Quality Certification Program, Section 402 National Pollutant Discharge Elimination System (NPDES), and Section 404 National Dredged and Fill Material Permit Program. The Draft Summary clearly indicates that any changes or clarifications to federal CWA jurisdiction will directly affect waters located on tribal lands over which Tribes can administer CWA regulatory programs, as well as waters over which the EPA would administer these programs where the EPA is the responsible entity.

In short, the Draft Summary could be strengthened by including the following elements:

- Include discussion and analysis of EPA's direct trust responsibility to Tribes - as trustee - to protect tribal waters as tribal trust resources independently of the Clean Water Act programs;
- Add a section specifically addressing the role and responsibility of EPA, and potential impacts to Tribes without Treatment as a State (TAS) status, including Alaskan Tribes and Alaskan Native Villages; and
- Conduct a robust aquatic resource inventory to assess cumulative effects and conduct adequate jurisdictional and economic analysis.

The topics listed above, along with additional information for EPA's consideration, are presented in the following pages.



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The NTWC understands that the intent of the CWA is to protect, maintain and restore the physical, chemical and biological integrity of water. The CWA values the important role that regulatory implementation of this intent has towards the protection of water resources in Indian Country and on tribal lands. It is important that EPA recognize that many Tribes view protection of the integrity of water to include water quality, drinking water sources, fish, wildlife and aquatic life, and human health, in addition to cultural, spiritual, ceremonial and religious values, as well as subsistence rights, habitat and natural food chain maintenance (Bryan, 2017).

We are mindful that the adoption of the 2015 Rule was preceded by many hours of public meetings, hearings, comment periods, webinars, scientific advisory panel meetings, and stakeholder meetings. The 2015 Rule is based on more than 1,200 publications of peer-reviewed science and was reviewed by the EPA's Science Advisory Board. It protects small streams and wetlands because science and traditional knowledge tell us that small streams and wetlands are connected to and have a strong influence on the chemical, physical, and biological integrity of downstream waterways.

This new proposed rulemaking completely fails to support the scientific theory of "significant nexus" that informed the Supreme Court's majority opinion expressed through Justice Kennedy's opinion that the critical factor in determining CWA jurisdiction is whether a water body has a "significant nexus" to downstream traditionally navigable waters through influencing its chemical, physical or biological integrity.

It is likely that Justice Scalia's narrow understanding of "waters of the U.S.," articulated in his opinion put forth as part of the 2006 *Rapanos v. United States* decision, omits the majority or a significant percentage of numerous waters that are by their very nature ephemeral and intermittent stream systems. This is relevant to EPA's planned aquatic resource analysis (see below) because this narrow understanding affects the number of potentially affected stream miles and wetland acres. Perennial, ephemeral and intermittent dynamic stream systems are at the foundation of tribal ecosystems and sustain tribal culture along with numerous terrestrial and aquatic plant and animal species and provide other essential ecosystem functions. These concepts are well documented in recent scientific literature; see, for example, Levick et al., 2008, and EPA's 2015 report, "The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-Arid American Southwest" and EPA's "Connectivity Report". As documented in these recent EPA reports, ephemeral and intermittent stream systems comprise close to sixty percent of all streams in the United States and over eighty percent in the Southwest region. Given the fact that many of these ephemeral and intermittent stream systems are often headwaters of major perennial streams and rivers and serve essential ecological and hydrological functions ranging from surface and subsurface water storage and exchange, ground water recharge and discharge, water supply and water filtering, nutrient storage and cycling, sediment transport and storage, forage, cover, nesting and movement corridors for wildlife and support for unique vegetation communities, EPA must consider potential impacts to clean water programs resulting from a potential change of definition to the WOTUS with full consideration of the potential cumulative impacts.

The application of Justice Kennedy's concept of "significant nexus," laid out in the same *Rapanos* decision, and the 2015 Rule are in accordance with tribal scientists whose understanding of hydrology has been refined over millennia to integrate an awareness that all waters are connected, and all of the components of our hydrologic systems deserve our utmost respect and protection efforts.

Any change of the definition of WOTUS by the agencies could decrease the reach of CWA permitting and other requirements, such as 401/402/404 Permitting, Spill Prevention, Control and Countermeasure



(SPCC), both within and upstream of tribal waters and could undermine numerous federal protections for tribal treaty rights and resources.

