



USET

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

February 16, 2024

Thomas Chaleki
Chief Readiness Support Officer
U.S. Department of Homeland Security
3801 Nebraska Ave. NW
Washington, DC 20460

Re: USET SPF Comments in Response to RFI Regarding DHS Activities and Advancing Environmental Justice, Docket ID No. DHS-2023-0048

Dear Chief Readiness Support Officer Chaleki,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Department of Homeland Security's (DHS) Request for Information (RFI) on DHS activities and advancing environmental justice. We appreciate DHS's initiative to seek feedback on how environmental justice is considered across the Department's 15 Operational and Support Components. This initiative includes work to determine how DHS can provide opportunities for meaningful engagement in decision-making processes that may affect human health or the environment, as well as what to include in its next "DHS Environmental Justice Strategy." While USET SPF supports these efforts, we note that the term 'environmental justice' has been used by the Administration to target resources to 'disadvantaged communities', in which Tribal Nations have been included. We remind DHS that it has federal trust and treaty obligations to Tribal Nations to protect and advance our sovereignty and self-determination for the well-being of our citizens. While Tribal Nations certainly have specific 'environmental justice' concerns, we strongly emphasize to DHS that recognizing us under the 'environmental justice' moniker does not absolve it of its moral and legally binding trust and treaty obligation. This trust and treaty obligation is the focus of our comments to DHS to ensure that our inherent sovereign rights and authorities as Tribal Nations are fully recognized and upheld throughout DHS's activities and actions.

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.

The words ‘disadvantaged’, ‘marginalized’, and ‘underserved’, as well as racially identifiable terms, have been used broadly across the federal government to identify areas eligible for federal programs and services to address ‘environmental justice’ issues and concerns. While USET SPF appreciates the Administration’s environmental justice initiatives, we do not support the use of these terms to reference Tribal Nations when they are inappropriately used in the context of our trust relationship with the federal government. Tribal Nations must be recognized by our unique political status as sovereign governments and prioritized to receive funds and services from the federal government due to trust and treaty obligations borne out of our cession of lands and resources – oftentimes by force. There must be a clear distinction and understanding that Tribal Nations exist as more than a racial or disenfranchised group. We have a political, legally established diplomatic relationship with the U.S. federal government that is rooted in the U.S. Constitution, treaties, statutes, Executive Orders, and upheld in rulings by the federal judiciary. Therefore, the U.S. has moral and legal trust and treaty obligations to fully fund its programs and services to support our efforts in Nation rebuilding. This includes recognizing our sovereignty and empowering us to appropriately address our environmental justice concerns affecting our Tribal homelands and citizens.

DHS Engagement and Collaboration with Tribal Nations Must Be Conducted Through a Free, Prior, and Informed Consent Consultation Process

For DHS to fully recognize, acknowledge, and uphold the unique moral and legal relationship it has with Tribal Nations, it must fully exercise its trust and treaty obligations to consult with Tribal Nations. Tribal consultation must remain paramount in any decision-making activity and must be thoroughly conducted prior to rendering a final decision or pursuing any activity or action that may affect Tribal Nations. DHS must ensure that it is fully aware of the consequences, both direct and in-direct, that its actions, activities, or decisions could have on the safety, public health, culture, and lifeways of our citizens as well as ensure that our Tribal homelands are appropriately safeguarded and protected from natural disasters and emergency events. These ideals must be at the forefront of how DHS improves and advances its environmental justice program and addresses environmental justice challenges for Tribal Nations. USET SPF strongly recommends that language regarding its trust and treaty obligations to consult with Tribal Nations, and recognition of its Nation-to-Nation diplomatic relationship with Tribal Nations as sovereigns distinct from any other population the agency serves, is included in its next “DHS Environmental Justice Strategy.”

The following recommendations should guide DHS’s environmental justice work with Tribal Nations, as well as ensure that proper protocols are followed for DHS to consult with Tribal Nations on environmental justice issues. While USET SPF acknowledges DHS’s efforts to involve Tribal Nations in its initiatives to address environmental justice, we stress that any such work should be done as part of upholding its trust and treaty obligations to Tribal Nations—

- **Successful DHS engagement and collaboration with federally recognized Tribal Nations is conducted through a Nation-to-Nation, Leader-to-Leader consultation mechanism.** This must be conducted in recognition of the Nation-to-Nation diplomatic relationship that exists between the 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 Tribal consultation can pertain to very specific programmatic issues requiring technical and subject matter expertise, true Tribal consultation should occur at a Leader-to-Leader level between DHS and Tribal Nations. Our duly elected or appointed Tribal Leaders must be afforded the respect and opportunity to directly voice Tribal Nation concerns to DHS 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 DHS officials do.

