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Transmitted Electronically

October 9, 2026

Lee Zeldin
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington, DC 20460

Adam Telle
Assistant Secretary for the Army – Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 20310

Re: USET SPF Comments to EPA and USACE on its Supplemental NPRM to Update the Definition of WOTUS, Docket ID No. EPA-HQ-OW-2025-0322

Dear Administrator Zeldon and Assistant Secretary Telle:

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Environmental Protection Agency and the Department of the Army, U.S. Army Corps of Engineers' ("the Agencies") Supplemental Notice of Proposed Rulemaking (SNPRM) to update the definition of "Waters of the United States" (WOTUS). This SNPRM was issued to seek additional comment on items from a previous NPRM published in November 2025 to revise the definition of WOTUS to comply to the United States' Supreme Court decision in *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023). Through numerous rulemakings on revising the definition and scope of WOTUS over the years, USET SPF has continued to assert that any revisions to the definition of WOTUS must move forward in a manner that respects Tribal sovereignty and upholds federal trust and treaty obligations to protect Tribal water resources, public health, natural environments, and cultural resources. USET SPF reiterates these previous concerns, cites that lack of Tribal consultation on the SNPRM, and provides further comment on the proposed supplemental definitions of "relatively permanent" waters and "continuous surface connection" posed by the Agencies in the SNPRM.

USET SPF is a non-profit, inter-Tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Turtle Island.[1] USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign

[1] USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), 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), Mi'kmaq Nation (ME), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), 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), Rappahannock Tribe (VA), 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), Upper Mattaponi Tribe (VA), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

Revisions to the Definition of WOTUS Must Protect Tribal Ecosystems and Cultural Resources

For several years, USET SPF has participated in prior rulemakings to revise the definition and scope of WOTUS, which are referenced in our comments submitted to the Agencies on May 20, 2025, as well as our comments to the November 2025 NPRM submitted on January 5, 2026. In response to all these proposals to revise WOTUS, USET SPF has repeatedly asserted that any narrowing in the interpretation of the scope of WOTUS could have detrimental effects on the authority of Tribal Nations to protect critical water resources and environments for our citizens and communities. Specifically, we have noted the lack of language acknowledging federal trust and treaty obligations to protect these resources as well as meaningful Tribal consultation during the previous Administration's rulemaking to revise WOTUS.

We have also expressed concerns related to the potential costs that would be incurred by Tribal Nations if the Clean Water Act's (CWA) authority was weakened by changes in Environmental Protection Agency Tribal Nation jurisdiction under WOTUS. Further, USET SPF has expressed concerns with rescinding or revising regulations related to the, "2016 Revised Interpretation of Clean Water Act Tribal Provision", which authorizes EPA to treat eligible Tribal Nations in a manner similar to states (Treatment as a State or "TAS"). We continue to emphasize that the TAS authority empowers Tribal Nations to exercise our inherent sovereignty to administer regulatory programs over the lands within our jurisdictional boundaries and that it provides a streamlined process for application.

For purposes of this supplemental rulemaking, USET SPF reiterates that any revisions to the definition and scope of WOTUS must not harm the ecological well-being of water resources critical to protecting wildlife and aquatic ecosystems, public health and property, and Tribal natural and cultural resources. We remind the Agencies that, through enactment and prior refinement of the CWA, Congress authorized Tribal Nations to administer CWA programs within our jurisdictional boundaries and expressed a preference for Tribal TAS to regulate surface water quality and ensure compliance with the goals of the statute. This process upholds trust and treaty obligations to promote inherent Tribal sovereignty and removes unnecessary and unintended barriers to the exercise of Tribal Nation authority to regulate and protect our waters, the environment, and natural and cultural resources.

However, we also remind the Agencies that regardless of whether Tribal Nations administer our own CWA programs and assume TAS responsibilities, the federal government still has an obligation to protect our waters, ecosystems, natural and cultural resources, and the public health of our communities. In this SNPRM, we note that the Agencies are seeking comment on supplemental regulatory options for revised definitions of "relatively permanent" waters, "continuous surface connection," and addition of the term "perennial." Any proposed changes to the definitions and scope of "relatively permanent" waters and "continuous surface connection" must take into consideration the trust and treaty obligations of the federal government to protect our ecosystems and natural and cultural resources, especially when Tribal Nations increasingly rely on federal authorities to implement CWA programs.

USET SPF asserts that any revisions to these definitions in WOTUS that result in the removal of certain waters from federal jurisdiction will ultimately raise costs for Tribal Nations as we must assume the responsibility to manage these waters and protect critical ecosystems that are important to our cultural lifeways. We remind the Agencies that, often, Tribal Nations must rely on federal authorities to protect these resources due to a lack of funding for us to administer CWA programs under TAS. In instances

where Tribal Nations cannot assume TAS authority, then the Agencies must appropriately retain and exercise federal jurisdiction over managing such waters to protect our critical ecosystems and natural and cultural resources.

