



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: CWAwotus@epa.gov

March 19, 2018

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

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 Draft Summary of Potential Effects to Clean Water Act Programs for Tribal Waters (the Draft Summary). The Draft Summary provides a summary of Tribal Clean Water Act programs under consideration as the agency moves forward with the rulemaking process to revise the definition of “waters of the United States” (WOTUS) under the Clean Water Act.

USET SPF is an intertribal organization comprised of twenty-seven 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.

On February 28th, 2018, EPA Regional Administrators released a draft summary of current Tribal Clean Water Act programs within EPA entitled the *Draft Summary of Potential Effects to Clean Water Act Programs for Tribal Waters* to Tribal representatives. The Draft Summary provides a general summary of Tribal programs, and requests input from Tribal Nations on any proposed revisions, additions, as well as any information on Tribal-specific programs. According to EPA, the Draft Summary will ultimately become part of the WOTUS rulemaking docket to be made publically available.

Tribal Nations have been managing and protecting their water resources since time immemorial. The health and wellbeing of our communities is closely tied with the health of our waters and environment. Within the Draft Summary, and within the overall WOTUS rulemaking process, USET SPF urges EPA and this Administration to fully support the protection of Tribal land and water. In addition, USET SPF urges support for Tribal self-determination and full facilitation of Tribal management of environmental resources and programs. This is also conveyed in our comments submitted to EPA in September 2017, for the agency's first step in the WOTUS rulemaking process, where we relay the importance of Tribal self-determination and the federal trust obligation to ensure protection of Tribal land and water. Many Tribal Nations rely on

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), 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).

the protections provided under the current WOTUS definition to ensure water quality standards sufficiently protect Tribal resources. Because this document will ultimately become an official part of the WOTUS rulemaking docket as the primary information for the potential effects of changes to WOTUS within Tribal Nations, USET SPF provides the below recommendations for the Draft Summary.

Lack of Language on Trust Responsibility and Tribal Consultation

USET SPF is discouraged that the Draft Summary does not include any reference to the federal government's trust responsibility to Tribal Nations. USET SPF reminds EPA that the federal government has a unique trust responsibility to Tribal Nations, founded in treaties and other historical relations with Tribal Nations, and reflected in numerous statutes. This trust relationship has been upheld in law and policy, and has become the cornerstone of federal Indian policy. In addition, USET SPF reminds EPA that the fulfillment of this trust obligation is a federal responsibility and that EPA has a responsibility to ensure Tribal Nations have the resources to protect their environment, including critical water resources. Any guidance provided by EPA for Tribal Nations, assessments and otherwise, must be reflective of this federal trust obligation. As an agency of the federal government, EPA is charged with delivering upon this trust responsibility. USET SPF urges EPA to revise the Draft Summary to reflect the trust responsibility of EPA, which is provided in the agency's own Tribal consultation policy, *EPA Policy on Consultation and Coordination with Indian Tribes*. This EPA policy recognizes the federal government's trust responsibility, which derives from the historical relationship between the federal government and Tribal Nations as expressed in treaties and federal Indian law.

Additionally, as it is written, the Draft Summary does not provide guidance on or reflect the agency-wide commitment to Tribal consultation under the federal trust responsibility. Again, these principles are specified within EPA's own consultation policy which states:

"EPA's policy is to consult on a government-to-government basis with federally tribal recognized governments when EPA actions and decisions may affect tribal interests. Consultation is a process of meaningful communication and coordination between EPA and tribal officials prior to EPA taking actions or implementing decisions that may affect tribes."

To ensure Tribal water, land and air are protected, USET SPF strongly encourages EPA include language within the Draft Summary to reflect this legal obligation of the EPA.

Inclusion of Potential Hazards to Indian Country

Though the Draft Summary provides detailed information when it comes to the current Tribal Clean Water Act programs, USET SPF has deep concerns about the lack of information when it comes to the potential hazards that Tribal Nations may face if the definition of WOTUS is weakened. The Draft Summary makes reference to the possible effects that changes to WOTUS will have on Tribal Nations and EPA in administering water quality standards under CWA for Tribal water sources. However, the Draft Summary does not specify what these likely hazardous effects may be if the regulatory tools for protecting water are diminished. Tribal Nations must be informed of the potential dangers to their communities, should the WOTUS rule be weakened. Further, Tribal communities should not have to rely on industry or state entities to ensure that vital water resources are protected as historically the health of Tribal water has not been a priority for industry and has had a detrimental, long lasting effect on the overall health of Tribal Nations and generations after.

