

FRN to Modernize Civil Works

Comments Summary Document

TRIBAL CONSULTATION POLICY UPDATE

This section contains summaries of both oral and written comments on the Army's FRN to Modernize Civil Works outreach effort that are related to the policy initiative for the update to the USACE Tribal Consultation Policy.

1.0 General Comments on Tribal Consultation Policy Update

1.1 *Implementation.*

Many commenters stated that without implementation of the Policy the actual language is moot. The Corps must do more to ensure full implementation of the Policy in a consistent manner. A commenter stated that the lack of consistency between Headquarters and Districts in engaging in tribal consultation, as well as the lack of standards that apply to all Corps programs, has already led to situations with lackluster tribal consultation.

1.2 *Specific text changes.*

One commenter stated that the term "effective" should be removed from the definition of consultation. A commenter stated that the Corps should add the term "an usufructuary" after "including treaty" in describing the Tribal rights the Corps must consider and over which parties must conduct consultation to the Tribal Consultation Policy. (2002-0006-0103) (Usufructuary is a legal right accorded to a person or party that confers the temporary right to use and derive income or benefit from someone else's property).

1.3 *Development.*

One commenter suggested the Corps' tribal consultation policy should incorporate feedback from GAO report Tribal Consultation, Additional Federal Actions Needed for Infrastructure Projects, which provides a series of recommendations for the Corps to improve its tribal consultation.

2.0 Regulatory Program.

2.1 *Application of Policy.*

Many commenters asserted that it must be clear in the Policy update that the Policy does apply to the Regulatory Program and they must implement it.

2.2 *Nationwide Permits.*

A number of commentors stated that the Tribal Consultation Policy should consider improvements to the Nationwide Permit Program, which they state does not provide for adequate Tribal consultation. A

commentor stated the Tribal Consultation Policy should address issues with the Nationwide Permit Program, including ensuring that tribal consultation is meaningful and that the processes are consistent across the varying Corps Districts. NWP General Condition #17 leaves it to individual Corps District Engineers to make decisions as to whether a project complies with this general condition, and it varies by district. A commenter mentions the Nationwide Permit program does not provide adequate or meaningful tribal consultation on a national level. The NWP program also does not outline how the varying Districts will conduct tribal consultation or under which standards it will evaluate potential project impacts on tribal rights. The top-down rulemaking approach continually defers an actual analysis of how NWPs will impact tribal rights, and as a result, the Corps also continually defers tribal consultation on NWPs.

2.3 *State delegation.*

One commentor stated that the Tribal Consultation Policy should address how it will ensure tribes are consulted and that tribal input is considered when regulatory programs are delegated to states as the Corps cannot delegate away its legal mandates and obligations pursuant to federal Indian law and policy. A commenter stated that the Corps must be consistent in upholding its responsibility to consult with tribes when USACE regulatory programs are delegated to state agencies.

2.4 *Notification.*

One commentor stated that the Corps should initiate the process to notify tribes of potential projects before the project application is deemed complete to jump start tribal consultation.

2.5 *Consistency.*

A commentor stated that the Tribal Consultation Policy should address how it will be consistent throughout all the regulatory and permitting programs that the Army Corps administers. A commenter stated the Policy must address how it would be implemented consistently throughout the Corps' regulatory and permitting programs. The Policy must set a high standard for meaningful tribal consultation for USACE Headquarters, as well as throughout all the USACE Districts, since Districts are often the entities that tribes communicate with most. Each District must be able to understand the Corps' responsibility as a federal trustee, as well as adhere to and implement the new Policy in a consistent manner. The Policy must also be consistent within all USACE programs and activities. There must be consistency between the Corps' general operations and regulatory programs, such that the Corps can uniformly implement its new Tribal Consultation Policy through the Corps' decision-making process.

2.6 *Regulatory general policies.*

A commentor stated that the Tribal Consultation Policy should supplement Corps General policies for evaluating permit applications at 33 CFR 320.4.

2.7 *Tribal consultation policy impacts to permit process.*

One commenter indicated that any new Tribal consultation policy needs to be effective, efficient, transparent, timely, and consistent to avoid permit delays as that could result cost increases.

