



USET

SOVEREIGNTY PROTECTION FUND

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

August 2, 2022

Michael Connor
Assistant Secretary of the Army (Civil Works)
Office of the Assistant Secretary of the Army for Civil Works
U.S. Army Corps of Engineers
108 Army Pentagon
Washington, DC 20310-0108

RE: USET SPF Comments on USACE Modernization of Army Civil Works Priorities, Docket ID No. COE-2022-0006

Dear Assistant Secretary Connor,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the U.S. Army Corps of Engineers (USACE) proposal to modernize its Civil Works priorities. This effort was announced on June 3, 2022 through a Notice and Request for Comments in the Federal Register. USACE announced proposals to inform decision-making regarding consultation with Tribal Nations, as well as USACE's programs to implement regulations for Section 106 of the National Historic Preservation Act (Sec. 106 NHPA) under the Appendix C regulations. Throughout June and July 2022, USACE held several public and Tribal Nation meetings to provide an overview of the Federal Register Notice. USET SPF attended several of these meetings and has concerns with USACE's proposals to modernize its Civil Works Programs, especially regarding proposed language to update its Tribal Consultation Policy as well as the continued use of the Appendix C regulations for Sec. 106 NHPA reviews.

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

Tribal Consultation Should be Conducted at a Nation-to-Nation Level

As part of USACE's efforts to modernize its [Tribal Consultation Policy](#) that was adopted in November 2012, USACE proposes to, "consult with Alaska Native Corporations on the same basis as Indian Tribes under Executive Order 13175." This is entirely inappropriate. In the spirit of partnership and with a goal of facilitating greater education and understanding of Tribal Nations, USET SPF reminds USACE that for-profit Alaska Native Corporations (ANCs) are not Tribal Nation governments, and therefore, do not enjoy a consultative relationship with the U.S. government—a sacred relationship that is founded in the mutual recognition of governmental status between consulting parties and the federal government's trust obligation to Tribal Nations.

While we fully support and affirm the governmental status of Alaska Native Tribal Nations and villages, we underscore that ANCs are for-profit corporations. Similarly, while Tribal Nations engage in numerous for-profit endeavors, the Nation-to-Nation relationship and accordant trust obligations exist between our respective governments (Tribal and federal) only. While USACE may have an interest in seeking the input of ANCs on issues relevant to its roles and responsibilities, to do so through consultation is an affront to our Tribal sovereignty and stands in violation of our Nation-to-Nation relationship with the United States. It is in pursuit of policy that does uphold this sacred relationship that we urge USACE to avoid equating Tribal Nations and ANCs. We note that while other federal agencies and departments reserve Tribal consultation for Tribal Nations, several seek the input of non-governmental Tribal entities through a 'confer' process.² For these reasons, we urge USACE to retain the current definition of "Tribe" as defined in its current November 2012 Tribal Consultation Policy under Section 3(a).

USACE Must Protect Tribal Nation Sensitive and Culturally Sensitive Information

Another item USACE has proposed to include in its Tribal Consultation Policy is Section 3.6 of [DoD Instruction 4710.02](#). Section 3.6 states that Department of Defense (DoD) representatives must take into consideration confidentiality concerns raised by Tribal Nations during consultation proceedings. While USET SPF strongly supports the recognition that Tribal Nations may want to keep certain information—especially culturally sensitive information—confidential, we believe that this policy does not go far enough.

Section 3.6(a) states that DoD representatives should:

"a. Assure tribes that DoD will make *every reasonable effort, consistent with the law*, to withhold from public discourse any specific information that a tribe identifies as confidential, especially information related to sacred sites and other traditional cultural properties." [*emphasis added*].

The inclusion of the phrase, "every reasonable effort, consistent with the law", places inappropriate limitations on fully protecting sensitive information for Tribal Nations. For example, USET SPF has become aware of the use of the Freedom of Information Act (FOIA) by non-Tribal entities to gain access to our sensitive information, including the location of sacred sites, from other federal departments and agencies. USACE must protect the sensitive information disclosed by Tribal Nations during consultation proceedings in order to fully uphold its trust and treaty obligations. USACE must also uphold Tribal Nation requests to redact sensitive information disclosed during consultation proceedings. This must apply to all media forms utilized during Tribal consultation proceedings, which include, but are not limited to, note taking during consultation proceedings, consultation report out documents, audio and video call meetings, audio and video call recordings, and written comments received from Tribal Nations. Furthermore, "every reasonable effort", does not uphold the federal government's trust and treaty obligations to consult with Tribal Nations and USET SPF opposes the inclusion of this specific language in USACE's Tribal Consultation Policy.