Lack of Tribal Consultation on Proposed Alternative WOTUS Definitions

USET SPF notes that the Agencies have failed to initiate Tribal consultation to inform and gather input from Tribal Nations on the proposed alternative WOTUS definitions in the SNPRM. Instead, the Agencies have stated that "this proposed action, as supplemented by this notice, may have Tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized Tribal governments, nor preempt Tribal law." The Agencies have unilaterally decided on behalf of Tribal Nations that the proposed alternative definitions in this SNPRM do not necessitate Tribal consultation. This determination does not adhere to the directives of Executive Order (EO)13175 "Consultation and Coordination with Indian Tribal Governments" (rather it is a misapplication of policymaking criteria under Sec. 3(b)(3)), nor the Environmental Protection Agency's (EPA) 2023 "EPA Policy on Consultation with Indian Tribes," or the U.S. Army Corps of Engineers' (USACE) 2003 "[USACE – Civil Works] Tribal Consultation Policy." The EO, EPA, and USACE Tribal Consultation Policies cite clear processes for engaging and consulting with Tribal Nations on policies, decisions, or actions that may affect or impact Tribal trust, treaty, or other rights.

While the Agencies proclaim in the SNPRM that they initially issued a "Notification of Consultation and Coordination" letter to Tribal Nations on March 21, 2025 and engaged with Tribal Nations over a 60-day Tribal consultation period during development of the 2025 NPRM, this does not exempt the Agencies' obligations to consult on the current consideration of the SNPRM. Further, the Agencies' noting that Tribal Nations could request government-to-government consultation during the current 30-day comment period of the SNPRM does not provide adequate prior informed notice or ample time for Tribal Nations and our technical experts to review the details of the SNPRM and appropriately engage in consultation activities. Due to this failure of adherence to its own Tribal consultation policies, USET SPF strongly recommends that the Agencies extend the opportunity for Tribal Nations to request formal consultation on the proposals of the SNPRM beyond the current 30-day comment period and in advance of promulgating a Final Rule to update the definition of WOTUS.

Concerns with Supplemental Definition for "Relatively Permanent" Waters

In the November 2025 NPRM, the Agencies proposed to define "relatively permanent" to mean "standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season." We note that in the SNPRM the supplemental proposed definition for "relatively permanent" waters would require that a water maintain standing or continuously flowing water for every day of the year. The Agencies propose an exception to this requirement in recognition of "anomalous events such as a drought or dry spell or non-anomalous events such as low tide or a regularly occurring dry spell." The Agencies are proposing a dictionary definition of "extraordinary" to inform anomalous events as "something that is unusual or caused by unforeseen circumstances or conditions." In addition, the Agencies also state that waters can lose "relatively permanent" status if such waters "[dry] up for more than 30 consecutive days in any given year as a result of non-anomalous events resulting in a temporary interruption such as low tide or a regularly occurring dry spell."

USET SPF reiterates its previous comments that nearly all streams, rivers, lakes, oceans, and wetlands have a connection to other waters, which means that these waters all connect and impact each other. We remind the Agencies that these connections may occur underground, occur for only a portion of the year as *intermittent* waters, or may be hard to discern or define without a detailed local investigation. It is important

to understand that these waters are still a critical feature of a waterbody or wetland, and thus, hydrological resources must be interpreted by the Agencies more broadly. Therefore, any revised definition of "relatively permanent" under WOTUS must be based on the best available science, which includes the use of Indigenous Knowledge and observation. Further, the Agencies must recognize the relative permanence of the *physical components of a water feature itself*, rather than the relative permanence of surface water within said feature, to define "relatively permanent" waters. Non-perennial waters play a critical role in the cumulative health of waterbodies and species dependent on this habitat. For this reason, we object to the Agencies' proposal to define "relatively permanent" waters to include a definition of "perennial" waters that meet a minimum flow duration metric. USET SPF also urges the Agencies to refrain from establishing a minimum flow duration for "relatively permanent" waters. Instead, the Agencies should identify specific elements for assessment, allowing for case-by-case analysis within that framework to consider regional hydrology, flow duration, topography, and other pertinent scientific factors.

We remind the Agencies that the proposed supplemental definition for "relatively permanent" waters and the addition of a definition of "perennial" waters would have significant detrimental impacts to our ecosystems, especially since many Tribal Nations lack TAS authority to administer CWA programs. Many Tribal Nations also lack the necessary resources and personnel to build equivalent TAS programs, due, in large part, to chronic federal underfunding. When the federal government neglects or surrenders its authority to regulate and monitor waters under the CWA it often falls upon Tribal Nations to find the funds and resources necessary to undertake these responsibilities. Removal of federal authority and jurisdiction to implement CWA programs is an outright disregard of the federal government's trust and treaty obligations to protect our ecosystems and natural and cultural resources.

