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*Transmitted Electronically
To tribalengagement@bsee.gov*

November 16, 2023

Kevin Sligh, Sr.
Director
Bureau of Safety and Environmental Enforcement
Department of the Interior
1849 C Street, NW
Washington, DC 20240

Dear Director Sligh, Sr.,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Tribal consultation held October 31, 2023 on development of the Bureau of Safety and Environmental Enforcement's (BSEE) Environmental Justice Strategy and Action Plan (EJ Strategy and Action Plan). This is a timely, important initiative since—as it relates to BSEE's jurisdiction—several USET SPF member Tribal Nations have long been contending with this Administration's streamlined development and approval of offshore wind projects. The activities executed by the federal government to streamline construction of these projects are impacting our submerged sacred sites and ancestral burial grounds, as well as our cultural lifeways. USET SPF appreciates BSEE's pursuit to develop its first-ever EJ Strategy and Action Plan. However, the four Pillars identified by BSEE for use in drafting this Plan utilize a "communities" approach and are not Tribal-specific. While the four Pillars can certainly be relevant to the inclusion of Tribal Nations, we oppose our inclusion under the umbrella term of "communities" due to our Nation-to-Nation diplomatic relationship with the federal government and our sovereign status. USET SPF strongly recommends that BSEE develop a Tribal Nation-specific EJ Strategy and Action Plan (Tribal EJ Strategy and Action Plan, or Tribal Plan) and our comments will provide several recommendations on how this process can be initiated in a meaningful and appropriate manner.

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.

Pillar #1: “Institutionalizing Environmental Justice: Cultivate bureau environmental justice competency and incorporate environmental justice considerations into bureau actions.”

In developing a Tribal EJ Strategy and Action Plan, USET SPF generally supports Pillar #1. We firmly believe that before BSEE staff, contractors, and others can appropriately conduct interactions and work with Tribal Nations, they must understand the unique legal and political status of Tribal Nations. This includes competency in the nature of federal trust and treaty obligations to Tribal Nations and our reserved rights, and how these legal and moral obligations have been established by the U.S. Constitution, treaties, Executive Orders, Acts of Congress, and upheld by interpretations of the federal judiciary. Further, BSEE personnel must understand what a sacred site and Indigenous Knowledge are and how to safeguard our Indigenous Knowledge from public dissemination. These principles are extremely important since—regardless of title or position within the bureau—the actions and activities of BSEE could have direct or indirect implications for Tribal Nations.

USET SPF offers the following recommendations for inclusion in developing BSEE’s Tribal EJ Strategy and Action Plan as it relates to Pillar #1—

- **Require federal employees and contractors receive education and training on Tribal sovereignty and U.S.-Tribal Nation Relations.** Before any federal agency, employee, or contractor can effectively implement best practices for the protection of sacred sites and Indigenous Knowledge, comprehensive training on understanding, working with, and communicating effectively with Tribal Nations is required. Effective and transparent communication, as well as a clear understanding of the federal government’s trust and treaty obligations to Tribal Nations, are essential, core components that should influence and guide federal decision-making processes. BSEE employees and contractors must understand that the agency’s actions have direct and indirect impacts and consequences on the public health and well-being Tribal Nations and our citizens, especially when such actions involve our sacred sites, ancestors, cultural resources, and our lifeways. Many federal employees and contractors are engaged in decision-making that will impact and affect our historic, cultural, and natural resources that are directly connected to our Tribal lifeways. Therefore, it is important that these federal employees and contractors fully understand the history of U.S.-Tribal Nation relations and the federal trust obligation.

The lack of education and understanding regarding trust and treaty obligations has and continues to contribute, at least in part, to federal failures to properly consult with Tribal Nations. USET SPF has long recommended mandatory training on U.S.-Tribal relations and the trust obligation for all federal employees, and, by extension, federal contractors hired to perform certain duties. BSEE must require its employees and hired contractors to receive training to become knowledgeable of the federal government’s obligations to promote Tribal sovereignty and self-determination, regardless of the level their position interacts with Tribal Nations. This training should be designed in consultation with Tribal Nations, and updated and revised as appropriate in response to ‘lessons learned’. Further, we recommend that references to federal trust responsibilities in developing a Tribal EJ Strategy and Action Plan should acknowledge federal trust and treaty obligations in recognition of the federal government’s legally binding and moral obligations to Tribal Nations and our citizens.

- **Protect sensitive Tribal information and Indigenous Knowledge from FOIA requests and do not permit interagency sharing or public dissemination of Tribal information and Indigenous Knowledge without Tribal consent.** First and foremost, during the exchange of Indigenous Knowledge (IK) and other sensitive Tribal cultural information, BSEE should actively work with Tribal Leaders to determine what information should be redacted from public dissemination and protected from Freedom of Information Act (FOIA) requests. Further, BSEE 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, BSEE 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 IK and cultural information should be withheld or redacted from public dissemination. We, as sovereign Tribal Nations, must always be the sole and final arbiters in identifying what constitutes IK and cultural information—not the federal government.

