



# 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*

March 10, 2020

Edward A. Boling  
Associate Director for the National Environmental Policy Act  
Council on Environmental Quality  
730 Jackson Place NW  
Washington, DC 20503

Re: Proposed Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act

Dear Associate Director Boling,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we write to provide comment to the Council on Environmental Quality (CEQ) on the Notice of Proposed Rulemaking (NPRM) issued on January 10, 2020, which seeks public comment on a proposed update to regulations implementing the procedural provisions of the National Environmental Policy Act (85 FR 1684). While USET SPF is pleased to see that the NPRM endeavors to be more inclusive of Tribal Nations and our areas of concern, we remain concerned about other proposed revisions that will affect Tribal Nations, our communities, and our cultural resources. In addition, we note the complete lack of Tribal consultation on the proposed update. The proposed update is touted as the most significant update to NEPA since 1978. With this in mind and in accordance with federal trust and treaty obligations, the promulgation of the proposed rule should be executed in a manner that ensures the opportunity for meaningful consultation with all 574 federally recognized Tribal Nations .

USET SPF is a non-profit, inter-Tribal organization advocating for thirty (30) 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.

We reiterate comments provided on August 20, 2018 on the Advanced Notice of Proposed Rulemaking, that any changes to the environmental review process of the NEPA regulations will have a significant impact on Tribal Nations and our ability to protect and manage Tribal resources as well as protect sacred sites and historic properties. On August 20, 2018 USET SPF provided comments to CEQ regarding the Advanced Notice of Proposed Rulemaking (ANPRM) on proposed updates to NEPA. In our comments we

---

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

*Because there is strength in Unity*

underscore that any changes to the environmental review processes within NEPA will have a significant impact on Tribal Nations and our ability to protect and manage Tribal resources as well as protect sacred sites and historic properties. It is incumbent upon the CEQ to ensure protection of Tribal resources, sacred sites, and historic places during environmental reviews of proposed actions requiring federal approval.

### **Lack of Tribal Consultation**

Despite the significance of the proposed revisions to NEPA implementation, there has been no Tribal consultation on this action thus far. To date, CEQ has convened a single meeting for Tribal Nations on the proposed changes, in addition to two public hearings. As CEQ acknowledged during the meeting, the February 26<sup>th</sup> Tribal leader meeting does not constitute government-to-government consultation with federally recognized Tribal Nations. Meaningful consultation includes timely notification to Tribal Nations, engagement of Tribal governments in the earliest of processes, and positively acting upon Tribal guidance and input. USET SPF joins a near universal call from Tribal Nations and organizations for meaningful consultation to be held in several regions throughout Indian Country, and to extend the comment period for an additional 60-day period for this purpose. These measures would ensure that Tribal Nations would have time to respond to the proposed updates to the regulations implementing procedural provisions of NEPA.

As stated within the NPRM, CEQ has taken certain steps to meet requirements under E.O.13175, "Consultation and Coordination With Indian Tribal Governments," however, to be in full compliance, CEQ must "have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications," as also required under E.O. 13175.

Further, prior to the formal promulgation of the regulation, CEQ must:

- Consult with Tribal officials early in the process of developing the proposed regulation;
- Provide to the Director of the Office of Management and Budget (OMB) a Tribal summary impact statement in a separately identified portion of the preamble of the regulation as it is to be issued in the Federal Register. The impact statement should include a description of the extent of the agency's prior consultation with Tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of Tribal officials have been met; and
- Make available to the Director of OMB any written communications submitted to the agency by Tribal officials.

### **Governmental Parity for Tribal Nations**

USET SPF is pleased see that CEQ included recommendations we provided during the ANPRM regarding the inclusion of Tribal Nations. We support the proposed changes that would provide parity with other units of government, particularly the proposal to engage with Tribal governments earlier in the NEPA process. Notably, USET SPF supports the proposed revision in NPRM Article II.A which states:

"CEQ proposes to add "Tribal" to the phrase "State and local" throughout the rule to ensure consultation with Tribal entities and to reflect existing NEPA practice to coordinate or consult with affected Tribal governments and agencies, as necessary and appropriate for a proposed action. This proposed change is also in response to comments on the ANPRM supporting expansion of the recognition of the sovereign rights, interests, and expertise of Tribes."