### Tribal Water – Trust Resources

Tribal waters, here defined as waters located on tribal lands that are not within the definition of WOTUS, should be treated as tribal trust assets, and thus subject to the federal trust responsibility. This is especially so where tribal waters are constituent to tribal water rights, tribal treaty rights, or are necessary for the existence of other tribal trust assets, such as forests lands, agricultural lands, economic development lands and the tribal human community.

Tribes acknowledge – as does the EPA - that they have independent sovereign authority – like the states – to protect and regulate tribal waters on tribal lands through tribal law. Tribal jurisdiction over tribal waters would allow the Tribes to set water quality standards, issue permits, and enforce compliance with tribal law.

Arguably, the EPA, which has recently confirmed its trust responsibility to Tribes, as trustee has a direct and continuing responsibility to protect tribal waters as tribal trust resource – independent of the EPA’s roles and responsibilities under the Clean Water Act. How the EPA would exercise this trust responsibility should continue to be considered and consultation with Tribes should include this topic as the EPA continues to evaluate the impacts of the prospective change(s) in the WOTUS definition on tribal waters and tribal water programs under the CWA.

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In EPA’s February 2018 WOTUS presentation (and March 2018 Meeting), EPA staff asked what Tribes intend to do in the future should the federal government clarify (reduce) the scope of the Clean Water Act jurisdiction. To respond to that question, in general, Tribes will continue to protect the biological, physical and chemical integrity of clean water in Indian Country and neighboring jurisdictions to the maximum extent practicable, regardless of federal status. It is important that EPA and other federal entities recognize tribal treaty rights and ensure federal obligations to protect tribal waters, including monetary and staff obligations, regardless of the federal status of WOTUS.

NTWC also recognizes that matters relating to jurisdiction will be challenging in enforcement and compliance of those waters determined to be outside of federal jurisdiction due to a restrictive definition of WOTUS. Many reservations are checker board in land ownership making it difficult to impossible for Tribes to enforce tribal law on non-tribal individuals residing on the reservation. As sovereign nations, many Tribes will not adopt or permit state jurisdiction when dealing with enforcement and compliance for unprotected waters. Once again, EPA has a trust responsibility to protect Tribes’ water resources on tribal lands. Mitigating or preventing water pollution on tribal lands by non-Indians and/or off-reservation activities must be a responsibility of the federal trustee – the EPA.



Additionally, there are circumstances where treaties or settlement acts with states may subject Tribes and the protection of the waters that they depend upon to state jurisdiction. Despite these jurisdictional barriers, Tribes have unique traditional, subsistence, and ceremonial uses of these waters, often times as treaty-reserved rights. It is imperative that EPA, as a federal trustee, adequately protect tribal uses of these waters, and all the physical, chemical, and biological connections to these waters regardless of jurisdiction.

The NTWC urges EPA to adopt an inclusive definition that upholds the intent of the CWA and implicitly recognizes tribal views of water. EPA can expect to see Tribes that currently have TAS status for CWA programs to adopt holistic definitions for “Tribal Waters” in their water quality standards, and other Tribes may adopt their own definition under tribal law. As noted in the Draft Summary, NTWC agrees that seeking and compiling details for Tribes that have promulgated waters of the tribe and the description of tribal waters would be informative.

Furthermore, NTWC supports an in-depth consideration and analysis of impacts to Alaskan Tribes and Alaskan Native Villages as they face a set of unique challenges often times overlooked or misunderstood, including the fact that all Tribes in Alaska have a traditional territory where they gather traditional subsistence foods and medicines and have those territories recognized by all local, state and federal agencies.

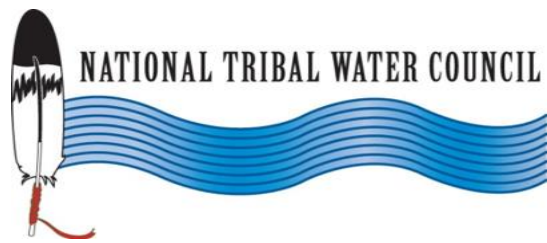
## Section 303 Water Quality Standards, CWA Section 303(d) Impaired Water Listing and Total Maximum Daily Load Programs, 402 NPDES