² See the Indian Health Service's policy on conferring with Urban Indian Organizations. Available at <https://www.ihs.gov/ihtm/pc/part-5/p5c26/>.

USACE's Intention to Provide Written Responses to Tribal Nations on its Final Decision-Making Processes in Response to Tribal Consultation Proceedings

In modernizing its Tribal Consultation Policy, USACE has proposed including a provision to provide written responses to Tribal Nations on how Tribal Nation input was considered in its decision-making processes. USET SPF supports this proposal to the extent that—as mentioned above—sensitive and culturally sensitive information identified by Tribal Nations as confidential is not publicly disclosed in these documents.

All too often following Tribal consultation, the federal government renders a decision without further explanation as to how that decision was reached. This is particularly true in the case of “check-the-box” consultation, where Tribal Nations provide input and that guidance is ignored completely. Not only does this run counter to the federal government’s consultation obligations, it undermines our Nation-to-Nation relationship. In recognition of and out of respect for our sovereign governmental status, as well as in the spirit of transparency, USACE should be required to publish a summary of all comments received, how that guidance influenced the USACE’s decision, and why the decision was reached. In addition, USACE should follow-up with Tribal Nations following the execution of its decisions to assess efficacy and better understand associated consequences.

USACE Must Update Additional Sections of its Tribal Consultation Policy

Although USACE has proposed several updates to its current November 2012 Tribal Consultation Policy, it has overlooked the consideration of several additional items in this proceeding to modernize this policy. USET SPF is specifically concerned with language in the November 2012 policy under Section 3(b), which states:

“(b) Consultation: Open, timely, meaningful, collaborative and effective deliberative communication process that emphasizes trust, respect and shared responsibility. *To the extent practicable and permitted by law*, consultation works toward mutual consensus and begins at the earliest planning stages, before decisions are made and actions are taken; an active and respectful dialogue concerning actions taken by the USACE that may significantly affect tribal resources, tribal rights (including treaty rights) or Indian lands.” [*emphasis added*].

The use of the phrase, “to the extent practicable and permitted by law”, is often used by the federal government to obstruct action on vital issues of importance to Tribal Nations and true Nation-to-Nation consultation. It undermines our status as sovereign Tribal Nations and does not uphold the federal government’s trust and treaty obligations. The use of this phrase also contradicts Section 5(a), which states that, “all federally-recognized Tribes are sovereign governments and will be treated with respect.” To respect us as sovereign Tribal Nations USACE must adopt policies, procedures, and regulations that ensure true and absolute Nation-to-Nation consultation.

‘Sufficiently Early’ Should be Defined in USACE’s Tribal Consultation Policy

An additional update USACE must consider regarding its current Tribal Consultation Policy involves Section 5(d)(1). Section 5(d), “Consultation will be an integral, invaluable process of USACE planning and implementation”, highlights several activities and processes USACE must adhere to regarding Tribal consultation. Specifically, USET SPF is concerned regarding the language of Section 5(d)(1), which states:

“(1) When appropriate, potentially affected Tribes, as determined by the Corps, including Tribes whose aboriginal territories extend to the lands where an activity would occur, will be contacted by letter, telephone or e-mail *sufficiently early* to allow a timely review of the proposed action. If

contacted Tribes notify USACE that other Tribes are potentially affected, USACE has the responsibility to notify those Tribes as well.” [emphasis added].

USET SPF is concerned that district or division level USACE Commands can interpret ‘sufficiently early’ in ways that best suit USACE’s mission and goals for project completion. This could also lead and contribute to an inconsistent interpretation and implementation of this section across USACE district and division level Commands. While some Tribal Nations may have close, beneficial working relationships with their district or division level Commands, others may not. This contributes to the streamlining of USACE projects without sufficient coordination and consultation with Tribal Nations regarding project impacts on the environment and Tribal Nation cultural and natural resources and sacred sites. USET SPF strongly recommends that USACE update Section 5(d)(1) of its Tribal Consultation Policy to ensure that timely contact with Tribal Nations is made, at a minimum, of 60 days in advance. Additionally, we recommend that USACE use *all* forms of contact media identified in Section 5(d)(1) so that all potentially affected Tribal Nations are contacted by letter, telephone, *and* e-mail.

Furthermore, the language in Section 5(d)(1) stating that, “if contacted Tribes notify USACE that other Tribes are potentially affected, USACE has the responsibility to notify those Tribes as well”, does not relinquish USACE of its trust and treaty obligations. It is not the responsibility of Tribal Nations to inform USACE of its obligations to engage with our fellow Tribal Nations routinely and continually. It is USACE’s responsibility to be informed and knowledgeable about how proposed projects impact all Tribal Nations and our ancestral homelands. It is important that USACE be proactive in cultivating relationships with Tribal Nations to understand our true diversity and appropriately engage in Nation-to-Nation consultations on USACE activities.