In addition, the U.S. must 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].”

- **Tribal consultation conducted by DHS must be early, ongoing, and with advance notice and sufficient response timelines.** One of the guiding principles of [E.O. 13175](#), “Consultation and Coordination with Indian Tribal Governments”, is to establish regular, meaningful consultation and collaboration with Tribal Nations in developing and implementing federal policies. However, this principle has been exercised using methods that have not always taken into consideration the direct and 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 trust and treaty obligations to Tribal Nations. Rather, consultation and collaboration must recognize Tribal Nations as equal sovereigns. Therefore, Tribal Nations must always be engaged at the earliest stages of DHS decision-making processes. In addition, our authority to initiate consultation in response to DHS activities and/or actions (or proposed activities and/or actions) to protect the health and environments of our communities and citizens must be recognized and honored. In addition to E.O. 13175, on November 30, 2022, President Biden issued a, “[Memorandum on Uniform Standards for Tribal Consultation](#)”, which established certain parameters for how agencies should conduct and engage in Tribal consultation. This included directives for how agencies should initiate, provide notice for, conduct, record, and report on Tribal consultations.

Further, this Administration recently proclaimed a commitment to promote and usher the next era of Tribal self-determination when President Biden issued [E.O. 14112](#), “Reforming Federal Funding and Support for Tribal Nations to Better Embrace our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination.” Under E.O. 14112, President Biden has directed the federal government to, “better acknowledge and engage with Tribal Nations as respected and vital self-governing sovereigns”, by, “[providing] Tribal Nations with the flexibility to improve economic growth, address the specific needs of [our] communities, and realize [our] vision for [our] future.” The Executive Order further states that the Administration must improve Nation-to-Nation relations with Tribal Nations by reducing administrative burdens and administer funding, “in a manner that provides Tribal Nations with the greatest possible autonomy to address the specific needs of [our] people.” Coupled with the directives of E.O. 13175, DHS must actively engage in direct consultation with Tribal Nations to determine how it can best support our sovereign authorities and efforts to address our environmental justice issues and concerns.

- **All DHS employees must be required to receive education and training on Tribal sovereignty and U.S.-Tribal Nation relations.** Before DHS and its agencies can effectively implement processes that appropriately consider Tribal Nation concerns regarding DHS activities and actions, DHS and its member agency employees must receive comprehensive training on working with and communicating effectively with Tribal Nations. 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 DHS decision-making processes. DHS employees must understand that federal actions have direct and indirect impacts and consequences on Tribal Nations and our citizens. The lack of education and understanding regarding the U.S.'s 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. DHS must require its employees and the employees of its agencies 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 has in direct interaction with Tribal Nations. This training should be designed in consultation with Tribal Nations and updated and revised as appropriate. Additionally, when DHS and its agencies hire third-party contractors to assist in any DHS activities or actions, these contracted employees should also be required to be knowledgeable of the federal government's trust obligations to Tribal Nations.

In Assessing Existing Programs, DHS Must Provide Full Funding and Technical Support, and Eliminate Cost-Matching Requirements for Tribal Nations

In recognition of its trust and treaty obligations to Tribal Nations, DHS must offer the full complement of the Department's 15 Operational and Support Components to provide greater access and equitable, baseline funding to Tribal Nations across its programs. Therefore, for DHS to appropriately address environmental and natural disaster concerns affecting Tribal Lands and our citizens, Tribal Nations must receive direct, unfettered full funding and technical support to build, sustain, and improve our capabilities to prepare for, protect against, respond to, recover from, and mitigate all hazards and disaster situations. In lieu of federal appropriations authorized by Congress, DHS must identify resources and personnel that can appropriately assist Tribal Nations. An essential foundation of federal trust and treaty obligations to Tribal Nations is the duty to ensure that we receive the appropriate resources and assistance when preparing for, responding to, and recovering from an environmental/natural disaster or emergency event. These principles must be incorporated into all DHS activities and actions to assist Tribal Nations to address our environmental justice concerns, especially in addressing climate change, as well as a pillar of its next "DHS Environmental Justice Strategy".

