

Comment Info: =====

General Comment: Introduction

The National Tribal Environmental Council (NTEC) is pleased to submit these comments regarding the U.S. Environmental Protection Agency's (EPA) proposed agency guidance (Guidance) for implementing Executive Order (EO) 13175 which addresses consultation and coordination with Indian tribal governments. NTEC is

a not-for-profit membership organization comprising more than 180 tribes. Our mission is to enhance each tribe's ability to protect, preserve and promote the wise management of air, land, and water for the benefit of current and future generations.

The EPA states in the Guidance that "the Agency's mission of protecting human health and the environment is advanced by the Tribal consultation process.¹ The

need for effectively carrying out this process, however, has become more pressing

as the number of agency rules and regulations (actions) continues to increase. Because tribes will be expected to carry out more EPA actions in Indian country in the future, it makes good management and marketing practice on the part of the agency to engage these tribes in helping to define the consultation process.

While NTEC is gratified that the EPA is taking the necessary action to implement

EO 13175 with respect to tribal consultation, we have concerns with how the agency determines when tribal implications exist and its position that guidance documents do not have tribal implications. Furthermore, we strongly feel that there needs to be some requisite items included in the consultation process in order to have "meaningful and timely" input, and that the agency needs to be careful about how it treats the Guidance in the future.

How Tribal Implications are Determined

While EO 13175 defines policies having tribal implications (TIIs) as those causing "substantial direct effects on one or more Indian tribes . . .," this same

EO fails to identify a threshold for determining when such TIIs exist. The EPA, on the other hand, identifies some scenarios in the Guidance where TIIs might exist.² By identifying these scenarios, the EPA acts contrary to the spirit of EO

13175 by setting thresholds for TIIs. We strongly believe that EO 13175 is purposefully vague concerning the existence of TIIs and thresholds as almost anything affecting tribes could be deemed to have such implications. When the EPA identifies the aforementioned scenarios, it sets a dangerous precedence for agency staff. This dangerous precedence could lead staff to limit their determinations about TIIs to these scenarios alone, discounting other circumstances that might have TIIs but do not necessarily fit under the parameters of the scenarios.

We strongly disagree with any thresholds set by the EPA concerning TIIs, even if not intended as such. It is therefore our recommendation that the EPA remove mention of all scenarios from the Guidance that allegedly have TIIs and instead ask that agency staff make decisions concerning TIIs on a case-by-case basis.

Why Guidance Documents Could Have Tribal Implications

Under sec. 1(a) of EO 13175, the types of policies having TIIs are defined, but also included under this definition are "other policy statements or actions." The EP

A

has determined that these statements and actions could include "EPA policy statements, strategies, guidelines, guidance and interpretive documents."³ The

agency has further determined, however, that guidance documents should not be included as they do not create "legally binding requirements."⁴ While guidance documents generally do not create legally binding requirements, we disagree with

the EPA regarding their potential impact and believe that these documents could have "substantial direct effects" on one or more Indian Tribes.

The EPA often issues inter-agency interpretive or procedural guidance that helps its staff in implementing the agency's programs. While not legally binding, such

guidance has a practical effect on the public based on the action expected to be

taken by EPA staff. The previously cited example concerning how the Guidance and its scenarios having TIs is a perfect example of how tribes could be affected

by internal guidance. Tribes could be prohibited from identifying TIs beyond those

scenarios listed in the Guidance and used as precedence by EPA staff. The Guidance would then have tribal implications itself, adversely affecting the consultation process and preventing requirements under EO 13175 from being carried out.

As someone once said, "if you do it long enough, it becomes habit." Such is the

situation for guidance documents that EPA staff regularly refer to in carrying out

agency programs, and are sometimes used to eventually advance regulatory change. To prevent such guidance documents from having substantial direct effects on tribes without their input, we recommend that the EPA

acknowledge "guidance documents" as the type of "other policy statements or actions" that can trigger the various requirements of EO 13175 as it relates to consultation with tribes.