3.0 Section 106 of National Historic Preservation Act (NHPA)

3.1 *Integrate Section 106 of NHPA into Tribal Consultation Policy*

A number of commenters recommended that the Corps' tribal consultation policy would greatly benefit from reconsideration of its approach to Section 106 compliance (i.e., Appendix C). One commenter provided that developing a common understanding between the Corps, Tribes and applicants on the scope, timing and content of the Section 106 consultation process is absolutely essential to protecting historic and cultural resources while minimizing delays to critical infrastructure projects.

3.2 *Protection of Traditional Cultural Properties and Tribal resources*

A number of commenters expressed that the Policy should reflect a desire to consider, protect, and preserve Traditional Cultural Properties and Tribal resources. One commenter stated the policy should explicitly state under what circumstances the Corps will turn over information to the applicant, including the possible use of a confidentiality agreement, and ensure Tribal permission is received before that occurs.

3.3 *Policy should include crosswalk with Section 106 of NHPA*

A number of commenters expressed that the Policy should include a crosswalk of how the Policy and the Tribal consultation requirements under the ACHP 800 regulations are interwoven.

3.4 *Corps must consult with Tribes for surveys.*

One commenter stated that it is the Corps' responsibility to identify and evaluate historic properties in consultation with Tribes which means that Tribes must be provided the opportunity to consult on methods for Phase I and Phase II surveys.

4.0 Confidentiality and Data

4.1 *Integrate Section 304 of NHPA and 36 CFR 800.11(c) to protect sensitive cultural resources.*

A commenter recommended the Corps incorporate Section 304 of NHPA and 36 CFR 800.11(c) into the Tribal Consultation Policy to protect sensitive cultural resources.

4.2 *The consultation policy should include criteria for withholding and sharing information.*

One commenter indicated that the Tribal consultation policy should mandate that withholding information from Tribal governments will be the exception, include criteria that speaks to limited circumstances when information can be withheld, and whether the information could still be released to

tribes with additional protective measures such as a confidentiality agreement. A commenter stated the Policy must provide a clear structure to protect information and data the tribe deem confidential. The commenter states the Policy must clearly state how the Corps will protect culturally sensitive information received as part of tribal consultation. Several commenters stated that the Corps should codify the Tribal Consultation Policy to keep confidential the culturally sensitive information provided and so designated by tribes during consultation. There should be a mechanism in place to protect tribal resources from being revealed to the public and in some cases, the project applicant, as a result of the tribal consultation. This should include explicit outline of how the Corps will protect culturally sensitive information received as part of tribal consultation.

4.3 *Sharing project information and data with tribes.*

A commenter stated that The Tribal Consultation Policy must address procedural hurdles to sharing data to facilitate meaningful tribal consultations. The commenter stated that the Policy should make clear that the Corps must freely share project information and data with tribes as part of the tribal consultation. A number of commentors stated that the Corps needs to freely provide information that affects tribes, including a clear scope, project information and data.

5.0 Free, Prior, Informed Consent (FPIC)

5.1 *Include a requirement for FPIC in Consultation Policy*

A number of commenters recommended the Corps include a requirement that no federal action that will have a significant impact on Tribal Nations may proceed without FPIC, respecting Tribal sovereignty and self-determination.

5.2 *FPIC would significantly decrease the risks associated with advancing a federal action without Tribal consent.*

A number of commenters expressed that FPIC would result in reduced litigation, costs and resources, and threats to the financial viability of federally-backed projects and actions.

5.3 *FPIC emphasizes the political equality of indigenous peoples and empowers Tribal Nations.*

A number of commenters expressed that FPIC empowers indigenous peoples to negotiate the conditions under which a proposed project will be designed, implemented, monitored and evaluated, or to say no to a proposed federal action.

5.4 *The Corps should demonstrate efforts to achieve consensus and explain why consent was not accomplished.*

The Policy should place the burden on the Corps to demonstrate that it made sufficient efforts to obtain Tribal consent, and to clearly explain the reasons why Tribal consent to the proposed federal action was not accomplished, including a dispute resolution process.

