



# Federal Register

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**Part VI**

## **Environmental Protection Agency**

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**Review of Environmental Protection  
Agency Draft Guidance for Implementing  
Executive Order 13175, Consultation and  
Coordination With Indian Tribal  
Governments; Notice**

**ENVIRONMENTAL PROTECTION AGENCY**

[EPA-HQ-OA-2006-0248; FRL-8159-9]

**Review of Environmental Protection Agency Draft Guidance for Implementing Executive Order 13175, Consultation and Coordination With Indian Tribal Governments****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Notice; request for public comment.

**SUMMARY:** The Environmental Protection Agency (EPA) is seeking public comment on its draft *Guidance, Executive Order 13175: Consultation and Coordination with Indian Tribal Governments* ("Guidance"). This draft Guidance addresses the provisions of Executive Order 13175 ("EO 13175") and how EPA generally intends to implement EO 13175 in connection with relevant EPA activities. EPA is seeking public comment on this draft Guidance in order to provide EPA with a broad range of experiences and perspectives as the draft Guidance is finalized.

**DATES:** Comments must be submitted on or before July 18, 2006.**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OA-2006-0248, by one of the following methods:

- *http://www.regulations.gov:* Follow the online instructions for submitting comments.

- *E-mail:* OEI.Docket@epa.gov.

- *Mail:* OEI Docket, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

- *Hand Delivery:* EPA Docket Center (EPA/DC), Room B102, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC 20460. Attention Docket ID No. EPA-HQ-OA-2006-0248. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA-HQ-OA-2006-0248. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you

consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*.

*Docket:* All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the EPA-HQ-OA Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the EPA-HQ-OEI Docket is (202) 566-1752.

**FOR FURTHER INFORMATION CONTACT:** Joan Crawford, Office of Policy, Economics and Innovation, Mail Code 1803A, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 564-6568; fax number: (202) 564-0965, e-mail: *crawford.joan@epa.gov* or Jose Aguto, American Indian Environmental Office, Mailcode 4104, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 564-0289; fax

number: (202) 564-0298, e-mail: *aguto.jose@epa.gov*.**SUPPLEMENTARY INFORMATION:****I. General Information***A. Does This Action Apply to Me?*

This draft Guidance document is intended for EPA managers and staff who are involved in planning and/or developing actions such as regulations, legislative comments or proposed legislation, and other policy statements or actions. While this draft Guidance is open for public comment, this draft Guidance may be of particular interest to Indian tribes, tribal officials, and those charged with the responsibility of ensuring the protection of public health and the environment in Indian country and elsewhere.

The statements in this draft document are intended solely to provide internal EPA guidance. This document is designed to implement EO 13175, Consultation and Coordination with Indian Tribal Governments. The draft document does not, however, substitute for requirements in federal statutes or regulations, nor is it a requirement itself. This document is not intended, nor can it be relied upon, to create any right or trust responsibility enforceable in any cause of action by any party against the United States, its agencies, officers or any other person. It does not impose legally binding requirements on EPA or anyone else, and may not apply to a particular situation based upon the circumstances. EPA may change this Guidance in the future, as needed or appropriate, without public notice. In addition, EO 13175, by its terms, is itself intended only to improve the internal management of the executive branch and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

*B. How Can I Get Copies of the Draft EPA Guidance, Other Related Documents, and Additional Information?*

You may view copies of the draft Guidance, other related documents, or request additional information by contacting:

1. *By mail:* Joan Crawford or Jose Aguto at the addresses listed under **FOR FURTHER INFORMATION CONTACT**.

2. *In person.* Copies of the entire draft Guidance, together with other related documents, may be examined during normal business hours at the OA Docket, at the docket address listed under **ADDRESSES**.

3. <http://www.regulations.gov/>. Publicly available docket materials are available electronically in <http://www.regulations.gov> by entering Docket ID No. EPA-HQ-OA-2006-0248. The electronic public docket includes an index of all available documents associated with this action as well as electronic versions of those documents.

### C. What Should I Consider as I Prepare My Comments for EPA?

When submitting comments, remember to:

1. Identify the action by docket ID number and other identifying information (subject heading, **Federal Register** date, and page number).
2. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a specific chapter or section number.
3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
4. Describe any assumptions and provide any technical information and/or data that you used.
5. Provide specific examples to illustrate your concerns, and suggest alternatives.
6. Explain your views as clearly as possible, avoiding the use of profanity, obscene language, or personal threats.
7. Make sure to submit your comments by the comment period deadline.

### Background

EO 13175 was signed on November 6, 2000 and sets forth various provisions regarding consultation and coordination between Federal agencies undertaking "policies that have tribal implications" and Indian tribal governments. This draft Guidance is intended to describe EPA's policy views regarding the provisions and procedures of the EO and to assist EPA personnel in implementing the EO as the Agency undertakes its various actions. Although other federal and EPA policies relating to Indian tribes and government-to-government consultation between EPA and Indian tribes may be referenced in the draft Guidance, the draft Guidance is not intended to define the scope of procedures that may be called for under, or otherwise to implement, those separate documents. Thus, where, for instance, the draft Guidance discusses consultation between EPA and Indian tribal governments, such consultation and related procedures are designed to relate specifically to the EPA/tribal interaction called for by EO 13175.

In developing this draft Guidance, EPA considered the unique relationship between the Federal government and

Indian tribes and attempted to address various complex issues as they arose to help strengthen our efforts to work with tribes and establish regular and meaningful consultation and collaboration with tribes as contemplated by EO 13175. Prior to developing this draft Guidance document, EPA convened an internal workgroup to consider the provisions of the EO and potential procedures to implement the EO in the context of EPA programs. During this early development stage, the EPA workgroup had significant interaction with representatives of tribal governments selected and designated for this purpose by the Tribal Caucuses of each of the EPA Regional Tribal Operations Committees. This interaction included active participation by the designated tribal representatives in regularly scheduled teleconferences with EPA staff to exchange ideas, insights and experiences, and to identify challenges related to outreach, engagement and consultation between EPA and Indian tribal governments as well as possible solutions and methods by which EPA and tribal officials might improve the consultation process. EPA recognizes the significance of this early tribal involvement in the process of developing EPA's approach to implementation of EO 13175 and looks forward to additional tribal input as part of this comment process.

EPA is seeking comment on the entire document but would appreciate special consideration of the following issues at this time:

Section 1(a) of EO 13175 defines the term "Policies that have tribal implications." In addition to regulations, legislative comments and proposed legislation, the EO includes a reference within the definition of that term to "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. EPA believes that the reference to such "other policy statements or actions" potentially includes issuance of EPA policy statements, strategies, guidelines, guidance and interpretive documents (collectively, "guidance documents"). EPA's position set forth in the draft Guidance is that guidance documents generally do not create legally binding requirements and, therefore, will not have "substantial direct effects" as described in the EO. Thus, where there are no legally binding requirements being created, such guidance documents

generally will not have Tribal Implications and will not trigger the various requirements of EO 13175. However, where a document does create legally binding requirements, it may have Tribal Implications. EPA is seeking comment on this issue, including information regarding prior EPA guidances that commenters believe may have had substantial direct effects as described in EO 13175. In addition, EPA is specifically seeking comment on applicability of the EO to certain other types of EPA actions as set forth in Chapter 5 of the draft Guidance.

Comments received within the 90-day period designated in this notice will be taken under consideration as the EPA workgroup continues drafting the Guidance and the key attachments to the Guidance.

Dated: April 13, 2006.

### Brian F. Mannix,

Associate Administrator, Office of Policy, Economics and Innovation.

*Draft Guidance: Guidance, Executive Order 13175: Consultation and Coordination With Indian Tribal Governments.*

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**Note:** Attachments A through D (as listed in the table of contents) are available in the docket (EPA-HQ-OA-2006-0248) for this draft Guidance. Attachments E through J are in the drafting stage and not open for public comment. Those attachments therefore are not provided in the docket for this draft Guidance document.

### List of Acronyms, Abbreviations and Key Definitions

**AIEO:** American Indian Environmental Office of EPA (within the Office of Water).

**EO:** Executive Order. When used alone, it refers to EO 13175.

**FACA:** Federal Advisory Committee Act.

**OGC:** Office of General Counsel.

**OLA:** Office of International Affairs.

**OMB:** Office of Management and Budget.

**OPEI:** Office of Policy, Economics and Innovation.

**OPPTS:** Office of Prevention, Pesticides and Toxic Substances.

**ORC:** Office of Regional Counsel.

**PRA:** Paperwork Reduction Act.

**RIC:** Regional Indian Coordinator.

**RFA:** Regulatory Flexibility Act.

**RMD:** Regulatory Management Division.

**RRC:** Regional Regulatory Contact.

**RSC:** Regulatory Steering Committee.

**S/L/T:** State, local, and Tribal governments.

**UMRA:** Unfunded Mandates Reform Act.

### Key Definitions

**Authorized Inter-Tribal Organization:** For the purposes of this draft Guidance, an "authorized inter-tribal organization" is an organization that has been officially designated by the elected or duly-appointed leader of a federally recognized Tribal government to represent that Tribe on a particular issue. EPA would generally recognize an inter-tribal organization as "authorized" after receiving confirmation from an elected or duly-appointed Tribal leader that organization is authorized to consult with EPA on the Tribe's behalf. Consultation with intertribal organizations can enhance but should not be an acceptable substitute for direct

consultation with Tribal governments, unless officially delegated the authority by the Tribal government. EPA recommends that such confirmation be provided in writing (e.g., letter, e-mail).

**Duly Appointed Officials:** For the purposes of this draft Guidance, "duly appointed officials" are representatives that have been officially designated by elected or duly-appointed leaders of federally recognized Tribal governments to represent their Tribes on a particular issue. EPA would generally recognize a representative of a Tribal government as a "duly appointed official" after receiving confirmation from an elected or duly-appointed Tribal leader that the representative is authorized to consult with EPA on the Tribe's behalf. EPA recommends that such confirmation be provided in writing (e.g., letter, e-mail).