To better understand FOIA protocols, BSEE should review the November 2022 Council on Environmental Quality (CEQ) and the White House Office of Science and Technology Policy's (OSTP), "Guidance Memorandum for Federal Departments and Agencies on Indigenous Knowledge" (Guidance on IK). CEQ and OSTP's 2022 Guidance on IK instructs federal agencies to, "...consult with Federal agency legal counsel regarding the agency's obligations under the Freedom of Information Act and other public disclosure laws, and legal authorities that may apply to inclusion of Indigenous Knowledge." Since the issuance of the Guidance on IK, several federal agencies (including some of BSEE's partners at the Department of the Interior), have initiated consultation with Tribal Nations to develop agency-specific IK Guidance. USET SPF strongly recommends that as BSEE drafts its initial Tribal EJ Strategy and Action Plan it should collaborate with its federal colleagues, such as CEQ, OSTP, the Environmental Protection Agency, and the White House Council on Native American Affairs. This will ensure that Tribal Nation concerns and comments raised in those consultations are appropriately incorporated into the initial draft of BSEE's Tribal EJ Strategy and Action Plan and, hopefully, result in less time needed to revise the draft Tribal Plan once it is released for Tribal Nation comment.

Additionally, USET SPF has noticed that some federal agencies have started including written disclaimers in Dear Tribal Leader Letters announcing scheduled Tribal consultations and verbal disclaimers during a consultation session stating, "please note that information shared during this consultation may be subject to disclosure under the Freedom of Information Act." Until Congress amends FOIA to protect sensitive IK and cultural information from public disclosure, we strongly encourage BSEE to specifically identify and reference its obligations under FOIA in its Tribal EJ Strategy and Action Plan. BSEE personnel must be directed to provide written and verbal disclaimers during a consultation session, or any other interaction, with Tribal Nations that may include or result in the transmission of IK.

- **Include FOIA disclaimers during consultation sessions and ensure the transcription of consultation sessions does not create a sensitive record of Indigenous Knowledge.** USET SPF strongly urges BSEE to include language in its Tribal EJ Strategy and Action Plan that if its personnel receive IK (verbally, written, or otherwise) from Tribal Nations, then it should not be shared with other federal agencies in the absence of express Tribal Nation consent. We also stress inclusion of language in the Tribal Plan that if BSEE receives such an inquiry or request, then it should inform the respective Tribal Nation of the nature of the request, such as what is being

requested, for what purpose, and how it will be used. As always, Tribal Nations should be the sole determiners regarding whether this information should be shared or withheld.

Furthermore, BSEE should include language in its Tribal EJ Strategy and Action Plan that its personnel 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 IK 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, BSEE must adhere to any objections of the recording or transcription of any IK or cultural information divulged during consultation proceedings and other communications. BSEE must also ensure that its Tribal EJ Strategy and Action Plan acknowledges that Tribal Nation requests for the redaction of sensitive IK and cultural information should be allowed to be stated verbally during consultation sessions and in any follow-up written, or otherwise documented, materials submitted to BSEE following a consultation proceeding.

Pillar #2: “Delivering Equity through Investments: Advance equitable access to federal procurement opportunities, resources, and other qualitative benefits.”

In developing a Tribal EJ Strategy and Action Plan, USET SPF generally supports Pillar #2. However, we would recommend that Pillar #2 be revised to read, “Honoring Trust and Treaty Obligations through Investments: Advance equitable access for Tribal Nations to federal procurement opportunities, resources, and other qualitative benefits.” This revised language more appropriately reflects the diplomatic Nation-to-Nation relationship Tribal Nations have with the federal government. In developing a Tribal EJ Strategy and Action Plan, BSEE must reinforce this type of language throughout this document to ensure that BSEE personnel are again reminded of the agency’s trust and treaty obligations to Tribal Nations. Consistent recognition of these obligations will reinforce and remind those individuals of these legal and moral obligations. This is absolutely essential to execute a meaningful and respectful Nation-to-Nation diplomatic relationship.

