



USET

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November 22, 2021

Brenda Mallory
Chair
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

RE: Docket No. CEQ-2021-0002, National Environmental Policy Act Implementing Regulations Revisions

Dear Chair Mallory,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Council on Environmental Quality (CEQ) Notice of Proposed Rulemaking (NPRM) on proposed revisions to the National Environmental Protection Act (NEPA) regulations and the NEPA 2020 Final Rule. CEQ has stated that this action is aimed at restoring community safeguards during environmental reviews on federal projects. CEQ is also conducting this comprehensive review as directed by E.O. 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis", and E.O. 14008, "Tackling the Climate Crisis at Home and Abroad", issued by President Biden on January 20 and 27, 2021. CEQ has stated that revisions to the NEPA 2020 Final Rule will be conducted in two phases, respectively designated as Phase 1 and Phase 2. Phase 1 of this process was initiated through the current NPRM to restore general provisions of NEPA that were in effect for decades before being modified in 2020. USET SPF's comments will focus on recognition of Tribal Nations as sovereigns, how NEPA must consider the cumulative impacts of projects, and issues with NEPA implementation across the federal government.

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.¹ 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.

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), 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), Nansmond 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).

Because there is Strength in Unity

USET SPF supports regulations that safeguard and protect our natural and environmental resources and cultural heritage. We also generally support the goals of efficiency and effectiveness, but we assert that this cannot be accomplished at the expense of Tribal sovereignty, health, spirituality, and culture. Industrial and commercial entities do not fully understand the concerns of Tribal Nations when addressing issues such as the protection of Tribal resources, sacred sites, historic properties and other cultural properties. As a result, USET SPF is opposed to any and all revisions that would undermine Tribal consultation and the federal government's trust responsibility to consult with Tribal Nations under NEPA. CEQ should strongly consider the intent and effects of the National Historic Preservation Act, the Antiquities Act, and the Native American Graves Protection and Repatriation Act on Tribal Nations when making any determination regarding potential changes to the NEPA process. These laws were all passed with the intention of protecting important Tribal sites, items, and remains and must continue to be implemented along with meaningful Tribal consultation requirements under NEPA.

Tribal Nations Are Not "Stakeholders" or the "Public"

Tribal Nations are sovereign governments that pre-date the formation of the United States and are engaged in a diplomatic relationship with the federal government. We have a government-to-government, Nation-to-Nation relationship with the United States due to the unique recognition of our status under the U.S. Constitution and federal laws. Therefore, CEQ and federal agencies must not consider or combine us under definitions of "stakeholders", or the "public", prior to or during the consideration of any NEPA proceeding. Consultation and collaboration with Tribal Nations on projects that directly and/or indirectly affect our cultural and natural resources should occur prior to any decision-making process undertaken by federal agencies. Additionally, consultation and collaboration with Tribal Nations on these projects should also occur in advance of any public scoping meetings with "stakeholders" and the "public". Meaningful consultation includes timely notification to Tribal Nations, engagement of Tribal governments in the earliest of NEPA processes, and positively acting upon Tribal guidance and input. Weakening Tribal consultation requirements through the revision of NEPA regulations would result in irreparable damage to our sacred sites and threaten the public health of USET SPF member Tribal Nations and Tribal Nations across the country, which would violate the federal government's trust and treaty obligations.

Tribal Consultation Must Occur Prior to Any Agency Revision to NEPA Regulations

One of the guiding principles of E.O. 13175, "Consultation and Coordination with Indian Tribal Governments", is to establish regular, meaningful consultation and collaboration with Tribal Nations in developing and implementing federal policies. However, this principle has been exercised using methods that have not always taken into consideration the direct and indirect implications for Tribal Nations, especially under NEPA. Federal departments and agencies often unilaterally conduct their own review of NEPA policies and actions. Similarly, they often rely on third-party industry consultants to conduct environmental assessments and environmental impact statements as the foundation for initial NEPA review procedures. These activities are often conducted without Tribal collaboration and consultation, which frequently result in findings of no significant impact on our lands, environmental and cultural resources, and historic properties. These actions fail to recognize and adhere to the federal government's fiduciary trust and treaty obligations to Tribal Nations. Rather, consultation and collaboration must recognize Tribal Nations as equal sovereigns. Tribal Nations must always be engaged at the earliest stages of federal decision-making in the NEPA process.

Furthermore, our authority to initiate consultation in response to federal action(s), or proposed federal action(s) or activities, must be recognized and honored. It is critical that these requirements are not only protected from any potential changes to NEPA but are also expanded to include projects outside of our jurisdictional boundaries. The preservation and expansion of current Tribal consultation requirements are a

critical standard in the fulfillment of federal trust responsibilities and obligations. Under Title 40, Sec. 1507.3 of the Code of Federal Regulations, CEQ is required to review any proposed changes to agency NEPA procedures before their adoption to ensure those procedures are consistent with the NEPA law and CEQ regulations. We strongly urge CEQ to require agencies to consult with Tribal Nations on proposed revisions to their agency NEPA regulations and provide documentation and comments from Tribal governments regarding these Tribal consultation proceedings. Agencies should also be required to seek consent from Tribal governments on any proposed projects that may directly or indirectly affect our natural, cultural, and environmental resources. Furthermore, if an agency submits proposed revisions to its NEPA regulations to CEQ without documentation on Tribal consultation and comments received on the proposed revisions, CEQ must direct the agency to hold Tribal consultations on the proposed revisions and CEQ should also participate in the agency consultations to ensure the agency is following through with this directive.

