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

RE: USET SPF Comments to CEQ its Notice of Proposed Rulemaking on the "Bipartisan Permitting Reform Implementation Rule" and Phase II Implementing Regulations Revisions of NEPA, Docket ID No. CEQ-2023-0003

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's (CEQ) Notice of Proposed Rulemaking (NPRM) on National Environmental Policy Act (NEPA) implementing regulations revisions (Phase II).This NPRM proposes a "Bipartisan Permitting Reform Implementation Rule" to revise its regulations for implementing procedural provisions of NEPA, including the implementation of the Fiscal Responsibility Act's (P.L. 118-5) amendments to NEPA. Any proposed revisions to NEPA will inevitably impact Tribal Nations, since over 80 federal agencies must comply with NEPA and this impacts deployment of critical infrastructure like broadband, water and wastewater systems, fee-to-trust applications, cultural resources, and Tribal trust and treaty rights. The proposed NEPA Phase II revisions seek to support certain aspects of Tribal sovereignty, environmental justice, Tribal reserved rights, and integration of Indigenous Knowledge in the NEPA process. USET SPF generally supports the proposed revisions, but has concerns regarding defining what constitutes Indigenous Knowledge and the persistent lack of funding for technical assistance for Tribal Nations to participate in the NEPA process.

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

[1] USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), 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), Mi'kmaq Nation (ME), 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).

advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

General Support for Phase II NEPA Revisions That Support Tribal Sovereignty, Participation, and Decision-Making in the NEPA Process

The Phase II NEPA NPRM proposes several revisions that support the sovereign authority and decision-making processes of Tribal Nations participating in the NEPA process. First, the NPRM proposes revisions to NEPA regulations that would exclude from the definition of "major federal action" activities or projects approved by a Tribal Nation that occur on or involve Tribal Lands when such activities involve no federal funding or other federal involvement. This new exclusion under Sec. 1508.1(u)(2)(ix) for activities or decisions for projects approved by a Tribal Nation that occur on or involve land held in trust or restricted status will not require a Tribal Nation to complete an environmental review process when such projects occurring on Tribal Lands do not involve federal funding or other federal involvement.

The categories of activities on trust or restricted status lands that typically will not constitute a "major federal action" include:

- Transfer of existing operation and maintenance activities of federal facilities to Tribal groups, water user organizations, or other entities;
- Human resources programs such as social services, education services, employment assistance, Tribal operations, law enforcement, and credit and financing activities not related to development;
- Self-governance compacts for Bureau of Indian Affairs (BIA) programs;
- Service line agreements for an individual residence, building, or well from an existing facility where installation will involve no clearance of vegetation from the right-of-way other than for placement of poles, signs (including highway signs), or buried power/cable lines; and
- Approvals of Tribal regulations or other documents promulgated in exercise of Tribal sovereignty, such as Tribal Energy Resource Agreements, certification of a Tribal Energy Development Organization, Helping Expedite and Advance Responsible Tribal Homeownership (HEARTH) Act Tribal regulations, Indian Trust Asset Reform Act Tribal regulations and trust asset management plans, and Tribal liquor control ordinances.

USET SPF supports CEQ's proposed revisions to its NEPA regulations under Sec. 1508.1(u)(2)(ix) since the addition of this exclusion under the definition of "major federal action" supports Tribal sovereignty and streamlines project activities approved by Tribal Nations that occur on our lands and do not involve federal funding or other federal involvement. This action supports the inherent sovereignty of Tribal Nations and our authority to execute critical programs and Tribal regulations to best serve our citizens and communities and support Nation rebuilding. We look forward to a time when Tribal Nations are the sole arbiter of whether the NEPA process is to occur on our homelands, regardless of whether a project is funded with federal dollars.

