COALITION for TRIBAL SOVEREIGNTY

April 30, 2025

The Federal Communications Commission
45 L Street NE, Washington, DC 20554

via electronic filing at www.fcc.gov/ecfs

RE: Comment on CTIA Petition for Rulemaking on the Commission's National Environmental Policy Act Rules, RM-12003

On behalf of the undersigned organizations serving Tribal Nations and Tribal citizens and communities, we write in response to the Public Notice released by the Wireless Telecommunications Bureau of the Federal Communications Commission (Commission). The Commission is seeking comment on the petition by CTIA - The Wireless Association (CTIA) requesting the Commission engage in rulemaking to update and streamline the Commission's NEPA rules in Part 1, Subpart I, to facilitate wireless broadband deployment across the country. We oppose this action because CTIA's petition understates important ways in which the Commission's current rules and programmatic agreements implementing the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA) deliver on trust and treaty obligations to Tribal Nations.

CTIA seeks no new rulemaking, but rather it urges the Commission to depart from decades of precedent and deregulate its rules and processes for how it implements NEPA and the NHPA. In its petition, CTIA asks for hurried changes to a number of Commission rules, including potentially the creation of a new NEPA categorical exclusion. The authority for this proposed deregulation, CTIA argues, is that Congress passed bipartisan amendments to NEPA in 2023, the Council for Environmental Quality (CEQ) recently rescinded its NEPA implementing regulations and issued a new guidance memorandum, and the current Administration recently issued Executive Orders directing agencies to eliminate all delays within their respective permitting processes. The basis for this proposal, the underlying legal authorities, the nature of the motivation, and the potential future plans after such proposed deregulation require great scrutiny.

CTIA's petition argues that a "changed legal landscape" should empower the Commission to abandon regulations designed to provide Tribal Nations with the ability to be involved in processes that protect the environment and preserve our culture—processes which are linked directly to Tribal Nations' rights and the federal government's trust and treaty obligations. What is not disclosed or discussed in the petition is that current Commission regulations under NEPA and the NHPA are designed not only to protect the environment, but also to protect the unique interests of Tribal Nations in our environments and our cultural preservation, and to promote robust government-to-government relationships with the 574 federally recognized Tribal Nations.

While we generally support efficiency and effectiveness, including with regard to permitting in Indian Country, this cannot be accomplished at the expense of Tribal sovereignty,

health, spirituality, or culture. Any changes to how the Commission implements NEPA regulations that minimize or forgo mandated Tribal consultation will have significant impacts on Tribal Nations and our ability to protect and manage Tribal resources, sacred sites, and historic properties. In accordance with trust and treaty obligations, the Commission must strongly consider the intent and effects of the NHPA on Tribal Nations when making any determination regarding potential changes to NEPA processes and regulations. These laws were all passed with the intention of upholding obligations to Tribal Nations by protecting important Tribal sites, items, and remains and must continue to be implemented under NEPA along with meaningful Tribal consultation requirements.

In addition, CTIA's petition is encouraging the Commission to consider how CEQ responded to the "changed legal landscape." The National Congress of American Indians (NCAI) and the National Association of Tribal Historic Preservation Officers (NATHPO), as well as the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), wrote public comment letters[1] in response to CEQ's Notice of Interim Final Rule, which effectively suspended NEPA-implementing regulations and reverted to guidance originally published in 2020. In doing so, CEQ erased multiple regulatory provisions that had been crafted through careful consultation with federally recognized Tribal Nations, without any additional consultation or even notice. This was a breach of the federal government's trust and treaty obligations and a lapse of decades-long practices of Tribal consultation.

CEQ conducted itself without regard to how Tribal Nations might be affected by abrupt deregulation, notwithstanding its own guidance and (now-defunct) regulations. The Commission is urged to be mindful of its own, independent commitment to honor the unique legal relationship between Tribal Nations and the federal government.[2] This commitment predates Executive Order 13175, the guiding standard of federal agencies in their Tribal consultations with Tribal Nations. In its own self-developed policy, the Commission affirmed a commitment to promote government-to-government relationships with federally recognized Tribal Nations and recognized its own commitments under those unique legal relationships. The Commission acknowledged that, as an independent government agency, it has "its own general trust relationship with, and responsibility to, federally recognized Indian Tribes," and that the "historic trust relationship requires the federal government to adhere to certain fiduciary standards in its dealings with Indian Tribes."[3]

The Commission's Tribal Policy enshrines its commitment to work with Tribal Nations on a government-to-government basis prior to regulatory initiatives that significantly or uniquely affect Tribal land and resources. This commitment, by logical extension, would include any initiatives to amend/reform environmental reviews or reviews conducted under the NHPA. The

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[1] Comment from the National Congress of American Indians and the National Association of Tribal Historic Preservation Officers re Removal of National Environmental Policy Act Implementing Regulations, 90 Fed Reg. 10610 (Feb. 25, 2025) (Docket No. CEQ-2025-0002, Comment ID CEQ-2025-0002-88384 (March 27, 2025). See also, comments of the United South and Eastern Tribes Sovereignty Protection Fund, RE: Docket No. CEQ-2025-0002, Removal of National Environmental Policy Act Implementation
Regulations. Attached hereto and incorporated by reference.

[2] Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes, 16 FCC Rcd 4078, 4080-81 (2000) (*Tribal Policy Statement*).

[3] *Id.*

NHPA, in particular, contemplates that land and landscapes are uniquely sacred to Tribal Nations and are worth preserving intact.

Trust and treaty obligations are prepaid commitments owed to Tribal Nations on the basis of the lands and resources taken by the United States, enshrined in bedrock legal principles that supersede the special interests of private companies to more easily and more quickly expand their commercial interests without environmental oversight and at the potential expense of environmental and cultural impacts. Both the Commission and Tribal leaders share an interest in expanding technological access to Indian Country, and this is recognized in the Commission's policy and throughout Indian Country. However, this process must allow sufficient time for Tribal consultation in order to surface and incorporate the acumen, creativity, potential solutions, and guidance from the Tribal communities that could be the most affected. As it did when it recognized its government-to-government relationships with Tribal Nations, the Commission should proactively initiate a comprehensive Tribal consultation with Tribal Nations on all of these issues.

In considering this petition for rulemaking, the Commission is reminded of its commitment to consult with Tribal Nations *prior* to undertaking regulatory initiatives—particularly those that may affect the rights of Tribal Nations. In the past, the Commission met this obligation by engaging Tribal Nations and other stakeholders in a three-year process to develop its Programmatic Agreement for NHPA Section 106 reviews.[4] In another instance, the Commission convened meetings with Tribal Nations before issuing an order to accelerate wireless broadband deployment that, *inter alia*, changed its regulations to exempt certain facility deployments from NHPA and NEPA reviews.[5] Although that effort, in the second instance, was considered sufficient for consultation purposes, the resulting order was overturned in part because it failed to articulate that the deployments posed "little to no cognizable religious, cultural, or environmental risk," and because it neither addressed the possible harms of deregulation or the benefits of environmental and historic-preservation reviews.[6]

CTIA is wrongly asking the Commission to proceed in the same way that resulted in the order overturning the accelerated wireless broadband deployment. CTIA urges that the Administration's "Unleashing American Energy" Executive Order 14154 warrants immediate and sweeping changes. But history shows that changes are most effective when they are made collaboratively—a process that, by its nature, takes time and consideration. This is especially true considering CTIA's attempt to conflate NEPA-implementing regulations with NHPA-implementing regulations. CEQ may have lacked delegated rulemaking authority, but the

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[4] NATIONWIDE PROGRAMMATIC AGREEMENT REGARDING THE SECTION 106 NATIONAL HISTORIC PRESERVATION ACT REVIEW PROCESS, 20 FCC RCD 1073, 70 FR 555 (01/04/2005).

[5] *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, 32 FCC Rcd 9760 (2017) (eliminating historic preservation review for certain replacement utility poles); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, 33 FCC Rcd 3102 (2018) ("NHPA/NEPA Order"). (revising the rules and procedures for deployments subject to NEPA and historic preservation review), *aff'd in part, vacated and remanded in part, United Keetoowah Band of Cherokee Indians in Okla. v. FCC*, 933 F.3d 728 (D.C. Cir. 2019).

[6] *United Keetowah*, 933 F. 3d at 733.

Advisory Council on Historic Preservation (ACHP) does not.[7] Accordingly, a change to the Commission's Section 106 Programmatic Agreement or implementing regulations will require negotiation with the NHPA ACHP, consultation with Tribal Nations, and rulemaking with other interested parties from across the sector. The revision of many decades of Commission practice and precedent is not an undertaking that should be done lightly or without considering the full breadth of the legal commitments required.

Sincerely,

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Affiliated Tribes of Northwest Indians (ATNI)
American Indian Higher Education Consortium (AIHEC)
California Tribal Chairpersons' Association (CTCA)
Great Plains Tribal Chairmen's Association (GPTCA)
Midwest Alliance of Sovereign Tribes (MAST)
National Association of Tribal Historic Preservation Officers (NATHPO)
National Congress of American Indians (NCAI)
National Indian Child Welfare Association (NICWA)
National Indian Education Association (NIEA)
National Indian Health Board (NIHB)
United South & Eastern Tribes Sovereignty Protection Fund (USET SPF)

[7] *Marin Audubon Society v. FAA*, Opinion and Order, (U.S. Ct. App. D.C., Nov. 12, 2024), p. 8; 54 U.S.C. § 304108(a).

March 27, 2025

TO: Megan Healy, Principal Deputy Director for NEPA, Council on Environmental Quality

SUBJECT: Removal of National Environmental Policy Act Implementing Regulations, 90 Fed Reg. 10610 (Feb. 25, 2025) (Docket No. CEQ-2025-0002)

Dear Ms. Healy:

The Council on Environmental Quality (CEQ) requested comments on its Interim Final Rule removing CEQ regulations implementing the National Environmental Policy Act (NEPA) from the Code of Federal Regulations.