USET SPF offers the following recommendation for inclusion in developing BSEE’s Tribal EJ Strategy and Action Plan as it relates to Pillar #2—

- **BSEE must prioritize all necessary resources and technical assistance funding to Tribal Nations when an action or activity is proposed or directly or indirectly affects our sacred sites and historic, cultural, and natural resources.** Many Tribal Nations operate with limited resources and few dedicated personnel to participate in consultations with federal agencies on proposed federal actions that may include or be relevant to Tribal sacred sites. This includes having limited access to federal resources to hire historic preservation experts, which hinders the ability of Tribal Nations to adequately participate in consultations and the review processes under the National Environmental Protection Act (NEPA), Sec. 106 of the National Historic Preservation Act (NHPA), and the repatriation of ancestral remains and items of cultural patrimony under the Native American Graves and Repatriation Act (NAGPRA), among other authorities. These limitations are the direct result of the federal government’s failure to uphold its trust and treaty obligations to fully fund the necessary programs and services for Tribal Nations to meaningfully participate in these activities. USET SPF strongly recommends that BSEE utilize direct and contract funding to Tribal Nations for consultation-related costs, staff training and the hiring of Tribal Nation personnel to conduct NEPA, NHPA, and NAGPRA responsibilities. This can be accomplished by adopting the contracting and compacting mechanisms through the Indian Self Determination and Education Assistance Act (P.L. 93-638).

Further, in lieu of dedicated appropriations, BSEE should identify additional agency resources to provide technical assistance and staffing support to Tribal Nations for environmental, cultural, and historic preservation reviews and to participate in other processes required for any development on the Outer Continental Shelf, especially offshore wind projects. For instance, not all Tribal Nations have Tribal Historic Preservation Officers (THPOs) dedicated to these review processes due to funding limitations and shortfalls. In the instances that Tribal Nations have a THPO and/or cultural or natural resources department dedicated to conducting environmental, cultural, and historic preservation reviews, oftentimes these individuals and departments are inundated with multiple projects and permit applications that exceed their available capacity and resources. Review of these projects can also be lengthy because they are often broken into multiple, segmented reviews of a single project and span across multiple federal and state agency jurisdictions and oversight. Furthermore, these individuals and departmental staff may fulfill multiple roles within Tribal government due to historic and persistent funding shortfalls for these positions. It is not uncommon for a cultural resource manager to also fulfill the role of a natural resource manager or serve in an emergency management role.

Pillar #3 Reducing Burdens and Harms: Enhance compliance and enforcement actions to reduce impacts on communities with environmental justice concerns.”

Again, Pillar #3 uses the term “communities”, which does not recognize the inherent sovereign status of Tribal Nations and our Nation-to-Nation diplomatic relationship with the federal government. Further, there’s no mention of funding for mitigation efforts or enforcement of a moratorium on actions and activities. USET SPF recommends that Pillar #3 be revised to read, “Reducing Burdens and Harms: Enhance compliance and enforcement actions, appropriately fund mitigation activities, and enforce moratoriums on projects for Tribal Nations with environmental justice concerns.”

In developing a Tribal EJ Strategy and Action Plan, BSEE must be more proactive in exercising its compliance and enforcement authorities over its federal partners. For instance, for well over a year, several of USET SPF’s member Tribal Nations have been contending with the rapid authorization and approval of offshore wind projects in our region. These Tribal Nations and USET SPF have repeatedly approached and engaged with DOI leadership and staff of the Bureau of Ocean Management (BOEM) stating that proper and appropriate Tribal consultation was not conducted with the affected Tribal Nations. Without upholding trust and treaty obligations to consult with us meaningfully and appropriately, it has led to the fast-track of project approval and construction. These actions have resulted in the deplorable disturbance and destruction of our submerged sacred sites, the callous unearthing of our ancestors at submerged burial grounds, and disruptions to our cultural lifeways.

BOEM is currently considering additional offshore wind project proposals and several Tribal Nations, both within and outside the USET SPF region, continue to raise concerns about potential threats to submerged sites of cultural significance, natural and environmental resources, and aquatic life. The development of these projects is moving forward without necessary avoidance and mitigation measures or impact aid to Tribal Nations. In recognition of these concerns, USET SPF adopted [USET SPF Resolution No. 2023](#) SPF:013, which urges a temporary moratorium on BOEM’s offshore wind scoping and permitting processes until a Nationwide Programmatic Agreement (NPA) was developed and agreed upon with Tribal Nations.² At our recent USET/USET SPF Annual Meeting, our member Tribal Nations also adopted [USET SPF](#)

² USET SPF partner organizations, the National Congress of American Indians and the Affiliated Tribes of Northwest Indians, share these concerns and have passed similar resolutions.

[Resolution No. 2024 SPF:001](#), which urges BOEM to standardize its mitigation procedure with Tribal Nations for offshore wind energy projects. Despite our repeated requests to halt construction of current and future offshore wind energy projects until appropriate consultation and mitigation efforts have taken place, BOEM has not considered enacting a moratorium. Although the bureau has engaged in consultation with Tribal Nations on this matter, these issues remain unresolved and persist.

