



United South and Eastern Tribes, Inc.

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USET Resolution No. 2014:048

ENVIRONMENTAL PROTECTION AGENCY POTENTIAL NEW INTERPRETATION OF CLEAN WATER ACT PROVISIONS FOR TRIBES TO OBTAIN TREATMENT IN A SIMILAR MANNER TO STATES

- WHEREAS,** United South and Eastern Tribes Incorporated (USET) is an intertribal organization comprised of twenty-six (26) federally recognized Tribes; and
- WHEREAS,** the actions taken by the USET Board of Directors officially represent the intentions of each member Tribe, as the Board of Directors comprises delegates from the member Tribes' leadership; and
- WHEREAS,** Congress amended the Clean Water Act (CWA) in 1987 by adding Section 518 which is a provision for Tribes to obtain Treatment in a Similar Manner to States (TAS) for CWA Regulatory Programs; and
- WHEREAS,** Section 518 of the CWA authorizes the U.S. Environmental Protection Agency (EPA) to offer TAS to Tribes for purposes of specific CWA regulatory programs provided Tribes met these criteria: (1) is federally recognized and has a reservation; (2) has a governing body carrying out substantial governmental duties and powers; (3) has appropriate authority to regulate the quality of reservation waters; and (4) is reasonably expected to be capable of carrying out the functions of the program; and
- WHEREAS,** in 1991 EPA developed TAS provisions so that Tribes could apply for CWA regulatory programs, one of which is developing surface Water Quality Standards (WQS) to be approved by EPA; and
- WHEREAS,** EPA took a very cautious approach in their interpretation which required Tribes to demonstrate their own inherent regulatory authority; and
- WHEREAS,** such interpretation went further in that Tribes with non-member owned fee lands within the boundaries of the reservation are required to meet the "*Montana*" test which requires Tribes to provide in this context a factual demonstration that non-member activities could have a substantial, direct effect on the Tribe's health and welfare; and
- WHEREAS,** this interpretation has created a barrier to Tribes in applying for CWA regulatory authority by having to meet the "*Montana*" test which has added on average 2.3 years to a Tribe's application process for the WQS program; and
- WHEREAS,** of 566 federally recognized Indian Tribes, only 48 have successfully demonstrated their own inherent regulatory authority to the EPA and have received TAS status to obtain approved CWA Section 303(c) WQS and Section 401 certifications, while 266 Tribes have obtained approved CWA Section 106 WQS management programs, and 180 Tribes have obtained approved CWA Section 319 nonpoint source management programs; and

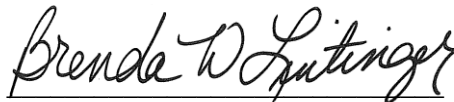
- WHEREAS,** EPA is considering a new interpretation of the provisions allowing Tribes to be treated in a similar manner to states under Section 518 of the Clean Water Act by eliminating the “*Montana*” test of Tribal inherent regulatory authority and replacing it with a statement of the Tribe’s willingness and ability to accept Congressional authority as cited in Section 518 of the Clean Water Act for consideration by the Environmental Protection Agency; and
- WHEREAS,** the potential new interpretation is supported by the plain language of Section 518, a similar approach in implementing the Clean Air Act TAS provisions, relevant judicial cases since 1991, and EPA’s experience since 1991; and
- WHEREAS,** neither the CWA statutory language nor EPA’s 40 CFR 131.8 implementing regulations will need to be revised, thus all existing regulatory requirements will remain; and
- WHEREAS,** in December 2010, the United States recognized the rights of its First Peoples through its support of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), whose provisions and principles support and promote the purposes of this resolution; therefore, be it
- RESOLVED** the USET Board of Directors supports the new interpretation of the provisions allowing Tribes to be treated in a similar manner to states under Section 518 of the Clean Water Act by eliminating the “*Montana*” test of Tribal inherent regulatory authority and replacing it with a statement of the Tribe’s willingness and ability to accept Congressional authority as cited in Section 518 of the Clean Water Act for consideration by the Environmental Protection Agency.

CERTIFICATION

This resolution was duly passed at the USET Semi-Annual Meeting, at which a quorum was present, in Bar Harbor, ME, June 4, 2014.



Brian Patterson, President
United South and Eastern Tribes, Inc.



Brenda Lintinger, Secretary
United South and Eastern Tribes, Inc.

“Because there is strength in Unity”