



USET

SOVEREIGNTY PROTECTION FUND

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*Transmitted Electronically
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April 8, 2024

Eric Beightel
Executive Director
Federal Permitting Improvement Steering Council
1800 G St NW
Washington, DC 20590

Dear Executive Director Beightel,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Federal Permitting Improvement Steering Council's (Permitting Council, or Council) draft Tribal Consultation Policy and Plan (draft TCP and Plan). We appreciate the Permitting Council's continued engagement with Tribal Nations to define and refine the parameters of its TCP and Plan in accordance with Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments", and its stated commitment to fulfilling its trust and treaty obligations to Tribal Nations through regular, meaningful, and robust consultation. It is apparent, however, that following the Tribal consultation on the Permitting Council's draft TCP and Plan held on March 7, 2024, further education and outreach efforts are required to inform Tribal Nations on the roles and responsibilities of the Permitting Council. USET SPF firmly believes that establishing a detailed TCP and Plan outlining the roles and obligations of the Permitting Council to consult with Tribal Nations is a good starting point. USET SPF's comments provide recommendations on how to improve the draft TCP and Plan to provide additional clarification of the roles and responsibilities of the Permitting Council, as well as additional recommendations on development of additional informative materials.

USET Sovereignty Protection Fund (USET SPF) is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.¹ USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

¹ USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), 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

Title 41 of the Fixing America's Surface Transportation Act (commonly referred to as "FAST-41") established a new governance structure, set of procedures, and funding authorities aimed at improving the federal project review and permitting processes for FAST-41 covered projects. Although it established procedures for coordinating federal environmental reviews and authorizations through a Federal Permitting Dashboard to publicly track the status of project review, it is important to emphasize that project sponsors must voluntarily apply to participate in the FAST-41 process. This has contributed to the confusion regarding the roles and responsibilities of the Permitting Council in the permitting and environmental review processes of FAST-41 infrastructure projects and how Tribal Nations can become active participants in these processes. USET SPF offers the following recommendations to assist and improve the Council's outreach, engagement, and consultation with Tribal Nations.

Further Clarification is Needed on the Role of the Permitting Council

During the March 7, 2024 Tribal consultation hosted by the Permitting Council to gather input and feedback from Tribal Nations on the draft TCP and Plan, it was evident that attendees were still unfamiliar with the roles and responsibilities of the Council in coordinating permitting and environmental reviews of FAST-41 projects. This was especially apparent when attendees questioned how the Council is responsible for coordinating permitting and environmental reviews of FAST-41 projects but is not directly responsible for conducting these permitting and review processes. USET SPF has been involved with the Permitting Council since 2021 and has been actively engaged in its policy development, including the development of the "FAST-41 Best Practices for Tribal Engagement" document and the Environmental Review Improvement Fund (ERIF) Tribal Assistance Program. Although we have participated in these developments, the Permitting Council still has trust and treaty obligations to conduct outreach, education, and direct Nation-to-Nation consultation with Tribal Nations. These obligations are especially important for the Permitting Council since it is still a relatively new federal entity. The Permitting Council still has further education and outreach obstacles to overcome to clearly express and delineate its roles and responsibilities in the permitting and environmental review processes of FAST-41 infrastructure projects, especially since this is a voluntary process that its member federal agencies and project sponsors must apply to participate in.

Recommendations to Improve the Permitting Council's Draft Tribal Consultation Policy and Plan

USET SPF generally supports the Permitting Council's draft TCP and Plan. We especially appreciate that language under "Sec. 2: Authority" explicitly acknowledges that the unique Nation-to-Nation relationship that exists between the federal government and Tribal Nations was established by the U.S. Constitution, treaties, statues, and court decisions. We would, however, recommend that Executive Orders and Memoranda, including Executive Order 13175, also be added to this list as they are governing directives issued by the President to federal agencies, which several with specific Tribal directives have been issued over the years. While USET SPF has additional specific recommendations to improve the Permitting Council's draft TCP and Plan, we also provide the following recommendations to improve the Council's outreach, education, and coordination efforts with Tribal Nations—

- **Under "Sec. 4: Responsibilities", the Permitting Council should clarify that Tribal Nations can apply for representation on a Joint Federal-Tribal Team to revise the Council's TCP and Plan.** Currently, the draft TCP and Plan states that the Tribal Liaison Officer (TLO) is responsible for identifying Tribal Nations to designate a Tribal representative to sit on the Joint Federal-Tribal Team (Team) in the event the TCP and Plan requires revisions/updates. While we support the formation of a Team, we strongly emphasize that such Team must be regionally and nationally representative of Tribal Nations across Indian Country. Further, USET SPF recommends that the Joint Federal-Tribal Team be renamed the "Joint Federal-Tribal Workgroup" in recognition that the

members of this group would be duly elected or appointed Tribal Leaders or their designees. Further, the Council should be transparent when it has decided to form a Joint Federal-Tribal Workgroup and should a Tribal Nation request to become a member of a Workgroup to revise/update the Council's TCP and Plan, we strongly recommend that the Council and TLO establish a process for how a Tribal Nation can submit such a request.