The Continued Use of the Appendix C Regulations Undermine USACE’s Tribal Consultation Policy

USACE adopted the Appendix C regulations ([33 CFR 325](#)) in 1990, which was two years before passage of the 1992 amendments to NHPA. The 1992 amendments to NHPA, specifically Sec. 106, require federal agencies to take into account the effects of a federal undertaking on historic properties and provides the Advisory Council on Historic Preservation (ACHP) the authority to review and comment prior to the completion of these activities. The Sec. 106 NHPA process also recognizes the authority of Tribal Nations to assert religious or cultural significance to a ‘historic property’ (i.e., sacred sites). The Sec.106 NHPA process has been used by Tribal Nations and Tribal Historic Preservation Officers to protect our sacred sites from the effects of harmful and detrimental federal undertakings.

The USACE Appendix C regulations do not explicitly recognize the authority of Tribal Nations to attach religious and cultural significance to sacred sites, or the ability of Tribal Nations to be consulting parties in review of places listed, or eligible for listing, as a historic property in the National Register of Historic Places. USACE has issued two Interim Guidance documents, one in 2005 and the other in 2007, in response to criticism that the Appendix C regulations were not adhering to the 1992 amendments to NHPA. However, Appendix C and the 2005 and 2007 Interim Guidance have failed to appropriately mandate Tribal consultation activities when USACE activities impact our sacred sites. USACE has even admitted in this Federal Register Notice that there is longstanding disagreement between it and ACHP regarding Appendix C and the Sec. 106 NHPA process.

USET SPF continues to strongly urge that USACE rescind the Appendix C regulations and adopt the NHPA regulations promulgated by the ACHP at [36 CFR 800](#). Additionally, upon rescission of the Appendix C regulations, memoranda and other communications must be relayed to USACE personnel to ensure that this activity has occurred, and personnel should be trained on the NHPA regulations promulgated by the ACHP. Furthermore, we strongly recommend that all USACE personnel be educated on Section 5(f)(1) of its Tribal Consultation Policy, which states:

“(1) USACE recognizes the importance of strict compliance with the Native American Graves Protection and Repatriation Act (NAGPRA), the National Historic Preservation Act (NHPA) and other statutes concerning cultural and natural resources.”

Education materials regarding the statutes listed under Section 5(f)(1) of USACE’s Tribal Consultation Policy should be developed in consultation with Tribal Nations and distributed to all USACE personnel. Additionally, all USACE personnel must undergo training regarding these statutes.

Furthermore, USACE must not delegate consultation or Sec. 106 NHPA responsibilities to third parties, such as energy and communications companies, or non-Tribal archaeologists and historians. Only the representatives of Tribal Nations, including Tribal leaders and Tribal Historic Preservation Officers, can determine whether a place or item has Tribal cultural, historic, or spiritual significance. Tribal Nation representatives must have the unhindered opportunity to assess and evaluate all crossings or sites of any potential infrastructure projects. Tribal knowledge and tradition must supersede all other assessments and opinions. Permit applicants and their representatives should never be allowed to make key determinations regarding Tribal interests.

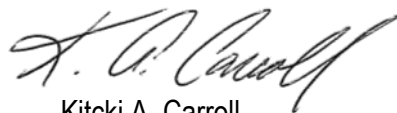
Conclusion

The Civil Works programs of USACE have a profound impact on Tribal Nations, our natural and cultural resources, our environments, and our cultural and religious practices. These impacts can occur on our traditional homelands, adjacent to our lands, or in upstream areas where those impacts will reach our communities. USACE must be cognizant of its activities and make every effort to consult with Tribal Nations meaningfully, effectively, and appropriately. These consultation efforts must also be done well in advance of a proposed activity and must not be a simple ‘check the box’ activity. True consultation means respecting Tribal Nation sovereignty, building relationships, seriously considering and acting upon Tribal Nation concerns, and affording us with advance notice of proposed project activities. These actions would uphold USACE’s trust and treaty obligations to Tribal Nations and establish a foundation for true Nation-to-Nation diplomatic relations. Respectful and meaningful Tribal consultation activities benefit all involved. It is a process that is fundamental to USACE’s trust and treaty obligations and is to be used to avoid damages to Tribal Lands, our natural and cultural resources, the environment, and avert potential litigation activities. USET SPF urges USACE to consider the updates to its Tribal Consultation Policy that were not part of this Notice and Request for Comment as well as rescind the Appendix C regulations due to their inadequate and damaging implications for Tribal Nations. We look forward to continuing this dialogue with you on these critically important issues. 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,



Kirk Francis
President



Kitcki A. Carroll
Executive Director