



# USET

SOVEREIGNTY PROTECTION FUND

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*Transmitted via regulations.gov*

April 15, 2019

The Honorable Andrew Wheeler  
Administrator  
Environmental Protection Agency  
1200 Pennsylvania Ave. NW  
Washington, DC 20460

Dear Administrator Wheeler,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we write to provide comment to the Environmental Protection Agency (EPA) on the proposed rule that would revise the definition and scope of the waters federally regulated under the Clean Water Act (CWA) known as “waters of the United States,” or WOTUS. According to EPA, this proposal is the second step in the two-step process intended to review and revise WOTUS consistent with the Executive Order, “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule” signed on February 28, 2017.

USET SPF is an intertribal organization comprised of twenty-seven federally recognized Tribal Nations, ranging from Maine to Florida to Texas<sup>1</sup>. USET SPF is dedicated to enhancing the development of federally recognized Tribal Nations, to improving the capabilities of Tribal governments, and assisting USET SPF Member Tribal Nations in dealing effectively with public policy issues and in serving the broad needs of Indian people.

## **Introduction**

In September 2017, USET SPF provided comment to EPA on the first step in revising the definition of WOTUS that would rescind and recodify the 2015 definition. We write again to reiterate our previous points regarding the protection of Treatment in a Manner Similar to a State (TAS) and the critical importance of meaningful and robust Tribal consultation on the proposed rule. We also provide additional comment on how EPA has conducted outreach thus far and has failed to address the deep concerns from Indian Country on the protection of Tribal waters. USET SPF continues to assert that any revisions to the definition of WOTUS must move forward in a manner that respects Tribal sovereignty and upholds federal treaty and trust responsibilities.

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<sup>1</sup> USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

To date, EPA has neither responded to Tribal concerns, nor has the agency outlined how these concerns have been incorporated into the proposed rule. According to EPA, this proposed definition revision is intended to “restore and maintain the quality of the nation's waters while respecting State and **tribal authority over their own land and water resources**” (emphasis added), which is the overall objective of the CWA. However, implementation of the proposed rule could have a deleterious effect on the authority of Tribal Nations to protect crucial water resources for our communities and citizens. Should Tribal waters be polluted as a result of implementation of the revisions to WOTUS, the proposed rule does not provide an avenue or adequate resources to allow Tribal Nations to seek justice or other recourse. The federal role in protecting the health and resources of Tribal communities is a sacred one, governed by the unique government-to-government relationship between the federal government and federally recognized Tribal Nations. The manner in which EPA has moved forward with the proposed rulemaking process is not consistent with the federal trust responsibility and obligations to Tribal Nations, who will be greatly affected by the changes within the proposed rule. USET SPF implores EPA to immediately discontinue efforts to move forward with the two-step process that would revise the definition of WOTUS.

### **Lack of Meaningful Tribal Consultation**

USET SPF continues to be deeply troubled by the lack of meaningful consultation from EPA throughout the WOTUS rule-making process. To date, EPA has held 3 regional half-day forums to gather input from Tribal representatives. However the agency has not provided information nor engaged in additional consultation with Tribal Nations on how the agency will address concerns and recommendations from Indian Country. As stated in our previous letter, EPA must utilize the longstanding principles articulated in the 1984 EPA Indian Policy to ensure the agency and Tribal Nations work together to protect the health and environment of Tribal communities. USET SPF asserts that a half-day forum cannot be considered consultation and is not reflective of the government-to-government relationship. EPA, as an agency of the federal government, shares in the trust responsibility and obligation to engage in meaningful consultation with Tribal Nations. It is vital that EPA regularly engage in a continued dialogue with Tribal Nations across the country on this and other issues, as well as honor our expectations and guidance with a goal of reaching consent for federal actions

### **Treatment in a Manner Similar to a State (TAS)**

USET SPF continues to underscore the importance of upholding the principles of Tribal sovereignty and self-determination included in the final 2016 Revised Interpretation of Clean Water Act Tribal Provision that authorizes EPA to treat eligible Tribal Nations in a manner similar to states (TAS). This authority enables Tribal Nations to administer regulatory programs over our entire reservations and provides a streamlined process for application. This was, and continues to be, an important step by EPA that would remove unnecessary and unintended barriers to Tribal Nations reassuming the authority to regulate and protect the environment, including the waters, on our reservations.

As EPA moves forward in the next step of the proposed rule-making to revise the definition of WOTUS, EPA must maintain parity for Tribal Nations under the CWA. A rollback of current regulations would have a long-lasting effect on Tribal communities and would undermine advances made in restoring sovereign authority to Tribal Nations. Any changes to WOTUS should promote Tribal sovereignty and self-determination, providing for additional opportunities to extend the TAS designation.