Agencies Must Implement NEPA to Address the Cumulative Impact of Projects

Federal agencies implementing the NEPA process can sometimes not fully consider the long-term and cumulative effects of large-scale projects. Tribal Nations have witnessed issues where no single agency takes full responsibility for large-scale projects and, therefore, those projects are approved through a piecemeal NEPA process that includes multiple agencies implementing their own NEPA review processes. These piecemeal approval processes conducted by agencies can often overlook the cumulative effects of a large-scale project, especially those stretching over large geographical land bases that include a mixture of Tribal, public, private, and other lands. Additionally, every federal agency implementing its NEPA review processes has varying levels of Tribal engagement, coordination, and consultation and sometimes, agencies have been known to take the position, in the absence of Tribal consultation, that a given project would have no significant impact on our natural, cultural, and historical resources. Only Tribal Nations can confirm that a project would have no impact.

Similarly, since the purpose of NEPA is to protect our public health and environmental resources, federal agencies often use the NEPA process to completely bypass Section 106 reviews under the National Historic Preservation Act. While Phase 1 of the proposed revisions to the NEPA 2020 Final rule are focused on a set of targeted amendments that are posing near-term NEPA implementation challenges, CEQ must address the issue of the cumulative impact of large-scale projects on Tribal lands and our homelands outside of our current jurisdictional boundaries. This is critically important to protect our natural, cultural, and historic resources. Additionally, CEQ and federal agencies must support and provide additional funding for Tribal Nations and Tribal Historic Preservation Officers (THPOs) to conduct NEPA reviews. This is especially important since the Administration is focused on major investments in infrastructure with the Build Back Better agenda. With the large influx of infrastructure dollars coming to Indian Country we also need funding for our THPOs to conduct the necessary environmental, cultural, and historical reviews under NEPA and Sec. 106 of the National Historic Preservation Act.

Restoration of the Terms of “Direct” and “Indirect” in the Definition of “Effects”

In the NPRM, CEQ stated that the impact of this proposed rule would not significantly impact Tribal Nations and our communities. This is highly inaccurate. In the Phase 1 NPRM, CEQ has proposed to reinstate the terms of “direct” and “indirect” to the definition of “effects” to realign NEPA regulations with the intent of the 1978 law and existing case law on judicial interpretations of NEPA. CEQ has recognized that this change would better reflect NEPA’s statutory purpose and intent as courts have interpreted NEPA to require agencies to analyze the “reasonably foreseeable direct and indirect effects of a proposed action and alternatives.” During the proceedings leading up to the NEPA 2020 Final Rule, USET SPF expressed concerns with proposed changes and “clarifications” to NEPA definitions of what constitutes an “effect”. We believe that the reinstatement of the terms “direct” and “indirect” to the definition of “effects” is an

appropriate action to ensure that NEPA is fulfilling its original intent and purpose. This action will support reason- and science-based decision-making to protect the environment and public health, as well as our natural, cultural, and historic resources. Direct and indirect effects are critical parts in the evaluation of potential environmental effects of a proposed project or activity. Similarly, the absence of the term “indirect” from the definition of “effects” may direct agencies to not adequately consider the long-term or geographically remote impacts of projects or proposed activities. This would also apply to the protection of our public health as well as our natural, cultural, and historic resources.

Proposed Revisions to “Purpose and Need”

The NEPA 2020 Final Rule modified the “purpose and need” section of an environmental impact statement (EIS) by adding language requiring agencies to base the purpose and need on the “goals” of an applicant. USET SPF supports CEQ’s determination to revert to the original 1978 NEPA language of “purpose and need” since the 2020 Final Rule changes could be interpreted by agencies to prioritize an applicant’s “goals” over the public health and environmental protection priorities of Tribal Nations. Federal agencies must always consider the impacts of a proposed project or activity on the public health and environmental, natural, and cultural resources of Tribal Nations. Similarly, CEQ and federal agencies must always coordinate and communicate with Tribal Nations regarding project applications that may cause irreparable harm to our people and environmental, natural, and cultural resources.

Conclusion

The NEPA process plays a critical role for Tribal Nations and our communities, not just in the protection of public health and the environment, but our traditional practices, sacred sites and historic places, as well. The scope of NEPA’s regulations spans the authority of many federal actions, including energy development, infrastructure, transportation, air and water pollution, and many others. The ability for Tribal Nations to protect our environment, resources, sacred sites, and historic properties provided through NEPA regulations is vital to the health of future generations within Indian Country. Historically, failures to effectively engage with Tribal Nations have caused irreversible damage and harm to Tribal resources and cultural practices. USET SPF strongly urges CEQ to protect the processes that require federal agencies to engage and consult with Tribal Nations as early as possible thoroughly and meaningfully on revisions to NEPA regulations. As part of its trust and treaty obligations, CEQ must promote and preserve our sovereign authority to protect our people and homelands. We look forward to continued dialogue on these important Phase 1 and upcoming Phase 2 revisions to NEPA regulations to ensure the protection of our natural, cultural, and historical resources. 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 615-838-5906.

Sincerely,



Kirk Francis
President



Kitcki A. Carroll
Executive Director