The National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native Tribal governments. NCAI advocates on behalf of Tribal governments and communities, promoting strong tribal-federal government-to-government policies. NCAI established the Institute for Environmental Sovereignty to advance Tribal Nations' leadership in natural resource governance and environmental stewardship; the safeguarding of Tribal Nations' cultural heritage linked to the landscape and natural environment; and innovative Indigenous-led approaches to environmental protection.

The National Association of Tribal Historic Preservation Officers (NATHPO) is the only national organization devoted to supporting Tribal historic preservation programs. Founded in 1998, NATHPO is a 501(c)(3) non-profit membership association of Tribal government officials who implement federal and Tribal preservation laws. NATHPO empowers Tribal preservation leaders protecting culturally important places that perpetuate Native identity, resilience, and cultural endurance. Connections to cultural heritage sustain the health and vitality of Native peoples.

We recognize the Trump Administration's commitment to "prioritiz[ing] efficiency and certainty" in the environmental review process.[1] But these policy objectives do not take priority over the Federal government's obligations to the original peoples of this land. These obligations are recognized in the U.S. Constitution, treaties, statutes, and court decisions.

The Interim Final Rule (IFR) ignores federal trust and treaty responsibilities, impinges on roles and sovereignty of Tribal Nations, and flouts longstanding policy and practice by failing to consult with Tribal Nations. CEQ's promulgation of this "interim rule" without notice and comment is also legally deficient.

1 Memorandum for the Heads of Federal Agencies on Implementation of the National Environmental Policy Act, CEQ (Feb. 19, 2025) [hereinafter Guidance Memorandum] https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQ-Memo-Implementation-of-NEPA-02.19.2025.pdf.

The National Congress of American Indians and the National Association of Tribal Historic Preservation Officers are eager to work with CEQ and the Trump Administration on reducing unnecessary federal regulations and streamlining overly complex permitting processes that disproportionately burden Tribal Nations. In doing so, we emphasize the federal trust relationship between our sovereign Tribal Nations and the Federal government. This unique political and legal relationship with the United States is rooted in our inherent sovereignty and recognized in the U.S. Constitution, treaties, statutes, and court decisions.[2] The Administration explicitly recognizes this core principle of federal Indian law.[3]

We offer the following recommendations in the spirit of building upon this relationship to promote Indian Country's economic growth, our country's national security interests, and a safe and healthy environment for ourselves and generations to come.

[2] Letter from National Congress of American Indians, et. al. to The Honorable Donald J. Trump, et al. on Status of Tribal Nations as Political Entities in the Implementation of the President's Executive Orders (Feb. 2, 2025) (hereinafter "Coalition Letter"); *See also* Consultation and Coordination With Indian Tribal Governments, 65 Fed. Reg. 67249 (Nov. 6, 2000) [hereinafter E.O. 13175].

[3] *See, e.g.,* Secretary of the Dept of the Interior Order No. 3416 §6 (Ending DEI Programs and Gender Ideology Extremism) (Jan. 30, 2025) ("Nothing in this Order shall be construed to eliminate, rescind, hinder, impair, or otherwise affect activities that implement legal requirements independent of the rescinded equity-related EOs, including but not limited to…(d.) the statutory authorities, treaty, and/or trust obligations of the Department and its Bureaus/Offices to Tribal nations and the Native Hawaiian Community").

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I. CEQ's Interim Final Rule Violates Legal Requirements Protecting Tribal Nations

A. CEQ Failed to Engage in Government-to-Government Consultation with Tribal Nations When Promulgating the IFR, Breaching the Trust Responsibility

CEQ promulgated the IFR in response to Executive Order (E.O.) 14154, Unleashing American Energy, which rescinded E.O. 11991 and its authorization of CEQ to promulgate regulations for agency implementation of NEPA.[4] E.O. 14154 directs CEQ to issue guidance on implementing NEPA and propose rescinding CEQ's NEPA regulations found at 40 CFR 1500 *et seq*. CEQ promulgated the IFR to carry out President Trump's instructions but, in promulgating the IFR, CEQ did not consult with Tribal Nations.

The U.S. has a duty to consult with Tribal Nations on federal actions that may have Tribal implications, as expressed in Executive Order 13175.[5] Congress and the Supreme Court have explicitly acknowledged the "general trust relationship between the United States and the Indian people."[6] In his first term, President Trump repeatedly recognized and committed his Administration to "ensuring the sovereignty" of Tribal Nations.[7] Government-to-government consultation recognizes this sovereign status. As opposed to Tribal consultation, the announce-and-defend method of developing federal Indian policy is an inappropriate, paternalistic, unjustified, and historically inefficient method of decision-making with respect to the rights and governmental status of Tribal Nations. Refusal to engage in consultation disregards the progress of the federal-Tribal trust relationship over the past 57-year history of the Self-Determination and Self-Governance era of federal Indian law and policy. Our organizations stand ready to help CEQ correct its approach and method of working with Tribal Nations.

CEQ, in advising and coordinating environmental efforts across executive branch agencies, must recognize its obligations to Tribal Nations. Federal agency decision-making impacts environmental quality on Tribal lands and lands and sites to which Tribal Nations have specific legal, cultural, and historical responsibilities. The EPA has broad regulatory authority over Tribal Nations' environment, such as under the Resource

[4] Unleashing American Energy, 90 Fed. Reg. 8353 § 5(c) (Jan. 20, 2025) [hereinafter E.O. 14154].
[5] E.O. 13175, *supra* note 2.
[6] United States v. Jicarilla Apache Nation, 564 U.S. 162, 176 (2011), citing United States v. Mitchell, 463 U.S. 206, 225 (1983). *See also, e.g.*, 25 U.S.C. § 560; California Valley Miwok Tribe v. United States, 515 F.3d 1262, 1267 (D.C. Cir. 2008). The U.S. Supreme Court has consistently recognized and upheld the distinct legal and political status of Tribal Nations and their citizens. Morton v. Mancari, 417 U.S. 535, 553 n. 24 (1974); United States v. Antelope, 430 U.S. 641, 641 (1977). Any misclassification of consultation policies that are designed to fulfill the United States political trust obligations – as DEI and Environmental Justice initiatives would severely undermine the trust relationship and have a terrible and wide-ranging negative impact on Tribal communities.
[7] *See, e.g.*, Presidential Message on the 50th Anniversary of the Federal Policy of Indian Self-Determination (July 8, 2020) https://trumpwhitehouse.archives.gov/briefings-statements/presidential-message-50th-anniversary-federal-policyindianselfdetermination/#:~:text=In%20his%20message%2C%20President%20Nixon,and%20respecting%20Tribal%20decision%2Dmaking.

Conservation and Recovery Act (RCRA),[8] Clean Water Act,[9] Clean Air Act,[10] and NEPA.[11] Other federal agencies directly control natural resources on Tribal land critical to Tribal Nations. To illustrate, the U.S. Department of the Interior's Bureau of Indian Affairs (BIA) manages Tribal forest resources pursuant to Secretary of the Interior approved Forest Management Plans.[12] The BIA and Bureau of Land Management (BLM), among other federal entities, control permitting for the development of Tribal oil, gas, geothermal, and solid mineral resources.[13] The Secretary of the Interior and BIA provide for the management of Indian agricultural lands, including their lease.[14] Accordingly, CEQ's Interim Final Rule removing NEPA implementation rules has significant Tribal implications. Its drafting merits delaying the effective date of the rule, currently set as April 11, to engage in robust consultation.

B. The IFR Fails to Meet the Federal Trust Responsibility by Not Directing Agencies to Consult with Tribal Nations

CEQ, in coordinating environmental review standards and processes across agencies, must clarify and advise agencies in the IFR and its accompanying Memorandum for Heads of Federal Departments and Agencies ("Guidance Memorandum") that they are required by the trust responsibility to engage in government-to-government consultation with Tribal Nations for proposed federal actions affecting Tribal Nations.[15] The IFR fails to address this requirement in any manner.[16] The Guidance Memorandum, issued to assist agencies in developing new NEPA implementing rules,[17] covers topics such as project sponsor preparation procedures, deadlines, and the definition of 'effects.' Its sole mention of Tribal Nations is limited to a single sentence, stating that agencies should "[e]stablish protocols for engaging with State, Tribal, territorial, and local government agencies . . . ." Like the IFR, the Guidance Memorandum does not

[8] State of Washington, Dept. of Ecology v. U.S.E.P.A., 752 F.2d 1465, 1472 (9th Cir. 1985) (pursuant to RCRA, EPA has regulatory authority for hazardous waste on Indian lands).
[9] State of Mont. v. U.S. E.P.A., 941 F. Supp. 945, 953 (D. Mont. 1996), *aff'd sub nom*. State of Montana v. U.S. E.P.A., 137 F.3d 1135 (9th Cir. 1998), *cert. denied sub nom*. Montana v. E.P.A., 525 U.S. 921 (1998); 40 C.F.R. § 131.8.
[10] 42 U.S.C. § 7601(d)(4) ("In any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions . . . .").
[11] Davis v. Morton, 469 F.2d 593, 597 (10th Cir. 1972).
[12] 25 U.S.C. §§ 406–407, 5109, 3101–3120.
[13] 25 C.F.R. §§ 200.11–227.3.
[14] 25 U.S.C. §§ 3701–3746, §§ 391–416j.
[15] E.O. 13175 *supra* note 2, at § 2.
[16] Other federal agencies have taken steps to clarify that implementation of the Administration's Executive Orders and priorities should not impact the United States' delivery of trust and treaty obligations to Tribal Nations and our people. On January 30, the U.S. Department of the Interior, in Secretarial Order 3416, recognized that trust and treaty obligations to Tribal Nations and associated statutory authorities are legal requirements that must not be impaired while implementing President Trump's Executive Orders. Sec'y Order No. 3416 (Jan. 30, 2025) https://www.doi.gov/document-library/secretary-order/so-3416-ending-dei-programs-and-gender-ideology-extremism. On February 25, the Office of the General Counsel at the U.S. Department of Health and Human Services (HHS) issued an advisory opinion stating that the Executive Order affecting diversity, equity, and inclusion programs does not apply to programs or activities that affect or serve American Indians and Alaska Natives in part because Tribal Nations are separate sovereigns. Op. Off. General Counsel HHS No. 25-01 (2025) https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/advisory-opinion-25-01.pdf. The trust responsibility requires CEQ to take a similar affirmative stance in the IFR and guidance memoranda and remind other agencies of their trust responsibility to consult with Tribal Nations.
[17] Guidance Memorandum, *supra* note 1.

expressly recommend agencies consult with Tribal Nations in a government-to-government capacity, as is required by the federal trust responsibility.