**EPA's 1984 Indian Policy:** The EPA Policy for the Administration of Environmental Programs on Indian Reservations.

**EPA's Indian Program:** The phrase "EPA's Indian Program" generally describes the composition of EPA's offices, internal workgroups and employees across the Agency's specific environmental program offices that work in whole or in part on Tribal environmental issues. EPA offices devoted specifically to Tribal issues include the American Indian Environmental Office (AIEO) and the Regional Tribal Offices. Internal workgroups include the National Indian Workgroup (NIWG), the Indian Policy Program Council (IPPC) and the National Indian Law Workgroup (NILWG). Contact information is located at <http://www.epa.gov/indian/miss.htm>.

**Indian Tribe:** "Indian Tribe" means an Indian or Alaskan Native Tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.<sup>1</sup>

**Order:** Executive Order 13175.

**Tribal Coordination:** For the purposes of this draft Guidance document, coordination refers to the harmonization of EPA's Tribal outreach and information dissemination/exchange activities to ensure that Tribal governments are aware of EPA actions that might impact them and afforded the opportunity to alert EPA that they wish to be consulted according to the terms of Executive Order 13175 early in the process of developing those actions.

**Tribal Consultation:** For the purposes of this draft Guidance document, and to the extent practicable and permitted by

<sup>1</sup> Executive Order 13175, section 1(b).

law, consultation consists of a meaningful and timely two-way exchange with Tribal officials in developing Agency actions, providing for open sharing of information, the full expression of Tribal and EPA views, a commitment to consider Tribal views in decision-making, and respect for Tribal self-government and sovereignty.

*Tribal Implications:* 'Policies that have Tribal implications' refers to 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.<sup>2</sup>

*Tribal Officials:* 'Tribal officials' means elected or duly appointed officials of Indian Tribal governments or authorized intertribal organizations.<sup>3</sup>

## Executive Summary

### *What Is the Purpose of This Document?*

This draft Guidance document provides guidance to EPA staff on how to meet requirements of Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments", and recommends how EPA staff should set about the consultation process when required.

### *What Is in This Document?*

#### Chapter 1: Introduction to Executive Order 13175

This chapter discusses what is Executive Order 13175 and what EPA is required to do under the Order, and, for purposes of this draft Guidance, what are Tribal Coordination and Consultation. This chapter also outlines the Federal Government's relationship with Tribal Governments and how Tribal interests may be distinct from State and Local Governments.

#### Chapter 2: EPA Regulations

This chapter provides EPA staff and managers guidance on how to determine whether EPA regulations are subject to Executive Order 13175, and what EPA staff should do if the regulation is subject to the Order. Chapter 2 discusses how to determine whether a regulation has Tribal implications, and what EPA should or must do if a rule is determined to have (or not have) Tribal implications. This chapter describes whether and how EPA should or must coordinate or consult with Tribal officials on a regulation, and outlines

steps EPA should follow to coordinate with Tribal officials on a regulation. This chapter also discusses how EPA should develop a consultation plan, and when and how to begin the Tribal consultation process. In addition, this Chapter discusses whether and how EPA's certification process under Executive Order 13175 applies to regulation activities, and how does EPA track and record actions affected by the Order.

#### Chapter 3: Legislative Comments or Proposed Legislation

Chapter 3 discusses how Executive Order 13175 applies to legislative comments or proposed legislation submitted by EPA, and whether the Order applies when EPA provides comments to another Federal agency on their draft legislation or provides technical assistance to Congressional staff.

#### Chapter 4: Waivers

This chapter discusses Executive Order 13175 requirements that apply to applications submitted to EPA by Tribal governments seeking to waive some or all of the statutory or regulatory requirements that apply to them. Chapter 4 also discusses the EPA's flexibility when considering Tribal applications for waivers of statutory and regulatory requirements.

#### Chapter 5: Permits

Chapter 5 discusses whether and how the requirements of Executive Order 13175 apply to permitting activities.

#### Chapter 6: Policy Statements, Guidance Documents and Similar Actions

This chapter discusses whether and how Executive Order 13175 requirements apply to EPA's development of policy statements, guidance documents, and similar actions. This chapter discusses under which situations the requirements of the Executive Order may apply to these statements, documents or actions, and when consultation is recommended even if it is not required under the Executive Order.

#### Attachments

- (a) Executive Order 13175: Consultation and Coordination with Indian Tribal Governments.
- (b) EPA's 1984 Policy for the Administration of Environmental Programs on Indian Reservations.
- (c) Stephen L. Johnson's September 26, 2005 Memorandum Reaffirming EPA's 1984 Indian Policy.
- (d) EPA's April 29, 1994 Memorandum on Government-to-

Government Relations With Native American Tribal Governments.

(e) EPA's Indian Program Infrastructure and Examples of Tribal Partners (*flowchart*).

(f) Executive Order 13175 Analysis for EPA Rules and Regulations (*flowchart*).

(g) Recommendations for Developing Tribal Consultation Plans.

(h) Executive Order 13175 Preamble Template Language.

(i) Executive Order 13175 Compliance Certification Form.

(j) Agency Contacts.

### *A Note About the Development of This Draft Guidance Document*

As with many guidance documents, this draft Guidance is a living document. We acknowledge that, over time, we may need to revise and improve this draft Guidance based on the consultation experiences of EPA and Tribes. You should take advantage of the insight and knowledge that Tribal governments will afford you in your consultation opportunities when dealing with policies that have Tribal implications and not merely because the Executive Order requires it. Incorporating the views and concerns of Indian Tribal governments in the action development process may help to bring about more effective implementation and collaboration on actions that are beneficial to public health and the environment in Indian country and elsewhere. As such, the Agency's mission of protecting human health and the environment is advanced by the Tribal consultation process.

### *Scope and Applicability of This Draft Guidance Document*

#### A. Scope

This draft Guidance document summarizes the requirements under Executive Order 13175, and recommends how EPA staff should set about the consultation process when required. For some actions, separate EPA policies relating to Indian Tribes (described later in this section in "How Do the Requirements of Executive Order 13175 Relate to EPA's Existing Tribal Policy Framework?") may be broader than the Executive Order, reflecting EPA's commitment to early and meaningful consultation whenever possible. However, this draft Guidance document is in no way intended to serve as a guide to EPA's implementation of any other statute, executive or judicial order, memoranda on administration policy, or internal EPA policy directive concerning Tribal governments and the development and/or implementation of EPA policies. This

<sup>2</sup> Executive Order 13175, section 1(a).

<sup>3</sup> Executive Order 13175, section 1(d).

draft Guidance document is not a holistic guide to consultation with Tribal governments and should not be interpreted as such.

**B. Applicability**

This draft Guidance document is intended for EPA managers and staff who are responsible for planning and/or developing actions such as regulations, legislative comments or proposed legislation, and other policy statements or actions. The requirements of Executive Order 13175 will apply to your action if it will have substantial, direct effects on Tribal governments. This draft Guidance document also describes when consultation with Tribal officials is required under this Executive Order, and how EPA staff should set about the consultation process when required. What you should do to comply with the Order depends on the type of action that you are developing. The following table tells you where to continue reading, based on the type of your action:

|  |  |
|--|--|
| If your action is a . . .                    | Then go here for more information about whether the Order applies and what to do . . . |
| Regulation (or "Rule")                       | page (to be added in final).   |
| Legislative Comment or Proposed Legislation. | page (to be added in final).   |
| Waiver .....                                 | page (to be added in final).   |
| Permits/License .....                        | page (to be added in final).   |
| Policy Statement/ Guidance Document.         | page (to be added in final).   |

While you should read carefully through this draft Guidance to identify what, if anything, you should do to comply with the Executive Order requirements, this draft document is not intended to prohibit any alternative methods of complying with those requirements as they may apply to your action.

*How Do the Requirements of Executive Order 13175 Relate to EPA's Existing Tribal Policy Framework?*

In situations where your action does not have Tribal implications, and thus does not trigger relevant requirements of the Executive Order, it is still important to assess Tribal interests that may be affected by your action and consider whether other Executive or EPA policies or legal requirements call for the Agency to seek Tribal input or otherwise address Tribal issues. At various places, this draft Guidance may recommend

seeking Tribal input and considering Tribal views and interests regarding EPA actions that do not have Tribal implications under Executive Order 13175. Where such recommendations are based solely upon considerations apart from Executive Order, they should not be interpreted as an indication of any EPA position regarding the scope or implementation of Executive Order 13175. Any such recommendations are only intended to help you address the separate legal and policy considerations in a manner consistent with this Executive Order. When developing a policy that has Tribal implications pertaining to a U.S. border region and implements a binational/international treaty and/or agreement, you should consult with the Office of International Affairs (OIA) about any issues that warrant your consideration.

Consider, for instance, the EPA Policy for the Administration of Environmental Programs on Indian Reservations (a.k.a. the "Indian Policy") and the April 29, 1994 Presidential Memorandum regarding the Government-to-Government Relations With Native American Tribal Governments. Consistent with these and other policy statements and the Federal government's trust responsibility to federally-recognized Indian Tribes, EPA generally attempts to engage Tribes regarding Agency actions that may affect Tribes through government-to-government consultation and other means of outreach. It is important to note that separate policies and considerations, such as the following, may have different threshold standards than Executive Order 13175 that you might need to consider even if you determined that your action would not have Tribal implications as defined in the Executive Order.

**A. EPA's Indian Policy**

The EPA Indian Policy states that the "keynote" of EPA's effort to protect human health and the environment on Indian reservations will be:

"\* \* \* to give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands."

