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*Transmitted Electronically
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February 24, 2022

Richard Spinrad
Under Secretary of Commerce, Oceans and Atmosphere
Administrator, National Oceanic and Atmospheric Administration
U.S. Department of Commerce
1401 Constitution Ave., NW
Washington, DC 20230

Dear Under Secretary Spinrad,

The United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) submits these comments in response to a request for information (RFI) from the National Oceanic and Atmospheric Administration (NOAA) on its Tribal Consultation Handbook and Traditional Ecological Knowledge (TEK) Guidance policies and procedures. NOAA has initiated this proceeding in response to President Biden's, "Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships" (Presidential Memorandum), issued on January 26, 2021. This Presidential Memorandum directs federal agencies to submit to the Office of Management and Budget a detailed plan of actions agencies will take to implement the policies and directives of Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments" (E.O. 13175). USET SPF welcomes the opportunity to provide input on NOAA's 2021 draft Tribal Consultation Handbook and 2019 TEK Guidance policies and procedures. Our comments generally support the proposed changes to these documents, as well as recommendations on the addition of certain language and removal of certain terms to strengthen effective government-to-government consultation and collaboration. USET SPF also supports the proposed agency-wide expansion of NOAA's TEK Guidance.

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.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), 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).

Because there is Strength in Unity

NOAA's 2021 Draft Tribal Consultation Handbook

USET SPF supports federal agency efforts to implement and improve meaningful consultation and coordination efforts with Tribal Nations. We see the value in the spirit of the January 26th Presidential Memorandum, which is to recommit and refocus federal agencies to engaging in meaningful Tribal consultation. However, these actions alone are not sufficient to address systemic failures in the various consultation processes across the federal government. Broadly, the U.S. must work to reform the Tribal consultation process—to “build back better” in a way that truly modernizes our relationship with the federal government. Tribal Nations continue to experience inconsistencies in consultation policies, the violation of consultation policies, and mere notification of federal action as opposed to a solicitation of input. Letters are not consultation. Teleconferences are not consultation. Providing the opportunity for Tribal Nations to offer guidance and then failing to honor that guidance is not consultation.

While each executive department and its agencies must reevaluate its protocols and procedures for Tribal consultation, communication, and engagement, there must be a broader reconciliation across the federal government to provide certainty, consistency, and accountability in this process. The federal government must work to standardize and provide a uniform foundation to its Tribal consultation methods to provide certainty to Tribal Nations and federal officials alike. It is time for a Tribal Nation-defined consultation model, with dual consent as the basis for strong and respectful diplomatic relations between two equally sovereign nations. In the short term, we must move beyond the requirement for Tribal consultation via Executive Order to a strengthened model achieved via statute.

In the long term, we must return to the achievement of Tribal Nation consent for federal action as a recognition of sovereign equality and as set out by the principles of the United Nations Declaration on the Rights of Indigenous Peoples. Our recommendations focus on general principles of how federal departments and agencies must improve their coordination and consultation efforts, as well as specific recommendations to improve NOAA's 2021 draft Tribal Consultation Handbook.

Evolve Consultation to Consent

The U.S. must move beyond a “check the box” method of consultation and instead work to formalize diplomatic relations with and seek the consent of Tribal Nations individually. This directive is reflected in Article 19 of the U.S.-endorsed United Nations Declaration on the Rights of Indigenous Peoples, which states that nations, “shall consult and cooperate in good faith”, with the governmental institutions of our Tribal Nations, “in order to obtain [our] free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect [us].”

Standardize and Codify Consultation Requirements

For far too long, Tribal Nations have experienced inconsistencies in consultation policies, the violation of consultation policies, and mere notification of federal action as opposed to a solicitation of input. Letters are not consultation. Teleconferences are not consultation. Providing the opportunity for Tribal Nations to offer guidance and then failing to honor that guidance is not consultation. Accountability is required to ensure Tribal consultation is meaningful and results in corresponding federal efforts to honor Tribal input and mitigate any concerns. All federal agencies, including independent federal agencies and the Office of Management and Budget, must be statutorily required to adhere to consultation policies with additional oversight from the White House and Congress. USET SPF strongly supports the codification of consultation requirements for all federal agencies and departments, including a right of action to seek judicial review of consultation when the federal government has failed to engage, communicate, and consult

appropriately. We further urge the Biden-Harris Administration to use its authority, in consultation with Tribal Nations, to create and implement a standard consultation process for use by all agencies.