Second, the Phase II NEPA NPRM proposes to clarify that Tribal, federal, state, or local agencies may serve as a joint lead agency to prepare an environmental assessment (EA) or environmental impact statement (EIS) and that, "a joint lead agency shall jointly fulfill the role of a lead agency", under Sec. 1501.7(2)(b). Additionally, proposed revisions to Sec. 1501.7(2)(b) seek to clarify that Tribal agencies may serve as joint lead agencies because they are ineligible to serve as a primary lead agency. Although USET SPF believes that Tribal Nations should have the opportunity to act as a primary lead agency if they so choose, we support the addition of language that Tribal agencies can serve as a joint lead agency and jointly fulfill the role of a lead agency. USET SPF also supports the proposed addition of language defining "joint lead agency" under Sec. 1508.1(q) to mean, "a Federal, State, Tribal, or local agency designated

pursuant to § 1501.7(c) that shares the responsibilities of the lead agency for preparing the environmental impact statement or environmental assessment." Further, proposed revisions to Sec. 1501.7(d) state that any Tribal, federal, state, or local agency affected by the absence of a lead agency designation for a given project may submit a written request for this designation to senior agency officials of the potential lead agencies and that such requests will also be transmitted to each participating federal agency and CEQ. The proposed revisions to Sec. 1501.7(d) ensure that Tribal agencies—that are substantially affected by the absence of a lead agency designation to supervise the preparation of an EA or EIS of a given project—have a mechanism to request designation of a lead agency. USET SPF supports this language, but recommends that Tribal agencies submitting a request for a lead agency designation can also recommend the designation of a lead agency that is proficiently suited to assume the preparation of an EA or EIS on a given project in their request. Designation of a lead agency that has the requisite expertise and funding to prepare an EA or EIS should receive the foremost consideration. This is critically important since many Tribal agencies do not have the appropriate capacity and resources to assume these responsibilities due to chronic underfunding and the federal government's failure to fulfill its trust and treaty obligations.

Finally, the Phase II NEPA NPRM proposes revisions to Sec. 1501.8(a) to clarify that a lead agency may request a Tribal agency with "special expertise" to serve as a cooperating agency, and that "special expertise" can include having Indigenous Knowledge. However, we recommend that Sec. 1501.8(a) be further revised to include language stipulating that Tribal Nations also have the ability to make a request to a lead agency to serve as a cooperating agency and provide "special expertise". USET SPF proposes this change as it will ensure that Tribal agencies will have appropriate opportunity to participate in the environmental review process and federal agencies can benefit from the participation of Tribal agencies with inherent Indigenous Knowledge to assume responsibility or assist with the preparation of environmental analyses. Further, under Sec. 1501.8(b)(5), the proposed revision to "special expertise" to include Indigenous Knowledge would mean that a Tribal cooperating agency would be eligible to receive funds (to the extent available funds permit) from the lead agency requesting activities or analyses in the NEPA process. The NPRM also proposes defining what constitutes Indigenous Knowledge, which USET SPF has some concerns about and will address is a subsequent section of these comments to CEQ.

General Support and Additional Recommendations for Phase II NEPA Revisions to Integrate Environmental Justice Considerations

The Phase II NEPA NPRM proposes several revisions to the NEPA regulations to update how agencies integrate climate change and environmental justice considerations into the analysis of environmental effects. This includes defining environmental justice under Sec. 1508.1(k) to mean:

> *"…the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision making and other Federal activities that affect human health and the environment so that people:*
>
> > *(1) Are fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers; and*
> >
> > *(2) Have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices."*

USET SPF appreciates the mention of "Tribal affiliation" in the proposed definition of environmental justice since Tribal Nations are often inappropriately incorporated into definitions of a "racial group" in Administration and agency initiatives that promote environmental justice. Identifying Tribal Nations and our citizens as a "racial group" does not acknowledge our unique legal and political status as citizens of our

