

TRIBAL CONSULTATION BEST PRACTICES GUIDELINES

Introduction

The Northeast Regional Planning Body (RPB) tribal workgroup consists of ten northeast regional tribes located throughout New England to implement strategies for tribal engagement and tribal interests related to ocean spatial planning. Tribal Consultation Best Practices Guidelines is directly related to the goals of the Tribal RPB within effective decision making.

This document contains the best practices derived from comments and responses through valuable input from tribal leaders, examples of existing consultation policies provided by tribes, reference materials such the United Nations Declaration on the Rights of Indigenous Peoples, and material provided by the Environmental Protection Agency (EPA) on consultation practices.

Since November 2009 when President Obama directed federal agencies to develop plans to ensure regular and meaningful consultation with federally-recognized tribal governments, tribal leaders provided constructive and helpful comments on how efforts can be improved to consult and coordinate with tribes. This data was gathered through numerous listening sessions and meetings with tribes and tribal organizations, two sets of national consultation conference calls and written submissions.

Only federal agencies are bound by Executive Order 13175, however the Tribal RPB encourages the adoption of best practices standards for all and any seeking to create consultation plans.

The goals of creating best practices consultation guidelines are to:

- 1) establish clear standards for the consultation process, including defining the what, when, and how of consultation;
- 2) designate specific personnel responsible for serving as consultation points of contact in order to promote consistency in, and coordination of, the consultation process; and
- 3) establish a management- oversight and reporting structure that will ensure accountability and transparency. Moreover, any proposed consultation policy sets a broad standard for when federal agencies should consider consulting with federally-recognized tribal governments.

Notably, the scope of this document is intended to broaden that found in Executive Order 13175.

Agencies are encouraged to designate a Tribal Consultation Advisor (TCA). The fundamental role of TCAs is to ensure adherence to any proposed consultation policy and ensure its consistent application throughout the agency. The TCAs should form a consultation policy implementation workgroup that will take up the suggested goals referenced above, as well as develop any additional guidelines and tools necessary for effective and meaningful consultation. Agencies with tribal liaisons should have Tribal Consultation Advisors for consistency and continuity in the long-term process of consultation.

General Guidelines

1. Establish an advisory committee to guide development of the consultation policy.

- a. Agencies can expand their resources to develop a group that is tasked with frequently communicating with tribal partnership groups, including the Tribal RPB, and with tribes during the early phases of development of a proposed consultation policy. The advisory committee may hold teleconferences, meetings and other opportunities to engage with tribes and tribal organizations to design a customized approach to what meaningful consultation means between the agency and the tribes.
- b. Federal agencies are encouraged to enhance communication not just with tribes, but also very importantly with other federal agencies in an effort to demonstrate parity among contributors of the consultation design and implementation.

2. Hold regularly-scheduled meetings between tribal leaders and agency leaders.

- a. Tribes request that federal agencies hold regularly-scheduled annual or semi-annual meetings between tribal nations and federal leaders, especially within their respective regions. This is very important in addressing and ensuring the government-to-government relationship and the intention of the Executive Order.

3. Use existing tribal relationships for consultation as much as possible.

- a. Use various tribal partnership groups that federal agencies meet with regularly, including the national and regional tribal caucuses, and use these meetings for consultation and coordination as much as possible. While discussions with these groups are not a substitute for government-to-government consultation, these interactions nonetheless add significant value to the consultation process.
- b. Consultation should consider to include inter-tribal organizations in government-to-government consultations for certain groups of tribes. For example, inter-tribal organizations are important to include when working with Alaskan Native Corporations, along with the understanding that most Alaskan tribes have statutory recognition as development corporations through congressional acts.

4. Value the input from tribal governments.

- a. Federal agencies should understand that tribal input is valuable, and proposed consultation policy guidance seeks to ensure that tribal input is duly considered by the agency in its decision-making processes. It is important to ensure that tribal input was considered by officials and that tribes are informed about *how* their input was considered.
- b. It is very important to demonstrate a “paper trail” or to validate that the consultation was engaging and has follow-through within a developed process.

5. Federal agencies owe a duty to tribes under the trust responsibility of the federal government.

- a. Federal agencies have trust responsibility in support of the duty to consult with tribes and to protect human health and the environment in Indian country. The trust responsibility should be guided by applicable case law, federal statutes, and executive orders that set forth the framework of the trust responsibility. Given the complex and varied nature of the trust responsibility in differing circumstances, it is difficult to articulate a simple definition that fits all circumstances that might arise.
- b. It is important to recognize that tribes may or may not have treaty rights that apply.
- c. Agencies have trust obligation to tribes, however legal counsel and services under a contractual obligation with the federal agency for client protection do not. It is important to pay attention to any conflicts of interest and/or interference from legal counsel on behalf of the agency. When agencies are upholding their trust responsibility, any legal position or legal action on behalf of the agency should not obstruct that trust responsibility.