For DHS to uphold its trust and treaty obligations and support our efforts in Nation rebuilding and to protect our citizens, USET SPF offers the following recommendations for DHS to strengthen our abilities to appropriately address our environmental justice issues and concerns—

- **Tribal Nations must receive direct funding allocations and parity with state governments for all DHS grant programs.** Tribal Nations and Tribal emergency management organizations have consistently had limited access to direct funding from DHS since current funding mechanisms require Tribal Nations and our emergency management organizations to seek these funds through state governments. While USET SPF generally does not support the award and allocation of federal funds through grant-making processes, especially those that are structured under a competitive grant model, the current structure of grant-making at DHS must be altered to ensure Tribal Nations receive direct assistance. State governments should not be allowed to dictate whether Tribal Nations receive DHS grants, funds, and services. DHS and its agencies have solemn moral and legally binding trust and treaty obligations to Tribal Nations to provide for and support Tribal Nation efforts to protect our homelands, sacred sites, cultural, natural, and environmental resources, and the public health and safety of our communities. Current emergency management funding mechanisms and grant eligibility guidelines disregard Tribal sovereignty and self-determination and are not consistent with the December 2016 Federal Emergency Management Agency (FEMA) Tribal Policy, [FP 305-111-1](#), which states that, "Tribal governments

are not political subdivisions of states, but are to be recognized by the United States as distinct sovereigns.” There continues to remain glaring funding disparities and eligibility restrictions for Tribal Nations, as compared to states, across an array of DHS grant programs, to include, but not limited to: Hazard Mitigation Assistance Grants, Pre-disaster Mitigation Grants, Preparedness Grants, Assistance to Firefighters Grants and Emergency Management Performance Grants, and the Tribal Homeland Security Grant Program.

In recent years, DHS, and FEMA in particular, has increasingly consulted with Tribal Nations to update and revise guidance documents and programmatic regulations to eliminate barriers for Tribal Nation access to critical DHS funds. USET SPF strongly urges DHS to effectively standardize these practices and regularly consult, identify, and eliminate both procedural and current eligibility impediments by working directly with Tribal governments to facilitate greater access to DHS grant programs. DHS must ensure that its funding allocation methodologies address the stark funding disparities between Tribal Nations and states by providing equitable and baseline funding to Tribal Nations, eliminating competitive grant cycles, and advocating for contracting and compacting authorities similar to the Indian self-determination programs (ISDEAA, P.L. 93-638) administered by the Bureau of Indian Affairs and the Indian Health Service.

These actions are supported by USET SPF’s member Tribal Nations through [USET SPF Resolution No. 2019 SPF:021](#), “Calling Upon Congress and the Department of Homeland Security to Ensure Necessary Funding and Flexibility for Tribal Nations’ Homeland Security and Emergency Management Departments”, and, [USET SPF Resolution No. 2020 SPF:008](#), “Calling on Congress and the Department of Homeland Security to Allow All Federally Recognized Tribes Access to the Tribal Homeland Security Grant.” DHS must offer the full complement of its programs, to provide greater access and equitable, baseline funding to Tribal Nations. Tribal Nations must receive direct funds to build, sustain, and improve our capabilities to prepare for, protect against, respond to, recover from, and mitigate all hazards and disaster situations. In addition, the federal government must move beyond the grant- and competitive grant-making models to determine disaster relief awards to Tribal Nations. In addition to competing with state and local governments and other non-governmental entities, these processes and practices unjustly force Tribal Nations to compete with each other for critical disaster response and relief dollars. These actions do not uphold the federal government’s moral and legal obligations to Tribal Nations and should not be reinforced through DHS’s efforts to address environmental justice concerns affecting Tribal Nations.

- **DHS cost-matching requirements do not uphold DHS’s trust and treaty obligations to Tribal Nations.** The federal government’s trust and treaty obligations are the result of the millions of acres of land and extensive resources ceded to the U.S.—oftentimes by force— in exchange for which it is legally and morally obligated to provide benefits and services in perpetuity as payment on debt to Tribal Nations. Unfortunately, certain funding requirements for DHS programs do not adhere to these moral, legally binding trust and treaty obligations. For instance, certain DHS FEMA Public Assistance (PA) programs have non-federal cost-matching requirements, which unjustly and inappropriately asserts financial burdens on Tribal Nations to obtain these resources. Non-federal match requirements are based on a concept that non-federal governments must invest their own resources to receive federal assistance from DHS, which abrogates DHS’s trust and treaty obligations to Tribal Nations. Many Tribal Nations avoid seeking federal assistance in response to emergencies or disasters because of significantly burdensome processes imposed by FEMA under non-federal match requirements. These burdensome processes became further evident during the COVID-19 Public Health Emergency. Tribal Nations seeking emergency declarations under the Stafford Act experienced unnecessary and burdensome unfunded mandates and requirements

from FEMA and prevented a majority of Tribal Nations from seeking federal assistance authorized under the Act. The COVID-19 pandemic further highlighted undeniable truths that Tribal Nations remain the furthest behind among the U.S. family of governments in response and recovery to disaster efforts due to the lack of support in developing levels of preparedness, as well as burdensome and unnecessary requirements to identify a Tribal disaster. Further, it was determined that the FEMA review process for major disaster or emergency declaration requests under the Stafford Act is not transparent, which makes it almost impossible for Tribal Nations to successfully appeal FEMA's decision if our declaration request is denied.