C. The 2020 Rule Lacks Indian Country-Relevant Protections

The Guidance Memorandum recommends lead agencies follow the 2020 NEPA Rule.[18] The 2020 Rule, while briefly mentioning Tribal Nations,[19] lacks provisions directly relevant to Indian Country. The 2020 Rule, unlike CEQ's Phase 2 implementing regulations promulgated in 2024, does not consider the degree to which an action may adversely affect Tribal sites of religious and cultural significance.[20] Neither does it require, when determining the level of NEPA review, assessing the degree to which the proposed action adversely affects the rights of Tribal Nations reserved in treaties, statutes, or Executive Orders.[21]

In contrast, CEQ's NEPA Phase 2 implementing regulations incorporate more than nine provisions directly relevant to Indian Country. As an example, those regulations exempted from the definition of "Major Federal action" projects "approved by a Tribal Nation that occur on or involve land held in trust or restricted status by the United States for the benefit of that Tribal Nation . . . ."[22] This is significant, as the U.S. holds most Tribal Nations' land in trust and the Secretary of the Interior must approve the lease of any trust land for developments—which is considered a major federal action.[23] The IFR's removal of the exemption necessitates that Tribal Nations await NEPA review before leasing land for business development, for instance, severely impacting Tribal Nations' economic growth.[24] This runs counter to the spirit and plain language of the Trump Administration's E.O. 14154 § 3(d) whereby, "the head of each agency shall . . . begin implementing action plans to suspend, revise, or rescind all agency actions identified as unduly burdensome" to energy exploration and on Federal lands, which "power[] our Nation's economic prosperity."[25]

These provisions are the minimum standard of what the trust responsibility requires. CEQ removed these sovereignty-affirming policies by issuing the IFR and accompanying Guidance Memorandum.[26]

NCAI, in its 2023 comments on the draft Phase 2 NEPA regulations, vigorously advocated for the federal government to uphold its trust responsibility. CEQ implemented a number of our recommendations, including Indigenous Knowledge as "relevant special expertise,"[27] requiring agencies to consider environmental "effects" to include "effects on Tribal resources,"[28] and taking government-to-government

[18] Guidance Memorandum, *supra* note 1, at 4.
[19] 40 C.F.R. §§ 1501.2(b)(4)(ii), 1501.8, 1502.16(a)(5), 1508.1 (2020).
[20] *Compare* 85 Fed. Reg. 43304 (Jul. 16, 2020) *with* 40 C.F.R. § 1501.3(d)(2)(ii) (2024).
[21] *Compare* 40 C.F.R. § 1501.3, 85 Fed. Reg. 43304, 43360 (Jul. 16, 2020) *with* 40 C.F.R. § 1501.3(d)(2)(viii) (2024).
[22] 40 C.F.R. § 1508.1(w)(2)(viii) (2024).
[23] Davis v. Morton, 469 F.2d 593, 597 (10th Cir. 1972).
[24] TIM BUTLER & MATTHEW KING, ENVIRONMENTAL LAW AND PRACTICE § 3.35 NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) A ROADBLOCK TO DEVELOPMENT ON THE RESERVATION (2d ed. 2024). Consider also the loss of a Tribal Nation's revenue due to the delay in development for NEPA review.
[25] E.O. 14154, *supra* note 4, at §§ 3(b).
[26] *See, e.g.*, 40 C.F.R. §1501.10(d)(9) (CEQ required Federal agencies, when determining schedules and deadlines, to consider "[t]ime necessary to conduct government-to-government Tribal consultation."). This is a critical part of the trust responsibility. After issuing the Interim Final Rule, CEQ neither requires nor recommends it.
[27] 40 C.F.R. § 1501.8(a).
[28] 40 C.F.R. § 1508.1(i)(4).

consultation into account when calculating the timeframe for environmental review.[29] The table below summarizes these provisions. In the IFR, CEQ breached its trust responsibility to Tribal Nations by removing these and other Indian Country-relevant sections.

EXAMPLES OF INDIAN COUNTRY-RELEVANT PROTECTIONS NOT IN 2020 RULE		
2020 Rule	2024 Rule	Relevant Protection
40 C.F.R. § 1508.1(q)(1)	40 C.F.R. § 1508.1(w)(2)(viii)	Exempts some Tribally approved projects from the definition of a "major Federal action."
40 C.F.R. § 1501.3(b)	40 C.F.R. § 1501.3(d)(2)(ii)	Considers Tribal sacred sites and cultural resources in the significance determination.
40 C.F.R. § 1501.3(b)	40 C.F.R. § 1501.3(d)(2)(viii)	Considers the degree to which the action may adversely affect rights of Tribal Nations reserved through treaties, statutes or E.O.'s in the significance determination.
40 C.F.R. § 1501.8(a)	40 C.F.R. § 1501.8(a)	Includes Indigenous Knowledge as "relevant special expertise."
40 C.F.R. § 1508.1(g)	40 C.F.R. § 1508.1(i)(4)	Requires agencies to consider environmental "effects" to include "effects on Tribal resources."
40 C.F.R. §1501.10	40 C.F.R. §1501.10(d)(9)	Taking government-to-government consultation into account when calculating environmental review deadlines and schedules.
40 C.F.R. §1501.5	40 C.F.R. §1501.5	The Environmental Assessment shall list the Tribal Nations consulted with.
40 C.F.R. §1502.14	40 C.F.R. §1502.14(f)	Considers environmentally preferable alternatives to be those maximizing environmental benefits by protecting, preserving, or enhancing Tribal Nation resources and their rights reserved through treaties and statutes.

D. Assessment of Cumulative Impacts and Indirect Effects is Needed in the Context of Tribal Nations

Federal agencies will no longer consider cumulative impacts or indirect effects in the definition of "effects" as a consequence of IFR removing CEQ's NEPA implementing regulations and agencies reverting to the 2020 Rule pending promulgation of new, agency-specific implementing regulations. The federal government's failure to consider cumulative impacts compounds the disregard of its trust and treaty responsibility.

The nearly 50-year history since the 1978 recognition of "cumulative impacts" and inclusion of "indirect effects"[30] in the definition of "effects" shows that they provide an effective mechanism to ensure agencies take the "hard look" required by NEPA.[31]

[29] 40 C.F.R. §1501.10(d)(9).
[30] 40 CFR §§ 1508.7, 1508.8(b) (1978).
[31] Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dept. of Interior, 608 F.3d 592, 606 (9th Cir. 2010).

Cumulative impacts are particularly important to Tribal Nations as "[T]ribal cultural identity may be tied to specific areas, cultural properties, natural resources found within these areas or properties, and traditions and uses involving these places and resources."[32] These impacts are compounded by other factors, such as the limited ability to mitigate impacts on checkerboarded reservations and the location of reservation lands near mining activities, railroads, and energy production. Tribal Nations with smaller land holdings are profoundly impacted by indirect effects stemming from activities on adjoining and surrounding lands "due to the relatively small boundary length and relatively short distances between individuals and the nearby environmental hazards."[33]

Through the piecemeal destruction of our cultural resources, Tribal Nations have witnessed deaths by a thousand cuts.[34] Consider the more than 100 years of hydroelectric power generation in the Pacific Northwest,[35] where cumulative impacts span "industrial development of the river . . . continued management for purposes of electric power generation, water supply, flood risk management, and barge transportation."[36] This has resulted in a multiplicity of adverse impacts: the loss of salmon, which are central to Tribal identity, spirituality, and a primary source of sustenance; the displacement of people living near water bodies; the destruction of housing; ruination and inundation of cultural and religious sites, Tribal lands, and natural resources; the diminishment of Tribal members' ability to exercise treaty rights; and the rise of poverty in Tribal communities.[37] Taken together, these impacts "threaten Tribal well-being, way of life, and, ultimately, sovereignty."[38]

We call on CEQ, in the IFR and Guidance Memorandum, to recommend that agencies include cumulative impacts and indirect effects in their NEPA implementing regulations. We stand ready to assist CEQ's doing so.