- **In accordance with Executive Order 13175 and the Presidential Memorandum on Tribal Consultation, USET SPF recommends that language regarding “Training”, under “Sec. 4: Responsibilities”, should be expanded to include Tribal sovereignty and U.S.-Tribal Nation relations to employees of the Permitting Council and its member agencies.** 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. Federal employees must understand that federal actions have direct and indirect impacts and consequences on Tribal Nations and our citizens. Federal employees of the Permitting Council's member agencies are responsible for the review of every federal undertaking and action involving environmental and cultural reviews of FAST-41 projects. However, many of these same federal employees will be engaged in decision-making that will potentially impact our historic, cultural, and natural resources. Therefore, it is important that these federal employees fully understand the history of U.S.-Tribal Nation relations and the federal trust obligation.

The lack of education and understanding regarding the federal government'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. As an agency of the federal government, the Permitting Council must actively work with and offer training for employees of its member agencies 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 in the FAST-41 project review process. This training should be designed in consultation with Tribal Nations and updated and revised as appropriate in response to 'lessons learned' when issues arise in the FAST-41 project review process. Additionally, when the Permitting Council and its member agencies hire third-party contractors to assist in developing and conducting environmental and cultural reviews of FAST-41 projects, these contracted employees should be required to be knowledgeable of the federal government's trust and treaty obligations to Tribal Nations. Therefore, USET SPF recommends that language under Sec. 4 of the draft TCP and Plan regarding “Training” should be revised to state that the Permitting Council, byway of the Tribal Liaison Officer or otherwise, will actively engage in training efforts and opportunities for staff of the Council's member agencies.

- **Provide additional clarification and establish definitive timelines under “Sec. 6: Determining Whether Consultation is Appropriate.”** USET SPF appreciates the Permitting Council's inclusion of language that a Tribal government can request consultation on a policy or action of the Council that may have Tribal implications. However, USET SPF recommends further clarification under Sec. 6 to re-state that the Council only initiates consultation on its direct policies, actions, and activities, and not the permitting and environmental review processes the Council's member agencies are responsible for. This section led to additional confusion on the meaning of the Council's TCP and Plan and how it concerns Tribal interests. As recommended and will be emphasized further in our comments, additional materials must be developed to further illustrate the scope, process, and responsibilities of the Council's consultation obligations to Tribal Nations,

and how they differ from those of member agencies. Further, USET SPF recommends the addition of language stating that, at a minimum, the Council would respond to a Tribal government request for consultation within 30 days. We also recommend that additional language be included to state that if the consultation request is time-sensitive then the Council will commit to engage in Tribal consultation at an agreeable date and time for the respective Tribal Nation(s).

- **Moving forward, we recommend that the Permitting Council host multiple Tribal consultations, in addition to individual Nation-to-Nation consultations on Council policies, actions, and activities.** We note that there was only a single Tribal consultation held on the draft TCP and Plan, but that the Permitting Council welcomed requests from Tribal Nations for individual one-on-one consultation. However, moving forward, USET SPF recommends that the Permitting Council host multiple Tribal consultations and listening sessions on proposed Council policies, actions, and activities. This will ensure that Tribal Leaders, their designated officials, and Tribal personnel and inter-Tribal organization and association staff have alternative options to attend a session if one or more sessions conflict with other responsibilities.
- **Upon finalization of the TCP and Plan, the Permitting Council should develop a “TCP and Plan Frequently Asked Questions” (FAQ) document and other supporting education and outreach materials.** While the Permitting Council serves as a coordinating federal entity to increase communication on permitting and environmental reviews for FAST-41 projects, it does not conduct the actual permitting and environmental reviews for these projects. This has led to confusion regarding the purpose of the Permitting Council and its obligations to engage in consultation with Tribal Nations. Due to this confusion, USET SPF recommends further clarification to some of the terminology in the Permitting Council’s draft TCP and Plan, which will be addressed later in these comments, as well as the development of a FAQ document detailing how, why, and when the Council engages in consultation with Tribal Nations. We would also recommend the development of illustrative materials, such as a flowchart of the consultation process that highlights what areas the Permitting Council is responsible for conducting Tribal consultation proceedings on. In addition, since the Council is not directly responsible for conducting the permitting and environmental reviews of FAST-41 projects, additional publicly available materials should be developed to illustrate how the Permitting Council coordinates with its member agencies in these activities and where Tribal Nations stand and can act within that process with the Council and its member agencies. The development of these materials should also refer to and direct readers to the Council’s TCP and Plan once this document is finalized.
- **The Permitting Council should establish a Tribal consultation and resource landing page on the Permitting Dashboard and list the Tribal point of contact(s) for FAST-41 projects.** Currently on the Permitting Council’s Permitting Dashboard webpage there are no up-front direct links to resources and information specific to Tribal Nations and our role in reviewing permits and environmental reviews of FAST-41 projects. Even information regarding the ERIF Tribal Assistance Program is buried under the “Become a FAST-41 Project” link in the top right-hand corner of the Dashboard’s homepage, which is problematic for Tribal Nation awareness unless a Nation is already aware of and informed about the Permitting Council and the ERIF Tribal Assistance Program. Moving forward we strongly encourage the Permitting Council to establish a “Tribal Consultation, Coordination, and Outreach” tab on the Permitting Dashboard webpage as a direct resource Tribal Nation’s can access to learn more about the Council’s TCP and Plan (once finalized) as well as the ERIF Tribal Assistance Program and the other educational materials USET SPF has recommended the Council develop. This webpage should also include the Tribal points of contact (POC) for the Permitting Council as well as those of the Council’s 12 participating federal