5.5 *The Corps should incorporate a dispute resolution process into a FPIC-based consultation process.*

One commenter indicated a dispute resolution process would help better facilitate discussions between the Corps and Tribal nations.

6.0 Timing of Consultation

6.1 *Include requirement for timely consultation*

Several commenters recommended the Corps include a requirement for early consultation, at the earliest stages of planning and even at the pre-application phase.

6.2 *Early notification.*

A number of commentors stated that the Corps early notification to tribes should begin with the review of a proposed project. The Corps should seek input from Tribal governments to determine when is early enough to engage Tribes for consultation such that Tribes are a substantive part of the project review as early as possible. A commenter stated that the Corps should engage in Tribal consultation prior to receiving an application.

6.3 *Consequences of untimely engagement.*

A commentator stated that when the Corps engages the tribe too late in the process, the tribe has undue burden to turn around fast-tracked response in order to meet other Corps deadlines.

7.0 Communication with Tribes on Consideration of Input

7.1 *Include requirement for timely and transparent communication with Tribes on how the Corps considered Tribal input.*

Many commenters recommended the Corps include a requirement timely and transparent communication with Tribes on how the Corps considered Tribal input received during consultation in its decision-making process. Some provided time estimates, such as 30 days post-decision.

7.2 *Include requirement for written communication back to Tribes on consideration of input.*

Many commenters recommended the Corps communicate in writing with Tribes that informed the Corps that the proposed federal action affects their Traditional Cultural Properties and Tribal resources. Such communication should clearly explain how exactly the Corps considered Tribal comments, efforts it took to address concerns, and mitigation of impacts to Traditional Cultural Properties and Tribal resources. The Corps should explain in detail why it acted contrary to Tribal input and data or other information which may have enabled being able to address Tribal input, where applicable. A few commenters noted that such written communication should follow each Tribal comment/engagement and not all at the end when a decision is made.

8.0 Process

8.1 *Include requirement for a process for Tribal consultation.*

One commenter recommended that the Corps inform the Tribal Chair, Director of Archaeology and Historic Preservation, and Director of Natural Resources in writing via mail and email of any proposed Corps action within Tribal lands and ancestral homelands; ensure Corps Tribal liaison is copied on all correspondence with Tribe and attends all meetings. To conduct meaningful tribal consultation, the incorporation of tribal input should be an ongoing process, such that the Corps responds throughout the process of tribal consultation, rather than just at the point where the Corps issues a decision. This will allow tribes to respond to the Corps as the project is being reviewed.

8.2 *Public notices are not appropriate notifications.*

Several commenters stated that notifying Tribes through a public notice of potential projects, even on ancestral lands, is not appropriate. Corps should develop appropriate notification procedures for Tribes.

8.3 *Silence is not consent.*

One commenter noted that simply because a Tribe does not respond to a public notice or letter from the Corps does not mean the Tribe consents or does not object to the proposal. Tribes have legal right to consult or comment at any point.

8.4 *Process should have timelines.*

A few commenters recommended that the consultation policy should have a clear process for consultation with established limited timelines. This would ensure little delay in decisions and preclude misuse of the process to delay decisions. Another commenter stated these timelines should be reasonable but enforceable to reduce uncertainties and delays.

8.5 *Tribal consultation itself does not equal consent.*

One commenter indicated the Corps must recognize that tribal consultation does not equal consent, which is necessary to move forward on projects that will impact a Tribal nation and land.

8.6 *Threshold for Tribal consultation.*

One commenter indicated consultation should be required where any project or regulation has any effect, not just potentially significant effects, on Traditional Cultural Properties and Tribal resources.

8.7. *Process for ending consultation.*

One commenter indicated the Corps should consult with Tribes to conclude the process and that the Corps should not be able to unilaterally end consultation. The Corps must also consult with tribes on when tribal consultation is concluded. The Corps cannot unilaterally close the process of tribal consultation with notice to the consulting tribes and an opportunity for consulting tribes to provide feedback on whether the consultation should be concluded.