6. Use “Indigenous Nation” or other terms when referring to Indian governments rather than “Tribe.”

- a. Various federal laws refer to “federally recognized Indian tribes.” Tribes are also referred to as villages, pueblos, or rancherias. To simplify your documents and ensure consistency with federal law and Executive Order 13175, utilize the term “Indian tribe”. When consulting directly with a tribal government, however, refer to the government by its chosen, official term whether that term is tribe, nation, or other title.
- b. It is important to remain respectful of what language the tribe has adopted when referring to the tribal organization. The title can be revealed through the consultation process and understanding the nation that you are dealing with.

7. Include within the scope of tribal interests off-reservation reserved rights and subsistence gathering/use a broad interpretation of tribal land.

- a. Agencies should use the term “tribal interests” broadly when implementing the proposed consultation policy and that includes encompassing reserved rights and subsistence gathering where appropriate. Apply this broad interpretation consistent with any applicable limits imposed by law.

8. Include aboriginal territories within the scope of tribal interests.

- a. Federal agencies must consider consulting with tribes when agency actions may affect tribal interests, and that may include interests or reserved rights in ceded territories or areas eligible for protection under the National Historic Preservation Act.

- b. Federal agencies may not always be aware of a particular tribe's interest in aboriginal lands, therefore, they need to be understanding that tribes may bring those interests to their attention.

9. Include a comprehensive definition of consultation.

- a. Consultation is a process of meaningful communication and coordination between a federal agency and tribal officials prior to taking actions or implementing decisions that may affect tribes. As a process, consultation may include several methods of interaction that could occur at different levels. The appropriate level of interaction is determined by past and current practices, the continuing dialogue between the agency and tribal governments, and any possible national, regional, and agency program office policies and plans. The proposed consultation policy then further describes specific details of the consultation process.

10. Recognize that consultation represents an ongoing process, including a back-and-forth exchange, not simply "notice and comment."

- a. Effective consultation involves two-way communication. The consultation process should be flexible and actual consultation is conducted. A primary objective of a proposed consultation policy should be to promote consistency in the consultation process, including how the agency determines which actions warrant consultation and conducts consultation in a meaningful manner.
- b. The consultation policy should consider implementing guidance for consultation while still allowing for flexibility in the consultation process to respond to the unique nature of each consultation situation.
- c. Establishing set timelines with a mutual understanding that it is evolutionary in nature and an ongoing process.

11. Recognize that tribes have limited resources to participate in consultations. Provide tribes with resources to allow tribal personnel to travel to consultations or other necessary meetings. Also consider alternative methods to distant face-to-face meetings.

- a. Federal agencies should strive to minimize the resource investment required by tribes to participate in the consultation process. For example, consider holding meetings at tribal offices or piggybacking off other meetings that tribes attend. Encourage the use of alternative methods for consultation across federal agencies such as those suggested by tribes.
- b. Caution: tribal consultation can never become diluted or "information only". The set up and design must adhere to the process and allow for executive session discussions and open forum. Tribes have the right to be heard one on one.

12. Do not use time and resource constraints as a potential caveat to when/how your federal agency will consult with tribes.

- a. Transparency about limitations with budgets and resources available can be important to tribes in order to plan sufficient and meaningful consultation around any restrictions. If

tribes have suggestions regarding ways to ensure consultation on certain matters while accounting for resource constraints, agencies should be open to considering those suggestions.

13. Develop a more consistent approach to consultation. Develop standardized procedures for conducting consultation. Set specific timelines for consultation.

- a. One of the primary objectives of the proposed consultation policy is to promote consistency in the consultation process. This includes how the federal agencies determine which actions warrant consultation and conducts consultation. The federal agencies need to consider the development of implementation guidance allowing for flexibility in the consultation process to respond to the unique nature of each consultation situation.

14. Respect tribal preferences in terms of communication and notify or copy appropriate staff.

- a. Federal agencies should honor a tribe's preferences regarding to whom correspondence is addressed, individuals to be copied, and other tribe-specific communication preferences. Regional offices interact with tribes most directly and are frequently in the best position to capture this information. Tribes should also keep their regional contacts updated when the tribe has personnel, address, email, or phone changes.
- b. Allow for a two stage meeting one day with leaders and program staff. This works very well and results in meaningful engagement. The process should never resemble committee work or conferences.

15. Consultation is treated as a procedural rather than substantive requirement.

- a. Consultation should not be viewed merely as a procedural requirement rather than a meaningful opportunity for tribes to provide substantive input on federal agency actions. In order to ensure consultation is meaningful, the federal agency should describe consultation as having several phases, including an input phase. The purpose of this phase is to ensure that tribes have a meaningful opportunity to provide input on what actions warrant what level of consultation. A suggested follow-up phase ensures that the federal agency informs tribes about how their input was considered. Follow up and follow-through are key components for a healthy government-to-government relationship.