EPA recommends that states and Tribes develop TMDLs on a watershed basis to “manage holistically” the quality of surface waters and notes that this approach supports “sound environmental management” (EPA 820-B-15-001, Water Quality Standards Handbook January 2015). First, how could this process be effective if a WOTUS revision subsequently excluded intermittent and ephemeral stream systems in existing watershed TMDL program? Further impacts will occur in cases where a state has restrictions from being stricter than federal law. For example, the Cottonwood Wash (Utah) TMDL, which features an ephemeral stream system (Cottonwood Wash), continues to discharge radioisotope-laden water and legacy mining waste from water sources under state and federal jurisdiction upstream of the Ute Mountain Ute Reservation. These discharges and waste violates tribal water quality standards at the Reservation boundary. Cottonwood Wash travels through the Ute Mountain Ute Reservation, eventually reaching the San Juan River, a traditionally navigable waterway and that, downstream, is under Navajo Nation jurisdiction.

Regarding NPDES 402, the Draft Summary states on page 7 the following:

“EPA Regional offices are typically responsible for administering the NPDES program on reservation lands. ... Any change in the definition of waters of the United States that in turn affects the federal jurisdiction of a receiving water on reservation lands, could affect the Regions’ responsibilities for any permitting actions and could also potentially affect compliance and enforcement roles.”

This action has the potential to leave waters of certain Tribes completely unprotected from entities that have no vested interest in the area to exploit resources and contaminate the water, wildlife and land homed within that watershed. Once again, ability to enforce tribal law on non-tribal entities can become a



jurisdictional nightmare that any given tribe may not have the expertise and/or resources to rectify. EPA mentions as an example in the Draft Summary that if “a change in the scope of CWA jurisdiction is modified, the EPA may need to make new determinations whether NPDES permitted discharges on reservation lands reach waters of the United States.” This is true; however, EPA would need to make new determinations whether NPDES permitted discharges off reservation lands reach waters of the United States. Under a potential rule change, off reservation discharges to ephemeral and or intermittent waters off reservation could still reach jurisdictional waters and be subject to 402 requirements.

### Tribal Example

Tribes in California face degradation to their seasonal waters in certain areas where the numbers of medical and recreational cannabis cultivation operations has grown exponentially. Water contamination from fertilizer, pesticide and herbicide runoff into intermittent and ephemeral streams threatens drinking water sources for many Tribes. Lessening CWA protection to these waterways poses a significant risk to the health and welfare of Tribes and undermines their culture by degradation of these watercourses and the waters therein.

In general, Tribes throughout the nation would be forced to deal with upstream point source and non-point source discharges of toxic agriculture-related effluent, concentrated animal feeding operation effluent, wastewater discharges, contaminated legacy and active mining waste to upstream intermittent and ephemeral stream systems or hydrologically-connected wetlands. Toxic heavy metal contamination, bacteria and other pathogens, nutrients, salts, herbicides and pesticides, contaminants of emerging concern (pharmaceuticals, etc.), acidic discharges and radioactive waste threaten groundwater and surface water drinking water sources, aquatic resources including fisheries and plants as well as aquatic resources that have fundamental subsistence, spiritual and ceremonial importance.

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Potential Impacts to groundwater and surface water drinking water sources and associated health risks/higher treatment cost burdens

The interconnected nature of the hydrologic cycle means that potential cumulative effects of contamination to ephemeral and intermittent stream channels and or wetlands may impact both surface water and groundwater. Ephemeral and intermittent stream systems along with wetlands function to recharge groundwater aquifers and also often contribute significant chemical loads to downstream surface water bodies seasonally and with precipitation events. Tribes may be vulnerable to increased drinking water treatment costs. Tribes who rely on surface water have the potential for even greater economic burdens from treating the water with potentially new, complex and expensive technologies necessary to provide the community with clean and safe drinking water that meets existing and ever-evolving standards.



## CWA Section 311 Spill Prevention, Control and Countermeasure (SPCC)/Oil Pollution Act (OPA)

Under the heading “CWA Section 311 SPCC and Oil Spill Response Program: Oil Spill Prevention and Planning”, the Draft Summary notes that “the Spill Prevention Control and Countermeasure (SPCC) program cannot be delegated to states or Tribes and that if there were jurisdiction changes to the SPCC program due to revisions to the WOTUS definition, Tribes may need to develop and construct entirely new regulatory and enforcement programs with no resources or expertise to rely on, to address compliance issues and conduct inspections.” At a minimum, EPA needs to provide clarity regarding the potential economic and potential unintended consequences in this area. A quantification of the number of facilities that may be affected needs to be provided as a part of the Aquatic Resource Analysis.