Concerns with Supplemental Definition for Waters Having a "Continuous Surface Connection"

In the SNPRM, the Agencies have proposed a supplemental definition of "continuous surface connection" to mean "perennial surface water in a wetland that is continuously connected with the surface water in the jurisdictional water such that it is difficult to determine where the jurisdictional water ends and the wetland begins." The SNPRM further states that the proposed alternative definition also recognize that "a temporary interruption in the surface water connection may occur as the result of anomalous events such as drought or a dry spell" and that non-anomalous events resulting in a temporary interruption in the surface water connection should last no more than "a single period of up to 30 consecutive days in any given year." The Agencies also state that "only the portion of the wetland that is indistinguishably part of the jurisdictional water would be itself jurisdictional."

USET SPF reiterates its comments submitted to the Agencies in response to the 2025 NPRM as they still apply to the proposed supplemental definition of "continuous surface connection." We remind the Agencies that these updated definitions would not include wetlands without semi-permanent surface hydrology, such as wetlands with only saturated soil conditions supported by groundwater. Under the Agencies' proposed definitions, only those portions of a wetland with continuous surface hydrology at least during the wet season, that are "abutting," or are perennial waters would be considered jurisdictional as adjacent wetlands no matter the full delineated scope of the wetland. We note that in its previous NPRM the Agencies recognized that wetlands having a continuous surface connection to a water of WOTUS are under federal jurisdiction since few waters and wetlands are truly "isolated" in an ecological sense. Since wetlands are not truly "isolated," we reiterate that non-perennial waters also play a critical role in the cumulative health of waterbodies and species dependent on these habitats.

USET SPF continues to oppose the Agencies' proposed changes to the definitions of "continuous surface connection" and their implication for wetlands. The proposed changes remove critical federal protection for wildlife and aquatic plant life across the country that exist endemic to wetland ecosystems that are uniquely not connected via a semi-permanent surface water connection. Some of these systems only have sub-surface water connections and are some of the most biodiverse wetlands currently considered in the WOTUS definition. Many of these species have cultural value to USET SPF member Tribal Nations and other Tribal Nations across the U.S.—plant and wildlife species with which we have fostered relationships since time immemorial in alignment with the physical and emotional well-being of these ecosystems and our cultural lifeways. These relationships are inherently medicinal, spiritual, or utilitarian in purpose. Failure to account for these cultural resources in the definition of WOTUS puts these critical cultural values at risk to human development, hydrological alteration or functional loss, and pollution leading to water quality loss. These will likely have cascading effects across the landscape to waters that would be aligned with the current WOTUS definition.

For these reasons, USET SPF does not support the exclusion of wetlands without semi-permanent surface hydrology, including wetlands with only saturated soil conditions supported by groundwater, from the definition of "continuous surface connection" under WOTUS. Headwaters, including wetlands fed by groundwater, small streams with impermanent or intermittent flows, and ephemeral streams, are integral to the ecological functions, water quality, and water quantity of downstream, rivers, lakes, and coastal waters. In fact, wetlands meeting such parameters, including some bogs, fens, and vernal pools, provide unique habitats that often support high levels of biodiversity and endangered species. For example, many Tribal Nations have critical cultural ties to Black/Brown Ash trees (Fraxinus nigra), considered "critically endangered" by the IUCN and listed by two states, and which often live in bogs with irregular surface waters but consistently high soil moisture. Other species, including several amphibians listed under the Endangered Species Act (ESA), rely on intermittent wetlands without obvious surface water connections for reproduction.

Conclusion

The federal government must not limit the definition of waters protected in fulfillment of trust and treaty obligations, especially those waters to which we have inherent cultural connections that are located outside our current jurisdictional boundaries. Rather, we urge the Agencies to fully support the protection of Tribal lands and waters, as well as support our inherent sovereignty and self-determination by providing the necessary funds and assistance to fully facilitate Tribal management of environmental and natural resources and programs.

While USET SPF appreciates the Agencies' recognition of Tribal authority to manage our water resources in the 2025 November NPRM and again in the recent SNPRM, we remain concerned with changes to the definition of WOTUS that could lead to contamination of waters that Tribal citizens, Tribal communities, and native species depend upon. Removal of federal jurisdiction to monitor and regulate certain waters would further destabilize delicate ecological systems that Tribal Nations have worked hard to protect and restore. Further, we note that the Agencies have failed to adhere to their own Tribal Consultation Policies and the directives of EO 13175 by limiting requests for government-to-government consultation activities to the current 30-day comment period. We remind the Agencies that they must adhere to these policies to ensure that Tribal Nations are provided prior and early notification of proposed activities, decisions, and proposals that may affect our trust, treaty, and other rights.

The Agencies must fulfill trust and treaty obligations to protect Tribal sovereignty and the exercise of culture, Water Rights, the public health of our citizens and communities, and our natural and environmental resources. This is increasingly pertinent to the proposals advanced in the SNPRM, since Tribal Nations disproportionately rely on the federal government for implementation and enforcement of Clean Water Act programs. Prior to promulgating a Final Rule, USET SPF strongly recommends that the Agencies extend the Tribal consultation period beyond the current 30-day comment period of the SNPRM. Should you have any questions or require further information, please contact Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at LMalerba@usetinc.org or 615-838-5906.

Sincerely,

Chief Kirk Francis
President

Kitcki A. Carroll
Executive Director