EPA's Indian Policy goes on to recognize Tribes as the primary parties for setting standards, making environmental policy decisions, and managing programs for Indian reservations consistent with Agency standards and regulations. The policy states that EPA will, consistent with the Federal trust responsibility, assure that Tribal concerns and interests are

considered where EPA's actions and/or decisions may affect reservation environments. Similarly, the guidance document for implementing EPA's Indian Policy states, among other things, that:

"[w]here EPA manages Federal programs and/or makes decisions relating directly or indirectly to reservation environments, full consideration and weight should be given to the public policies, priorities and concerns of the affected Indian Tribes as expressed through their Tribal Governments. Agency managers should make a special effort to inform Tribes of EPA decisions and activities which can affect their reservations and solicit their input as we have done with State Governments. Where necessary, this should include providing the necessary information, explanation and/or briefings needed to foster the informed participation of Tribal Governments in the Agency's standard-setting and policy-making activities."

**B. 1994 Presidential Memorandum**

In addition, the April 29, 1994 Presidential Memorandum regarding the Government-to-Government Relations With Native American Tribal Governments sets forth various principles designed to clarify the federal government's responsibility to:

- (1) Operate within a government-to-government relationship with federally-recognized Tribes and
- (2) Build more effective working relationships respecting the rights of such Tribes to self-government.

The Presidential Memorandum also requires agencies to consult, to the greatest extent practicable and to the extent permitted by law, with Tribal Governments prior to taking actions that affect federally-recognized Tribal Governments and to assess the impact of Federal plans, projects, programs, and activities on Tribal trust resources and assure that Tribal Government rights and concerns are considered during the development of such plans, projects, programs, and activities.

**Chapter 1: Introduction to Executive Order 13175**

*1.1 What Is Executive Order 13175 and What Am I Required to Do?*

On November 6, 2000, President Clinton issued Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," to establish regular and meaningful consultation and collaboration with Tribal officials in the development of Federal policies that have Tribal implications, to strengthen the United States government-to-government relationships with Indian Tribes, and to reduce the imposition of unfunded mandates upon Indian Tribes. The Executive Order (the "EO" or "Order")

established specific requirements for agencies as they develop policies with Tribal implications (TI) and emphasizes consultations with elected and duly appointed Tribal officials of Tribal governments and authorized intertribal organizations. For example, the Order directs agencies to formalize practical and achievable procedures within their decision-making systems to ensure that Tribal officials have the opportunity to consult, as required by the Order, in a "meaningful and timely manner."

The requirements of Executive Order 13175, as described throughout this draft Guidance document, apply to policies that have Tribal implications. The Executive Order describes these types of policies as regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on:

- One or more Indian Tribes;
- The relationship between the Federal government and the Indian Tribes; or
- The distribution of power and responsibilities between the Federal government and Indian Tribes.

As the EO's description of policies that have Tribal implications is rather broad, this draft Guidance document does not identify specific EPA actions or types of EPA actions as examples of policies that are definitely subject to the EO requirements. On the one hand, it could be useful to understand that a specific type of action might be more likely to have TI. However, on the other hand, it is important to recognize not only that any identified types of actions may not always have TI, but that identifying a specific action or types of actions within these pages might have been construed by some managers and staff to be the entirety of actions that are subject to the EO. Since a broad array of actions are potentially subject to the EO, managers and staff need to carefully consider whether a given action falls within the scope of the EO. In this light, then, your action might have TI if it:

- Directly impacts Tribal interests, such as access to natural resources, that are specifically recognized by treaty, statute, etc.
- Directly impacts Tribal natural resources and trust lands that the Federal government has a responsibility to protect.
- Directly applies to lands of interest to Tribes, including ceded land where Tribes retain usufructuary rights, reservation land, dependent Indian communities, and allotments.
- Directly applies to the activities, or impacts the authority, of Tribal governments.

## 1.2 What Are Tribal Coordination and Consultation?

### [1.2] A. Coordination

For the purposes of this draft Guidance document, coordination refers to the harmonization of EPA's tribal outreach and information dissemination/exchange activities to ensure that Tribal governments are:

- (1) Aware of EPA actions that might impact them and
- (2) Afforded the opportunity to alert EPA's offices and officials that they wish to be consulted with according to the requirements of Executive Order 13175 early in the process of developing those actions.

The unique government-to-government relationship between EPA and Tribes presents various complexities. As discussed in Part 2.10(a) (*Coordination and Outreach*), Agency staff are encouraged to coordinate with Tribal governments during the early stages of action development to determine whether the action has potential TI that may call for government-to-government consultation under the EO. The Office of Policy, Economics and Innovation's (OPEI's) Regulatory Management Division (RMD) works with the members of the Agency's Regulatory Steering Committee (RSC) and the American Indian Environmental Office (AIEO) to coordinate the development and dissemination of information to Tribal governments regarding the Agency's regulatory activities. The Agency anticipates that, in the spirit of collaboration, Tribal governments will review the information and provide their views, in a meaningful and timely fashion, on whether actions may have potential TI and warrant further coordination or consultation with the Tribes. In some cases, the coordination efforts described above may be adequate for your action.

Good faith efforts to reach out to and coordinate with Tribes should be undertaken in order to assist EPA in determining whether a consultation obligation under the EO exists and as part of discharging any duty to consult that is identified. The Agency has a Tribal affairs infrastructure already in place that might be helpful to you as you undertake these responsibilities. You may find it useful to seek the help of EPA staff with expertise in Tribal affairs as you evaluate your actions and coordinate with Tribal governments to determine if Tribal consultation obligations under the EO exist. For instance, the help and knowledge of the Indian program representatives in EPA's headquarters and regional offices may be of great value.

AIEO Indian Coordinators and Indian program representatives are often aware of Tribal organizations that have subject matter expertise on the EPA action in question, and may be able to connect you with those groups for further insight and feedback.<sup>4</sup> For example, AIEO has regularly scheduled conference calls with the Tribal Caucus of the Tribal Operations Committee, which is composed of Tribal leaders and Tribal environmental professionals. Most Regional Tribal Offices interact with a Regional Tribal Caucus as well. In another example at headquarters, Office of Prevention, Pesticides and Toxic Substances (OPPTS) works regularly with the Tribal Pesticides Program Council (TPPC) and the Tribal Assistance Project of Forum On State and Tribal Toxics Action (FOSTTA). The TPPC and FOSTTA are both composed of environmental directors with expertise on issues related to pesticides and toxic substances.

AIEO Indian Coordinators and Indian program representatives are also often aware of preferred Tribal consultation protocols and special Tribal considerations. For example, many members of Alaska Native Tribes spend the summer months engaged in subsistence activities. In this example, non-responses to EPA inquiries during that time should not automatically be construed as a lack of interest. Rather, EPA's coordination and, as appropriate, consultation efforts should be implemented, where possible, when active participation in the development of policies likely to be of interest to these Alaska Native Tribes and villages can be maximized.

### [1.2] B. Consultation

The Agency generally defines Tribal consultation with Tribal governments as a meaningful and timely government-to-government dialogue with elected or duly appointed Tribal officials or authorized intertribal organizations (*Acronyms, Abbreviations and Key Definitions*).

To the extent practicable and permitted by law, consultation consists of a meaningful and timely two-way exchange with Tribal officials in developing Agency actions, providing for open sharing of information, the full expression of Tribal and EPA views, a commitment to consider Tribal views in decision-making, and respect for Tribal self-government and sovereignty. Where one or more Tribes and the Agency

<sup>4</sup> Meetings with outside organizations may be subject to the Federal Advisory Committee Act (FACA). Consult your Office of General/Regional Counsel attorney to determine whether FACA applies to your meeting.



explicitly or inherently share intergovernmental responsibilities or administration, the Agency seeks mutually acceptable resolutions as part of consultation, when feasible. However, the Tribal officials being consulted do not have the power to stop Agency action by withholding consent.

A need for Tribal consultation under the EO for an agency action is determined as a result of EPA evaluation, as described in 2.2 (for regulations, 2.6 and 2.7), and coordination. In certain limited circumstances as described in section 3c and section 5 of the EO and elaborated upon in Parts 2.6 and 2.7 of this guidance, Tribal consultation is required of the Agency. Where Tribal consultation is recommended or required, this draft Guidance also provides assistance on resources and personnel who can assist you in the implementation of Tribal consultation.

### 1.3 What Is the Federal Government's Relationship With Tribal Governments and How May Tribal Interests Be Distinct from Those of State and Local Governments?

Indian Tribes are distinct entities, sometimes described as domestic dependent nations, exercising attributes of sovereignty over their members and territory. Among other things, the Federal government has a trust responsibility to federally-recognized Tribes arising from various documents, including the Constitution of the United States, treaties, statutes, executive orders, and court decisions, as well as the historical relations between the United States and the Tribes.

Although the precise legal contours of this trust responsibility are not fully defined, it can be described as including general and specific components providing for the Federal government to, among other things, consult with and consider the views and interests of Tribes when taking actions that may affect Tribes or their resources and to ensure that its actions are consistent with the protection of Tribal rights arising from treaties, statutes and Executive Orders. Consistent with this responsibility and with its legal and political relationship with Tribes, the Federal Government works with Tribes on a government-to-government basis to address issues concerning Tribal self-government, Tribal trust resources and Tribal treaty and other rights.

EO 13175 specifically recognizes the special relationship between the Federal government and Indian Tribes and requires that agencies be guided by certain fundamental principles in formulating or implementing policies

with Tribal implications. As outlined in section 2 of the EO, these fundamental principles recognize that the United States has a unique legal relationship with Indian Tribal governments as set forth in the Constitution of the United States, treaties, statutes, executive orders, and court decisions. They further acknowledge that the United States recognizes Indian Tribes as domestic dependent nations under its protection and that the Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian Tribes. In addition, the Executive Order recognizes that Indian Tribes exercise certain inherent sovereign powers over their members and territory, that they have the right to self-government, and that the United States supports Tribal sovereignty and self-determination and works with Indian Tribes on a government-to-government basis.

In addition, understanding the Federal/Tribal relationship and the unique and varied Tribal interests in lands and other natural resources and in respecting their sovereign prerogatives will also help in identifying policies that have Tribal implications in the first instance and developing a constructive foundation for consultation between the Agency and the Tribes.