agencies as well as links to “Dear Tribal Leader Letters” that are issued by the Council announcing Tribal consultations or listening sessions. USET SPF further recommends that these Tribal POCs be included on the webpages of every project listed on the FAST-41 Permitting Dashboard. The current POCs listed for the individual FAST-41 projects listed on the Dashboard include the contact information for the lead federal agency and the project sponsor. However, if these POCs are unresponsive to Tribal Nation requests for consultation and engagement on a specific FAST-41 project then we would at least have contact information for the agency’s Tribal affairs officer or liaison to initiate additional follow-up and assistance. USET SPF also recommends that the relevant Tribal affairs staff for the Permitting Council also be listed on these project webpages.

- **Update the Permitting Dashboard to emphasize the benefits for federal agencies and project sponsors to become a FAST-41 Project.** While the Permitting Dashboard provides a great deal of information regarding projects participating in the FAST-41 process, it is still a voluntary process that federal agencies and projects sponsors choose to participate in. The Permitting Council, as well as the Council’s Executive Director, is responsible for enhancing interagency coordination and resolving disputes in overseeing FAST-41 implementation. Therefore, the Council has a unique role and opportunity to ensure that the construction of FAST-41 projects occurs through a transparent, inclusive process. The concerns and priorities of Tribal Nations, especially in protecting and safeguarding our sacred sites, cultural lifeways, and cultural, natural, and environmental resources, are often overlooked in the scoping, permitting, and construction of infrastructure projects. This is especially indicative in the construction of projects occurring on our ancestral homelands outside of our current jurisdictional boundaries, which often contain areas of sacred significance and culturally significant natural and environmental resources and wildlife. This has often led to costly and time consuming litigation between Tribal Nations and federal and non-federal entities involved in these infrastructure projects.

As a means of avoiding these costly and time consuming litigation proceedings, we urge the Permitting Council to stress to its member agencies, and industry, the benefits of becoming a FAST-41 project if such a project is eligible. Not only would it create transparency around the project’s evolution, but it could also provide Tribal Nations the opportunity to become active participants in the early scoping stages of a project. Further, we recommend that the Permitting Council conduct outreach to Tribal Nations if a proposed FAST-41 project is located near a Tribal Nation’s existing jurisdictional boundaries. Although USET SPF’s member Tribal Nations were the first to contend with non-Native contact and experienced forced removal from our ancestral homelands to reservations in the west—many of us have persisted and persevered to stay in our homelands. Though the current land base of our member Tribal Nations is but a mere fraction of our ancestral homelands due to outright theft and forced removal, we still have sacred sites and other areas of cultural significance outside our current jurisdictional boundaries, especially on lands held and maintained by the federal government. It is incumbent that the Permitting Council, as a federal entity, uphold its trust and treaty obligations to Tribal Nations by ensuring that we are aware of and become active participants in reviewing FAST-41 project proposals to determine if they will affect our sacred sites, cultural lifeways, and cultural, natural, and environmental resources.

Conclusion

As a federal agency established by Congress, and permanently authorized in 2021 by the Bipartisan Infrastructure Law, the Permitting Council has inherited the same trust and treaty obligations to Tribal Nations that apply across the federal government. The Council must continuously and proactively uphold and fulfill these obligations that exist in perpetuity. In developing the draft TCP and Plan and welcoming Tribal Nation input and feedback, the Permitting Council has taken a proactive approach to its consultation

and engagement activities with Tribal Nations. USET SPF reminds the Council that early, meaningful, and robust Tribal consultation and engagement is a critical component of upholding its trust and treaty obligations to support our inherent sovereignty and self-determination. Moving forward, we look forward to continued dialogue with the Permitting Council on these important matters regarding appropriate engagement and consultation with Tribal Nations on Council policies, actions, and activities that may have direct or indirect Tribal implications. 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,

A handwritten signature in black ink, appearing to read "K. Francis", with a long horizontal flourish extending to the right.

Chief Kirk Francis
President

A handwritten signature in black ink, appearing to read "K. A. Carroll", written in a cursive style.

Kitcki A. Carroll
Executive Director