Tribal Nations and the diplomatic Nation-to-Nation relationship Tribal Nations have with the United States. This legal, political status has been established and recognized by the U.S. Constitution, treaties, federal statutes, Executive Orders, and it has been upheld by the federal judiciary. In revising its NEPA regulations, CEQ must ensure that the use of the term "environmental justice communities" distinctly recognizes the unique legal, political, and diplomatic status of Tribal Nations as sovereign governments and the unique legal, political status of Tribal Nation citizens. We, individually and cumulatively as communities, are not defined by a racial designation or affiliation. Rather, we identify our "Tribal affiliation" as being citizens of federally recognized Tribal Nations, which operate as inherently sovereign governments with laws and authorities determining the parameters of citizenship in our Nations. This inherent governmental function distinctly separates us from having a "racial" classification. It is also important to emphasize that, while pursuing initiatives that support environmental justice, the federal government's trust and treaty obligations to Tribal Nations and our citizens requires a higher level of responsibility and responsiveness from the federal government to support our communities. This is especially important since CEQ is proposing to add paragraph (a)(14) to Sec. 1502.16, Environmental Consequences, to provide that agencies must discuss the potential for disproportionate and adverse health and environmental effects on communities with environmental justice concerns. The addition of this paragraph would clarify that EISs generally must include an environmental justice analysis to ensure that agency actions do not unintentionally impose disproportionate and adverse effects on these communities. The addition of this language must recognize the federal trust and treaty obligations the federal government has to Tribal Nations and our citizens due to the inherent sovereignty our governments operate on, and our "Tribal affiliation" that identifies us as the citizens of Nations with distinct legal, political status acknowledged by the existing body of Federal Indian Law.

Finally, the NPRM proposes revisions to Sec. 1500.2, Policy, under subsection (d), that:

> *"Sec. 1500.2, Policy. Federal agencies shall to the fullest extent possible:*
>
> *(d) Encourage and facilitate public engagement in the decisions that affect the quality of the human environment, including meaningful engagement with communities with environmental justice concerns, which often include communities of color, low-income communities, indigenous communities, and Tribal communities."*

While USET SPF supports the addition of Tribal communities in the proposed language for Sec. 1500.2(d), we strongly recommend that CEQ adopt language stating that public engagement does not constitute or fulfill agency requirements to consult with Tribal Nations under NEPA. CEQ has acknowledged this in its NPRM stating that:

> *"In proposing to make this change to emphasize public engagement, CEQ notes that the obligation to consult with Tribal Nations on a nation-to-nation basis is distinct from the public engagement requirements of NEPA. CEQ invites comment on whether additional changes to the NEPA regulations would be appropriate in light of the obligation for Tribal consultation."*

USET SPF strongly recommends that CEQ adopt language like what it stated above in its NPRM – "…that the obligation to consult with Tribal Nations on a [Nation-to-Nation] basis is distinct from the public engagement requirements of NEPA." We further recommend the addition of language that federal agencies must consult with Tribal Nations on all matters related to NEPA, that consultation requirements are separate from public engagement sessions, and the use of public engagement sessions do not fulfill agency requirements to consult with Tribal Nations on NEPA matters.

Support for Phase II NEPA Revisions Acknowledging Tribal Reserved Rights

USET SPF supports the addition of language in the NPRM for Phase II NEPA revisions that clarifies that agencies should consider how a federal action may impact the reserved rights of Tribal Nations. Specifically, CEQ proposes the addition of new language under Sec. 1501.3(d)(2)(x), stating:

> *"*Sec. 1501.3(d). *In considering whether the effects of the proposed action are significant, agencies shall examine both the context of an action and the intensity of the effects.*
>
> *(2) Agencies shall analyze the intensity of effects considering the following factors, as applicable and in relationship to one another:*
>
> *(x) The degree to which the action may adversely affect rights of Tribal Nations that have been reserved through treaties, statutes, or Executive Orders."*

CEQ also proposed including language from Sec. 1501.3(d)(2)(x) to Sec.1502.14(f), stating:

> *"Sec. 1502.14, Alternatives including the proposed action. The alternatives section is the heart of the environmental impact statement. The alternatives section should identify the reasonably foreseeable environmental effects of the proposed action and the alternatives in comparative form based on the information and analysis presented in the sections on the affected environment (§ 1502.15) and the environmental consequences (§ 1502.16). In doing so, the analysis should sharply define the issues for the decision maker and the public and provide a clear basis for choice among options. In this section, agencies shall:*
>
> *f) Identify the environmentally preferable alternative or alternatives. The environmentally preferable alternative will best promote the national environmental policy expressed in section 101 of NEPA by maximizing environmental benefits, such as addressing climate change-related effects or disproportionate and adverse effects on communities with environmental justice concerns; protecting, preserving, or enhancing historic, cultural, Tribal, and natural resources, including rights of Tribal Nations that have been reserved through treaties, statutes, or Executive Orders; or causing the least damage to the biological and physical environment. The environmentally preferable alternative may be the proposed action, the no action alternative, or a reasonable alternative.*