Further, the federal government must conduct appropriate oversight over approved projects and provide immediate notification to Tribal Nations when necessary. For example, it has recently come to our attention that human burials have been found on land associated with the Vineyard Wind project in Massachusetts in mid-October. However, affected Tribal Nations were not notified by BOEM about this discovery until confronted by Tribal leadership. Both BOEM and BSEE must commit to upholding their trust and treaty obligations to Tribal Nations by monitoring project proponents, taking enforcement action when necessary, and always informing Tribal Nations when a discovery is made or violation committed.

BSEE's Mission Statement proclaims, "To promote safety, protect the environment, and conserve resources offshore through vigorous regulatory oversight and enforcement." In developing its Tribal EJ Strategy and Action Plan, BSEE must apply these words and develop language pertaining to how it will conduct enforcement and compliance actions on its federal partners and non-Tribal developers when those entities desecrate our submerged sacred sites, ancestors, and impact our cultural lifeways. This has always been a critical issue that has affected Tribal Nations specifically. We have always been subjected to the destruction of our sacred sites, desecration of our burial grounds and the theft of our ancestors, the theft of our natural and cultural resources, and the destruction of our cultural heritage and lifeways. This was all done and justified by the federal government and industry in the name of manifest destiny. The time is long overdue to rectify the transgressions of the past. BSEE must exercise its authority to hold its federal partners and developers accountable for activities occurring on the Outer Continental Shelf.

Pillar #4: "Meaningful Outreach and Engagement: Foster opportunities for communities to participate as informed partners in bureau actions that are important to their wellbeing."

In developing a Tribal EJ Strategy and Action Plan, USET SPF recommends revising Pillar #4 to read, "Meaningful Outreach and Engagement: Foster opportunities for Tribal Nations to participate as informed partners in bureau actions that are important to their wellbeing." While meaningful outreach and engagement is critically important to forming and improving relationships with Tribal Nations, which in turn fosters trust, it should not be used as a mechanism to replace Nation-to-Nation Tribal consultation. Too often we've witnessed federal agencies 'check the consultation box' because they did a presentation to a group of Tribal Leaders, technical experts, and others at a Tribal conference. True, meaningful consultation occurs on a Nation-to-Nation, leader-to-leader basis. Duly elected or appointed Tribal Leaders must be afforded the respect and opportunity to directly voice Tribal Nation concerns to those BSEE officials with actual decision-making authority. Additionally, we must further have the opportunity to include and confer with our respective expert staff during every consultation, just as BSEE officials do.

Meaningful outreach and engagement with Tribal Nations occur when you inform us, with advance notice and sufficient response timelines, of potential agency actions, activities, funding opportunities, or to serve as a technical expert in the review of environmental, cultural, and historical documents. This could include potential regulatory and enforcement actions, notices of potential activities that could affect Tribal Nations, and opportunities to apply for technical assistance, procurement, and other federal assistance. This could also include extending invitations to Tribal Leaders, or our duly authorized designees, to participate in trainings for certification purposes, or to operate in a speaker capacity to educate BSEE staff on U.S.-Tribal Nation relations, Indigenous Knowledge, and other areas that may benefit BSEE's work. Further, if

meaningful outreach and engagement with Tribal Nations is to include invitation of our technical experts to assist in the review of environmental, cultural, and historical documents, then those individuals must be duly compensated for their time and services.

Finally, meaningful outreach and engagement must include utilizing several methods of communication to contact Tribal Nations, which could include mailers, telephone calls, email, and coordinating with federal partners and inter-Tribal organizations. The primary goal of Pillar #4 must be to build trust and establish open lines of communication between BSEE and Tribal Nations.

Conclusion

Developing, adopting, and upholding policies that direct federal agency personnel to appreciate and understand the nature of U.S.-Tribal Nation relations is extremely important. It upholds this Administration's directives under E.O. 13175, "Consultation and Coordination with Indian Tribal Governments", as well as BSEE's own recognition of E.O. 14096, "Revitalizing Our Nation's Commitment to Environmental Justice for All." The use of a Tribal EJ Strategy and Action Plan serves to educate BSEE staff and contractors on ways to appropriately protect sacred sites and Indigenous Knowledge and uphold meaningful Tribal consultation protocols is absolutely essential to fulfilling trust and treaty obligations. For these reasons, the four Pillars of BSEE's current EJ Strategy and Action Plan fall short in recognizing our inherent sovereign status. We must not be inappropriately lumped under the umbrella term of "communities". Even when we, as Tribal Nations, use the term "Tribal communities", it still evokes the implied recognition of our Nation-to-Nation diplomatic relationship with the United States. We look forward to continued dialogue on these important issues and anticipate that our recommendations will assist BSEE in developing a draft Tribal EJ Strategy and Action Plan. 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