Tribal Consultation Should Occur on a Nation-to-Nation, Leader-to-Leader Basis

Although consultation can pertain to very specific programmatic issues requiring technical and subject matter expertise, true consultation should occur at a Leader-to-Leader level. Duly elected or appointed Tribal Leaders must be afforded the respect and opportunity to directly voice Tribal Nation concerns to those federal officials with actual decision-making authority. We must further have the opportunity to include and confer with our respective expert staff during every consultation, just as federal officials do.

In addition, because the U.S. is engaged in a diplomatic relationship with each federally recognized Tribal Nation, greater effort must be made to consult with Tribal Nations on an individual basis. Due to the COVID-19 pandemic, virtual and teleconference consultations have had to take the place of in-person, face-to-face, consultations. While this is not a preferred method of consultation, it does offer the federal government another opportunity to engage, communicate, and consult at a Leader-to-Leader level. These methods of consultation provide the federal government with the opportunity to engage and communicate directly with every Tribal Nation.

No Delegation of Federal Consultation Obligations

The trust relationship exists between the federal government and Tribal Nations exclusively. To this point, the federal government must not delegate its consultation obligation to third party entities, which include non-profit organizations, industries/corporations, hired consultants and contractors, non-Tribal archaeologists and anthropologists, and other units of government. When other entities are party to or involved in federal actions, the federal government must exercise appropriate oversight in ensuring Tribal interests are not adversely impacted. Tribal Nations, and not any other entity, are the final arbiters of whether a federal action impacts our governments, homelands, cultures, public health, or sacred sites.

Consultation Should be Early and Ongoing, with Advance Notice and Sufficient Response Timelines

One of the guiding principles of E.O. 13175 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 in-direct implications for Tribal Nations. Under the current consultation framework, federal departments and agencies often unilaterally conduct their own internal review of proposed policies and actions, which frequently results in a finding of no impact. This fails 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 process. In addition, our authority to initiate consultation in response to federal action (or proposed federal action) must be recognized and honored.

Deference to Tribal Nations

E.O. 13175, Section 3 lays out a set of policymaking criteria that have been implemented unevenly over the last two decades. In particular, this includes directives to extend "maximum administrative discretion" to Tribal Nations by encouraging Tribal Nations to develop our own policies and standards to achieve objectives as well as consult with us on the necessity of any federal

standards. USET SPF urges NOAA and the Biden Administration to consider how this section can be better operationalized and consistently applied throughout the federal government. In addition, the Indian Canons of Construction should always be applied during Tribal consultation, the policymaking process, and beyond. That is, any ambiguities in law or policy should be interpreted in favor of Tribal Nations.

Flexibility for Tribal Waivers

Similarly, E.O. 13175, Section 6 encourages the federal government to facilitate and streamline Tribal applications for waivers of statutory and regulatory requirements. With some notable exceptions, this section does not appear to be actively implemented across the federal government. NOAA and the Biden Administration should also revisit this section and examine what further Executive action is necessary to ensure its widespread operationalization.

Transparency in and Follow-Up in Decision-making

All too often following Tribal consultation, the federal government renders a decision without further explanation as to how that decision was reached. This is particularly true in the case of “check-the-box” consultation, where Tribal Nations provide input and that guidance is ignored completely. Not only does this run counter to the federal government’s consultation obligations, it undermines our Nation-to-Nation relationship. In recognition of and out of respect for our governmental status, as well as in the spirit of transparency, each federal agency should be required to publish a summary of all comments received, how that guidance influenced the agency’s decision, and why the decision was reached. This should also be reflected in language under Section VI(G) of the 2021 draft Tribal Consultation Handbook.