### **Federal Trust Obligation to Protect Tribal Resources**

As result of diminished jurisdiction under the proposed rule, Tribal lands and waters will no longer have the protections necessary to ensure the health and wellbeing of our communities. The limitations undermine the federal trust responsibility and obligation to Tribal Nations to ensure the protection of Tribal resources in perpetuity. USET SPF highlights an inquiry made by a Tribal representative at the Tribal Forum hosted by

EPA in Albuquerque, NM on March 27<sup>th</sup>, who asked what remedies are available to Tribal Nations when polluted waters not included under the revised definition of WOTUS flow into Tribal jurisdiction. EPA responded that Tribal Nations have two options that include either pursuing a nuisance defense or seeking retribution through an environmental justice avenue. USET SPF is gravely disappointed that EPA would direct Tribal Nations to seek retribution through these methods, as the protection of Tribal land and water is an obligation of the federal government. The trust responsibility and obligations to Tribal Nations are a legal and moral imperative shared by all branches and agencies of the federal government stemming from the exchange of the millions of acres of land and natural resources ceded to the U.S., oftentimes by force.

Tribal governments rely on EPA's water pollution prevention programs to a much greater extent than states or local governments to protect water quality on Tribal lands. Directing Tribal Nations to seek justice for the pollution of Tribal resources through "nuisance defenses" or "environmental justice avenues" diminishes the federal role in the obligation to protect Tribal land and water – an abrogation of the federal trust responsibility and obligations.

Additionally, during the Tribal Forum, EPA informed attendees that the agency consulted with the Department of Justice (DOJ) and the Department of Interior (DOI) on whether revisions to WOTUS would diminish trust responsibility. According to EPA, the agency did not receive adverse comments from DOJ and DOI that the proposed rule diminishes trust responsibility, however EPA officials did not provide any formal documentation from either agency to Tribal leaders or representatives on this determination. We formally request that EPA provide this supporting documentation on the agencies determination that the proposed rule does not diminish the federal government's trust responsibility. USET SPF, however, notes that we strongly disapprove that EPA consulted only with DOJ and DOI on the trust responsibility. In recognition of our inherent sovereignty and the government-to-government relationship, Tribal Nations must be consulted, as well, on impacts to the trust responsibility and obligations, and on an ongoing basis throughout the evolution of the proposed rule.

### **Funding For and Under Requirements of WOTUS**

During the March 27<sup>th</sup> Forum, EPA was specifically asked if Section 106 and Section 319 funding levels would be affected by the proposed rule change, to which EPA responded that funding under these programs is not intended to be affected. To ensure the proposed changes will not have an impact on these funding streams that are crucial to Tribal water programs, EPA must fully evaluate whether or not these programs would be affected and explicitly include the determination prior to publication of the final rule. As part of informed consent, Tribal governments must have this information during the consultative process.

Finally, during the Tribal Forum, EPA stated that the agency will seek to develop common geospatial datasets in order comprehensively map "traditional navigable waters" as no single map or set of data exists. When it comes to geospatial data within Indian Country, Tribal Nations will most often use maps from various sources including maps/data from: Fish and Wildlife Service, U.S. Army Corps of Engineers, Bureau of Indian Affairs, and others. Should EPA require or seek gathering data of WOTUS jurisdiction under the final rule, EPA must engage in meaningful and ongoing consultation with Tribal Nations on building geospatial datasets. EPA must further provide Tribal Nations with financial and technical assistance on gathering and compiling data under WOTUS. Requiring Tribal Nations to fund requirements of gathering data under WOTUS is a violation of the trust responsibility, as this shifts costs onto Tribal governments and is a drain on Tribal resources. While USET SPF encourages collaborative efforts between EPA and Tribal Nations on updating maps and data sets, we strongly oppose any conditions where Tribal Nations would be obligated to release confidential and culturally sensitive information.

## Conclusion

USET SPF continues to underscore that current regulations outlined under the 2015 definition of WOTUS provide for the adequate protection of sacred land, water and air, which are vital to the health and well-being of Tribal communities. In accordance with the trust responsibility and obligations, EPA must fully support and facilitate Tribal self-determination over environmental resources and programs. EPA must work to address the many concerns from Tribal Nations before any changes to the definition of WOTUS can move forward. Tribal communities depend on the water that flows through our lands, and we oppose any action taken by the federal government that would endanger the health and wellbeing of our communities. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at [LMalerba@usetinc.org](mailto:LMalerba@usetinc.org) or 202-624-3550.

Sincerely,



Kirk Francis  
President



Kitcki A. Carroll  
Executive Director