It is important to note that Tribes are distinct from state and local governments and that Agency actions may have unique political, legal and resource implications for Tribes that are not encountered with other governments. For instance, Tribes and Tribal members may retain various hunting, fishing and gathering rights in areas, or may attach religious and cultural significance to resources, located outside and at a distance from the areas of Indian country they occupy. In addition, economic conditions in Tribal communities may differ from conditions outside of Indian country and thus may uniquely affect the assessment of potential impacts on Tribes. Further, unlike state areas, 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 and Tribes and non-Tribal owners of reservation land. It is important to consider these relationships and the integrity of reservation boundaries in assessing impacts of Agency actions on Tribes. For further information on the relationship between the Federal government and Tribal governments and on unique Tribal interests, contact your

AIEO liaison or Indian Program representative and/or refer to AIEO's *Working Effectively with Tribal Governments Guidance*.

## Chapter 2: Regulations (or "Rules")

### 2.1 How Will I Know If My Rule Is Subject to Executive Order 13175?

Executive Order 13175 applies to rules with *Tribal implications*. As noted in the Chapter 1, this means a rule that has *substantial direct effects on:*

- (1) One or more Indian Tribes;
- (2) The relationship between the Federal Government and the Tribes; or
- (3) The distribution of power and responsibilities between the Federal Government and Indian Tribes.

### 2.2 What Resources and Tools Can I Access To Help Determine If My Rule Has Tribal Implications?

There are several tools and resources you can use to help determine whether your rule has Tribal implications. Some of them, used individually, will not provide a clear determination, and therefore the use of several at the same time is recommended.

#### Collaboration with EPA Employees

Because the guidelines are not clear, perhaps the most important resource to access are relevant EPA employees, including:

- RSC representative in your program office—<http://intranet.epa.gov/adplibrary/rsc/index.htm>.
- Tribal Liaison in your Program office—<http://www.epa.gov/indian/miss.htm>.
- Regional Indian Coordinator (RIC)—<http://www.epa.gov/indian/region.htm>.
- RMD representative—<http://intranet.epa.gov/adplibrary/contacts.htm#DO>.
- AIEO representative—<http://www.epa.gov/indian/>.
- Office of General Counsel (OGC) representative—<http://intranet.epa.gov/ogc/issues.htm#assign>.

#### Sections 2 and 3 of the Executive Order

Sections 2 and 3 of the EO describe fundamental principles and policy making criteria respectively that provide the initial context that is unique to Tribes to assist in a TI determination. For example, section 2(b) of the EO states "The United States continues to work with Indian Tribes on a government-to-government basis to address issues concerning Indian Tribal self-government, Tribal trust resources, and *Indian Tribal treaty and other rights*." "Indian tribal treaty and other rights" may include Tribal interests on land and waters outside formal reservation boundaries. A rulemaking



on such lands may have Tribal implications.

#### Existing Analytical Tools

EPA also has existing analytical tools that it applies to other entities such as states, local governments and small entities, that may be of some assistance when formulating your Tribal implications determination. The analyses used under the Federalism Executive Order and Unfunded Mandates Reform Act (UMRA) (See section 2.6 of the draft Guidance) can assist you in determining whether your rule has an economic impact upon a Tribe that is substantial and direct.

#### Preemption of Tribal Law

With the help of Agency counsel, you might determine that your rule may preempt existing Tribal law, which may affect your Tribal implications determination.

#### Other Tools

Rules that would apply directly to Indian country may be more likely to have Tribal implications, such as when a regulation would be expected to impose substantial direct compliance costs on one or more Tribal governments. These rules do not have to be national in scope, but are intended to be applied to a specific geographic area which includes Tribes. A Tribal implications determination can be made even if it does not impose substantial direct compliance costs or preempt Tribal law. For example, you could determine that your rule might directly impact Tribal interests (such as land rights and access to natural resources) that are specifically recognized by treaty, statute or federal court rulings and/or that fall within the Federal government's trust responsibility. Other examples of the kinds of rules that you should more closely scrutinize for possible Tribal implications include those that might:

- Establish Federal standards that must be met and/or implemented by Tribal governments.
- Establish or suggest safety levels or levels of protection of, and/or access to, waterways and/or lands and/or other resources of significance to Tribes or held in trust by the Federal government for Tribes.
- Authorize or delegate state, local, and/or Tribal authority over Federal environmental programs or projects in areas where Tribes are located.
- Affect jurisdictional arrangements between the Federal, state and Tribal governments.

- Establish rules in geographic areas that include Indian Country or lands in which Tribes have an interest.

#### 2.3 What Do I Do If My Rule Is Subject to the Executive Order?

The basic process that EPA follows to ensure that Agency actions are developed in compliance with the Executive Order consists of coordination, consultation, and certification to the extent that the EO applies. Early evaluation of rules that may have Tribal implications is recommended. In broad terms, the compliance assurance process for EO 13175 includes the following steps during each stage:

##### [2.3] A. Coordination

- RMD disseminates early information about new EPA actions to Tribal Officials via the *Unified Agenda of Regulatory and Deregulatory Actions* ("Regulatory Agenda" or "Reg Agenda").
- Tribal Officials have the opportunity to respond to the Regulatory Agenda and provide their views regarding whether actions may potentially have Tribal implications.
- The rulewriting office works with AIEO/RICs and the OGC/Office of Regional Counsel (ORC) attorney assigned to the rule to consider Tribal views and to determine whether an action has Tribal implications.
- For Tier 3 Region-specific rulemakings, offices will have the opportunity to participate through the generic side-agreement.
- Coordination should at minimum include notification to all affected Tribal governments with meaningful and timely opportunities for elected Tribal Officials or duly appointed Tribal representatives to consult with EPA.
- If you determine that your rule will have Tribal implications and requires consultation, you should further coordinate with the Tribes to determine which Tribes are interested in participating in consultation (see "Engaging Tribal Officials" for details).

##### [2.3] B. Consultation

- For a complete Agency definition of "Tribal consultation," see section titled "What are Tribal coordination and consultation: Consultation."
- For actions that have Tribal implications and impose substantial direct compliance costs, preempt Tribal law and/or establish Federal standards, the rulewriter would adhere to the consultation requirements of the Order.
- For actions subject to the consultation provisions of the Order, the program office should work with AIEO

(as well as other EPA Indian Program and regional staff, as needed) to initiate and implement a consultation plan in a manner appropriate for that action.

##### [2.3] C. Certification

- For actions with Tribal implications, if the action is subject to Office of Management and Budget (OMB) review under EO 12866, and after the rulewriting office has completed any needed Tribal consultation activities, that office coordinates with AIEO to obtain certification that the Agency has complied with the requirements of EO 13175 when transmitting the draft proposal or final rule to OMB.

What you should do depends on the type of action you have. In general, EO 13175 puts a strong emphasis on consulting with Tribal officials, which are defined as *elected* and/or *duly appointed* officials of Indian Tribal governments (who may be different from your professional counterparts in Tribal government) or their authorized inter-tribal organizations. (*Acronyms, Abbreviations and Key Definitions*) Of course, you should continue to work with your professional Tribal government counterparts, but consulting with them may not satisfy the consultation requirements of EO 13175.

#### 2.4 What Do I Do If My Rule Does Not Have Tribal Implications?

If you have determined, using the guidelines in Chapter 2.2, that your rule does not have Tribal implications, then there are no special requirements under the EO that apply to your rule. You should discuss briefly in the preamble to your rule why the Order did not apply.

Additionally, if you determine that there are no Tribal implications, but Tribal consultation occurred nonetheless, you should discuss briefly in the preamble to your rule any consultation that occurred, the nature of the Tribal government's concerns, and how you addressed those concerns or why EPA decided not to implement suggested changes.

#### 2.5 What Do I Do If My Rule has Tribal Implications?

If you determine that your rule has Tribal implications under any of the guidelines that are summarized above in Chapter 2.2, then, in addition to being guided by the fundamental principles set forth in section 2 of the EO, the general policymaking criteria of section 3 of the Order apply to your rule to the extent permitted by law. The policymaking criteria for all rules with Tribal implications include:

- Respect Indian Tribal self-government and sovereignty, honor Tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal government and Indian Tribal governments;

- With respect to Federal statutes and regulations administered by Indian Tribal governments, grant the Tribes the maximum administrative discretion possible;

- Encourage Indian Tribes to develop their own policies to achieve program objectives;

- Where possible, defer to Indian Tribes to establish standards; and

- In determining whether to establish Federal standards, consult with Tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian Tribes.

In addition, the EO may impose certain requirements to consult with Tribal officials regarding your rule. Those requirements are discussed below in Chapter 2.6 and 2.7.

### 2.6 What Are the Types of Rules With Tribal Implications for Which I Must Consult With Tribal Officials?

The guidelines for each type of rule with Tribal implications that requires consultation are outlined below in paragraphs A, B, and C.

EO 13175 identifies requirements to consult to the extent practicable and permitted by law, for rules:

A. That have TI and impose substantial direct compliance costs on Indian Tribal governments, unless they are required by statute or Federal funds are provided to cover the direct costs of compliance incurred by the Indian Tribal government or the Tribe (EO section 5(b)); and for rules

B. That have TI and preempt Tribal law (EO section 5(c)); and for rules

C. That have TI and that establish Federal standards. In determining whether to establish Federal standards, consultation with Tribal officials shall include consultations as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian Tribes (EO section 3(c)(3)).

Even if your rule has TI but does not impose substantial direct compliance costs, preempt Tribal law, or establish Federal standards, it still may be appropriate to provide an opportunity for meaningful and timely input by Tribal officials under separate Agency policy.

### [2.6] A. Rules With Tribal Implications That Impose Substantial Direct Compliance Costs

The regulatory analysis under UMRA, sections 202 and 203 may help you determine whether your EPA rule places substantial direct compliance costs upon Tribal governments. An explanation of the UMRA analysis follows below.