Educate Federal Employees on Tribal Sovereignty and U.S.-Tribal Nation Relations

It is critically important that all employees of federal departments and agencies receive comprehensive training on working with and communicating effectively with Tribal Nations. Federal actions impact Tribal Nations and our citizens. Every right-of-way permit, application for land into trust, and environmental and cultural review document are reviewed by federal employees. However, many of the same federal employees engaging in decision-making that impacts our interests do not fully understand the history of U.S.-Tribal Nation relations and the federal trust obligation. This lack of education and understanding regarding the fiduciary trust and treaty obligations contributes, at least in part, to federal failures to properly consult. USET SPF has long recommended mandatory training on U.S.-Tribal relations and the trust obligation for all federal employees. This training should be designed in consultation with Tribal Nations. We appreciate NOAA’s efforts to provide training to all NOAA staff involved with outreach, consultation, and operations with Tribal governments, which is referenced several times throughout the 2021 draft Tribal Consultation Handbook. However, USET SPF recommends that *all* NOAA staff receive training on the government-to-government relationship and the trust and treaty obligations of the federal government to Tribal Nations. This will ensure that all NOAA personnel are aware and knowledgeable of the federal government’s obligations to promote Tribal sovereignty and self-determination, regardless of the level their position has in direct interaction with Tribal Nations. These directives should be explicitly referenced in Section III(C) and Section III(D) of the current 2021 draft of NOAA’s Tribal Consultation Handbook.

Invest in Diplomacy

NOAA must fully recognize and uphold our Nation-to-Nation diplomatic relationship. This directive extends to ensuring both the department and Tribal Nations have access to resources that support diplomatic activities. True diplomacy, as evidenced by activities conducted by the U.S Department

of State, would involve U.S. ambassadors appointed to liaise with each federally recognized Tribal Nation on behalf of the federal government, rather than facilitating this relationship through national or regional consultations. While we recognize retooling the consultative relationship to allow for a truly diplomatic relationship involves many steps, funding for these activities is certainly one of them. We encourage NOAA to consider how it might include diplomacy in future budget requests. This would include funding for the department to build and sustain diplomatic infrastructure, as well as increased funding for Tribal Nation participation in these processes. NOAA budgets should reflect a broad commitment to improvements in our Nation-to-Nation relationship, including its own functions.

General Support for Changes in NOAA's 2021 Draft Tribal Consultation Handbook

NOAA's Tribal Consultation Handbook has not been revised since it was adopted on May 21, 2013. USET SPF generally supports the proposed changes in NOAA's draft Tribal Consultation Handbook, which includes further detail and clarifications on definitions and terminology, as well as the addition of new language to strengthen Tribal consultation, collaboration, and communication. The proposed changes include changing the use of language such as "informal consultation" to "engagement" to provide further clarification to NOAA employees by defining engagement to include a range of interactions between NOAA staff and Tribal Nations that do not constitute formal consultation activities. These include the sharing of information, data, perspectives, feedback and concerns, joint projects, and education and outreach. We support NOAA's clarification on engagement with Tribal Nations as an initial process to facilitate meaningful consultation by encouraging NOAA staff to engage in routine communication with Tribal Nations as a foundation for successful collaboration and coordination. USET SPF believes this distinction is important to preserve the integrity of government-to-government consultation as a formal exchange between sovereigns. Formal consultation activities must always occur on the development and review of proposed NOAA actions, activities, and policies that may affect Tribal Nations and our cultural, historical, trust, and natural resources, our public health, and our environment, coastal areas, and seascapes.

NOAA has also proposed the inclusion of a definition of "Tribal trust resources" to include, "those resources, either on or off [Indian] lands, retained by, or reserved by or for [Indian Tribes] through federal treaties, federal statutes, judicial decisions, and executive orders, which are protected by a fiduciary obligation on the part of the United States." USET SPF generally supports the adoption of this definition and language since it recognizes and acknowledges that Tribal trust resources are located within and outside our jurisdictional boundaries and should receive protections guaranteed by treaties, federal statutes, executive orders, and judicial decisions. However, we recommend that this language be expanded to acknowledge that Tribal Nations have the authority to designate environmental, cultural, and natural resources and landscapes for protections similar to those explicitly guaranteed by the aforementioned legal documents. This will ensure that all resources and landscapes of environmental, cultural, and historical significance to Tribal Nations can be protected from potentially harmful development and other activities, especially those areas that may now exist in submerged environments.

Sensitive Information Must be Protected from FOIA Requests

Section IV, "Exchange of Information to Support Consultation", of the NOAA 2021 draft Tribal Consultation Handbook references the disclosure of information received from Tribal governments to the public under Freedom of Information Act (FOIA) requirements. Section IV(A) states that, "information received by NOAA from a tribal government should not be released to the public without permission from the tribal government unless required by applicable law such as [FOIA]."