What Meaningful and Timely Input Means

While we consider it important as to how tribal implications are determined and why guidance documents could have tribal implications, what is necessary for "meaningful and timely" input as part of the consultation process is equally

important. Among those items that we feel should be included as part of the consultation process as a means to advance the spirit of EO 13175 are adequate resources provided to tribes in order to adequately participate, involvement of the

appropriate agency officials, complete involvement of the tribes in the consultation

process, the ability to adequately address special circumstances, and conducting

post-consultation assessments.

Because EO 13175 essentially mandates consultation with tribes, the EPA must act in good faith in providing sufficient resources to the tribes in order for them to

optimally participate in the consultation process. In its Guidance, the EPA acknowledges that the Regulatory Management Division provides tribal officials with the Unified Agenda of Regulatory and Deregulatory Actions as a means to inform them about new EPA actions.⁵ From this, the EPA expects these officials to discern if any of the agency actions have tribal implications. While this document contains valuable information, it necessitates the eye of someone who is familiar with both technical expertise concerning the EPA action and tribal issues. While these officials likely have the requisite understanding about tri

bal

issues, the technical expertise is often unavailable, largely due to limited resources. While tribes can partially rely on tribal consortiums such as NTEC for this technical expertise, the EPA still needs to provide tribes with the remaining support in order to enable them to fully and effectively participate in the consultation process. The EPA needs to take its queue from other federal agencies, such as the U.S. Forest Service, that has expressed its willingness to

provide tribes with the requisite resources to effectively participate in the consultation process. As stated in its manual, "[t]he Forest Service may compensate Tribes for specialized tribal expertise or other extraordinary consultation costs . . ."⁶ A commitment like that from the EPA would help tribes be full partners with the agency in the consultation process.

While making sufficient resources available to tribes in order to effectively participate in the consultation process, there is a real need to have the appropriate EPA staff members involved as well. Many tribes send their leaders to consultation meetings whereas it has not been unusual for the EPA to send low-level staff or contractors to discuss issues with these leaders. This is not the true essence of consultation. In conducting "meaningful and timely" consultation, it is imperative that the EPA provide its most senior officials in the process. We are therefore gratified that the EPA has acknowledged this need in its Guidance,⁷ and willingly offer our support to help make sure that this need is met. As part of this effort, it is our expectation that these senior officials will also talk, listen, and having meaningful conversations with the tribes concerning proposed EPA actions. In this manner, the true spirit of consultation can be met.

Having senior officials involved is only part of an effective consultation process with tribes. With respect to meetings, tribes should be intimately involved with agenda development, determination of meeting participants, and meeting location. Furthermore, tribes should be involved with the drafting and redrafting of documents, and tribal input should receive full consideration. Finally, tribes should be allowed to reopen previously closed matters if strong contention exists on their part. While consultation does not mean agreement, it necessitates that substantive input concerning matters receive the utmost attention on the part of the agency.

The consultation process also can involve special circumstances that necessitate wise management by the EPA. In particular, the agency must be prepared to effectively deal with states and issues specific to tribes.

With respect to states, the EPA recognizes in its Guidance that "the histories of some areas of Indian country and the opening up of some Indian reservations to settlement by non-Tribal members has resulted in complex relationships between Tribal and state governments . . ."⁸ While the EPA considers the importance of these relationships and the need to protect reservation boundaries, the agency must also act accordingly in those cases where states may have been granted authority to administer environmental programs on lands owned or occupied by

tribes. When such circumstances exist, the EPA should work closely with these states in developing proper mechanisms for tribal consultation. Furthermore, these mechanisms should be developed and implemented prior to taking any actions that could adversely impact tribal lands.

With respect to issues specific to tribes, we appreciate EPA's inference in its Guidance that tribes may be hesitant to have a full and open discussion with agency officials when the subject matter concerns such things as cultural practices and resources.⁹ In such cases, the EPA has identified the need to communicate to tribes that "memorializations of consultations" may not be privileged information.¹⁰ As a practical matter, we would only advise that this consultation with tribes concerning such information be done prior to any discussion about the subject matter taking place.