E. CEQ's Interim Final Rule Does Not Qualify for the "Good Cause" Exception Under the Administrative Procedure Act

The IFR seizes upon the "good cause" exception to notice and comment for rulemaking, one of only two such exceptions available under the Administrative Procedures Act (APA). The notice and comment

[32] TRIBAL COOPERATING AGENCIES, CUMULATIVE EFFECTS ANALYSIS NORTHMET MINING PROJECT AND LAND EXCHANGE, 5 (Sept. 2013) https://www.epa.gov/sites/default/files/2021-06/documents/fdl-exhibit-7-tribal-cumulative-effects-analysis-59pp.pdf.
[33] Letter from Ken Norton, Chairman, National Tribal Water Council, to Council on Environmental Quality (Mar. 9, 2020) (National Tribal Water Council Comments on: The Council on Environmental Quality Proposed Rule: Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act) https://www7.nau.edu/itep/main/ntwc/docs/Policy_Responses/3-09-2020_NTWC-NEPA-Letter.pdf.
[34] *See, e.g.,* U.S. DEPT. OF ENERGY, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE QUARTZSITE SOLAR ENERGY PROJECT AND PROPOSED YUMA FIELD OFFICE RESOURCE MANAGEMENT PLAN AMENDMENT 29, at CRIT Comment No. 3-7 (2012) https://www.wapa.gov/wp-content/uploads/2023/04/FinalQSEIS.pdf.
[35] DEPARTMENT OF THE INTERIOR, HISTORIC AND ONGOING IMPACTS OF FEDERAL DAMS ON THE COLUMBIA RIVER BASIN TRIBES 22 (June 2024) https://www.doi.gov/media/document/tribal-circumstances-analysis. *See also* NCAI, Resolution #NC-24-051 Calling for Tribal Leadership and Oversight in Electric Grid Governance and Electric Transmission Planning (2024) https://ncai.assetbank-server.com/assetbank-ncai/action/viewAsset?id=5638.
[36] *Id.*, at 63.
[37] *Id.*, at 36.
[38] *Id.*, at 54.

process is often the only opportunity for the public to influence and provide oversight of agency decision-making.[39]

The text provides that an agency may dispense with formal notice and comment procedures if the agency "for good cause finds . . . that notice and public procedure thereon are *impracticable*, *unnecessary*, or *contrary to the public interest*."[40] Neither the APA nor the Supreme Court have established a clear definition of "good cause." However, federal case law is clear that exceptions to notice and comment must be "narrowly construed and only reluctantly countenanced."[41] Courts caution agencies to resort to these exceptions only in specific, emergency situations in which the delay associated with standard rulemaking will result in a "particular harm."[42]

CEQ's argument falls far short of meeting the statutory criteria for the "good cause" exception. Federal courts consistently apply each of three prongs to interim rules purportedly justified by this exception. The three prongs are whether the interim rule is *impracticable*, *unnecessary*, or *contrary to the public interest*. CEQ's only two rationales, "the need to expeditiously resolve agency confusion" and "to meet the deadlines in E.O. 14154" do not meet any of these prongs.[43]

Impracticability typically involves "emergency action which must be taken immediately to avoid injury."[44] A few examples include: "'Immediate hazard[s] to aircraft, persons, and property,'" "'a safety investigation [that] shows that a new safety rule must be put in place immediately,'" and matters "of 'life-saving importance' to mine workers in the event of a mine explosion[.]"[45]

The executive branch's self-imposed 30-day deadline stated in E.O. 14154 is insufficient. Courts have noted that a tight statutory, judicial, or administrative deadline alone by no means warrants invocation of the good cause exception.[46] Even "strict congressionally imposed deadlines, without more, by no means warrant invocation of the good cause exception."[47]

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[39] C. Koch & R. Murphy, *Good Cause for Avoiding Procedures*, 1 ADMIN. L. & PRAC. § 4:13 (3d ed. 2021) ("notice and comment procedures are so efficient and beneficial that good cause in avoiding the procedures will be rare.").
[40] 5 U.S.C. § 553(b)(B) (emphasis added).
[41] *Biden v. Missouri*, 595 U.S. 87, 106 (2022).
[42] *See Mack Truck, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012); *Missouri*, 595 U.S. at 106-107 (citing *United States v. Brewer*, 766 F.3d 884, 890 (8th Cir. 2014)).
[43] 90 Fed. Reg. 10610, 10614 (Feb. 25, 2025).
[44] Koch & Murphy, *supra* note 39.
[45] *Mack Truck*, 682 F.3d at 93 (citing *Jifry v. FAA*, 370 F.3d 1174, 1178–79 (D.C. Cir. 2004) (first); *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 755 (D.C. Cir. 2001) (second); *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 581 (D.C. Cir. 1981) (third)).
[46] *See Am. Pub. Gas Ass'n. v. U.S. Dep't of Energy*, 72 F.4th 1324, 1339-40 (D.C. Cir. 2023) (citing *Chamber of Com. of U.S. v. SEC*, 443 F.3d 890, 908 (D.C. Cir. 2006)) ("We have typically applied the good cause exception to 'excuse[] notice and comment in emergency situations, where delay could result in serious harm, or when the very announcement of a proposed rule itself could be expected to precipitate activity by affected parties that would harm the public welfare.'")
[47] *Id.* at 1339; *See also* Koch & Murphy, *supra* note 39 ("The statutory deadline will establish good cause only where the agency can show that Congress intended to relieve the agency of its duty to follow notice and comment procedures" or absent additional circumstances.).

Neither does CEQ's "concern" over two recent court decisions, *Marin Audubon Society v. Federal Aviation Administration*, and *Iowa v. Council on Env't Quality*, suffice.[48] The courts' opinions do not rise to the level of a "judicial threat," a very narrow circumstance in which an agency bypasses notice and comment in response to a court injunction.[49]

We set aside here the paradoxical conundrum of CEQ's authority to issue the IFR if Congress did not grant CEQ any regulatory authority in the first place, and take at face value the agency's concern that, due to the *Iowa* court's decision vacating CEQ's 2024 Rule, "agencies and the public are confused as to the status and legitimacy of its NEPA regulations."[50] E.O. 14154 instructs CEQ to propose rescission of the NEPA regulations explicitly and solely "[to] expedite and simplify the permitting process." Nothing in the plain text of the E.O. indicates urgency.[51] A simple memorandum or other guidance explaining the situation and the Administration's approach would have sufficed. In the meantime, the Administration could have simultaneously sought clarification about CEQ's regulatory authority in the courts and pursued any desired modifications to the regulations through the appropriate and significantly more democratically engaging and justifiable notice-and-comment process.

The *unnecessary* prong is "confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public."[52] Rescission of a regulatory scheme in existence since 1978 and which has, in recent years, occasioned substantial revisions, belies any claim this IFR is so "routine," "insignificant," or "inconsequential" as to justify dispensing with notice and comment. As of submission, Regulations.gov indicates over 103,000 comments submitted—indicating the public is quite interested, indeed. Sections A-D, herein, describe Tribal Nations' clear concerns and reliance interests in detail.

An agency meets the c*ontrary to the public interest* prong "only in the rare circumstance when ordinary procedures—generally presumed to serve the public interest—would in fact harm that interest." More specifically, this occurs "when the timing and disclosure requirements of the usual procedures would defeat

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[48] *Marin Audubon Society v. FAA*, 121 F.4th 902, 912 (D.C. Cir. 2024), *reh'g en banc denied*, 2025 WL 374897 (D.C. Cir. Jan. 31, 2025) ("The provisions of NEPA provide no support for CEQ's authority to issue binding regulations. No statutory language states or suggests that Congress empowered CEQ to issue rules binding on other agencies—that is, to act as a regulatory agency rather than as an advisory agency."); *Iowa v. CEQ*, No 1:24cv00089 (D.N.D. Feb. 3, 2025), ECF No.145 (finding CEQ exceeded its authority, vacating the 2024 NEPA Phase 2 amendments, and leaving in place the 2020 version of the regulations).

[49] Koch & Murphy, *supra* note 39 ("Publication of rules in response to judicial threats might constitute good cause." *See also Am. Fed'n of Gov't Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1157 (D.C. Cir. 1981) (promulgation of an interim final rule was "a reasonable and perhaps inevitable response to [an] injunctive court order.").

[50] 90 Fed. Reg. 10610, 10614 (Feb. 25, 2025). That "[t]he President's authority to act 'must stem either from an act of Congress or from the Constitution itself'" further calls into question the enforceability of the directive to CEQ if the recent *Marin* and *Iowa* cases were presently controlling law across the entire United States. *See Bldg. & Const. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 32 (D.C. Cir. 2002) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)).

[51] In full, the text is: "To expedite and simplify the permitting process, within 30 days of the date of this order, the Chairman of the Council on Environmental Quality (CEQ) shall provide guidance on implementing the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, and propose rescinding CEQ's NEPA regulations found at 40 CFR 1500 et seq." E.O. 14154, *supra* note 4, § 5(b) (emphasis added).

[52] *Mack Truck*, 682 F.3d at 94 (citing *Util. Solid Waste*, 236 F.3d at 755) (emphasis added); *see also* Koch & Murphy, *supra* note 39 (stating that rules meeting this prong are "[t]hose in which the public can be expected to have so little interest that an agency should not expect any public participation.").

the purpose of the proposal."[53] Here, for the same reasons described above, the claimed "good" of addressing agency confusion and meeting a self-imposed deadline "weigh[] relatively lightly against the much heavier risk of failing to 'foster reasoned decision making' by 'providing a forum for the robust debate of competing and frequently complicated policy considerations having far-reaching implications.'"[54]

CEQ's alternative argument, that the IFR could be characterized as interpretive rules or general statements of policy,[55] is inaccurate and inappropriate. CEQ argues the IFR qualifies as interpretive because it does not make "discretionary policy choices, which establish enforceable rights or obligations for regulated parties under delegated congressional authority."[56] However, this argument would suggest that while imposing enforceable rights or obligations requires notice and comment, removing enforceable rights or obligations does not.[57] Eliminating the existing regulations is a clear policy choice to decimate numerous hard-won protections for Tribal trust assets and resources and to erase standards agencies and project proponents must follow in recognition of Tribal sovereignty and rights. CEQ also makes a clear policy choice by promulgating the IFR itself without engaging in government-to-government consultation. As for characterizing IFR as a "general statement of policy," this rule removes obligations of regulated parties and of agencies to take certain important measures, from enforceable mitigation measures to protections for reserved and other rights. Thus, this is a clear and drastic *change* of existing policy.