NOAA should proactively protect the sensitive cultural, governmental, and economic information of Tribal Nations and include language in this section to direct NOAA staff to inform Tribal governments when the agency receives these requests, what entity is requesting information, and the information being requested. Furthermore, language should be added to this section to protect information shared by Tribal religious and cultural leaders as well as Tribal government officials such as Tribal Historic Preservation Officers and environmental, cultural, and natural resource managers.

Additionally, NOAA has retained the 2013 Tribal Consultation Handbook language under Section VI(F)(4), which states that NOAA and Tribal Nations, “should acknowledge and discuss the limited capacity of NOAA to protect the confidentiality of information provided by the tribe consistent with the requirements of [FOIA] or litigation.” The use of the term ‘limited’ should be struck from this section since it could be interpreted by NOAA staff that the agency will not make the utmost effort to protect the confidentiality of sensitive Tribal government and cultural information. Upon removal of the term ‘limited’, this language should also be referenced under Section IV(A) to ensure NOAA staff appropriately inform Tribal governments regarding the functions of FOIA and further inform Tribal governments to specify what information should be protected and redacted from FOIA requests. Section IV(A) should also reference NOAA’s additional guidance on the exchange of sensitive or confidential information provided by the [NOAA Fisheries and National Ocean Service Guidance and Best Practices for Engaging and Incorporating Traditional Ecological Knowledge in Decision-Making](#).

NOAA has also proposed adding FOIA language to its 2021 draft Tribal Consultation Handbook under Section VI(F)(5) stating that, “NOAA and tribes should not circulate written information without first discussing the government’s obligations under FOIA.” Section VI(F)(5) directs NOAA staff to work with Tribal Nations to agree on a method of recordkeeping in consultation proceedings, which may include recording, taking of notes, or direct transcription of a consultation discussion by machine or other methods. USET SPF supports the addition of NOAA’s proposed language under Section VI(F)(5) stating that, “Tribes must be notified of any recordings and permission given prior to any meeting recordings or development of a transcript takes place.” However, additional language should be added following this sentence to state that Tribal Nations can request redactions of sensitive Tribal information from recordings or transcripts of Tribal consultation sessions. These redaction requests should be allowed to be stated verbally during consultation sessions and in follow-up through written materials submitted to NOAA by Tribal government officials, religious and cultural leaders, and environmental, cultural, and natural resource managers.

Establishment of Tribal Liaison Positions in NOAA Offices and Regional Teams

NOAA has proposed new language under Section III(D) of its 2021 draft Tribal Consultation Handbook requiring each line office, staff office, and the NOAA Regional Teams to establish a position of “Headquarters Tribal Liaison.” Newly proposed Section III(D) language also requires the NOAA Regional Teams to, “serve as a cross-line-office group to share information regarding tribal interactions at the regional level.” USET SPF supports the addition of these changes under Section III(D). However, we recommend the addition of language (highlighted by italics) in Section III(D) in the following sentence: “If a NOAA line office or staff office deems necessary, *or by request from a Tribal government*, they also may consider establishing a tribal liaison within a program or region.” Addition of this language will direct NOAA staff to appropriately follow-up on Tribal Nation requests for a Tribal liaison position within a NOAA program or region rather than leave the decision-making on establishing such position solely with the line or staff office.

Furthermore, USET SPF supports the addition of the following language proposed by NOAA under Section III(D) of its 2021 draft Tribal Consultation Handbook:

“In addition to aiding in consultations, the duties for the headquarters line office tribal liaison duties frequently include:

- Helping the NOAA tribal liaison fulfill the requirements of the NOAA tribal policy and ensure compliance with DAO 218-8 and E.O. 13175.
- Participating in monthly NOAA tribal team meetings.
- Developing and executing a yearly work plan, these include topics such as: Policy Implementation; Program Delivery; Training; Employee Education; Guidance; National Outreach and Communication; and other issues.
- Attending meetings between tribes and NOAA Leadership.
- Facilitating discussion and dissemination of information to field offices.
- Bringing information, suggestions, issues from the field offices to the NOAA tribal team.
- Ensuring their line office is aware of and complying with the tribal Handbook.
- Ensuring consultations and meetings are entered by the regions into the NOAA tribal tracker in accordance with the guidance.
- Reviewing and providing information as requested by the NOAA tribal liaison.”

