



USET

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*Transmitted Electronically
To osd.ejstrategy@mail.mil*

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Ronald E. Tickle
Deputy Assistant Secretary of Defense
Environmental Management & Restoration
Department of Defense
529 14th St NW, Ste 350
Washington, DC 20045

Dear Deputy Assistant Secretary Tickle,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Tribal listening sessions held on the Department of Defense's (DoD) 2024 Environmental Justice Strategy Draft Goals and Overall Approach (2024 EJ Strategy). We appreciate DoD's outreach to Tribal Nations regarding its draft 2024 EJ Strategy and hosting the regional, virtual Tribal listening sessions throughout June 2024. However, the current draft DoD 2024 EJ Strategy is generic in scope and does not include any Tribal specific EJ goals and priorities. Further, while USET SPF supports EJ efforts, we note that the term 'environmental justice' has been used by the Administration to address the EJ concerns of 'disadvantaged communities', in which Tribal Nations have been included. We remind the DoD 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 communities and citizens. While Tribal Nations certainly have specific 'environmental justice' concerns, we strongly emphasize to DoD that recognizing us under the 'environmental justice' moniker does not absolve it of its moral and legally binding trust and treaty obligations. These trust and treaty obligations are the focus of our comments to DoD to ensure that our inherent sovereign rights and authorities as Tribal Nations are fully recognized and upheld throughout DoD's EJ activities and actions. Our comments also stress the importance of protecting Indigenous Knowledge from public dissemination through any EJ related actions and activities.

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

DoD Engagement and Collaboration with Tribal Nations on EJ Priorities and Goals Must Be Conducted Through Appropriate Consultation Processes

For DoD to fully recognize, acknowledge, and uphold the unique moral and legal relationship it has with Tribal Nations, it must begin by delivering upon its trust and treaty obligations to consult with Tribal Nations on EJ and all other matters affecting us. 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 and those lands now under DoD jurisdiction. DoD must ensure that it is fully aware of and addresses the consequences, both direct and in-direct, that its actions could have on the safety, public health, culture, and lifeways of our citizens as well as ensure that our Tribal homelands—both within and outside our current jurisdictional boundaries—are appropriately safeguarded and protected prior to DoD initiating activities and operations. These ideals must be at the forefront of how DoD advances its EJ activities and must be included in its 2024 EJ Strategy. Language regarding DoD's trust and treaty obligations to consult with Tribal Nations and recognition of its Nation-to-Nation diplomatic relationship with Tribal Nations as sovereigns must be included in the next iteration of the draft DoD 2024 EJ Strategy.

The following recommendations should guide DoD's EJ goals and overall approach in working with Tribal Nations, as well as ensure that proper protocols are followed for DoD to consult with Tribal Nations on EJ matters—

- **Successful DoD engagement and collaboration on EJ matters with federally recognized Tribal Nations must be 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 EJ issues requiring technical and subject matter expertise, true Tribal consultation should occur at a Leader-to-Leader level between DoD and Tribal Nations. Our duly elected or appointed Tribal Leaders must be afforded the respect and opportunity to directly voice Tribal Nation concerns to DoD 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 DoD officials do.

In addition, DoD must work to formalize diplomatic relations with and seek the consent of Tribal Nations individually on EJ goals and activities, as well as all DoD undertakings that may affect us. 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]." This should become a central pillar of DoD's EJ Strategy to direct its personnel—both federal employees and contractors—to facilitate diplomatic relations and engagement with Tribal Nations on EJ matters.

- **Tribal consultation conducted by DoD on EJ matters 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, historically and contemporarily, this principle has not been upheld by DoD in a manner that respects our inherent sovereignty and self-determination, especially when considering the

direct and in-direct implications of DoD undertakings on Tribal Nations and our homelands, lifeways, and public well-being. Like other federal departments and agencies, DoD has often unilaterally conducted its own internal review of proposed policies and actions, which frequently results in a finding of no impact on Tribal Nations and, therefore, results in irreparable harm to our Nations, lands, lifeways, and the well-being of our communities and citizens. This fails to recognize and adhere to the federal government's trust and treaty obligations to Tribal Nations, which is a concerning issue regarding EJ consideration by DoD. Rather, consultation and collaboration must recognize Tribal Nations as equal sovereigns. Therefore, Tribal Nations must always be engaged at the earliest stages of DoD decision-making processes on EJ matters. In addition, our authority to initiate consultation in response to DoD activities and/or actions (or proposed activities and/or actions) 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 Memorandum expressly recognizes and acknowledges our authority and right to self-govern as inherently sovereign Nations, reaffirms and strengthens the principles of E.O. 13175, and reinforces that federal agencies must pursue consultation with Tribal Nations in a meaningful and respectful way. This includes directives for how agencies should initiate, provide notice for, conduct, record, and report on Tribal consultations. This Memorandum must also become part of DoD's EJ goals and approach in consulting and collaborating with Tribal Nations so that we may appropriately and meaningfully achieve our EJ goals and priorities.