CEQ further states its "regulations implementing NEPA's procedural requirements may be characterized as rules of agency procedure and practice" because they "do not dictate what environmental policies agencies must adopt." The agency supports this argument by stating that NEPA itself is "merely a procedural statute that does not dictate the outcome of any particular environmental review." This rings hollow and is similarly inappropriate. The *very point* of NEPA is to impose "procedural requirements designed to force agencies to take a 'hard look' at environmental consequences."[58] When properly implemented, NEPA procedures ensure that the agency "will inform the public that it has indeed considered environmental concerns in its decision-making process."[59] Environmental review carried out properly can make a substantial difference in project design and implementation. For example, removing a requirement for lead agencies to consider cumulative impacts (discussed in Section D herein), which "can result from individually minor but collectively significant actions taking place over a period of time"[60] is detrimental to Tribal Nations, which, as stated earlier, have witnessed a "death by a thousand cuts" through the piecemeal destruction of their cultural resources.[61]

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[53] *Mack Truck*, 682 F.3d 95 (citing *Util. Solid Waste*, 236 F.3d at 755) (emphasis added) (in providing the example where "announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent").
[54] *Regeneron Pharmaceuticals, Inc. v. U.S. Dept. of Health & Human Srvs.*, 510 F. Supp. 3d 29, 49 (S.D.N.Y. 2020) (citing *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 115 (2d Cir. 2018)).
[55] 90 Fed. Reg. 10610, 10615 (Feb. 25, 2025).
[56] *Id*.
[57] Taken to an extreme, this would mean that the Occupational Safety and Health Administration (OSHA) could rescind all workplace safety regulations with minimal transparency and oversight.
[58] *Lands Council v. Powell*, 395 F.3d 1019, 1027 (9th Cir. 2005) (citation omitted).
[59] *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983); *see also W. Watersheds Project v. Bernhardt*, 543 F. Supp. 3d 958, 976 (D. Idaho 2022) (citing *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989)) ("[T]he broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time.").
[60] *See Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 868 (9th Cir. 2005).
[61] *See, e.g.*, U.S. DEPT. OF ENERGY, *supra* note 34, CRIT Comment No. 3-7).

Finally, CEQ characterizes the IFR as a "procedural and ministerial step to implement the President's directive" because the agency "may not possess the authority to issue rules binding up agencies in the absence of E.O. 11991." The agency's reasoning here is self-contradictory:[62] Lack of authority to promulgate regulations implies a similar inability to issue the IFR itself.

Critically, and even assuming CEQ's arguments for skipping past notice-and-comment were legally and logically sound, they do not excuse the agency from its important and unique trust and treaty responsibilities to Tribal Nations.

II. Overarching Recommendations for CEQ

F. Calling Upon the Trump Administration to Fix the Prior Administration's Failings

We urge the CEQ to address the prior Administration's refusals to incorporate many of NCAI's original recommendations for improving the NEPA regulations. The most crucial is a standalone section expressly emphasizing consultation as a core element of meeting the federal trust responsibility.

Consultation protocols result in greater efficiencies in the environmental review process and establish clear expectations between parties in advance. Components CEQ should incorporate, at a minimum, into the guidance memorandum and should recommend for incorporation into every single federal agency's NEPA implementing regulations, include the following.

Agency principles:

- A goal of obtaining free, prior and informed consent (FPIC).[63]
- A robust definition of consultation with the goals of:
    (1) Meeting the responsibilities the United States government has committed to via its treaty and trust relationship with Tribal Nations;
    (2) Working with Tribal Nations to achieve their free, prior and informed consent on any actions affecting Tribal lands, Tribal sacred sites, treaty rights or other acquired rights, Tribal statuses as governments, and legislation directed solely at Tribal peoples; and

[62] 90 Fed. Reg. 10610, 10615 (Feb. 25, 2025).
[63] G.A. Res. 295, UNGAOR, 61st Sess. Supp. No. 49, UN Doc A/RES/61/295 art. 19, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.

(3) Generally trying to reach a consensus with Tribal Nations on all matters affecting them.[64]

- Consultation should cover, at a minimum, the following subjects:
  (1) Threshold determinations;
  (2) Potential effects;
  (3) Scope, type, and intensity of effects;
  (4) Mitigation measures; and
  (5) Monitoring and compliance.
- Adequate training for key agency personnel on the federal trust responsibility, Tribal sovereignty, cultural competency, and historical relations between Tribal Nations and the United States, as well as briefings on the specific history, culture, and environmental concerns of the Tribal Nation potentially affected by a proposed federal action.
- The expectation that consultation is an ongoing process rather than a discrete meeting.
- Explanation that formal consultation is diplomatic engagement between high-level officials with decision-making authority, though it may be appropriate for each sovereign to designate a point of contact for routine communication between face-to-face meetings.
- Dispute resolution mechanisms that are culturally relevant, recognize the sovereignty of both parties, and are not overly bureaucratic.

Agency Procedure

- A clear triggering mechanism for proactively initiating government-to-government consultation.
- Formal notification to a Tribal Nation's designated contact person or representative, including a brief description of the proposed project, its location, lead agency contact, and a statement the Tribal Nation may request formal government-to-government consultation at any point during environmental review.[65]
- Good faith effort to follow up via all reasonable and available modes of communication.
- Thirty-day period to initiate consultation upon receiving a Tribal Nation's request for consultation.[66]

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[64] NCAI offered an expanded version for purposes of an OMB consultation policy. *See* Letter from Fawn Sharp, President, Nat'l. Cong. Of Am. Indians, to Shalanda Young, Acting Director, U.S. Off. Of Mgmt. & Budget 2-3 (Apr. 1, 2021) (On file with NCAI) [hereinafter President Sharp Letter]. The five goals therein are: (1) Meet the responsibilities the U.S. government has committed to via its treaty/trust relationship with Tribal Nations; (2) grant Tribal Nations maximum administrative discretion with respect to Federal statutes and regulations administered by Tribal Nations as required by E.O. 13175; (3) identify areas where deference to Tribal Nations to establish standards is permissible, as required by E.O. 13175; (4) work with Tribal Nations to achieve their free, prior and informed consent on any actions affecting Tribal lands, Tribal sacred sites, treaty rights or other acquired rights, Tribal statuses as governments, and legislation directed solely at Tribal peoples; and (5) generally try to reach consensus with Tribal Nations on all matters affecting them.

[65] *See, e.g.,* Cal. Pub. Res. Code § 21080.3.1(d). We note examples of state-level statutes and federal agency agreements establishing a 30-day period, and Tribal Nations report that the timeframe is insufficient due to capacity constraints. This concern extends to nationwide consultation sessions federal agencies hold. *See, e.g*., President Sharp Letter, *supra* note 64, at 5 ("A common concern raised by tribal government leaders related to consultation sessions is the lack of time and information to adequately prepare. Similarly, federal agencies have also commented on their frustration that, at times, Tribal Nations do not seem adequately prepared to engage in meaningful dialogue on a particular topic. Both of these issues can be addressed by improving notice requirements among Executive Branch agencies.").

[66] We believe thirty days is sufficient time for lead agencies, given the comparatively greater number of personnel and other resources.

- Minimum logistical requirements for consultation are:
    (1) Reasonable timeframes;
    (2) Joint development of agendas; and
    (3) Accurate written records of consultation meetings, circulated among the parties for review and corrections.
- Memorialization of consensus in a Memorandum of Understanding, Memorandum of Agreement, or another formal document. Ideally, this should be enforceable.
- Written explanation of how the agency took Tribal input into consideration, followed by sufficient time for the parties to resolve any disagreements. This must occur prior to the agency finalizing the Draft Environmental Impact Statement.[67]
- Opportunity for Tribal Nations to identify and address any misinterpretations of their input or information, including any Indigenous Knowledge.

CEQ should, at least 12 months prior to Federal agencies releasing their draft implementing regulations, draft guidance documents on these elements, including on training personnel and developing protocols with Tribal governments.

G. CEQ Should Facilitate the Development of a Centralized Digital Consultation Portal

NCAI further suggests and endorses a centralized digital consultation portal to coordinate information-gathering and more efficiently consult with Tribal Nations. This comports with President Trump's E.O. 14154 directing agencies to prioritize efficiency in implementing regulations.[68] Consultation today is inconsistent across lead agencies. Each agency maintains its own practices and procedures for identifying Tribal Nations potentially affected by proposed actions, notifying and communicating with Tribes about proposed actions, and exchanging and co-producing information, studies, and reports. The Federal Permitting Improvement Steering Council recommended developing a "central federal information system of Tribal areas of interest and points of contact," and NCAI called for a similar portal in 2021.[69] A few agencies already administer the building blocks of a unified system. The Permitting Portal Study required under the Fiscal Responsibility Act (FRA) § 110(a) provides an excellent opportunity to move this effort forward.

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[67] This should apply also to nationwide consultation sessions. *See, e.g.*, President Sharp Letter, *supra* note 64, at 7 ("A common piece of feedback from Tribal Nations regarding consultation sessions is that agencies holding consultation sessions rarely provide an indication of how Tribal Nation input affected the rules/policies being discussed; or, conversely, that there is rarely any indication of why Tribal Nation input was not acted upon.").

[68] E.O. 14154, *supra* note 4, § 5(c).

[69] FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL, RECOMMENDED BEST PRACTICES FOR ENVIRONMENTAL REVIEWS AND AUTHORIZATIONS FOR INFRASTRUCTURE PROJECTS FOR FISCAL YEAR 2018 13 (2017), https://www.permits.performance.gov/documentation/fy-2018-recommended-best-practices-report; U.S. GOV. ACCOUNTABILITY OFF., GAO-19-22, TRIBAL CONSULTATION: ADDITIONAL FEDERAL ACTIONS NEEDED FOR INFRASTRUCTURE PROJECTS 35-38 (2019), https://www.gao.gov/assets/gao-19-22.pdf; U.S. DEPT. OF INTERIOR, TRIBAL CONSULTATION: PRESIDENTIAL MEMORANDUM ON TRIBAL CONSULTATION AND STRENGTHENING NATION-TO-NATION RELATIONSHIPS (Mar. 10, 2021), https://www.doi.gov/sites/doi.gov/files/interior-tribal-consultation-transcript-03-10-2021pm.pdf; President Sharp Letter, *supra* note 64, at 4 (calling for "Centralized monitoring and reporting of tribal consultation notice"); *see also,* ADVISORY COUNCIL ON HISTORIC PRESERVATION, IMPROVING TRIBAL CONSULTATION IN INFRASTRUCTURE PROJECTS 5 (2017) (report recommending a section 106 consultation process) https://www.achp.gov/sites/default/files/2019-08/ImprovingTribalConsultationinInfrastructureProjects5-24-17-2.pdf.