However, these UMRA analyses are not determinative due to the economic hardships that some Tribes endure. The Census Bureau reported in 1999 that “the percentage of American Indians and Alaska Natives living below the poverty level (25.7%) was over two times greater than for all other people in the United States (12.4%).”<sup>5</sup> Many Tribes do not have a reliable stream of revenue, and no tax base. Additionally, many Tribes depend heavily upon federal funding to administer Tribal environmental programs. Therefore, seemingly innocuous direct compliance costs may be substantial for some Tribes.

[2.6–A] 1. *Significant Federal intergovernmental mandate under UMRA Section 202.* If your rule contains a significant federal intergovernmental mandate within the meaning of section 202 of UMRA—*i.e.*, it is likely to result in the expenditure by State, local, and Tribal (SLT) governments<sup>6</sup> in the aggregate of \$100 million or more in any one year—then EPA should conclude the rule also has TI and imposes substantial direct compliance costs thus triggering the requirements of section 5(b) of the EO, unless:

- The rule is required by statute,
- Federal funds are provided to cover the Tribal Governments’ or Tribe’s compliance costs of the rule, or
- You can demonstrate that the costs to Tribes are minimal.

We interpret the phrase, “required by statute,” to mean that the action is specifically and explicitly compelled by statute without the use of any discretion by EPA. While our rules are authorized

<sup>5</sup> See <http://www.census.gov/prod/cen2000/phc-5-pt1.pdf> *Characteristics of American Indian and Alaska Native by Tribe and Language: 2000*, Table 13: Poverty Status in 1999 for Selected American Indian and Alaska Native Tribes.

<sup>6</sup> The UMRA section 202 Federal intergovernmental mandate trigger is based on the aggregate expenditures by State, Tribal and local governments. Although the definition of TI does not include effects on State and local (S/L) governments, we nonetheless use the UMRA section 202 trigger with minor modification to make the test easy to apply. If you believe your rule primarily affects S/L governments and only has minimal impacts on Tribes, consult with your Regulatory Steering Committee Representative and the attorney assigned to your rule to determine whether it is appropriate to conclude your rule has TI.

by statute, most are not specifically and explicitly compelled by statute without the exercise of our discretion.

[2.6–A] 2. *Impact on Small Governments under UMRA Section 203.* While UMRA defines “small government” to include Tribal governments, we recognize that economic data for small governments is available only for local governments and generally does not include Tribal governments. As described above, Tribal revenues may be less than that of other small governments. With this recognition in mind, if your rule will significantly or uniquely impact small governments (e.g., the cost of the rule is likely to equal or exceed 1% of their revenues), then as a policy matter, EPA should conclude the rule also has TI and imposes substantial direct compliance costs thus triggering the requirements of section 5(b) of the EO, unless:

- The rule is expressly required by statute without the use of any discretion by EPA,
- Federal funds are provided to cover the Tribal governments’ or Tribes’ compliance costs for the rule, or
- You can demonstrate that no Tribes are directly regulated or that the costs are minimal.

*Tip for combining consultation under UMRA and EO 13175:* If your rule contains a significant Federal intergovernmental mandate under UMRA section 202, then section 204 requires you to consult with elected officers of State, local, and Tribal governments or their designated employees with authority to act on their behalf. Likewise, if your rule has a significant or unique impact on small governments under UMRA section 203, you must allow officials of affected small governments (including Tribes) to provide meaningful and timely input into the development of your rule. Thus, consultation under UMRA does not have to be with elected officials. However, where consultation is called for under EO 13175, the consultation must be with “Tribal Officials,” which is defined as elected or duly appointed officials of Indian Tribal governments or authorized interTribal organizations. Thus, unless consultation under UMRA is conducted with Tribal representative that also qualify as “Tribal Officials” under the EO, the consultation under UMRA will not satisfy consultation requirements under EO 13175.

### [2.6] B. Rules With Tribal Implications That Preempt Tribal Law

Generally, preemption is the doctrine that holds that certain matters are of such a national, as opposed to local,

character that Federal laws take precedence over non-Federal laws. When preemption occurs, a Tribal government may not pass a law that is inconsistent with the Federal law. There are generally three types of preemption:

- Express preemption: Congress' intent to preempt non-Federal law is stated expressly in the Federal statute.
- Field preemption: Occurs where Congress' creation of a pervasive system of Federal regulation makes reasonable the inference that Congress left no room for other governments to supplement it, or where an Act of Congress touches a field in which the Federal interest is so dominant that the Federal system is assumed to preclude enforcement of non-Federal laws on the same subject.
- Conflict preemption: Occurs when Federal law is in direct conflict with non-Federal law or where non-Federal law stands as an obstacle to the achievement of Federal objectives.

In general, minor amendments to an existing preemptive program probably will not trigger the consultation and other requirements of section 5(c) of the EO which relates to rules with TI that preempt Tribal law. [Note: Such rules could still have TI for other reasons even if they don't preempt Tribal law or trigger 5(c).] On the other hand, a significant new preemptive program may create TI and preempt Tribal law for purposes of section 5(c).

Application of the principles of preemption in the context of Federal and Tribal laws may raise significant and complex issues. Consult with the AIEO, OGC/ORC attorney assigned to your rule, your RIC (if applicable) and your RSC/RRC Representative to determine whether your rule has TI and preempts Tribal law.

#### [2.6] C. Federal Standards

Section 3(c) of EO 13175 states:

(c) When undertaking to formulate and implement policies that have Tribal implications, agencies shall:

- (1) Encourage Indian Tribes to develop their own policies to achieve program objectives;
- (2) Where possible, defer to Indian Tribes to establish standards; and
- (3) In determining whether to establish Federal standards consult with Tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian Tribes.

#### 2.7 What Should I Do if My Rule Has Tribal Implications and I Am Required To Consult?

- There are three possible scenarios under which you would decide to consult with Tribal officials:
  - You have determined there are no Tribal implications but EPA should consult for some reason,
  - You have determined there are Tribal implications and that consultation is not required, but EPA should consult for some reason, and
  - You have determined there are Tribal implications and that consultation is required.

#### [2.7] A. Consultation Plan Development

If you decide that consultation is either recommended or required under any of the above three possible scenarios, you should develop a Tribal Consultation Plan for your action. The consultation plan should outline an appropriate mix and sequence of Tribal consultation activities that will occur in a timely manner as you develop your action, and be tailored to the estimated impacts on Tribal Governments, complexity and controversy of issues involved, and other specific circumstances surrounding the rule. A description of issues to consider as you develop your consultation plan is provided in the document *Recommendations for Developing Tribal Consultation Plans*.

Your consultation plan should be developed to synchronize with steps outlined in EPA's "Action Development Process"<sup>7</sup>, which identifies the steps that you will follow as you develop your action. As you create and implement your Consultation Plan, you should be guided and informed by the Fundamental Principles set forth in section 2 of the EO and Policymaking Criteria in section 3 of the EO. For example, as stated in section 2,

The United States has a unique legal relationship with Indian Tribal governments \* \* \*. Since the formation of the Union, the United States has recognized Indian Tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian Tribes. \* \* \* The United States continues to work with Indian Tribes on a government-to-government basis to address issues concerning Indian Tribal self-government, Tribal trust resources, and Indian Tribal treaty and other rights.

EO § 3(a) in part states:

Agencies shall respect Indian Tribal self-government and sovereignty, honor Tribal

<sup>7</sup>The Action Development Guidance is available at (<http://intranet.epa.gov/adplibrary>).

treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian Tribal governments.

As you create and implement your Consultation Plan, it is recommended that you obtain input and views from the following resources:

- Tribal Liaison in your Program office (<http://www.epa.gov/indian/miss.htm>);
- RSC representative and Regional Regulatory Contact (RRC) (<http://intranet.epa.gov/adplibrary/rsc/index.htm>);
- AIEO representative (<http://www.epa.gov/indian/>); and
- RIC (<http://www.epa.gov/indian/region.htm>).

[2.7] B. If I Am Required To Consult With Tribal Officials Under Section 5 of the Executive Order Because My Rule Has Tribal Implications and Imposes Substantial Direct Compliance Costs and/or Preempts Tribal Law, Are There Certain Requirements in Section 5 of the Executive Order With Which I Must Comply?

Yes. In particular, section 5 of the EO directs you, to the extent practicable and permitted by law, to do the following:

1. Consult with Tribal officials;
2. Your consultation must be "meaningful and timely." Generally, we interpret "meaningful and timely" as beginning consultation with appropriate Tribal representatives as early as practicable in the development of the proposed action. It also means that you should strive to provide Tribal officials with information, to the extent that it is available, that will enable them to assess (and subsequently describe) potential Tribal impacts and views.

This consultation and information exchange should continue as you develop the proposed rule to give appropriate Tribal representatives an opportunity to consider and comment on our proposed approach for the issues that are of concern to them. If EPA substantially changes its selected approach on these issues after the proposed rule's comment period, you should let those you consulted know about the change and why we made it, as appropriate.

3. In a separately identified portion of the preamble to the regulation, provide a Tribal summary impact statement, which consists of:

- A description of the extent of the Agency's prior consultation with Tribal officials,
- A summary of the nature of their concerns and the Agency's position

supporting the need to issue the regulation, and

- A statement of the extent to which the concerns of Tribal officials have been met.<sup>8</sup>

4. If your draft final rule has TI and is subject to OMB review under EO 12866, section 7(a) of EO 13175 states that you must include, in the package you send to OMB, an “EO 13175 Compliance Certification” signed by EPA’s Designated EO 13175 Compliance Official, the Director of AIEO, certifying that the Agency has met the requirements of the Order in a meaningful and timely manner in promulgating the rule. The EO 13175 Compliance Certification should be prepared after the rulewriting office has completed any needed Tribal consultation activities, and included in the draft proposal or final rule package that you will transmit to OMB. See section 2.11 for more information on how the certification form will be processed.