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, DoD 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 DoD employees must be required to receive education and training on Tribal sovereignty and U.S.-Tribal Nation relations.** Before DoD and its agencies can effectively implement processes that appropriately consider Tribal Nation concerns regarding DoD EJ activities and actions, DoD 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 DoD decision-making processes on EJ activities and actions. DoD employees must understand that federal actions have direct and indirect EJ 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 on all issues. USET SPF has long recommended mandatory training on U.S.-Tribal relations and the trust obligation for all federal employees. DoD 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 DoD and its agencies hire third-party contractors to assist in any DoD activities or actions, these contracted employees should also be required to be knowledgeable of the federal government's trust obligations to Tribal Nations.

The 2024 EJ Strategy Must be Refined to Include DoD Tribal Specific Goals and Overall Approach to Addressing EJ Matters

In reviewing DoD's draft 2024 EJ Strategy, it is apparent that it currently does not recognize, address, or outline how its EJ Strategy will apply to Tribal Nations. The current draft EJ Strategy is a generic one-pager meant to provide guidance for all DoD EJ activity. This does not account for the unique considerations of the EJ goals and priorities of Tribal Nations nor recognize our inherent sovereign rights and authorities to pursue these objectives. This must include directives for DoD to protect sensitive Tribal information when engaging in EJ discussions, while also providing the necessary technical assistance we require to engage in these activities. We firmly believe that the current draft EJ Strategy must be further revised to include the additional following—

- **Pursuing its EJ Strategy with Tribal Nations will undoubtedly include the exchange of Indigenous Knowledge to DoD, which should be protected from Freedom of Information Act (FOIA) Requests.** First and foremost, during DoD's engagement with Tribal Nations on EJ matters the exchange of Indigenous Knowledge (IK) and other sensitive Tribal cultural information is likely to occur. Therefore, DoD should actively work with Tribal Leaders to determine what sensitive information should be redacted from public dissemination and protected from FOIA requests. Further, DoD must inform Tribal Nations when FOIA requests are made to access our sensitive information from these EJ engagements and let us determine whether such requests should be withheld or redacted. Similarly, DoD 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 (THPOs), 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, DoD should review the November 2022 White House Council on Environmental Quality (CEQ) and the 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 have initiated consultation with Tribal Nations to develop agency-specific IK Guidance.

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 DoD to specifically identify and reference its obligations under FOIA in its 2024 EJ

Strategy. DoD 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 and engagement on EJ matters and ensure the transcription of consultation and engagement sessions does not create a sensitive record of IK.** USET SPF strongly urges DoD to include language in its EJ Strategy 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 EJ Strategy that if DoD 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, DoD should include language in its EJ Strategy 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, DoD must adhere to any objections of the recording or transcription of any IK or cultural information divulged during EJ consultation proceedings and other communications. DoD must also ensure that its EJ Strategy 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 DoD following an EJ consultation or engagement proceeding.
- **DoD 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 DoD utilize direct and contract funding to Tribal Nations for EJ consultation and engagement related costs, staff training, and the hiring of Tribal Nation personnel to conduct NEPA, NHPA, and NAGPRA responsibilities on EJ matters. 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, DoD 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 EJ processes. For instance, not all Tribal Nations have 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.

In the current DoD draft 2024 EJ Strategy, DoD acknowledges that it has historically used compliance with the National Environmental Policy Act (NEPA), NHPA, and Comprehensive Environmental Response, Compensation, and Liability Act processes to address EJ. DoD also states that it may take a more proactive approach by incorporating EJ into the Office of the Secretary of Defense (OSD), Military Department (MILDEP), and installation-level planning processes. We encourage DoD to incorporate these ideals while also expanding its 2024 EJ Strategy to address cultural sensitivity and privacy concerns that Tribal Nations have regarding the sharing of IK and pursuing EJ activities and engagement.

Conclusion

Moving forward, DoD must revise its current draft 2024 EJ Strategy to acknowledge and recognize the inherent sovereignty and self-determination of Tribal Nations to pursue our EJ goals and priorities. Currently, there is not a single mention of how DoD's EJ Strategy will apply to and consider our EJ goals and priorities or how DoD intends to engage with Tribal Nations on these matters. The current draft EJ Strategy is too generic and broad in scope, and, because of this, we are certain that the specific EJ goals and priorities of Tribal Nations will become an afterthought in any DoD undertaking. This will inevitably affect our lands (both within and outside of our current jurisdictional boundaries), our cultural lifeways, and the public health and well-being of our communities and citizens. The recommendations offered throughout our comments to draft a new EJ Strategy that is inclusive of Tribal Nations must be incorporated and establish the foundation for DoD undertakings and engagement with Tribal Nations on all EJ matters. These actions are critical to upholding DoD's trust and treaty obligations to Tribal Nations and support our efforts in Nation rebuilding and safeguarding our homelands within and outside of our current jurisdictional boundaries, as well as our protecting the safety and public health of our communities and citizens. We look forward to our continued work together to address these critically important EJ issues to ensure that DoD actions and activities are consistent with Tribal Nation EJ priorities and goals. 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