



USET

SOVEREIGNTY PROTECTION FUND

Nashville TN Office
711 Stewarts Ferry Pike, Ste. 100
Nashville TN 37214
P: (615) 872-7900
F: (615) 872-7417

Washington DC Office
400 North Capitol St., Ste. 585
Washington DC 20001
P: (202) 624-3550
F: (202) 393-5218

Transmitted via regulations.gov

September 27, 2017

The Honorable Scott Pruitt
Administrator
Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

Re: Docket ID No. EPA-HQ-OW-2017-0203

Dear Administrator Pruitt,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit comments to the Environmental Protection Agency (EPA) on the proposed *Definition of Waters of United States - Recodification of Pre-Existing Rules*, Docket ID No. EPA-HQ-OW-2017-0203, that proposes to initiate the first step in a two-step process that would review and revise the definition of “waters of the United States” (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-six federally recognized Tribal Nations, ranging from Maine to Florida to Texas¹. 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.

Within the proposed rule, the first step proposes to rescind and recodify the definition of WOTUS published by the EPA as a final rule defining the scope of WOTUS on June 29, 2015 (80 FR 37054) in the Code of Federal Regulations currently governing the administration of the Clean Water Act. Further, under this proposed rule, the federal agencies with jurisdiction would apply the definition of WOTUS as it existed prior to the promulgation of the stayed 2015 definition by the U.S. Court of Appeals for the Sixth Circuit.

As EPA moves forward with the two-step process that would review and revise the definition of WOTUS, EPA must not undermine the various federal protections for Tribal rights and resources. Current regulations provide for the protection of sacred land, water and air, which are vital to the health and well-being of Tribal communities. The federal role in protecting the health and resources of Tribal Nations is a sacred one, governed by the unique government-to-government relationship between the federal government and federally recognized Tribal Nations. We urge the EPA and this Administration to fully support the protection

¹ 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), 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).

of Tribal land and water, as well as support Tribal self-determination and fully facilitate Tribal management of environmental resources and programs.

Treatment in a Manner Similar to a State (TAS)

In May 2016, EPA finalized the revision of the interpretation of the Clean Water Act (CWA), *Revised Interpretation of Clean Water Act Tribal Provision*, authorizing EPA to treat eligible Tribal Nations with reservations in a manner similar to states (TAS) that would delegate authority to Tribal Nations to administer regulatory programs over their entire reservations (subject to eligibility requirements). This revision provided for a streamlined process for Tribal Nations applying for TAS designation by eliminating the requirement for Tribal Nations to demonstrate inherent regulatory authority over non-citizen activities within the borders of an Indian reservation. USET SPF lauded this important step taken by EPA that would remove unnecessary and unintended barriers to Tribal Nations assuming these responsibilities as the ability to regulate and protect the environment, including the waters, on our reservations is central to the exercise of Tribal sovereignty and self-determination.

As EPA moves forward in the next step of the proposed rule-making to review and revise the definition of WOTUS, EPA must continue to uphold the principles of Tribal self-determination that were included in the final 2016 Revised Interpretation of Clean Water Act Tribal Provision. The EPA must not undermine these important advances that have provided parity in the TAS process under the CWA. A rollback of current regulations would have a long-lasting effect on Tribal communities and would undermine the 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. EPA must continue to support Tribal self-determination and regulatory authority through TAS that would provide a coherent framework for Tribes to manage and protect their environmental resources.

Tribal Consultation

USET SPF has deep concerns about the lack of Tribal consultation from EPA on the proposed rule. The proposed rule was published on July 27, 2017, yet in an August notice to Tribal partners, the EPA stated that formal Tribal consultation period for the step 2 rulemaking took place from April 20 – June 20, 2017. The notice further explained that EPA planned to continue Tribal engagement throughout the rulemaking process. However, there has yet to be any meaningful Tribal consultation on the either of the two-steps that would review and revise WOTUS. As an agency of the federal government, EPA must seek coordination and consultation with Tribal Nations when taking actions that would affect them and their resources.

There has not been sufficient outreach by EPA to provide for ample input and consultation with federally recognized Tribal Nations. EPA must continue to 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. Further, Tribal consultation throughout the WOTUS rule-making process is needed to provide for meaningful input by Tribal communities that will be affected by this proposed rule change.

Conclusion

Thank you for your time and attention to this important matter. As the EPA moves forward with the proposed rulemaking to review and revise WOTUS, USET SPF insists that the Agency do so in manner that is consistent with the federal trust responsibility to consult with federally recognized Tribal Nations that will be affected by changes to EPA regulations. The ability for Tribal Nations to protect their environment and resources is vital, and EPA must continue to uphold its trust responsibility in a way that supports this self-determination. 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 or 202-624-3550.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Francis', with a long horizontal stroke extending to the right.

Kirk Francis
President

A handwritten signature in black ink, appearing to read 'K. A. Carroll', with a stylized, cursive script.

Kitcki A. Carroll
Executive Director