5. In addition, under section 5 of the EO you must make available to OMB any written communications submitted to the Agency by Tribal officials.

**2.8 What Steps Do I Follow for My Rule?**

In the broad sense, EPA’s “Action Development Process”<sup>9</sup> will serve as the vehicle for coordinating with Tribes to identify Tribal implications and complying with the Order.

**2.9 What Help and Participation Can I Expect as I Develop My Rule?**

The AIEO oversees and coordinates the Agency-wide effort to strengthen public health and environmental protection in Indian country and oversees development and implementation of EPA’s Indian Policy, including implementation of the EO, across the Agency. EPA’s Indian Program staff can help you with your efforts to comply with Executive Order 13175. Contact information for AIEO, Headquarters and Regional staff, is available at <http://www.epa.gov/indian/miss.htm>.

EPA’s RSC coordinates the Agency’s rulemaking process and includes representatives for each Assistant Administrator (AA) and each Regional Administrator (RA). As part of the Office of Water (OW), the interests of AIEO are represented on EPA’s RSC by the OW committee member. Like other members of the RSC, the OW representative reviews tiering forms, Regulatory Agenda entries, and other reports to identify rules under development that warrant or necessitate the AA-ship’s participation.

For Tier 1 and Tier 2 rules, OW, like each of the other AA-ships and Regional offices, has an opportunity to confirm their participation in a formal role as a workgroup participant as well as the option to concur or non-concur that the Agency should issue a regulation as drafted.

The preliminary TI determination should preferably be made before the action is tiered. If TI is determined and consultation is determined to be necessary, the Tiering form should reflect that determination and note that OW/AIEO is requested to be a workgroup member or have a side agreement. As described in the above paragraph, AIEO or OW on AIEO’s behalf would then reply in the affirmative to the tiering request to confirm that they will participate in a formal role as a workgroup participant or that they will request a side agreement.

You are encouraged to contact your RSC representative or RRC about any help they can give you as you plan or conduct your consultation. If you determine that your rule has TI after it has been tiered, alert your AA-ship’s RSC representative as soon as possible in order to arrange for any appropriate formal workgroup participation by OW/AIEO.

It is important that you provide the AIEO workgroup member with timely information, such as drafts of requested consultation plans or Tribal summary impact statements, and that you carefully consider and respond, as appropriate, to their comments at the earliest stages of rulemaking. The following chart provides a summary of the stages in the rulemaking process where you may interact with OW/AIEO:

| Step  | OW/AIEO participation on rules with tribal implications   |
|---|---|
| Tiering .....   | You should consult with AIEO before making your initial TI determination. AIEO participates on all rules that have TI. If you determine that your rule has TI, AIEO should participate on your workgroup either as an active member or through a “side agreement” between the lead office and OW to forward your consultation plan to AIEO. OW/AIEO may also have side agreements on Tier 1 and Tier 2 rules. If you cannot make a TI determination at the tiering stage (and for many rules, you may not be able to), alert your AA-ship’s RSC representative to arrange for any appropriate formal workgroup participation by OW/AIEO as soon you as you determine that your rule has TI. |
| Analytic Blueprint/Consultation Plan Final Agency Review (Tier 1 and 2 rules only). | You should work with AIEO in developing your analytic blueprint/consultation plan. If OW/AIEO participates on your Tier 1 or Tier 2 workgroup, they should participate in Final Agency Review of your rule. Like all participating offices, OW (in representation of AIEO and its other program offices) is asked to concur, concur with comment, or non-concur on the draft rule and preamble. You should alert the OW RSC representative if your rule has TI. If they non-concur, you should include their comments in the Action Memo sent by your AA to the Administrator, or in the memo to your AA requesting his or her signature on your rule.                                      |
| OMB Review under EO 12866 .....   | Under EO 13175, EPA’s Designated EO 13175 Compliance Official (the Director of AIEO) must certify each final rule with TI that will be reviewed by OMB under EO 12866. RMD will coordinate certification of your rule by the Designated EO 13175 Compliance Official.   |

<sup>8</sup> As a matter of policy, we recommend that you include the Tribal summary impact statement in the preamble to the proposal, as it helps alert Tribes to their potential interests, as well as in the final rule.

The EO calls for consultation early in the process of developing the proposed regulation so consultation should predate both the proposed and final rules.

<sup>9</sup> The Action Development Guidance can be found at <http://intranet.epa.gov/adplibrary>.

## 2.10 How Do I Begin the "Tribal Consultation" Process?

### A. Coordination and Outreach

Coordination and outreach provide the key building blocks that lead to full-blown consultation. Coordination and outreach allow for early information exchange, issue education, problem identification, and the eventual establishment of consultation protocols. Early coordination with Tribes and Tribal interests can help to inform the final determination that the rule does or does not have TI.

[2.10-A] 1. *Outreach through regulatory reports.* The Agency has a number of routine means to alert the public, including Tribal officials, that EPA is developing regulations. For example, EPA publishes the Regulatory Agenda twice each year. The Regulatory Agenda describes EPA's planned rulemakings, identifies anticipated schedules for proposed and final rules, and indicates which rules are likely to have impacts on State, local, and Tribal Governments.

OPEI intends to send a copy of the Regulatory Agenda to each federally recognized Tribe upon publication bi-annually. This information is made available via the Internet (<http://www.epa.gov/regagenda>).

When the Regulatory Agenda is disseminated to the Tribes, EPA should also specifically request that the Tribal governments review the regulatory information and respond to the EPA program offices with an indication of actions that may have potential Tribal implications and information to help the Agency understand such implications. The Agency should also strive to make this information available electronically through AIEO's Internet site (<http://www.epa.gov/indian>) and the Federal government's interagency Web site, Codetalk (<http://www.hud.gov/offices/pih/ih/codetalk/index.cfm>). This information exchange helps ensure that Tribal Officials are afforded early and meaningful opportunities to provide input on regulations that may require consultation.

Your determination of whether an action has TI should be made with the help of AIEO and the OGC/ORC attorney assigned to your rule. You should carefully assess the feedback of Tribal governments before making your TI determination. The sections above explain how you should generally proceed within the rulemaking process after you make the determination that your rule does or does not have TI. You should still continue to work with your RSC representative to provide periodic

updated regulatory information to Tribes. As stated earlier, a lack of Tribal responses to EPA inquiries during a time period should not automatically be construed as lack of interest, nor should you immediately infer that the lack of feedback regarding the potential impacts on Tribes means that the rule will not have TI. However, if after a meaningful and timely effort at consultation, there is no response from any Tribal Officials, these efforts will be sufficient to satisfy the EO with respect to your action's promulgation.

[2.10-A] 2. *Outreach through forums for hearing Tribal concerns and perspectives.* We also strongly encourage you to take advantage of existing EPA resources, contacts within your AA-ship's Lead Region, and the Agency's existing relationships with Tribal entities, be they EPA Indian program staff, advisory committees, and/or Tribal organizations. Your program office's Indian Coordinator/RIC and AIEO staff have developed relationships with Tribes and are well versed in areas of particular concern to Tribes. Your work with organizations representing Tribal interests may not satisfy the consultation requirements of the EO because representatives of these bodies are not necessarily authorized to speak officially on behalf of their respective Tribes. However, these organizations may provide you with valuable information and perspectives, as well as help you identify whether your rule has the potential to have more than a minimal impact on Tribes. They may also be able to recommend with whom you should/may consult.

In addition to the attorney assigned to your rule and your RSC/RRC Representative, your program office's Tribal coordinator/RIC, and EPA's Indian Program staff are the most appropriate internal contacts to help evaluate Agency actions for Tribal implications, identify the appropriate Tribal representatives and organizations, and facilitate contacts with those Tribal representatives and organizations. For a list of those contacts, see 2.10-C.

You should also consider soliciting input on the potential impact of your rule from EPA's TOC and RTOC, respectively. These committees are composed of EPA's senior leadership, Tribal leaders and/or their Tribal environmental program managers.

Engaging the TOC and RTOCs to discuss your rule, inviting input and comment from Tribes, and providing further outreach, if needed, may help bring about important insights and perspectives. Again, while the TOC and RTOCs are important and effective

vehicles for enhancing communications between EPA and the Tribes, your work with them may not a substitute for Agency consultation with Tribal Officials under the EO. However, the TOCs or RTOCs may be able to identify Tribal Officials with whom you should consult.

You may also consider soliciting input on the potential impact of your rule by publishing articles in EPA or other newsletters that reach Indian country, through electronic forums such as EPA Web sites, through e-mails directly to Tribal governments/environmental staff, or through other forums.

### [2.10] B. Engaging Tribal Officials

If you determine that your rule will have TI and requires consultation, you should further coordinate with the Tribes to determine which Tribes are interested in participating in consultation. You should prepare a letter from your senior program manager or AA to Tribal leaders that:

- Extends an opportunity to consult on the rule, and
- Requests that the Tribal leader identify the manner in which he or she wishes to be consulted, if at all, and/or identify a Tribal official, employee or inter-Tribal organization that is duly authorized to consult with the Agency on the Tribal leader's behalf. (Note: Meetings with inter-Tribal organizations may be subject to FACA.)

As part of that mailing, we recommend that you include your appropriate contact information and options for Tribes to recommend and return in order to simplify the response process. Once the consultation options have been identified, the Program office will develop a consultation plan in concert with AIEO.

### [2.10] C. Consultation With Tribal Officials

As discussed in sections 2.6 and 2.7, sections 3(c)(3) and 5 of the Order create requirements for EPA to consult with Tribal officials under certain circumstances on rules with Tribal implications and substantial direct compliance costs or that pre-empt Tribal law or that establish Federal standards. Such consultation should involve AIEO, rulewriters, and high-level program office representatives. Senior program managers should be involved because the Agency may be consulting with high-level officials in Tribal government. Given the government-to-government relationship between the Federal government and the Tribes, your AA/RA would optimally be involved in the consultation activity, or

at a minimum, delegate that responsibility to a senior program manager.