In addition, it is important to note that these Public Assistance funds are also provided to Tribal Nations through a reimbursement process. This does not honor the federal government's trust and treaty obligations, nor does it appropriately support Tribal Nation efforts to respond to natural and emergency disasters appropriately and effectively in real-time. Unlike other governments, Tribal Nations do not have substantial tax bases that we may access in times of emergency. While numerous COVID-19 relief and infrastructure laws have been enacted by Congress to assist with the nation's recovery from the pandemic, these investments do not account for the federal government's centuries-long chronic underfunding of resources and services to Indian Country. FEMA must provide Tribal Nations with up-front Public Assistance resources, instead of relying on reimbursement processes.

- **DHS and its agencies must prioritize all necessary technical assistance funding to Tribal Nations.** Tribal Nation staff and resources are constantly overextended the already limited availability of federal funds and technical assistance, which is further exacerbated during a natural or environmental disaster, or other emergency event. DHS and its agencies must provide the necessary funds and staff support for technical assistance to Tribal Nations to access and utilize DHS funds and services. This is especially critical during the response efforts of Tribal Nations to environmental and natural disasters and other emergency events. For DHS to appropriately address our environmental justice concerns and issues, it must direct its agencies to actively identify the additional resources necessary to appropriately assist Tribal Nations in these areas. Due to the federal government's failure to uphold its trust and treaty obligations in the federal appropriations process, Tribal Nations continue to experience a lack of necessary federal resources at DHS, and when those resources are available, we often experience administrative or regulatory barriers that hinder us from accessing and leveraging these resources. DHS, and its agencies, should actively inform Tribal Nations of its capacity and capability to provide technical assistance to access these resources and appropriately mitigate our environmental justice issues and concerns.
- **DHS must establish a Tribal Resiliency Program.** DHS exists as the primary federal department responsible for all funds appropriated by Congress to support the National Preparedness Goal. This Goal is to ensure that all communities, including Tribal Nations and citizens, are prepared for all types of disasters and emergencies to create a secure and resilient nation. However, while Congress has provided consistent funding to state and local governments for over 50 years to develop and sustain core homeland security and emergency services capabilities and capacities, Tribal Nations have consistently been left out of these funding authorizations. Since 2003, Congress has allocated over \$55 billion in homeland security grant funds to state and local governments, which averages \$3.2 billion per year, while Tribal Nations have only been allocated just over \$95 million (\$5.5 million per year average) in federal homeland security funding during the same period. As a direct result of the federal government's ongoing investments, state and local governments are better prepared and have the capacity to navigate complex FEMA processes and

policies to access billions in emergency relief funds. Unlike these other units of government, Tribal Nations have been continuously left behind, if not outright excluded, in securing DHS funding to meet core homeland security and emergency services capabilities and capacities. For these reasons, USET SPF's member Tribal Nations adopted [USET SPF Resolution No. 2023 SPF:011](#), "Support for the Establishment of a Tribal Resiliency Program at the Department of Homeland Security." USET SPF's Resolution strongly urges Congress to appropriate, at a minimum, \$206.64 million to establish a Tribal Resiliency Continuity Program that is non-competitive, has no federal cost share, and has a streamlined award process to empower all Tribal Nations to build core homeland security and emergency services capabilities and capacities. As DHS directs its efforts to address the environmental justice issues and concerns of Tribal Nations must, it must actively recommend to Congress the necessity of establishing this Tribal Resiliency Program to appropriately prepare Tribal Nations for future emergency and disaster response scenarios. This directive should become standard practice in all DHS activities as well as part of its "DHS Environmental Justice Strategy".

Conclusion

Throughout our comments we've provided DHS recommendations to recognize our inherent sovereignty, remove barriers to access critical funds, and enhance our capacity and capability to appropriately prepare for and mitigate our environmental justice issues and concerns. These recommendations must be considered in all DHS activities and actions and incorporated into its next "DHS Environmental Justice Strategy". These actions are critical to upholding DHS's trust and treaty obligations to Tribal Nations and support our efforts in Nation rebuilding and safeguarding our homelands and citizens. We look forward to our continued work together to address these issues, especially in the areas of protecting and preserving our Tribal homelands and supporting the public safety, health, and wellbeing of our citizens from the increasingly harmful effects of climate change. 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