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*Transmitted Electronically
To [regulations.gov](https://www.regulations.gov)*

January 16, 2024

Theresa Segovia
Principal Deputy Assistant Administrator
Office of Environmental Justice and External Civil Rights
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Achieving Health and Environmental Protection Through EPA's Meaningful Involvement Draft Policy, Docket ID No. EPA-HQ-OEJECR-2023-0326

Dear Principal Deputy Assistant Administrator Segovia,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the release of the Environmental Protection Agency's (EPA), "Achieving Health and Environmental Protection Through EPA's Meaningful Involvement Draft Policy" (draft EPA Meaningful Involvement Policy, or draft Policy). Initially published in 2003, the draft Policy proposes revisions that are intended for use by EPA staff to design public outreach on EPA decisions and consider public input. While this draft Policy is meant for EPA staff to conduct outreach on EPA decisions affecting private individuals and the public, we have serious concerns about how Tribal Nations and Indigenous peoples are included in this policy, often interchangeably and as members of "the public." Further, there are several references throughout the draft Policy stating that EPA will consult with Indigenous peoples on areas such as developing an Indigenous Knowledge plan or an environmental justice plan. USET SPF strongly emphasizes to EPA that the duly elected and appointed leaders of Tribal Nations or their designees are the only individuals that EPA should consult with on a Nation-to-Nation basis. USET SPF's comments focus on this issue of formal consultation as well as privacy concerns regarding Freedom of Information Act requests and the protection of sensitive Tribal cultural information.

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).

Because there is Strength in Unity

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

Duly Elected and/or Appointed Leaders of Tribal Nations Must be Synonymous with Nation-to-Nation Tribal Consultation

It is important for EPA to recognize and acknowledge that only the duly elected and appointed leaders of Tribal Nations can engage in true Nation-to-Nation, government-to-government consultation with federal agencies. This is in recognition of the Nation-to-Nation diplomatic relationship that exists between the U.S. federal government and Tribal Nations. This diplomatic relationship, and the federal government's ensuing trust and treaty obligations, is established by the U.S. Constitution, treaties, statutes, Executive Orders, and upheld by rulings from the federal judiciary. 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. This may include having our identified spiritual and cultural leaders and our cultural/natural resource officers in these consultations to provide the necessary cultural and technical expertise. EPA must recognize and acknowledge that duly elected or appointed Tribal Leaders are the sole arbiters on whether non-leadership staff and individuals should participate in consultations, not the federal government.

Therefore, it is concerning that throughout the draft EPA Meaningful Involvement Policy there is inclusion of references to "Indigenous peoples" alongside Tribal Nations for the purposes of Tribal consultation. There is cause for further concern since EPA references its 2014, "[Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples](#)" (2014 Policy) to justify the inclusion of Indigenous peoples throughout the draft EPA Meaningful Involvement Policy. According to EPA's 2014 Policy, Indigenous peoples are defined as, "state-recognized tribes; indigenous and tribal community-based organizations; individual members of federally recognized tribes, including those living on a different reservation or living outside Indian country; individual members of state-recognized tribes; Native Hawaiians; Native Pacific Islanders; and individual Native Americans." These entities are not appropriate to include in the Tribal consultation context. We recognize that the environmental consequences and the public health of Tribal Nation citizens affected by EPA decisions must always be considered. However, Indigenous peoples are not synonymous with Tribal Nations for the purposes of consultation. Tribal consultation is reserved specifically for the diplomatic relationship and exchange of information between the federal government and sovereign, federally recognized, Tribal Nations. Tribal Leaders, as the duly elected or appointed individuals of our communities, and their designees are the appropriate individuals to engage in formal consultation with EPA on decisions that could affect the public safety and health of our citizens and lands.

Further, USET SPF recommends that a greater distinction must be made between public/community engagement and Tribal consultation. USET SPF reminds EPA of its own "1984 Indian Policy" and the well-established principle that "Tribal Governments" are the appropriate non-federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, our environments, and the health and welfare of our populace. Contrarily, throughout the draft Policy there are mixed references to engagement with the public and consultation with the public—of which the term "Indigenous peoples" are included. References to formal Tribal consultation requirements are not mentioned until page 55 of the draft Policy in Appendix 3 under the section, "How does tribal consultation differ from community engagement?" Appendix 3 also contains the first reference in the draft Policy to Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments", as well as reference to the "EPA Policy on Consultation and