For instance, in the Section 1501.3 of the NPRM, federal agencies are charged with determining what actions will have significant effects and the subsequent appropriate level of NEPA review. A federal agency decision-maker or senior agency NEPA official exercises great authority in these determinations. USET SPF is encouraged that in Section 1501.9 agencies shall use an early and open process to determine the scope of issues of analysis, and as part of the scoping process, the lead agency shall invite the

participation of affected Tribal governments. USET SPF asserts that Tribal Nations must be the final arbiter in determining the effects or impacts to Tribal resources, sacred sites, historic and cultural places, as well as the social, economic, or health effects to our citizens. This includes providing the opportunity for Tribal Nations to initiate consultation ourselves during the NEPA process and not limiting the determination of which Tribal Nations are “affected” to federal agencies.

### **Protecting Off-Reservation Cultural Resources**

USET SPF further strongly supports changes that would expand the scope of Tribal interests to off-reservation. As the proposed rule further states under Article II.A:

“CEQ proposes to eliminate the provisions in the current regulations that limit Tribal interest to reservations. See proposed §§1501.8(a), 1502.16(a)(5), 1503.1(a)(2)(ii), and 1506.6(b)(3)(ii). The proposed changes are consistent with and in support of government-to-government consultation pursuant to E.O. 13175, titled “Consultation and Coordination With Indian Tribal Governments.””

As you are aware, the historic and cultural interests of Tribal Nations extend well beyond the borders of our reservations, as we continue to work to reacquire our homelands. Oftentimes, our cultural and sacred sites can be located miles from our trust and fee lands. As a result, USET SPF supports the provision that is a recognition of these challenges which Tribal Nations face in seeking to protect or restore our homelands.

### **Trust and Treaty Obligations Not Delegable**

In the proposed Section 1506.5, CEQ regulations would permit an applicant to submit environmental information, including environmental assessments (EAs) and environmental impact statements (EISs), for possible use by a federal agency in preparing an environmental document. While the agency is required to independently evaluate such submitted information and take responsibility for the scope and content, CEQ must not allow actions that would delegate federal trust and treaty obligations to a non-federal third party. Submission of environmental information which have Tribal implications by project applicants must initiate government-to-government consultation with Tribal Nations by the lead agency and invitation to participate as a cooperating agency. Again, when it comes to determining adverse effects on cultural and historical sites or on our communities, Tribal Nations are the only credible authority. Tribal Nations have a right to protect our sacred places, cultural properties, ancestral remains, environment, and public health, and the federal government, not project proponents, has a trust and treaty obligation to facilitate this protection.

### **NEPA Threshold Applicability Analysis**

In the proposed Section 1501.1(a)(1), federal agencies are charged with assessing when NEPA applies and whether the proposed action is a major federal action. A major federal action as defined in the proposed Section 1508.1(q) covers a broad range of actions, including rules, regulations, and *implementation of treaties*. A federal agency decision-maker or senior agency NEPA official exercises great authority in these determinations. USET SPF is concerned that such agency decision-maker may render decisions that will have adverse Tribal implications. We urge CEQ to provide specific procedural requirements for agency decision-makers to carry out the proposed Section 1501.1(b)(4)(ii) and to consult early with appropriate Tribal governments when federal involvement is reasonably foreseeable.

### **Definitions**

Several proposed changes and “clarifications” to NEPA definitions are also of concern, particularly the definition of “major federal action” and changes to what constitutes an “effect.” As these changes seek to limit the types of actions and effects that fall under the law, they would also limit Tribal involvement and review of projects with potentially significant implications for Tribal Nations, communities, and resources. USET SPF again reminds CEQ of its legal trust and treaty obligation to assist Tribal Nations in the

protection of our communities and cultural resources. This obligation rests solely with the federal government and supersedes the concerns of non-Tribal entities.

### **Conclusion**

While USET SPF is supportive of certain changes within the NPRM by the CEQ, we underscore that Tribal Nations across the country remain deeply concerned about the proposed update to the regulations implementing the procedural provisions of NEPA. As stated in our previous comments, any changes in the existing CEQ regulations must be done in a manner that upholds and respects Tribal sovereignty. As an agency of the federal government, it is incumbent upon CEQ to ensure all regulatory actions are reflective of the federal trust and treaty obligations. CEQ must conduct a meaningful consultation process with Tribal Nations and comply with the fundamental principles articulated in E.O. 13175. To that end, we request an extension of the comment period for an additional 60-day comment period. We look forward to continuing to working with CEQ regarding this critical NPRM to ensure the protection of Tribal resources, sacred and historical sites, while upholding Tribal sovereignty. 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 202-624-3550.

Sincerely,



Kirk Francis  
President



Kitcki A. Carroll  
Executive Director