Expansion of NOAA Traditional Ecological Knowledge Guidance to All NOAA Offices

In 2019, NOAA adopted the “NOAA Fisheries and National Ocean Service Guidance and Best Practices for Engaging and Incorporating Traditional Ecological Knowledge in Decision-Making” (TEK Guidance). The TEK Guidance currently applies only to NOAA Fisheries and the National Ocean Service (NOS) and details objectives for incorporating TEK into decision-making processes and procedures. Additionally, the TEK Guidance recognizes and acknowledges that there is no single universally accepted definition of TEK. The guidance relies on the NOAA Tribal Consultation Handbook definition of TEK as, “a cumulative body of knowledge, practice and belief evolving by adaptive processes and handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and with their environment.”

USET SPF supports a broad definition of TEK since the term and its use to incorporate Indigenous knowledge into environmental science, policy, and decision-making processes can mean different things to each Tribal Nation. It is the sole authority of Tribal Nations and cultural and religious leaders to determine how TEK can and should be used to inform these processes and NOAA must make every effort to protect the confidentiality of this sensitive cultural and religious information. We are pleased that throughout the TEK Guidance there are references to issues raised regarding cultural sensitivity and confidentiality, especially regarding the FOIA process as previously mentioned in these comments.

USET SPF recommends that the recommendations provided in these comments on the 2021 draft Tribal Consultation Handbook regarding FOIA requests also be referenced in the TEK Guidance to ensure that NOAA staff understand that these documents are inextricably connected. Additionally, USET SPF generally supports the language of the TEK Guidance, especially the sections on “Cause No Harm” and “Free, Prior and Informed Consent”, which provide a clear outline for working with Tribal Nations to protect sensitive cultural and religious information and affirm the authority we have to participate, or not, in TEK discussions. We also support expanding the TEK Guidance to be implemented agency-wide at NOAA and not just implemented by NOAA Fisheries and NOS. Furthermore, USET SPF recommends the inclusion of

language in the TEK Guidance to require NOAA offices to promote the incorporation and use of TEK to inform policy and decision-making processes when collaborating with other federal departments and agencies on projects that may have direct or indirect implications for Tribal Nations. In keeping with requirements to protect sensitive and confidential information, NOAA must receive prior approval from Tribal Nations for the sharing of TEK information with other federal departments and agencies during interagency collaboration on project activities. We defer to Tribal Nations and our religious and cultural leaders on further comment regarding the TEK Guidance as well as best practice examples for incorporating TEK into environmental science, policy, and decision-making processes.

Conclusion

NOAA has a trust and treaty obligation to ensure that all NOAA staff are informed and knowledgeable of the federal government's trust and treaty obligations to Tribal Nations. This includes requiring all personnel, regardless of the level of interaction that their position has with Tribal Nations, to understand, uphold, and promote Tribal sovereignty and self-determination. We encourage NOAA to adopt and implement appropriate revisions to its 2021 draft Tribal Consultation Handbook and 2019 TEK Guidance to strengthen its delivery of trust and treaty obligations to Tribal Nations, including the obligation to protect our vital cultural and natural resources, as well as the public health of our communities and surrounding environments. These actions must include the protection of Tribal resources located outside our current jurisdictional boundaries in recognition and acknowledgement of the immense land loss experienced by Tribal Nations. Similarly, NOAA must recognize the authority of Tribal Nations to designate cultural resources and landscapes for protection similar to those guaranteed by treaty, statute, judicial decisions, and executive orders. These actions will support NOAA's adherence to the directives of E.O. 13175 by incorporating Tribal-centric and Tribally driven directives into its Tribal Consultation Handbook and ensure that all NOAA staff adhere to appropriate protocols for government-to-government consultation and engagement with Tribal Nations.

Furthermore, NOAA's proposal to expand its TEK Guidance to apply agency wide to NOAA offices, beyond NOAA Fisheries and the National Ocean Service, adheres to the directives of President Biden's November 15, 2021 Presidential Memorandum to incorporate Indigenous TEK into federal decision-making processes. TEK must be respected and protected as Tribal proprietary knowledge, as Tribal Nations and cultures carry the responsibility of its application for the well-being of our communities, homelands, and seascapes. NOAA must make the utmost effort to protect TEK and other sensitive cultural information from public disclosure and ensure Tribal Nations have the ability to control what is shared by the agency, including through FOIA requests. USET SPF looks forward to continued engagement and dialogue with NOAA on these important government-to-government consultation and TEK Guidance policies and procedures. 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