



# USET

SOVEREIGNTY PROTECTION FUND

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To [regulations.gov](https://www.regulations.gov)*

February 7, 2022

The Honorable Michael Regan  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave, NW  
Washington, DC 20460

The Honorable Christine Wormuth  
Secretary  
U.S. Department of the Army  
108 Army Pentagon  
Washington, DC 20310

**Re: USET SPF Comments on EPA and Department of the Army Revised Definition of  
“Waters of the United States”, Docket ID No. EPA-HQ-OW-2021-0602.**

Dear Administrator Regan and Secretary Wormuth,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the virtual Public Hearings held on a proposed rule to revise the definition of “Waters of the United States” (WOTUS). These Public Hearings were held by the Environmental Protection Agency and the Department of the Army (“the agencies”) on January 12, 13, and 18, 2022 to receive public input from “stakeholders” on a proposed rule to rescind a 2020 rule that revised the definition of WOTUS. USET SPF generally supports the agencies’ decision to rescind the January 23, 2020, “Navigable Waters Protection Rule: Definition of Waters of the United States” (NWPR), which has disproportionate impacts on Tribal Nations because it decreases the scope of the Clean Water Act (CWA). However, USET SPF strongly recommends that the agencies conduct Tribal consultation separate from these Public Hearings to seek and incorporate Tribal Nation guidance as it finalizes its proposed rule to rescind the NWPR and revise the definition of WOTUS.

USET Sovereignty Protection Fund (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 Mexico.<sup>1</sup> USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

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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), 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), 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 Indian Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

### **The Agencies Should Initiate Tribal Consultation on the Proposed Rule Prior to Adopting a Final Rule to Revise the Definition of WOTUS**

Tribal Nations are sovereign governments that pre-date the formation of the United States and are engaged in a diplomatic, nation-to-nation relationship with the federal government. However, Tribal Nations are often inappropriately incorporated into definitions of “the public”, “underserved” communities, or non-governmental partners. Instead of initiating Tribal consultation on the proposed rule to revise the definition of WOTUS, the agencies proceeded in hosting Public Hearings to receive input from the public and “stakeholders”. Similar to using terminology referencing “the public”, Tribal Nations should not be incorporated into the definition of “stakeholder” due to the federal government’s trust and treaty obligations. These obligations include the agencies’ responsibility to engage in government-to-government consultation with Tribal Nations, as well as uphold Tribal sovereignty and self-determination while facilitating and empowering Tribal Nations to protect our critical natural, cultural, and environmental resources under the CWA.

Additionally, Public Hearings generally do not focus on issues of specific and important concern to Tribal Nations, since they attempt to address the impact of proposed actions and activities on a broad array of state and local governments, industry, and other non-Tribal entities. While the agencies conducted Tribal consultations on the initial development of the proposed rule between July 30, 2021 and October 4, 2021, further Tribal consultation should have been initiated by the agencies once the proposed rule to revise the definition of WOTUS was published on December 18, 2021. USET SPF strongly recommends that the agencies conduct Tribal consultation on the proposed rule prior to adopting a final rule to provide Tribal-specific updates to the comments received during the 2021 consultations and how those comments informed the development of the proposed rule.

### **Reiterating Previous USET SPF Comments on Revising the Definition of WOTUS**

USET SPF participated in several of the prior rulemakings to revise the definition of WOTUS. On September 27, 2017, we submitted [comments](#) to Docket ID No. EPA-HQ-OW-2017-0203 in response to the Environmental Protection Agency’s (EPA) initial rulemaking to rescind and recodify the definition of WOTUS consistent with the February 28, 2017 Executive Order 13778, “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule” (EO 13778). USET SPF also submitted follow-up [comments](#) on March 19, 2018 in response to EPA’s, “Draft Summary of Potential Effects to Clean Water Act Programs for Tribal Waters.” This Draft Summary provided a general summary of Tribal programs and requested input from Tribal Nations on any proposed revisions, additions, as well as any information on Tribal-specific programs. The last set of [comments](#) submitted by USET SPF to EPA regarding the proposed rule to revise the definition and scope of WOTUS were sent on April 15, 2019.