H. CEQ Should Instruct Federal Agencies to Recognize Indigenous Knowledge

NCAI requests CEQ include in the IFR and Guidance Memorandum explicit recognition of Indigenous Knowledge as a valid and valuable "knowledge of the environment based upon empirical observations that have been accumulated and tested over centuries."[70] We have long "encourage[d] federal agencies and researchers to meaningfully partner with [T]ribal [N]ations on research."[71] However, agencies' often "uncritical reliance on scientific materialism fails to consider and incorporate Native American perspectives, beliefs, and values, particularly including Native peoples' relationships to the environment."[72]

E.O. 14145 instructs lead agencies to "strictly use the most robust methodologies of assessment at their disposal.[73] The Guidance Memorandum similarly addresses the importance of "scientific integrity" and "reliable data sources."[74] CEQ should clarify that Indigenous Knowledge qualifies as "information,"[75] "ecological information,"[76] "reliable data and resources,"[77] "reliable data source,"[78] and "special expertise"[79] as used in NEPA.

I. Efforts to Prioritize American Energy Dominance Must be to the Benefit and Not at the Expense of Tribal Nations

Tribal Nations and Tribal lands have played, and will continue to play, an important role in realizing this Administration's ambitions to establish United States dominance over energy and critical minerals.[80] Tribal lands contain vast reserves of conventional energy sources, roughly estimated at nearly 30 percent of coal reserves, 50 percent of potential uranium reserves, and 20 percent of gas and oil reserves west of the Mississippi River.[81] In Fiscal Year 2022 alone, Tribal lands produced approximately 350 million cubic feet of natural gas, 81 million barrels of oil, and seven million tons of coal.[82] This has contributed significantly to revenue and employment growth for many Tribal Nations,[83] with an estimated 88 percent of these

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[70] Kurt E. Dongoske et al., The National Environmental Policy Act (NEPA) and the Silencing of Native American Worldviews. ENVIRONMENTAL PRACTICE 36, 40 (March 2015).
[71] NCAI Resolution No. PDX-20-044 Supporting Tribal Communities that Utilize a Co-Production of Knowledge Approach in Research Engagement (November 2020) https://ncai.assetbank-server.com/assetbank-ncai/action/viewAsset?id=486&index=0&total=1000&view=viewSearchItem.
[72] Dongoske, *supra* note 70, at 36.
[73] E.O. 14145 § 6(a).
[74] Guidance Memorandum, *supra* note 1.
[75] National Environmental Policy Act of 1969 § 205, 42 U.S.C. §4335(2)
[76] *Id.* § 102, 42 U.S.C. § 4332(K).
[77] *Id.* § 102, 42 U.S.C. § 4332(E).
[78] *Id.* § 106, 42 U.S.C. § 4336(b)(3)(A).
[79] *Id.* § 111, 42 U.S.C. § 4336e(13).
[80] *See,* E.O. 14154, *supra* note 4, at § 2(c), 2(b) ("ensuring that an abundant supply of reliable energy is readily accessible in every State and territory of the Nation" and "establish[ing] our position as the leading producer and processor of non-fuel minerals, including rare earth minerals, which will create jobs and prosperity at home, strengthen supply chains for the United States and its allies, and reduce the global influence of malign and adversarial states").
[81] MAURA GROGAN, REVENUE WATCH INSTITUTE, NATIVE AMERICAN LANDS AND NATURAL RESOURCE DEVELOPMENT 3 (2011) https://resourcegovernance.org/sites/default/files/RWI_Native_American_Lands_2011.pdf.
[82] MURIEL J. MURRAY, CONGRESSIONAL RESEARCH SERVICE, ENERGY LEASING AND AGREEMENT AUTHORITIES ON TRIBAL LANDS: IN BRIEF R47640 4 (Aug. 2, 2023) https://www.congress.gov/crs-product/R47640?q=%7B%22search%22%3A%22indian+land+coal%22%7D&s=3&r=2.
[83] U.S. Dept. of Energy, Report to Congress: Electricity Access and Reliability 32 (Aug. 2023).

resources yet undeveloped.[84] Tribal lands also hold key metals, such as nickel, copper, lithium, and cobalt,[85] and rare earth minerals including yttrium, cerium, and ytterbium.[86]

NCAI is deeply concerned about the Guidance Memorandum's directive that agencies "must prioritize efficiency and certainty over any other policy objectives that could add delays and ambiguity to the permitting process."[87] We urge CEQ and the Administration to clarify, in the IFR and through guidance memoranda to all agencies and relevant staff, that efficiency and certainty do not supersede the Federal government's trust responsibility and legal obligations to Tribal Nations.

The trust responsibility extends to ensuring any extraction of resources from or near Tribal lands—including lands where Tribal members exercise their reserved rights—be carried out with due regard for the affected Tribal Nation. For lead agencies evaluating leases and permits, this translates into the following: engaging in meaningful government-to-government consultation (see Sections A-E), negotiating conditions that economically benefit Tribal Nations, and avoiding or mitigating adverse impacts to Tribal reserved rights, culturally important sites, and community health and wellness.

Both NCAI and the Department of Energy (DOE) have long recognized the adverse impacts of mining and energy extraction to human health, subsistence resources, and areas of great cultural and environmental importance.[88] Thoughtful planning and good faith consultation efforts can help avoid local opposition and litigation resulting in lengthy delays and unrecoverable investments.[89]

NCAI applauds the Administration's efforts to remove unnecessary and burdensome regulations, especially where they impede energy infrastructure development on Tribal lands. Many Tribal communities lack

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[84] Sam Rutzick, *Regulatory Takings on the Reservation: Energy Development on Tribal Land and the Mismanagement of the Permitting Process*, 33 FED. CIR. B.J. 251, 253 (September 2024).

[85] 2021 analysis found the majority—97% of nickel, 89% of copper, 79% of lithium and 89% of cobalt—of U.S. resources are located within 35 miles of Indian reservations. *See,* SAMUEL BLOCK, MSCI, MINING ENERGY-TRANSITION METALS: NATIONAL AIMS, LOCAL CONFLICTS (June 3, 2021) https://www.msci.com/www/blog-posts/mining-energy-transition-metals/02531033947#:~:text=Among%20these%20key%20energy%2Dtransition,arising%20from%20these%20conflicting%20priorities (analyzing 5,336 U.S. mining properties in the S&P Global Market Intelligence database).

[86] Grogan, *supra* note 81, at 9.

[87] Guidance Memorandum, *supra* note 1.

[88] U.S. DEPT. OF ENERGY, REPORT TO CONGRESS: ELECTRICITY ACCESS AND RELIABILITY 32 (Aug. 2023). See also, NCAI Resolution #MKE-17-007, Protecting Chippewa Lands and Resources from the Threats Posed by PolyMet Mine (2017) https://ncai.assetbank-server.com/assetbank-ncai/action/viewAsset?id=575&index=21&total=28&view=viewSearchItem (Opposing "the legislative transfer of these federal lands for the development of the proposed PolyMet mine, and calls for the evaluation of whether such lands should be transferred and the mine permitting is done pursuant to, and in full compliance with, existing federal law, including the United States' obligation to protect Tribal Treaty rights from loss, damage or harm, and its trust responsibility to protect the health and welfare of Indian people who depend on such lands, waters and natural resources to meet their most basic subsistence, cultural and religious needs"); NCAI Resolution #NGF-09-005, Opposing the Development of the Proposed Pebble Deposit Mining District and Proposed Donlin Creek Mine. https://ncai.assetbank-server.com/assetbank-ncai/action/viewAsset?id=2057&index=11&total=28&view=viewSearchItem; and NCAI Resolution #AK-21-027, Supporting the Protection of Northern Paiute and Western Shoshone Ancestors and Cultural Lands at the Thacker Pass in Nevada and Protection of Eagles by Limiting Take Permits (2021) https://ncai.assetbank-server.com/assetbank-ncai/action/viewAsset?id=221&index=27&total=28&view=viewSearchItem.

[89] *See, e.g.,* Block, *supra* note 85 ("Local opposition increases risks that a mining asset could lose its license to operate and its value to investors.").

access to affordable energy, in spite of the vast fossil fuel reserves and potential for renewable energy.[90] DOE in 2023 estimated the average energy burden (the average annual housing energy cost divided by the average annual household income) at 28 cents/kWh, or double the national average.[91] Approximately 17,000 homes, or 54,400 people, in Indian Country lack access to electricity altogether, and Tribal communities experience outages 6.5 times more often than the national average.[92]

A frustrating reality is that Tribal Nations are rarely able to drive energy development on their own Tribal lands. While we observe more Tribal governments establishing their own utilities and developing their own energy resources, numbers remain low: there exist only 15 Tribally-owned and -operated electric utilities out of 574 federally recognized Tribal Nations.[93] Barriers to *Tribal* energy dominance include: "The checkerboard and fractionated ownership of land and mineral acres," "Supreme Court cases or cumbersome laws which impose additional tax or regulatory burdens on production of energy," "distance from markets, oil and gas pipelines, and distance and access to transmission lines," "lack of explicit authority recognized by the federal government for Tribal Nations to both encourage and regulate energy development activities within their boundaries," and, yes, "additional regulatory barriers imposed by federal agencies."[94]

We call on CEQ and the Trump Administration to address these obstacles first, both within the executive branch and in collaboration with Congress.[95] Cutting red tape must begin with reducing the number of regulatory hoops Tribal Nations must currently jump through to advance and support any potential energy development project. Scholars and industry experts note that Tribal Nations are "held to standards that don't apply to private owners,"[96] and face a permitting process that "requires forty-nine separate bureaucratic

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[90] NCAI Resolution #NGF-09-006, The High Cost of Energy and Weatherization in Indian Country (2009), https://ncai.assetbank-server.com/assetbank-ncai/action/viewAsset?id=2058&index=1&total=3&view=viewSearchItem; U.S. DEPARTMENT OF ENERGY OFFICE OF INDIAN ENERGY POLICY AND PROGRAMS. STRENGTHENING TRIBAL COMMUNITIES, SUSTAINING FUTURE GENERATIONS 2, https://www.energy.gov/sites/prod/files/2017/09/f36/DOE-IE-brochure_0917.pdf.