USET SPF also supports the addition of language in Sec.1502.14(f) to acknowledge that Tribal reserved rights are those that have been reserved through treaties, statutes, or Executive Orders and should guide federal actions in the NEPA process. Federal agencies must recognize that Tribal Nations exercise these reserved rights to protect our natural environments, resources, sacred, cultural, and historic sites, lifeways, and the public safety and health of our communities and citizens. Federal agencies must consider the impacts of federal actions on these critical environments, resources, sacred, cultural, and historic sites, and lifeways.

Additional Recommendations for Phase II NEPA Revisions

Throughout our comments USET SPF has expressed general support for CEQ's certain proposed Phase II NEPA revisions in its NPRM. However, we offer and emphasize the importance of the following concerns and additional recommendations to CEQ to further refine its NEPA regulations moving forward.

- **Concerns with defining "Indigenous Knowledge" necessitates further Tribal consultation.** CEQ has proposed the addition of language under Sec. 1501.8(a) that acknowledges that a lead agency may request a Tribal agency with "special expertise" to become a cooperating agency, and that the meaning of the phase "special expertise" includes Indigenous Knowledge. While USET SPF supports this addition, in the NPRM CEQ requests comment on whether it should have a definition of Indigenous Knowledge in its NEPA regulations. CEQ acknowledges that it, in

coordination and collaboration with the White House Office of Science and Technology Policy (OSTP) issued a "Guidance Memorandum for Federal Departments and Agencies on Indigenous Knowledge" (Guidance) on November 30, 2022. CEQ states, however, that the Guidance does not define Indigenous Knowledge.

USET SPF is concerned with defining what constitutes Indigenous Knowledge in its NEPA regulations since—as was repeatedly stated in the Tribal consultations contributing to development of the Guidance—Indigenous Knowledge can incorporate a broad range of cultural and spiritual beliefs and Tribal lifeways. This was consistently raised during Tribal consultations on development of the Guidance where Tribal Leaders and our recognized cultural/spiritual leaders emphasized that the Guidance needed to recognize and take a holistic approach and understanding of what Indigenous Knowledge is. The comments during these Tribal consultations eventually lead to CEQ and OSTP renaming "Indigenous Traditional Ecological Knowledge" to simply "Indigenous Knowledge" in recognition that Indigenous Knowledge goes beyond the special, spiritual, and cultural relationships and connections we have with our environment and ecosystems. If CEQ moves forward to consider adopting a definition of Indigenous Knowledge, then it should do so in consultation with Tribal Nations before adopting a definition in its NEPA regulations. At a minimum, USET SPF recommends that references to the Guidance be included in all proposed Phase II NEPA revisions that reference Indigenous Knowledge in the regulations. Further, revisions to NEPA regulations that reference Indigenous Knowledge should also acknowledge that we are the sole and final arbiters in identifying what constitutes Indigenous Knowledge and what does not—not the federal government.

- **Protect sensitive Tribal information and Indigenous Knowledge from FOIA requests and do not allow interagency sharing of this information and knowledge without Tribal consent.** Tribal Nations are best positioned to identify what types of our Indigenous Knowledge sets are sensitive or sacred and should be protected from public dissemination. CEQ and OSTP's 2022 Guidance instructs federal agencies to, "…consult with Federal agency legal counsel regarding the agency's obligations under the Freedom of Information Act (FOIA) and other public disclosure laws, and legal authorities that may apply to inclusion of Indigenous Knowledge." While inclusion of this language was a step in the right direction, USET SPF strongly urges that this language be expanded upon. Prior to the sharing of Indigenous Knowledge, there must be an established and respected high level of trust between the federal government and Tribal Leaders and our recognized cultural/spiritual leaders. This trust has been broken in the past and its restoration will require federal agencies to actively adopt, implement, and adhere to policies that provide the utmost protections for Tribal Nations sharing sensitive Indigenous Knowledge. Federal agencies must work with our Tribal Leaders and our recognized cultural/spiritual leaders to ensure sensitive Indigenous Knowledge is never shared with the public. Furthermore, federal agencies receiving Indigenous Knowledge from Tribal Nations should not share this information with other federal agencies in the absence of express Tribal Nation consent. Federal agencies that receive inquiries or requests for the sharing of Indigenous Knowledge from other federal agencies must also inform the respective Tribal Nation regarding these requests. We should be the sole determiners regarding whether this information should be shared or withheld.