Several key issues were presented and reiterated in all the previous comments submitted by USET SPF. Specifically, the lack of language on federal trust and treaty obligations and meaningful Tribal consultation were emphasized in all our comments during the previous Administration’s rulemaking to revise the definition of WOTUS. We also expressed concerns related to the potential costs that would be incurred by Tribal Nations if the CWA’s authority was weakened by changes in EPA and Tribal Nation jurisdiction under WOTUS. Additionally, USET SPF 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 (TAS). We emphasized that the TAS authority enables Tribal Nations to administer regulatory programs over the lands within our jurisdictional boundaries and provides a streamlined process for application. This process upholds Tribal sovereignty, and removes unnecessary

and unintended barriers to Tribal Nations reassuming the authority to regulate and protect our waters and the environment.

Although the agencies were directed by EO 13778 to review the 2015 Clean Water rule and issue a proposed rule to rescind or revise the 2015 rule, on October 22, 2019, the agencies published a final rule repealing the 2015 rule and recodifying the 1986 regulations without any changes to the regulatory text. However, three months later, on January 23, 2020, the agencies promulgated another final rule, the NWPR. While this current proceeding by the agencies seeks to repeal the NWPR and enhance the 1986 regulations of the CWA, USET SPF strongly recommends that the agencies review the record of proceedings related to Tribal provisions in the CWA. Strengthening these provisions will uphold trust and treaty obligations to support Tribal sovereignty and self-determination and our efforts to regulate and protect our waters and environmental resources.

### **General Support for Rescinding the NWPR Definition of WOTUS**

Beginning with the 2015 Clean Water rule and continuing with the agencies' subsequent rulemakings, there have been numerous legal challenges to executive action around revisions to the definition of WOTUS. In January 2018, the U.S. Supreme Court, through a unanimous opinion, held that rules defining the scope of WOTUS are subject to direct review in district courts. Several district courts remanded and vacated the rule citing significant flaws with the NWPR, which could not be remediated without revising or replacing the NWPR's definition of WOTUS. Therefore, USET SPF supports rescinding the NWPR definition of WOTUS since the changes in jurisdiction under the NWPR could disproportionately expose Tribal Nations to increased pollution and public health risks. This is especially important since the NWPR undermines the authority of Tribal Nations to regulate waters within our boundaries, which increases the potential of harmful effects of pollution by adjacent non-Tribal jurisdictions and entities.

USET SPF also agrees with the agencies' determination that rescinding the NWPR would be consistent with President Biden's January 20, 2021 Executive Order 13990, "Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis" (EO 13990). The priorities outlined in EO 13990 direct federal agencies to listen to science to improve public health and protect our environment, ensure access to clean air and water, limit exposure to dangerous chemicals and pesticides, and hold polluters accountable. It also supports addressing the harmful impacts of climate change and prioritizes environmental justice for communities impacted by climate change and environmental pollution.

It is important to note that EO 13990 also specifically acknowledges that Tribal Nations are disproportionately impacted by climate change and environmental pollution. This directive supports rescinding the NWPR to ensure that the agencies and Tribal Nations can utilize the full jurisdictional capabilities provided under the CWA. Rescinding the NWPR would reverse the actions that reduced the scope of CWA jurisdiction across the country. Additionally, the NWPR has disadvantaged Tribal Nations because, unlike states, many Tribal Nations do not have the financial resources or technical assistance to enforce a definition of "Tribal waters" that is broader than the definition of WOTUS.

### **Conclusion**

As evidenced by our past comments, USET SPF has consistently engaged with the agencies to ensure that any revisions to the definition of WOTUS support Tribal sovereignty and self-determination. During the initial 2015 rulemaking to revise WOTUS and the subsequent actions by the agencies to adopt the NWPR, USET SPF has urged the agencies to incorporate Tribal provisions that support our efforts to protect our waters, environmental resources, and public health. While we support rescinding the NWPR to revert to the pre-2015 definition of WOTUS, we strongly recommend that the agencies hold Tribal consultations to

receive recommendations from Tribal Nations on how to improve the administration of the CWA as well as the definition of WOTUS. Tribal consultation efforts should also focus on how improvements can be made to the agencies' efforts to incorporate explicit language recognizing federal trust and treaty obligations to consult with Tribal Nations on CWA issues. USET SPF looks forward to continuing dialogue and working with you on these initiatives. 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 615-838-5906.

Sincerely,