[91] U.S. Dept. of Energy, Report to Congress: Electricity Access and Reliability 40-41 (Aug. 2023).

[92] *Id*. at 52, 54.

[93] Thirteen more own or operate utilities, but do not own their own distribution lines. There are also 13 Tribally-owned wholesale energy generators, ten energy companies regulated by Tribal governments, and eight tribes that regulate utility or energy services on reservation land. U.S. DEPT. OF ENERGY, REPORT TO CONGRESS: ELECTRICITY ACCESS AND RELIABILITY 32, 62 (Aug. 2023).

[94] NCAI Resolution #TUL-13-043, Support for Removal by Congress and the President of Barriers to Full Control by Tribal Nations of the Development of Their Renewable and Non-renewable Energy Resources. https://ncai.assetbank-server.com/assetbank-ncai/action/viewAsset?id=1069&index=7&total=15&view=viewSearchItem. *See also*, U.S. DEPT. OF ENERGY, REPORT TO CONGRESS: ELECTRICITY ACCESS AND RELIABILITY 68 (Aug. 2023) (referencing a 2016 study finding the most substantial barriers to be funding and financing; infrastructure; and Tribal leadership and staff capacity).

[95] *See e.g.,* NCAI Resolution #ABQ-19-032, Calling on the Department of Interior to Adopt Tribal Energy Resource Agreement Regulations that Respect Tribal Sovereignty and Self-Determination (2019) https://ncai.assetbank-server.com/assetbank-ncai/action/viewAsset?id=250&index=14&total=15&view=viewSearchItem.

[96] "Tribes are held to standards that don't apply to private owners (for example, every lease granted on trust land must incorporate special environmental reviews and a cultural/archeological inventory); bear costs that don't apply to private owners (such as a $6,500 BLM-instigated drilling fee); and suffer a legacy of mismanagement of land ownership records that sometimes prevents perfecting title for rights-of-way or drilling." Grogan, *supra* note 81, at 26.

steps before actual groundbreaking on the project begins."[97] E.O. 13175 already instructs Federal agencies to take a flexible approach with Tribal Nations and consider waiving statutory and regulatory requirements when able.[98] NCAI asks CEQ to conduct a thorough review of agencies' adherence to that directive and address any barriers to it being fully and robustly implemented.

J. The Trump Administration Should Collaborate with Congress on Amending NEPA to Explicitly Address the Trust Responsibility and Clearly Grant CEQ Rulemaking Authority

We encourage the Trump Administration to work with Congress, and in consultation with Tribal Nations, to make two much needed and long overdue changes to NEPA. These amendments would: (1) delegate to CEQ appropriate regulatory authority; and (2) expressly add a Tribal consultation requirement. Specific modifications are as follows:

- **Recommendation #1**: Insert explicit mentions of Tribes and Tribal governments currently missing in the following provisions:

Provision	Update
NEPA § 102, 42 U.S.C. § 4332(2)(C)	"Copies of such statement and the comments and views of the appropriate Federal, State, Tribal, and local agencies, which are authorized to develop and enforce environmental standards"
NEPA § 102, 42 U.S.C. § 4332(2)(G)	"grants to States and Indian Tribes."
NEPA § 102, 42 U.S.C. § 4332(2)(G)(iv)	"solicits the views of, any other State or Indian Tribe, or any Federal land management entity"
NEPA § 102, 42 U.S.C. § 4332(2)(J)	"make available to States, Indian Tribes, counties, municipalities…"
NEPA § 104, 42 U.S.C. § 4344	Add meeting the federal government's trust responsibility as a goal under NEPA.
NEPA § 104, 42 U.S.C. § 4334	"to coordinate or consult with any other Federal, or State, or Tribal agency" and "of any other Federal, or State, or Tribal agency."
NEPA § 205, 42 U.S.C. §4335(1)	"consult with…and such representatives of…State, Tribal, and local governments…"

- **Recommendation #2**: Clearly recognize the Federal government's trust responsibility.

Provision	Update
NEPA § 102, 42 U.S.C. § 4332(2)(M)	Insert a new provision, along the lines of: "recognize and take into account the Federal government's trust responsibilities to Indian Tribes and the rights reserved by Indian Tribes and Indians, either expressly or implicitly, through Federal treaties, statutes, or executive orders."

- **Recommendation #3**: Codify the Federal obligation to engage in government-to-government consultation by adding a provision under NEPA § 102, 42 U.S.C. § 4331(2).

[97] Rutzick, *supra* note 84, at 251-252 ("A direct cause of this monumental federal failure is the complex, inefficient, and time-insensitive federal permitting regimen required for resource development on federally owned and managed land. A deadly combination of flawed legislation and federal agency inefficiency renders the average duration of a tribal permitting application measurable in years.").
[98] E.O. 13175, *supra* note 2, at 67252 § 6.

- **Recommendation #4**: Recognize Indigenous Knowledge qualifies as the following terms:

Provision	Update
NEPA § 102, 42 U.S.C. § 4332(E)	"reliable data and resources"
NEPA § 102, 42 U.S.C. § 4332(K)	"ecological information"
NEPA § 106, 42 U.S.C. § 4336(b)(3)(A)	"reliable data source"
NEPA § 111, 42 U.S.C. § 4336e(13)	"special expertise"
NEPA § 205, 42 U.S.C. §4335(2)	"information"

- **Recommendation #5**: Incorporate into the exclusion of certain Tribal actions from the definition of "Major Federal Action" at NEPA § 111, 42 U.S.C. § 4336e(10)(B), using the language in the NEPA Phase 2 rules at 40 C.F.R. § 1508.1(w)(2)(viii).

III. Detailed Recommendations for CEQ

The table below compiles suggestions for improving CEQ's Memorandum for Heads of Federal Departments and Agencies.

Location	**Recommendation**
Section III, page 5, last bullet point (Environmental Justice Considerations)	Clarify that the federal trust relationship between sovereign Tribal Nations and the Federal government is based on the political status of Tribal Nations. It is a unique political and legal relationship with the United States, rooted in Indian Tribes' inherent sovereignty, recognized in the U.S. Constitution, in treaties, and carried out by many federal laws and policies.[99]
Section III, page 6, sixth bullet point	The instruction to "[e]stablish protocols for engaging with State, Tribal, territorial, and local government agencies" is insufficient. Add a separate bullet point stating that "lead agencies should engage in meaningful, government-to-government consultation with Indian Tribes at the earliest feasible time, with a goal of reaching a mutual agreement. Lead agencies should establish clear but flexible protocols for carrying out consultation."
Section III, page 7, third bullet point from top	The bullet point currently states: "Include specific criteria for providing limited exceptions to public availability for classified proposals." Add "Include protocols for safeguarding Indigenous Knowledge and other potentially sensitive information provided by an Indian Tribe. This should incorporate a process for informing such Indian Tribe about the potential for public disclosure under the Freedom of Information Act (FOIA) before the Indigenous Knowledge is in the Federal agency's custody, as well as options for protecting, to the maximum extent practicable, confidentiality in a manner the conforms with FOIA's language and purpose."

[99] See Coalition Letter, *supra* note 2.

Section III, page 7	Add a new bullet point, as follows: "Recognize that Indigenous Knowledge qualifies as 'information,' 'ecological information,' 'reliable data and resources,' 'reliable data source,' and 'special expertise' as those terms are used in NEPA at § 205, 42 U.S.C. §4335(2); § 102, 42 U.S.C. § 4332(K); § 102, 42 U.S.C. § 4332(E); § 106, 42 U.S.C. § 4336(b)(3)(A); and § 111, 42 U.S.C. § 4336e(13), respectively.
Section IV, page 7, first sentence of the first paragraph	Add to the sentence as follows: "Agencies should complete the revision of their procedures no later than 12 months after the date of this memorandum and engage in meaningful and comprehensively substantive government-to-government consultation with Indian Tribes to meet the Federal government's obligations under its trust responsibility."
Section IV, page 7, second sentence of the third paragraph	Add to the sentence as follows: "In consultation with the Office of Information and Regulatory Affairs, agencies should conduct timely and efficient E.O. 12866 reviews of significant NEPA procedures and engage in meaningful and comprehensively substantive government-to-government consultation with Indian Tribes under E.O. 13175."
Section IV, page 7, first sentence of the sixth paragraph.	Add to the sentence as follows: "Agencies must develop a proposed schedule for updating their procedures and coordinate with CEQ to allow for planning and efficient review of those updates and to ensure adherence to the Federal government's obligations to Indian Tribes arising from its trust responsibility."

IV. Conclusion

The National Congress of American Indians and the National Association of Tribal Historic Preservation Officers are eager to work with CEQ and the Trump Administration on reducing unnecessary federal regulations and streamlining overly complex permitting processes that disproportionately burden Tribal Nations. In doing so, we emphasize the federal trust relationship between our sovereign Tribal Nations and the Federal government. We offer the above recommendations in the spirit of building upon and strengthening this relationship to promote Indian Country's economic growth, our country's national security interests, and a safe and healthy environment for ourselves and generations to come.

Respectfully,

Larry Wright, Jr.
Executive Director
National Congress of American Indians

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March 27, 2025

Jomar Maldonado
Director for the National Environmental Policy Act
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

RE: Docket No. CEQ-2025-0002, Removal of National Environmental Policy Act Implementation Regulations

Dear Director Maldonado,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Council on Environmental Quality (CEQ) Interim Final Rule on the proposed removal of the CEQ regulations implementing the National Environmental Policy Act (NEPA) from the Code of Federal Regulations. CEQ has stated that this action is directed by Executive Order (EO) 14154, "Unleashing American Energy" which aims to rescind all iterations of CEQ's NEPA implementing regulations and rulemaking authority. CEQ is simultaneously working to issue guidance on the revision and enactment of agency-level NEPA implementation to expediate and simplify permitting approvals. The proposed interim final rule would be the most significant update to NEPA since 1978. With this in mind and in accordance with federal trust and treaty obligations, the promulgation of the proposed rule must be executed in a manner that ensures and preserves the opportunity for meaningful consultation with all 574 federally recognized Tribal Nations.