Assuming the EPA manages the consultation process in the spirit of EO 31375 and accounts for the aforementioned specialized circumstances, the agency needs to enhance its post-consultation plan beyond including a Tribal summary impact statement in the preamble of an EPA action.¹¹ We would further recommend that the EPA assess the success of past consultations that would include gathering tribal responses concerning their experiences, particularly if the intended purpose of the consultation process was achieved. This would then be part of a larger monitoring system of consultations that agency staff would be required to implement to serve as a means to improved future consultation with tribes.

How the Guidance Should be Treated in the Future

In the spirit of EO 13175, the EPA may need to make revisions to advance the consultation process between the agency and tribes, and may also be forced to deviate from it on a case-by-case basis. For both circumstances, the EPA has adopted a position in its Guidance that we disagree with and would recommend different approaches by the agency.

With respect to making future revisions to the Guidance, the EPA states that it "may change this Guidance in the future, as needed or appropriate, without public notice."¹² While the EPA holds that the Guidance is solely intended to "improve the internal management of the executive branch and is not intended to create any right, benefit or trust responsibility substantive or procedural,"¹³ we firmly believe that tribes should be continually updated regarding any changes to the guidance. We would argue that any change to the guidance, even routine, could have a significant and even adverse impact on tribes with respect to the consultation process. It is therefore our recommendation that the EPA provide a notice-and-comment period for proposed changes to the Guidance as it has done for this current review. Furthermore, we would advocate that an updated version of the guidance be made available through any given number of media including print and internet.

While allowing tribes and others to comment on changes to the Guidance is important, the EPA must also restrict itself to those instances where it may need to deviate from the document with the intent of meeting the requirements as listed under EO 13175. The EPA states that its Guidance "is not intended to prohibit any alternative methods of complying with those requirements as they may apply to your action."¹⁴ We firmly believe that by making this statement, the EPA potentially grants its staff with too much discretion. We would instead recommend that the EPA develop a set of written procedures indicating when it is

appropriate to deviate from this Guidance in meeting the agency's obligations under EO 13175.

Conclusion

In summary, the National Tribal Environmental Council asks that the U.S. Environmental Protection Agency take the following actions to strengthen its consultation with tribal governments:

1. Remove mention of all scenarios from the Guidance that allegedly have TIs and instead ask that agency staff make decisions concerning TIs on a case-by-case basis;
2. Acknowledge "guidance documents" as the type of "other policy statements or actions" as defined under EO 13175;
3. Provide tribes with the requisite resources to effectively participate in the consultation process;
4. Have the agency's senior officials to be part of the consultation process to talk, listen, and having meaningful conversations with the tribes ;
5. Have tribes involved with the entire consultation process which includes meeting and document development;
6. Be prepared to effectively deal with states and issues specific to tribes;
7. Assess the success of past consultations as part of a larger monitoring program to help improve future consultations with tribes;
8. Provide a notice-and-comment period for proposed changes to the Guidance;
9. Make updated versions of the Guidance available through such media as print and the internet;
10. Develop a set of written procedures indicating when it is appropriate to deviate from this Guidance in meeting the agency's obligations under EO 13175; and
11. When possible and appropriate, work with tribally-created and -controlled nationally qualified tribal non-profit organizations to assist the agency in obtaining tribal advice on a national basis.

In conclusion, NTEC would like to reiterate that it is pleased to submit the aforementioned comments. We look forward to future discussions with your agency on this matter and others that directly or indirectly impact tribes across the nation. Please feel free to contact David Conrad, NTEC Executive Director, at 505-242-2175 ext. 110 or dconrad@ntec.org if you should have any questions or concerns.
Sincerely,

David Conrad
Executive Director
National Tribal Environmental Council