Regarding OPA oil spill responses, the Draft Summary acknowledges that “a quick response is critical to minimize impacts of a discharge and that significant threats from a discharge requires immediate attention including containment, countermeasures, cleanup and disposal activities.” The Draft Summary continues to describe that “if a water is not federally jurisdictional, EPA does not have the authority to respond or conduct oversight and the responsibility for a response would be determined by the tribal government and that costs incurred by Tribes to clean up discharges would not appear to be reimbursable by the Oil Spill Liability Trust Fund (OSLTF).” Furthermore, the Draft Summary goes on to state that “the OSLTF is managed by the U.S. Coast Guard (USCG) and, therefore, the USCG is ultimately responsible for addressing impacts on the OSLTF.”

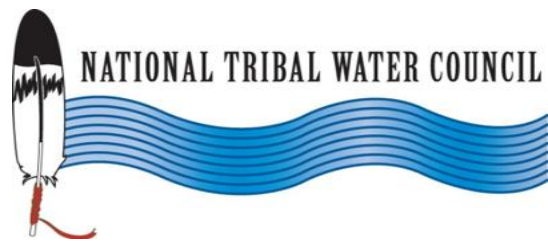
At a minimum, EPA must assess its trust responsibility to protect tribal natural resources and how this responsibility could affect situations where Tribes are unable to provide the significant financial and technical resources to respond to and clean up discharges of hazardous oil waste. What would the consequences be to human health and the environment on reservations and to neighboring (downstream) jurisdictions for toxic spills that Tribes are unable to respond to and clean up? How could downstream surface water drinking sources be affected? What about potential impacts to endangered species in the area(s) of un-remediated spills, or downstream? What are the potential cumulative impacts? Surface spills also have potential impacts on groundwater aquifers that may serve as drinking water supplies to tribal and other populations.

### 401/404 Permitting/Enforcement

The Draft Summary states on page 6 the following:

“A change in the definition of what constitutes a water of the United States has the potential to modify the number of activities that require a federal license and permit and associated opportunities for states and Tribes to issue CWA 401 certifications.”

Changes to the definition of WOTUS would leave waters of certain Tribes without regulatory TAS and CWA 401 certifications completely unprotected from neighboring entities, which have no vested interest in the area, to exploit resources and contaminate the water, wildlife and tribal land within that watershed. Subsistence living and economic vitality of a tribe may be threatened. Tribes with CWA 401 certification may also find themselves facing the same reality. EPA must complete a robust aquatic resource analysis to quantify the number of stream miles and wetland acres that may be affected by a change in the definition of what constitutes a water of the United States to facilitate an analysis and discussion with Tribes regarding the number and nature of activities that require a federal permit and the potential impacts to Tribes if they and their federal partner, EPA, lose the opportunity to issue 401 certifications.



## Aquatic Resource Analysis

In order for EPA to comprehensively consider jurisdictional and economic impacts associated with a potential rule change, EPA must complete a robust mapping project or aquatic resource analysis. During EPA's *Definition of "Waters of the U.S."* webinar for tribal partners held on February 20, 2018, EPA staff asked if Tribes are aware of specific mapping resources that might be used in EPA current qualitative assessment, inclusive of potential aquatic resource analysis, of key Clean Water Act (CWA) programs and their relationship with the definition of Waters of the United States (WOTUS). Below we offer suggestions.

A recent GIS-based stream classification study conducted in southwest Colorado (Caruso, 2014) developed a three-level hierarchical classification system using a combination of the National Hydrography Dataset, USGS Stream Stats and field observations to classify streams based on flow duration and other biophysical metrics, determining that 64% of the streams in the Cement Creek watershed are intermittent or ephemeral with all of the ephemeral reaches being classified as non-relatively permanent waterways requiring a significant nexus evaluation to determine jurisdiction.

We urge EPA to adopt a similar methodology to conduct a nationwide aquatic resource analysis. EPA should also consider that the Cement Creek watershed is the source of the Gold King Mine spill which negatively affected multiple state and tribal jurisdictions and communities downstream. With the Caruso study showing that a large percentage of mountain headwater stream systems are likely dependent on significant nexus determinations for jurisdictional status under the Clean Water Act, how will downstream jurisdictions and communities be protected from the thousands of remaining abandoned mines (38,869 identified in CO, AZ, NM and UT alone, BLM 2015) continuing to discharge acidic toxic mine wastes at steady rates or from other large scale disasters like the Gold King Mine Spill if funding for cleanup or enforcement are affected?