16. Face-to-face meetings are the only true way to consult with tribes.

- a. The proposed consultation policy should be intentionally designed to accommodate the diverse range of tribal consultation needs and preferences. Moreover, the specific form that any given consultation process takes is influenced by the variety of factors including, but not limited to, the issues being considered, the number of tribes potentially impacted, time and resource limitations of the tribes involved, and other pertinent factors.
- b. In some cases, agencies may need to rely on teleconferences or other approaches in order to conduct consultation. Although federal agencies may not be able to commit to face-to-face

meetings in all instances, they should attempt to regularly meet face-to-face with tribes and tribal groups in a variety of settings, including the National Tribal Caucus and other national and regional tribal partnership groups, and whenever it is appropriate and feasible.

17. Honor the confidentiality of certain information provided by tribes (e.g., sacred sites).

- a. Federal agencies should be aware that tribes may request that they honor the confidentiality of certain information that they may provide, such as locations of sacred sites, hunting and fishing locations, or other information that tribes may consider sensitive. Agencies should respect and honor these requests to the extent allowable by law.
- b. Federal agencies should request that tribes advise of such instances prior to providing the sensitive information so that the agency can advise the tribe as to whether it can treat the information as confidential.
- c. All tribal data and input should be viewed as confidential and all agencies should gain permission as to using or releasing it. Even data that one may think is public, is still tribally owned.

18. Ensure that the correct participants attend consultation meetings.

- a. As a general matter, federal agencies should ensure that managers should be present at consultation meetings, particularly when tribal leaders are present. There may be situations, however, such as during informational meetings, where technical staff will be the sole participants in meetings and do not involve senior agency decision-making officials. It is recommended that tribes discuss, in advance, who the appropriate participants are for any consultation meeting prior to the consultation occurring.

19. Provide follow-up and feedback to tribes regarding actions ultimately taken.

- a. Consultation policies should direct follow-up to consultation that includes formal, written communication from a senior federal agency official regarding how tribal input was considered in the final action. The follow-up should include how the input was incorporated.
- b. Include accountability mechanisms to track when and how consultation occurred.

20. Ensure consultation by states when states are implementing authorized programs.

- a. Recognize tribal concerns about consultation by states with tribes when states are implementing federal programs. Encouragement of states to consult with tribes whenever possible. Notably, some states, including New Mexico and New York, actually have tribal consultation policies and can potentially serve as models. All agencies State or Local need a policy if the executive order is in force and applicable.

21. Improve interagency coordination of consultation for multi-agency actions.

- a. Federal agencies should frequently engage the Bureau of Indian Affairs, the Indian Health Service, the National Indian Gaming Commission, the Department of Justice, and other federal tribal agencies on issues that potentially impact Indian country. Federal agencies should search for opportunities to improve interaction with other federal agencies on Indian country issues.
- b. Once best practices are designed, all agencies should adopt the document and allow for continuity of the process even throughout ever-changing hands.

22. Conduct cultural resource and other appropriate training of agency employees working with tribes.

- a. It is important to develop training on best practices for tribal communications and more specifically on consultation. Agencies could also consider adding information to their training programs on the protection of tribal cultural resources.
- b. Develop implementation plans for the proposed consultation policy, and consider what additional training would be appropriate for personnel involved in the consultation process.
- c. Tribes can assist in training appropriate staff and provide details on how their government works both culturally and officially.

23. Issue progress reports on implementation of the policy.

- a. Federal agencies should plan to request and receive ongoing feedback about the effectiveness of the proposed consultation policy from all parties, and particularly tribes.
- b. Agencies can plan opportunities to gather input from tribes and intertribal organizations on the implementation of the proposed consultation policy through tribal partnership meetings with tribes and intertribal organizations.
- c. Be sure to inform tribes on what kind of feedback is received and what changes or revisions to the policy are planned, if any.

24. Include “consensus” as the goal of consultation.

- a. The purpose of consultation is to allow tribes to provide meaningful input so federal agencies may consider that input in final decisions on actions that may affect tribal interests. While the goal of some consultation efforts may be to reach consensus on a matter where there is a disagreement between the agency and a tribe, it should be understood that some consultation efforts may have other purposes such as communicating agency research or receiving tribal input on an upcoming agency activity.
- b. While the federal agency should strive toward mutually acceptable outcomes, an agreed upon outcome may not always be possible, and therefore the actions (if any) should reflect this.

25. Add a dispute resolution provision.

- a. Consultation steps for a dispute resolution should be outlined in the consultation policy. A consultation advisory committee, as previously suggested, or an implementation workgroup should explore what initial dispute resolution processes might be appropriate and what steps might even be taken above and beyond those initial first steps.
- b. Tribal governments should be encouraged to communicate any concerns about a specific consultation or the consultation process in general to a Tribal Consultation Advisor, the head of the program or regional office conducting the consultation.
- c. It is very important to have a dispute resolution provision in place and have the adequate agencies available to assist in rendering a decision, such as the Department of Interior, for example.