The key to successful consultation is early notice and early initiation of contact with elected Tribal officials to promote adequate input during the regulatory development process. Important to the process is a willingness to go to the Tribes openly without preconceived outcomes, and to listen to the concerns and issues the Tribes bring to the process. It is in this climate of mutual respect and sharing of information that the concept of consultation can be realized.

It is also important to identify opportunities to engage the Tribes in outreach activities, such as scheduling special or separate sessions for Tribes at public hearings, attending National Tribal Forums, and other such meetings as circumstances warrant. This helps to ensure that Tribes continue to be informed of any actions with potential Tribal implications. Each rule may call for a different approach to consultation, and flexibility in this process will be a hallmark of successful collaboration.

[2.10–C] 1. *How much consultation is appropriate?* The amount and type of outreach and consultation for a rule should be commensurate with its estimated impacts on Tribal governments, its complexity, and controversy over the issues involved. This approach focuses the most extensive outreach and intensive consultation efforts on those regulations of greatest interest to, and potential effect on, Tribal governments. Recognizing that Tribal officials are often in a better position than EPA to identify the potential political and resource implications of regulations EPA is considering, you are strongly encouraged to coordinate with potentially affected Tribal leaders before deciding how much consultation would be appropriate and before preparing a final consultation plan. Consultation is especially important at key points in the process, such as options selection. AIEO can help you to determine appropriate levels of consultation.

Tribal consultation for rules with TI that are expected to preempt Tribal law and/or impose substantial direct compliance costs should begin early in the process of developing the proposed regulation. Proposed regulations that have benefitted from Tribal involvement in their development inherently have greater support from the regulated entities, and the possibility of poor reception to a proposed rule from those affected is diminished.

[2.10–C] 2. *How do I communicate with Tribal officials?* Because of the

large number of Tribal governments that you may potentially consult, there is no one-size-fits-all approach to Tribal consultation. You should tailor the consultation process, using the approach described above in C.1, to the regulation that you are developing. However, it is very important that a senior manager sign correspondence between EPA and the Tribes, and be present at conference calls and in-person meetings, especially during initial contact. Authority may be delegated—by both EPA and the Tribes—as appropriate, keeping in mind the government-to-government relationship and the importance of choosing appropriate personnel for these sensitive dialogues.

Once the consultation plan has been developed, confirm the time-line and provide the Tribes with enough information so that meaningful dialogue is promoted. Whether through teleconferences or face-to-face meetings, it is important to continue the dialogue, obtain input from the Tribes, and provide feedback.

You should carefully consider what information to prepare and provide to Tribal government representatives. Information can serve two purposes:

(a) To promote understanding of what EPA is planning and why, and

(b) To foster participation of these officials in the rulemaking process.

To consult with Tribal officials, you should design information specifically for their needs and interests. Materials designed for Tribal government officials should be in plain language and, to the extent such information is available:

- Describe clearly the problem the rule is intended to address.
- Explain the basis for determining there is a problem.
- Point out whether the problem is regional or national in scope.
- Explain how the rule will improve on present conditions.
- Identify who will benefit from the rule.
- Identify what facilities or operations will be subject to the requirements.
- Explain whether and how the benefits of the rule can be measured.
- Identify who will pay for the rule.
- Provide information on potential costs and benefits.
- Explain any flexibility in the rule that would allow for adjustments to Tribal conditions or circumstances.

Some of this information may not be available until later in developing a proposed rule. You may, however, begin your consultations without full information and provide further information as it becomes available.

[2.10–C] 3. *What types of consultation should I consider?* You should explore a variety of alternative approaches to consulting with Tribal government officials when developing a regulation—including one-on-one discussions, public meetings, Tribal summits, workshops, policy dialogues in formal advisory committees, written correspondence and regulatory negotiations.<sup>10</sup> You can also work with the TOC and RTOC to identify possible avenues for consulting with Tribal officials and via consortia, as appropriate or agreed upon. Remember, Tribes may not want or need to consult face-to-face but they should be offered the opportunity to consult if a proposed rule has TI and preempts Tribal law or imposes substantial direct compliance costs. Regardless, you should involve AIEO and the OGC/ORC attorney assigned to your rule when discussing these approaches, for example, in your consultation plan. You will need to be aware of any legal requirements that may apply to your approach (including, for instance, requirements of the Paperwork Reduction Act) and ensure your outreach and consultation activities are consistent with the law.

[2.10–C] 4. *Does the Federal Advisory Committee Act (FACA) apply to consultations with Tribal government representatives?* Under UMRA's FACA exemption, FACA does not apply to meetings that are “exclusively between Federal officials and elected officers of State, local, and Tribal governments (or their designated employees with authority to act on their behalf) acting in their official capacities, [provided that the] meetings are solely for the purposes of exchanging views, information, or advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration.” [UMRA 204(b), 2 U.S.C. 1534(b)]. OMB construes the UMRA exemption broadly<sup>11</sup> to facilitate intergovernmental communications.

Caution!! UMRA's exemption to FACA might not apply to your meeting!

While OMB construes the exemption broadly, it applies only to meetings convened solely to discuss matters

<sup>10</sup> Meetings with outside organizations may be subject to the Federal Advisory Committee Act (FACA). Consult your Office of General/Regional Counsel attorney to determine whether FACA applies to your meeting.

<sup>11</sup> Guidelines and Instructions for Implementing section 204, “State, Local, and Tribal Government Input,” of Title II of Public Law 104–4, Alice M. Rivlin, Director, Office of Management and Budget, September 21, 1995, pages 6–7.

relating to intergovernmental responsibilities or administration. Meetings relating to situations in which the Tribe is a regulated party likely are not exempt from FACA. Even if your meeting is not covered by the UMRA exemption, other statutes may still govern whether and how you are to consult with Tribal governments.<sup>12</sup>

[2.10–C] 5. *Should I keep records of Tribal consultations?* In general, yes. It is generally recommended to keep records of consultation activities that you undertake related to the Order, and place them in the docket of the rulemaking. This helps to readily document compliance in the event of questions, either from EPA's Designated EO 13175 Compliance Official or from OMB. However, it is also important to promote a full and frank exchange of views during government-to-government consultation with Tribes, which may include discussions relating to issues of unique sensitivity to Tribes such as Tribal cultural practices and uses of environmental resources, locations of Tribal cultural resources, Tribal relationships with surrounding States, jurisdictional issues, etc. In preparing any records memorializing consultations with Tribes, you should consider these potential sensitivities in determining the level of detail to include. You should also consider and, as appropriate, consult with the Tribes regarding the fact that memorializations of consultations (or other documents) exchanged between EPA and Tribes may not necessarily be privileged or otherwise protected from disclosure under the Freedom of Information Act. You should consult with your OGC/ORC contact in evaluating these issues.

### 2.11 *Process for Executive Order 13175 Certification*

If a draft final regulation has substantial, direct effects on Tribal governments (i.e., Tribal implications), a designated agency official must certify that EPA has complied with the relevant requirements of EO 13175, pursuant to section 7(a) of the Order.

If the draft final regulation will be reviewed by OMB pursuant to Executive Order (EO) 12866 and it has Tribal

implications, complete the form and submit it to OPEI's RMD with your EO 12866 submission package. OPEI will transmit this form to OMB when submitting the final rule to OMB pursuant to EO 12866.

For Tier 1 and 2 rules, OPEI's RMD will generate the EO 13175 Compliance Certification in preparation for the Final Agency Review meeting and coordinate signature by the Designated EO 13175 Compliance Official.

For Tier 3 rules, the RSC representative or RRC will send the rule and an unsigned certification form to RMD when the rule is ready for certification and submission to OMB. RMD will coordinate signature by the Designated EO 13175 Compliance Official.

Program offices place the EO 13175 Compliance Certification form in the docket of the rulemaking.

### 2.12 *How Does EPA Track and Record Actions That May Be Affected by the Executive Order?*

OPEI gathers a listing of all rules that will have any effect on Tribal governments in order to prepare EPA's semi-annual Regulatory Agenda.

The status of Tribal consultation plans (e.g., under development, consulting with AIEO, outreach initiatives) is monitored throughout the action development process.

For draft final regulations that are reviewed by OMB pursuant to Executive Order (EO) 12866 and have Tribal implications, the EO 13175 Compliance Certification forms will be placed in the docket for the particular rulemaking.

## Chapter 3—Legislative Comments or Proposed Legislation

### 3.1 *How Does Executive Order 13175 Apply to Legislative Comments or Proposed Legislation Submitted by EPA?*

The Order defines “policies that have Tribal implications” as including legislative comments or proposed legislation 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.

Accordingly, if EPA is submitting official Agency legislative comments or proposed legislation to Congress or OMB, and the comments or proposed legislation have TI, the principles of section 2 and the general policymaking criteria provided in section 3 of the Order would apply (see Chapter 2.5).

In addition, section 4 of EO 13175 contains “Special Requirements for

Legislative Proposals.” The Order states that agencies shall not submit to the Congress legislation that would be inconsistent with the section 3 policymaking criteria.

EPA interprets the EO as applying to proposed legislation or legislative comments that are official Agency positions with Administration clearance. At EPA, the Office of Congressional and Intergovernmental Relations (OCIR) within the Office of the Administrator is the Agency's principal point of contact with Congress, and has responsibility for developing and implementing the legislative agenda of the Agency.

Legislative comments or proposals that would fall within the scope of the Order are typically those on which OCIR has worked with all Agency offices to develop and/or draft; has worked with other departments and agencies within the Executive Branch to obtain Administration-wide concurrence and clearance through OMB; and has communicated to Congress.

For example, if a member of Congress or the Senate has draft legislation to introduce and sends a letter to the Administrator or the Associate Administrator asking for the Agency's position on that legislation, our legislative comments on that bill potentially would be subject to the requirements of sections 2, 3 and 4 of the Order. Similarly, if a member of Congress or the Senate asks EPA to submit draft legislation to him or her for consideration, this potentially would be subject to the Order.

