



September 18, 2019

David A. Ross, Assistant Administrator
Office of Water
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Mail Code 4101M
Washington, DC 20460

Ryan D. James
Assistant Secretary of the Army for Civil Works
United States Army Corps of Engineers
441 G Street, NW
Washington, DC 20314

RE: Proposed Definition of Waters of the United States, 84 Fed. Reg. 4154 (Feb. 14, 2019) – National Tribal Water Council’s Supplemental Comments

Dear Mr. Ross and Mr. James:

The National Tribal Water Council (“NTWC/Council”) remains extremely concerned by the proposed narrowing of the definition of Waters of the United States (“WOTUS”) under the Clean Water Act (“CWA”) as reflected in the proposed rule published February 14, 2019.

As you know, virtually all tribes maintain a deep personal, cultural, and spiritual relationship to water. No matter the size of the water body, whether an ocean, lake, river, stream, creek, spring, estuary or seep, the water is treated with respect and dignity as a living entity and held sacred. Water is a precious resource, essential to life, health, subsistence, recreation and culture of tribal communities.

Both the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers (collectively “Agencies”) have a responsibility under the CWA and a trust responsibility to American Indian Tribes to protect the quality of the waters on which they rely upon. As we explained in our comment letter dated April 1, 2019, we view any action by the Agencies to limit the waters that you have the statutory authority to protect as an abrogation of that responsibility.



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More recently, the Navajo Nation submitted a supplemental comment letter (dated July 15, 2019) putting forth the following arguments which the Council fully supports.

- EPA should exclude tribes from the rule changes because of the greater importance of waters to tribes and EPA's greater obligations to tribes; and
- EPA should consider geographic differences when framing the rule, such that tribes (and states) in arid and semi-arid areas of the country are more dependent on intermittent and ephemeral waters and so those waters should be included as WOTUS in those regions.

In addition to Navajo Nation's arguments, NTWC's has an additional proposal, which is also supported by the Region 9 Tribal Caucus, and that is a proposal to request for EPA to include a new category of WOTUS for any waters within or flowing through tribal trust land designated by a tribal government as protected to be "Waters of the Tribe" ("WOTT"). Thus, WOTT would be treated as WOTUS, regardless of any narrowing of the definition by EPA for purposes of Treatment as a State (TAS) approvals, Water Quality Standards (WQS) and 401 certs, grants and other actions under the CWA. This new category would be added to the WOTUS rule and would not need an amendment to the CWA and ensures tribally designated waters as WOTUS for all purposes under the CWA.

Furthermore, this recommended approach would:

- ensure the protection of waters that are critically important to sustain tribal communities, especially in the arid Southwest;
- enable EPA to continue to honor its trust responsibility to tribes for waters that may not be covered under the proposed new narrowed definition of WOTUS; and
- give certainty to industry regarding which waters constitute WOTUS without the need for an evaluation that may yield ambiguous results.

For all of the reasons stated above, the Council urges you to include in your final definition of WOTUS all waters that have been designated by an American Indian Tribe as "Waters of the Tribe" assuring continued protection under the Clean Water Act. This approach would provide the regulatory certainty and consistency you are seeking to achieve while at the same time ensuring the protection of critical tribal trust resources.

We appreciate the opportunity to provide these supplemental comments. If you have any questions, please contact Elaine Wilson, NTWC Project Manager, at Elaine.Wilson@nau.edu, or (480) 340-2306.

Sincerely,



Ken Norton, Chairman
National Tribal Water Council