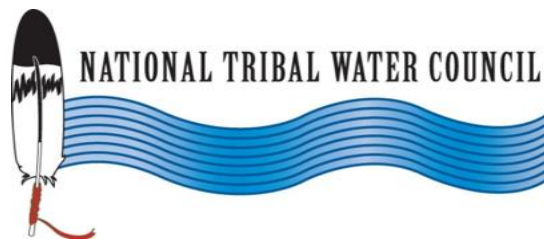
EPA could overlay the above analysis with data from CWA programs (e.g., NPDES permits, 404 permits, TMDLs, 311 oil spill prevention/preparedness facilities and emergency response data) to assess potential effects associated with policy options, and to estimate costs & benefits.

The US Department of Interior (USDOI) and US Geological Survey (USGS) developed the LANDFIRE data set, which has 30-meter resolution, and is summarized at: <https://www.landfire.gov/index.php>. LANDFIRE, which consists of a suite of data products developed from LANDSAT data, may be of value to EPA in their qualitative assessment, as they have identified shortcomings in the NWI (National Wetlands Inventory) and NHD (National Hydrograph Dataset). There are legacy editions of LANDFIRE data and there are newer data sets. One of the new USGS datasets is the Dynamic Surface Water Extent (DSWE), which uses an algorithm to identify ground surface inundation by water as detected in cloud-/shadow-/snow-free LANDSAT data collected over the US. Some of the development is described at:

<https://www.conservationgateway.org/ConservationPractices/FireLandscapes/LANDFIRE/Pages/ReMapSurfaceWater.aspx>

A recent application by the USGS was described in a 2015 Remote Sensing journal publication entitled Efficient Wetland Surface Water Detection and Monitoring via Landsat: Comparison with in situ Data from the Everglades Depth Estimation Network.

Possibly, the DWSE, in conjunction with the NWI and NHD, would be of use to EPA in meeting their qualitative assessment or other WOTUS-related and CWA-related objective(s). The relatively low resolution of DWSE, like NHD, limits its application to coarse-grained analysis and assessment.



There are higher resolution satellite-based data sets, such as from SPOT 6 & 7, that could conceivably be utilized by EPA. See, for example: Comparison of SPOT and LANDSAT data in classifying Wetland Vegetation Types, which is available at:

<https://www.int-arch-photogramm-remote-sens-spatial-inf-sci.net/XLII-3-W2/131/2017/isprs-archives-XLII-3-W2-131-2017.pdf>

However, EPA, after completing satisfactory proof of concept projects, may incur considerable expense for SPOT data acquisition, processing and analysis for all of the U.S. Perhaps a more spatially-limited analysis could be done for tribal and surrounding lands, as compared to doing the analysis for the entire land area of the U.S.

EPA needs to overlay a robust aquatic analysis similar in methodology to the Caruso study mentioned above with data from CWA programs (e.g., NPDES permits, 404 permits, TMDLs, 311 oil spill prevention/preparedness facilities and emergency response data), SDWA programs, threatened and endangered species (animal and plant) data, migratory bird data and information regarding cultural, subsistence and treaty rights in consultation with Tribes to assess cumulative potential effects and estimated costs and benefits as part of an adequate economic analysis associated with a potential policy change.

## Conclusion

The NTWC would like to reiterate that any change in the definition of WOTUS that diminishes the federal scope of waters protected under the CWA will imperil water resources that are sacred to Tribes and intrinsic to the support and protection of human health and the environment. In determining potential impacts to tribal waters, EPA must closely evaluate its federal trust responsibility, impacts to treaty rights and trust resources including Alaskan Tribes and Alaskan Native Villages, and comprehensively evaluate cumulative impacts to tribal jurisdiction, economies, tribal government(s) and environmental resources.

Federal agencies have an important role and obligation in protecting resources upon which federally-recognized Tribes depend and the agencies should not proceed down the path of encumbering Tribes and their federal partners' abilities to ensure the integrity of tribal aquatic ecosystems by placing tribal waters beyond the jurisdictional reach of the CWA.

We hope EPA finds the comments by the NTWC beneficial in the careful and thorough consideration of tribal programs in light of the proposed rulemaking to revise the definition of WOTUS under the CWA, and that EPA continues to engage the NTWC and Tribes by providing opportunities for input and feedback.

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





## References

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