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 Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

USET SPF supports regulations that safeguard and protect our natural and environmental resources and cultural heritage. We also generally support efficiency and effectiveness, but this cannot be accomplished at the expense of Tribal sovereignty, health, spirituality, or culture. Any changes to NEPA regulations that minimize or forgo mandated Tribal consultation will have significant impact on Tribal Nations and our ability to protect and manage Tribal resources, sacred sites, and historic properties. In accordance with trust and treaty obligations, CEQ must strongly consider the intent and effects of the National Historic Preservation Act, the Antiquities Act, and the Native American Graves Protection and Repatriation Act on Tribal Nations when making any determination regarding potential changes to NEPA processes and regulations. These laws were all passed with the intention of upholding obligations to Tribal Nations by protecting important Tribal sites, items, and remains and must continue to be implemented under NEPA along with meaningful Tribal consultation requirements. Replacing CEQ's regulations with voluntary guidance and shifting NEPA rulemaking to federal agencies will result in confusion and, in many cases, the destruction of Tribal Nations' irreplaceable cultural resources. As CEQ considers changes to the NEPA regulations, it must ensure that its trust and treaty obligations remain paramount, both during this transition process and in forthcoming agency-level NEPA regulations.

Tribal Consultation Must Occur Prior to Any Revision to NEPA Regulations

The U.S. has long engaged in nation-to-nation, sovereign-to-sovereign relationships with Tribal Nations. It has also assumed an ongoing solemn, legal duty to Tribal Nations to ensure the protection of Tribal and individual Native lands, assets, resources, as well as treaty and trust rights. These obligations are, in part, embedded in statutes that fund essential programs and services for Tribal communities, funding that is legally required, regardless of political priorities.

In the Interim Final Rule, CEQ states that the impact of this rule would not significantly affect Tribal Nations or our communities. This is highly inaccurate. NEPA serves as a pivotal legal framework that ensures federal decision-making processes consider the rights and interests of Tribal Nations. Consultation with Tribal Nations through the NEPA review process is a critical method by which the federal government meets its trust and treaty obligations. In the absence of Tribal consultation, the recission of NEPA regulations and replacement with voluntary guidance would be an abrogation of this responsibility. Historically, failures to effectively engage with Tribal Nations have caused irreversible damage and harm to Tribal resources and cultural practices. Despite the significance of the proposed revisions to NEPA regulations, there has been no Tribal consultation on this action thus far.

Tribal Consultation Must Be a Paramount Requirement in Any Reform to NEPA Regulations

CEQ's erroneous perception of lack of Tribal impact does not negate the federal government's responsibilities under EO 13175 to conduct consultation. One of the guiding principles of EO 13175 is to establish regular and meaningful consultation and collaboration with Tribal Nations on federal policies that have Tribal implications including "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes."

The NEPA process remains a key action in which the federal government upholds trust and treaty obligations to us, both in and around Indian Country. Thus, this federal policy undoubtably affects Indian Country. Moreover, the NEPA regulations themselves emphasize the goal of preserving "historic, cultural, and natural aspects of our national heritage" and further acknowledge the unique implications Tribal sovereignty through the "designation of any …Tribal agency… that has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal to serve as a cooperating agency." Together, these key directives stress the obligation of government-to-government consultation

and the significance of NEPA to Tribal sovereignty. Tribal Nations must have a seat at the table for all federal decision making that may affect Tribal Nations' cultural resources, public health, or sovereignty—whether located on or off Tribal lands.

Efficient Transition of NEPA Reform

CEQ's accompanying memo to federal agency and department heads, states that, "…although CEQ is rescinding its NEPA implementing regulations at 40 C.F.R. parts 1500–1508, agencies should consider voluntarily relying on those regulations in completing ongoing NEPA reviews or defending against challenges to reviews completed while those regulations were in effect." With hundreds of active NEPA reviews, federal agencies must be required, not encouraged, to rely on the rescinded CEQ regulations. These critical projects must continue to move through the review process, without compromising quality. The memo fails to mention agencies' obligation to consult with Tribal Nations for their revision of implementing procedures. Until federal agencies go through their legally mandated, respective government-to-government consultations with Tribal Nations on any amendments to their NEPA processes and implementing regulations, continuing use of CEQ's regulations will ensure trust and treaty obligations are fulfilled and ensure efficient implementation. By abruptly removing the implementing regulations, CEQ neglects these duties and does not give agencies the structure and clarity they need to fulfill their treaty-based obligations throughout ceded and unceded lands and waters. Moreover, without clear regulatory replacements, CEQ will have turned the NEPA process into an inefficient, maladroit procedure – one that lacks certainty. While we agree that the NEPA review process needs to be reexamined on Tribal Lands for projects being pursued by Tribal Nations, USET SPF strongly opposes the streamlining of NEPA processes on our traditional lands outside our jurisdictional boundaries without early engagement and clear and uniform consultation with Tribal Nations.

Tribal Nations have already experienced the harmful effects caused by an inconsistent approach to NEPA implementation. Federal agencies implementing the NEPA process often fail to fully consider the long-term and cumulative effects of large-scale projects. Tribal Nations have witnessed issues where no single agency takes full responsibility for large-scale projects and, therefore, those projects are approved through a piecemeal NEPA process that includes multiple agencies implementing their own NEPA review processes. These fragmented approval processes conducted by agencies can often overlook the cumulative effects of a large-scale project, especially those stretching over large geographical land bases that include a mixture of Tribal, public, and private lands. Additionally, every federal agency implementing its NEPA review processes currently has varying levels of Tribal engagement, coordination, and consultation, leading to confusion, wasted resources, and inconsistencies. The centralized CEQ regulations reduced the variability of consultations across agencies and streamlined the NEPA process. Without CEQ setting a standard for all federal agencies in the context of NEPA, irregular consultations will no doubt lead to decisions that infringe on Tribal sovereignty, disjointed determinations susceptible to judicial review, and prolonged outcomes.

Fully Fund and Provide Technical Assistance to Tribal Nations to Effectively Participate in Environmental Reviews

As part of our inherent sovereignty, Tribal Nations have oversight and authority for environmental and permitting reviews on Tribal Lands. However, project proposals and construction on our traditional homelands located outside of our jurisdictional boundaries often proceed with limited to no coordination with Tribal Nations. This can lead to irreparable harm to our sacred sites, areas of cultural significance, and critical natural resources such as nearby waterways essential for our communities. Just as the federal government has trust and treaty obligations to protect our cultural heritage and well-being, it also has obligations to empower us to exercise self-determination and utilize funds and other resources to protect what is important to us.

The resources available to Tribal Nations to fully participate in the NEPA review process have always been inadequate. Funding for Tribal Historic Preservation Officers (THPOs) has been largely stagnant for decades and will be further strained by a disparate approach to NEPA regulations. The CEQ and federal agencies implementing NEPA must support additional funding for Tribal Nations and THPOs to conduct NEPA reviews. This is especially important since this Administration is focused on major investments in natural resource development and energy infrastructure with the *Unleashing American Energy* agenda. With the forthcoming influx of development projects, we also need funding for our THPOs to conduct the necessary environmental, cultural, and historical reviews under NEPA and Sec. 106 of the National Historic Preservation Act. Providing sufficient resources for Tribal Nations to adequately participate in the NEPA review process and consultation activities will ultimately amount to expedited review and permitting timelines.

In addition, it is important to note that in instances where Tribal Nations have a THPO and/or a cultural or natural resources department dedicated to conducting environmental, cultural, historic preservation, and permitting reviews, these individuals and departments are often inundated with multiple projects and permit applications that exceed available capacity and resources. Reviews of these projects can also be lengthy because they are often broken into multiple, segmented reviews of a single project and span across multiple agency jurisdictions and oversight authorities. Additionally, these individuals and departmental staff may fulfill multiple roles within their Tribal government due to the historic and persistent failures of the federal government to fund its trust and treaty obligations, including appropriating the necessary resources for these positions. It is not uncommon for a THPO/cultural resource manager to also fulfill the role of a natural resource manager or serve in an emergency management role.

It should be noted that any reduction in federal permitting staff will further hinder the capacity of Tribal Nations to participate in NEPA reviews. These reviews require specific technical expertise and knowledge that Tribal Nations may not have in-house and thus rely on federal personnel to provide as part of trust and treaty obligations. Without these resources, Tribal consultation during the environmental review process amounts to an unfunded mandate, as we are not provided with the necessary resources and assistance to effectively participate in the processes. USET SPF stresses the significance of sufficient federal staffing to advance Tribal consultation and NEPA reviews.

For these reasons, we urge the federal government to uphold its trust and treaty obligations to Tribal Nations and propose appropriate funding for Tribal Nations to fully engage in the environmental review processes outside of our jurisdictional boundaries. This would benefit both the federal government and Tribal Nations by hastening review processes, limiting the potential for costly and lengthy litigation, and advancing the United States' development priorities.

Conclusion

While we support responsible consideration of environmental reforms, USET SPF will oppose any federal agency's NEPA revision or process that omits the required government-to-government consultation or provides subpar protection of cultural resources or public health. The ability of Tribal Nations to protect our environment, resources, sacred sites, and historic properties provided by NEPA regulations is vital to the health of future generations within Indian Country. In promulgating this Interim Final Rule, it is incumbent upon the CEQ to uphold their trust and treaty obligations by performing government-to-government consultation and continued protection of Tribal resources. USET SPF remains committed to protecting vital Tribal historic, cultural, and environmental reviews, as well as Tribal consultation requirements, as NEPA regulations are considered. This includes working toward a model that seeks Tribal Nation consent for federal action in recognition of our inherent sovereignty. We look forward to continued dialogue on these

revisions to NEPA regulations to ensure the protection of our natural, cultural, and historical resources. 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
USET SPF

Kitcki A. Carroll
Executive Director
USET SPF