Costs to Tribal Nations for Changes in Jurisdiction Under WOTUS

As mentioned previously, the Draft Summary provides detailed information when it comes to the current Tribal Clean Water Act programs, however it does not include important information on the likely costs

associated with the weakened CWA authority of EPA and Tribal Nations. USET SPF recommends that EPA include information on likely costs that will be incurred should the WOTUS rule be amended. For example, under the section *CWA Section 311 SPCC and Oil Spill Response Program*:

“If a water is not jurisdictional, the EPA does not have the authority to respond or conduct oversight, and the responsibility for a response would be determined by the tribal government. Additionally, costs incurred by tribes to clean up the discharge, and costs related to business impacts associated with discharges into that non-jurisdictional water, would not appear to be reimbursable by the OSLTF. Additionally, the EPA may not be authorized to conduct enforcement for such an oil spill.” (emphasis added)

USET SPF recognizes that various Tribal water quality programs have different levels of experience and access to different financial resources when faced with changes to jurisdiction. Therefore, we have overall concerns on the likely substantial costs to Tribal Nations who may not have sufficient resources to cover these costs. Oftentimes, these costs include: pollution cleanup, disposal, personnel, consultants, travel, equipment, supplies and materials, laboratory services, and other overhead costs. We recommend EPA include these potential cost estimations so Tribal Nations are able to adequately determine the effect, financial and otherwise, that changes to CWA jurisdiction will have on their vital resources.

USET SPF reminds EPA that the federal government has a trust responsibility to protect the health and environment of Tribal communities. To place the financial responsibility on Tribal Nations of costs associated with weakened authority under WOTUS would be a violation of that trust responsibility. Historically, Tribal Nations have had to shoulder these types of environmental costs. For example, the Saint Regis Mohawk Tribe has had to fund the development and maintenance of a strong Tribal environmental division due to the upriver and upwind Superfund sites that have been releasing hazardous contaminants into the air and water for sixty years. This is a failure of the federal government to fulfill the federal trust responsibility to protect the health and wellbeing of Tribal communities.

Opportunity for Future Tribal TAS Designation

USET SPF has concerns that the Draft Summary only provides a narrow assessment of the effect WOTUS revisions to Tribal Nations who are currently have “treatment as a state” (TAS) authority. According to the Draft Summary, there are 54 Tribal Nations who have obtained TAS authority to adopt water quality standards under CWA. This leaves well over 300 federally recognized Tribal Nations who do not have TAS authority, and are therefore not provided consideration under the Draft Summary. USET SPF urges EPA to not conduct policy-making in such a narrow manner that Tribal Nations who do not currently have the resources available to regulate their waters are penalized by a narrowing of the rule. USET SPF recommends EPA include the unique water and environmental needs of these Tribal communities within the Draft Summary who will be greatly affected by reducing WOTUS jurisdiction.

Role of Water in Tribal Nations

As you may know, water has a much more fundamental purpose within Tribal Nations than for other communities. To Tribal Nations, water is sacred, and is often used for traditional, ceremonial and cultural purposes. The quality of water is crucial to these traditional purposes which include Tribal subsistence rights (for example, sustenance fishing rights for Penobscot Nation). The Draft Summary must reflect the diverse and crucial role that water has for Tribal communities, not just from a functional perspective but from a cultural perspective as well.

Conclusion

The Draft Summary must not only recognize the strength and importance of current Tribal water quality protection programs under the CWA, but must also recognize the EPA-Tribal government relationship that supports Tribal Nations in implementing their water quality protection programs. 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. These current regulations provide for the protection of sacred land, water and air, which are vital to the health and well-being of Tribal communities. As EPA moves forward with the rulemaking process to amend the definition of WOTUS, EPA must not undermine the various federal protections for Tribal rights and resources. EPA must also not undermine current TAS designations or hinder opportunities for future TAS designations. 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,



Kirk Francis
President



Kitcki A. Carroll
Executive Director