Coordination with Indian Tribes.” The references to Tribal consultation, Tribal Nations, and Indigenous peoples are convoluted and inconsistent throughout the draft EPA Meaningful Involvement Policy. The draft Policy also does not reference the recently revised “EPA Policy on Tribal Consultation and Coordination with Indian Tribes” since these revisions were not published until December 2023. Therefore, USET SPF strongly recommends that EPA initiate formal Tribal consultation on the draft Policy since it only conducted public meetings in December 2023 and January 2024. USET SPF firmly asserts that this action is required for EPA to uphold its trust and treaty obligations to Tribal Nations and to ensure that publication of the current draft Policy does not conflict with EPA’s directives and obligations to uphold, promote, and advance the sovereignty and self-determination of Tribal Nations.

Emphasis Must Be Placed on Protecting Sensitive Tribal Cultural Information

On pages 20 through 21 of the draft Policy, under “Legal Considerations when Obtaining Information”, several laws and a paragraph pertaining to Personally Identifiable Information (PII) are referenced. These laws include the Freedom of Information Act (FOIA) while the rest of the section covers requirements under the Privacy Act, the Paperwork Reduction Act, and protecting PII. Although this section is meant to guide EPA staff on the legal requirements to collect information and maintain records of this information obtained from private individuals, it does not include references to the protection of sensitive information obtained from Tribal Nations. Of particular concern to USET SPF is how FOIA is being used by non-Tribal entities to access sensitive Tribal cultural information from federal agencies. We strongly urge that, prior to gathering information from Tribal Nations and our citizens, EPA should consult its attorneys for advice on what records may be required to be disclosed under FOIA and what legal protections might exist to withhold or protect our sensitive information. EPA must also be transparent with Tribal Nations about the risks of potential FOIA disclosure of sensitive Tribal cultural information and make such risks clear in advance of collecting information.

As an example, USET SPF has noticed that some federal agencies have started to include such written disclaimers in documents such as “Dear Tribal Leader” Letters, as well as verbal disclaimers during a consultation session stating that information collected during a consultation may be subject to FOIA disclosure. Until Congress enacts legislation that expressly protects sensitive Tribal information from public dissemination through FOIA requests, we strongly urge EPA to include language specific to Tribal Nations regarding the risks of FOIA disclosure in the draft Policy. It is important that EPA staff reviewing the EPA Meaningful Involvement Policy are aware of FOIA concerns and how it applies to Tribal Nations. Further, USET SPF strongly urges EPA to include language in the draft Policy that, when receiving sensitive information from Tribal Nations, such information will not be shared with other federal agencies in the absence of express Tribal Nation consent. Tribal Nations must be the sole arbiters regarding whether this information should be shared, or withheld, across other federal agencies. Further, EPA staff must inform Tribal Nations when it receives inquiries or FOIA requests from any non-Tribal entity attempting to access our sensitive information.

Conclusion

While USET SPF is not opposed to the federal government’s efforts to address concerns regarding environmental and social justice, we remain concerned that many of these initiatives do not acknowledge the sovereign authority and identity of Tribal Nations. Federally recognized Tribal Nations must not be considered a racial group, stakeholders, or mere members of the public. Rather, Tribal Nations have a diplomatic, sovereign identity and relationship with the United States. This diplomatic relationship was established by the U.S. Constitution, treaties, statutes, Executive Orders, and has been acknowledged and upheld by the federal judiciary. Too often, attributing racial status to Tribal Nations has been done in efforts to deny, infringe, and take away our sovereign rights and authorities. For these reasons, we are concerned with the current draft EPA Meaningful Involvement Policy since it does not adequately and appropriately

recognize our authority as sovereign Nations and conflates this identity to be synonymous with Indigenous peoples. Further, the definition of Indigenous peoples currently used by EPA includes groups and entities that do not have the same sovereign, diplomatic status as Tribal Nations nor the same diplomatic relationship with the United States. USET SPF strongly urges EPA to consult with Tribal Nations on the draft Policy to ensure that it does not conflate or abridge other EPA directives, guidance, and obligations to Tribal Nations. This is especially necessary since EPA did not hold Tribal consultations on the draft Policy and, instead, held public meetings. Further, Tribal consultation is necessary to address privacy concerns since EPA staff will reference the draft Policy for guidance on collecting sensitive Tribal information. We look forward to our continued dialogue on how EPA can improve its consultation, coordination, and collaboration efforts with Tribal Nations. 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