As with draft final rules that are subject to OMB review under EO 12866, when OCIR transmits to OMB for clearance any proposed legislation that has TI, OCIR must include an EO 13175 Compliance Certification Form signed by the Designated EO 13175 Compliance Official that states that EPA has met the requirements of the Order. In this case, the certification would state we have met the “Special Requirements for Legislative Proposals” contained in the Order.

Within EPA, the responsibility for determining whether there are TI and following the Order's requirements falls on the program office that has the lead for drafting the substance of the draft legislation or legislative comments. The lead office should work closely with its OGC or ORC attorneys and AIEO staff.

<sup>12</sup> Mandatory consultation provisions with Tribes (and other affected entities) may exist in statutes and regulations that may not be directly administered by EPA, but which may nevertheless obligate the Agency to consult. E.g., the National Historic Preservation Act (NHPA) and the Native American Graves Protection and Repatriation Act (NAGPRA) are not directly administered by EPA; however, circumstances may exist which require consultation under these statutes. Check with OGC and/or ORC for legal interpretations of the consultation-related provisions in the various statutory and regulatory schemes.



### 3.2 *Does the Executive Order Apply When EPA Provides Comments to Another Agency on Their Draft Legislation or Provides Technical Assistance to Congressional Staff?*

No. Responding to another agency's request for comments on their draft legislation or testimony would not be subject to the Order, as these are not comments submitted by EPA to Congress. The duty to determine whether there are any Tribal implications for the draft bill or legislative comments falls upon the agency that is submitting the bill or comments.

Similarly, responding to a request from Congressional staff for technical assistance on how to craft or word a bill would not be subject to the Order, as EPA is merely responding to the request for technical assistance, not submitting to Congress draft legislation or official agency legislative comments.

### Chapter 4—Waivers

#### 4.1 *What Does the Executive Order Require Concerning Indian Tribes Applying for Waivers of Statutory and Regulatory Requirements?*

Section 6 of EO 13175 contains requirements that apply to applications submitted to EPA by Tribal governments seeking to waive some or all of the statutory or regulatory requirements that apply to them.

Specifically, if the authorizing statute gives EPA discretion to waive some or all of the statutory or regulatory requirements as applied to the Tribal government(s), EO 13175 requires EPA, to the extent practicable and permitted by law, to:

- Streamline the process for Tribal waiver applications.
- Increase opportunities for utilizing flexible policy approaches where the proposed waiver is consistent with Federal policy objectives and is otherwise appropriate.
- Render a decision within 120 days or as otherwise provided by law or regulation.
- Provide timely written notice and reasons therefor if the waiver is not granted.

#### 4.2 *What Does the Executive Order Contain About Flexible Policy Approaches?*

As described above, the Order directs agencies, to the extent practicable and permitted by law, to consider Tribal applications for waivers of statutory and regulatory requirements with a general view toward increasing opportunities for use of flexible policy approaches. To this end, we encourage you to encourage

Tribes to develop their own policies to achieve program objectives, and where possible, to defer to Indian Tribes to establish standards. At a minimum, under the EO you would be required, to the extent permitted by law, to consult with Tribal officials as to the need for Federal standards and to explore any alternatives that would limit the scope of Federal standards or preserve the prerogatives and authority of Indian Tribes.

### Chapter 5—Permits and Licenses

#### 5.1 *Do the Requirements of Executive Order 13175 Apply to Permitting Activities?*

As noted throughout this draft document, EO 13175 applies to “policies that have Tribal implications.” In addition to regulations and legislative comments/proposed legislation, which are discussed, respectively, in Parts 2 and 3 of this draft document, “policies that have Tribal implications” may also include other policy statements and actions that have substantial direct effects as described in the EO. EPA’s position with respect to such other actions, including permitting actions, is that, to the extent they do not in and of themselves require any action or compliance by Tribal governments, these actions will not have direct effects on such governments and thus will not have Tribal implications. Permits typically apply directly to named parties (*i.e.*, permittees), and it is those named parties that realize any direct impacts. For example, a water treatment facility applying for a discharge permit will be directly responsible for compliance with the permit and the underlying environmental statute and regulations, as well as the associated compliance costs. Such a facility would be the entity that may be directly affected by the permitting action. Any additional effects (for instance, on users of the water or local communities) would necessarily be indirect in nature. Thus, permits issued to non-Tribal facilities would generally be considered as not having Tribal implications even if the facility is located in or near Indian country or some other area of interest to a Tribal government since any effect on the Tribe would be indirect in nature. However, where a permit would require action or compliance by a Tribal government (*e.g.*, where a Tribe or a Tribal facility is the applicant/ permittee), it is possible that the permitting action will have substantial direct effects as described in the EO, and EPA should consider whether the threshold for Tribal implications has been met.

For permitting actions that do meet the threshold for Tribal implications, EPA should apply all applicable provisions of the EO for this type of action. Because permits are not rules and because they do not establish Federal standards (which, for purposes of EPA actions, would generally be accomplished through rulemaking), EPA’s view is that the specific requirements, including consultation requirements, of sections 3(c)(3) and 5 of EO 13175 generally do not apply to permits.

Permits typically apply directly to named parties, and therefore it is those named parties that receive a permit which realize any direct impacts. For example, a water treatment facility holding a discharge permit is directly responsible for compliance with the permit and the underlying environmental statute and regulations, as well as the associated compliance costs. If EPA issues a permit to a non-Tribal facility that is located near, but not in, Indian country, the permit would generally be considered to have no Tribal implications. In such a case, while a Tribe may in fact be impacted, it is the facility that realizes any direct effects of the permit. Where a Tribe is the recipient of a permit, then the tribe is the directly impacted, named party subject to compliance with the permit, the statute, and regulations. In these situations, a permit could have substantial, direct effects on a tribe. However, for permitting actions with Tribal implications, you must still adhere to the fundamental principles and federal policymaking criteria expressed in sections 2 and 3 (respectively) of the EO. As always, you should work with the OGC/ORC attorney assigned to your action to address any questions about the applicability of EO 13175 to your action.

Lastly and importantly, even though you may not be required to consult with Tribal governments on individual permitting/licensing actions under the terms of EO 13175, consultation with Tribal governments may be called for under other Federal and/or EPA-specific policies and/or directives. The Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments, which EO 13175 intended to supplement, and EPA’s Policy for the Administration of Environmental Programs on Indian Reservations both set forth further criteria for appropriately consulting/interacting with Tribal governments.

## Chapter 6—Policy Statements, Guidance Documents and Similar Actions

### 6.1 Are EPA's Policy Statements, Guidance Documents, and Similar Actions Covered by Executive Order 13175?

In addition to those actions described in Chapters 2 through 5 of this draft document, EO 13175 also applies to “other policy statements and actions” that have substantial direct effects. These other policies may include policy statements, strategies, guidelines, guidance and interpretive documents (collectively, “guidance documents”). EPA's position is that guidance documents generally do not create legally binding requirements and, therefore, will not 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.” Thus, where there are no legally binding requirements being created, such guidance documents generally will not have TI and will not trigger the various relevant requirements of the EO. Nonetheless, other policies relating to consultation with Tribal governments and consideration of Tribal views may be relevant to your guidance document.

### 6.2 Do the Requirements of Executive Order 13175 Apply If My Guidance Document Is Not Titled a “Rule” or “Regulation” But Creates Legally Binding Requirements?

Regardless of what it is called, if your guidance document does create any legally binding requirements (e.g., grant guidelines/conditions—including application deadlines—upon which EPA will base its award decisions), the

requirements of the EO may apply, and you should determine in consultation with your program's RSC representative and the attorney assigned to your action whether it has TI.<sup>13</sup> Documents that contain legally binding requirements are generally subject to the TI analysis and consultation provisions in the same manner as rules, as discussed in Chapter 2 of this draft Guidance. As described in that Chapter, if your document has TI, you should consider whether consultation requirements of the EO are triggered by analyzing whether your document imposes substantial direct compliance costs on Tribal governments (including consideration of whether your action has either an UMRA intergovernmental mandate or will impact small governments at or above 1% of their revenues)<sup>14</sup>. Similarly, you should coordinate with OGC/ORC in analyzing whether the document would have preemptive effects.

### 6.3 An Important Note about Guidance Documents and EPA's Internal Policy on Consulting With Tribal Governments

As noted above, EPA's guidance documents generally do not create

<sup>13</sup> Under the APA section 551(4), “ ‘rule’ means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;”.

<sup>14</sup> In general, grant guidelines don't have TI under the substantial cost threshold (see part [2.6-A]1) because conditions of federal assistance are excluded from the definition of Federal intergovernmental mandate under UMRA, 2 U.S.C. 658(5). But you still must determine whether your guideline meets any of the other thresholds for TI (see part 2.6A and C).

legally binding requirements and most will not have Tribal implications. However, Tribal governments may have—or you may expect them to have—a heightened level of interest in certain non-binding guidance documents. For example, a policy statement might announce for the first time how EPA is planning to address a significant environmental problem nationally. In some circumstances, you might know or expect that the problem at hand is one of particular significance to Tribal governments, and that the policy statement would have significant implications for those governments.

Even if the consultation requirements of EO 13175 and the considerations of other EPA and/or government-wide policies do not apply to your guidance document, you are nonetheless encouraged to engage Tribal officials—in the spirit of EO 13175 and consistent with EPA's objective of promoting communication between EPA and Tribal governments—on those guidance documents that you expect to be of interest to Tribal governments by:

- Consulting early, to the extent practicable given the nature and the timing of the action, with appropriate Tribal government representatives, including your professional counterparts, if they so desire; and
- Discussing briefly in your document any consultation that occurred, the nature of the Tribal government representative's concerns, and how you addressed those concerns or why EPA decided not to implement suggested changes.

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