  Moving forward, CEQ must work with the Office of Management and Budget to develop guidance for federal agencies on how FOIA requests on our information should be handled regarding Indigenous Knowledge. First and foremost, during the exchange of Indigenous Knowledge and other sensitive Tribal cultural information, federal agencies should actively work with Tribal Leaders

to determine what information should be redacted from public dissemination and protected from FOIA requests. Furthermore, federal agencies must inform Tribal Nations when FOIA requests are made to access our information and let us determine whether such requests should be withheld or redacted. Similarly, federal agencies must inform Tribal Nations when the agency receives these requests, what entity is requesting information, and the information being requested. Tribal Leaders, Tribal Historic Preservation Officers, and other individuals we expressly identify, such as our recognized cultural/spiritual leaders, should be recognized as authorities to claim what Indigenous Knowledge and cultural information should be withheld or redacted from public dissemination. Additionally, as aforementioned, we should also be the sole and final arbiters in identifying what constitutes Indigenous Knowledge—not the federal government.

Furthermore, during Tribal consultation sessions, federal agencies should inform Tribal Nations of the federal government's legal obligations for the release of information to the public under FOIA requests. Federal agency staff must work with Tribal Leaders to ensure that the recording, taking of notes, or direct transcription of a consultation by machine or other methods does not create a record of sensitive Indigenous Knowledge and cultural information that could potentially be disseminated to or accessed by the public. During consultation sessions we should be notified of any recording and transcription methods being used. Additionally, federal agencies must adhere to any objections of the recording or transcription of any Indigenous Knowledge or cultural information divulged during consultation. Furthermore, requests for the redaction of sensitive Indigenous Knowledge and cultural information should be allowed to be stated verbally during consultation sessions and in any follow-up written materials submitted to federal agencies.

- **Tribal Nations are not "stakeholders" or the "public".** As USET SPF stated in a previous section of our comments, we support the addition of Tribal communities in the proposed language for Sec. 1500.2(d). However, we strongly reemphasize our recommendation that CEQ adopt language stating that public engagement does not constitute or fulfill agency requirements to consult with Tribal Nations under NEPA. 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, treaties, federal statutes, Executive Orders, and decisions rendered by the federal judiciary. Therefore, CEQ and federal agencies must not include 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 communities and citizens must 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 Nation guidance and input.

Conclusion

The NEPA process plays a critical role for Tribal Nations and our communities, not just in the protection of our public health and the environment, but also our traditional practices and lifeways, sacred sites, and places of cultural and historic significance. 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 cultural and historic properties provided through NEPA regulations is vital to the health of future generations within

our communities. Further, CEQ has trust and treaty obligations to assist us and support our efforts to protect and safeguard our communities and citizens. Historically, failures to effectively engage with Tribal Nations have caused irreversible damage and harm to Tribal Lands, resources, sacred sites, and cultural lifeways. USET SPF strongly urges CEQ to protect and uphold the processes that require federal agencies to engage and consult with Tribal Nations as early as possible and prior to any agency or project proponent actions. In considering its NEPA Phase II revisions, CEQ must promote and preserve our sovereign authority to protect our people and homelands and uphold its trust and treaty obligations. We look forward to continued dialogue on these important Phase II NEPA revisions, especially regarding the additional recommendations we have offered in our comments. 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,

Chief Kirk Francis
President

Kitcki A. Carroll
Executive Director