8.8. *Delegation of duties.*

One commenter said the Corps should not delegate its consultation obligation to project applicants and that the Corps should solicit input from Tribal Nations on how and to what extent it is appropriate for project applicants to coordinate directly with Tribes on a specific project. A commenter stated that the Corps should establish a program where Tribes permit the Corps to delegate consultation to the

applicant. This should also include a dispute resolution process where the Corps can resolve disputes. A commenter emphasized that the requirement for tribal consultation remains with the Corps and cannot be delegated to project applicants. Project applicants prioritize their projects and may minimize or disregard tribal concerns. The Corps must solicit input from tribes on how and to what extent it is appropriate to coordinate with project applicants.

8.9 Tribal POC list.

One commenter stated that the Corps should develop a list of all Tribes with POCs and designated decisionmakers, their preferred method of communication, and any developed agreements with the Tribes, including delegation to the applicant.

8.10 Monitoring.

One commenter stated Applicants should provide Tribes with notice of scheduled field work and an opportunity to monitor the work. Notice should be reasonable – at least 7 days in advance – and if a Tribe is unable to attend on a given day, the applicant should provide the Tribe with a summary of the work performed, an opportunity to discuss any questions or concerns and the opportunity to request a follow up visit to the missed site.

8.11 Procedural Steps.

One commenter provided a procedure for consultation. Each step of the consultation process, from pre-application/field investigations through the issuance of the Corps' permit should be clearly identified and explained; Each step should specify whether consulting parties may comment and the deadline for providing those comments (e.g. 30 days); Each step that requires an action by the Corps (e.g. a determination on whether there are any historic properties present, whether a property is eligible for listing in the National Register of Historic Places or whether the project will adversely affect an eligible property) should also have a deadline for the Corps; All deadlines must be enforced and observed by the Corps; If a deadline is missed, the Corps should make it clear that consulting parties, including Tribes, may continue to consult on future steps, but that prior steps will not be revisited.

8.12 Dispute Resolution.

A commentor stated that the Corps should implement a process where Tribes can elevate to a higher-ranking official within the Corps. A commentor stated that the Corps should not have the dispute resolution process developed through the consultation process. A commenter stated that the Corps should work with tribes to create an accountability process where tribes can appeal to Corps Headquarters or other higher-level staff when tribal consultation has gone awry. This process should also contemplate that such dispute resolution must take place *prior* to a Corps final decision being made or otherwise stay the construction of approved projects after a flawed consultation process.

8.13 Climate change.

A number of commentors stated that the Corps should commit to including climate change and its effects on Tribal lands, including sharing data and information regarding how tribal treaty and reserve rights are affected by climate change. This should be included in the Corps decision making processes for projects tribal rights and resources. Another commenter provided the Corps must commit to including the effects of climate change on tribal lands and resources as part of the Policy.

8.14 *Indigenous Knowledge.*

A number of commenters stated that the Corps should describe how ITEK will be used in the decision-making processes and how ITEK will be protected, ensuring that disclosure occurs only with the express consent of affected tribes.

8.15 *Interagency Coordination.*

A commentator stated the Tribal Consultation Policy should provide consistency and coordination with other federal agencies.

8.16 *Oklahoma.*

The policy must also consider the unique legal framework in Oklahoma as it relates to tribes.

9.0 Staffing

9.1 *Corps has staffing shortages and lack of training.*

A few commenters indicated that the Corps is understaffed and not adequately trained to conduct Tribal consultation. The Corps should hire more trained staff and conduct staff training.

9.2 *Tribal liaisons.*

A number of commenters stated that the Corps of Engineers should establish a Tribal Liaison in each District and a formal continuity program for Corps Tribal Liaisons and other staff that work with Tribes to ensure that knowledge about general and specific Tribal issues, policies and contacts. (2022-0006-082-A1) (2022-0006-101).

9.3 *Training.*

Several commenters stated that all Corps staff need training and education on Tribal matters. Such training should be conducted by Tribal members.

10.0 Compensation and Contracting

10.1 *Tribes should be compensated for providing information, acting like a consultant, and sharing Indigenous Knowledge.*

Several commenters stated that Tribes should be compensated when delegated the work of the Corps, such as providing information and sharing Indigenous knowledge. Cannot ask Tribe to prove significance of information without compensation. The Corps cannot delegate their responsibilities to Tribes.

10.2 *USACE should directly contract with Tribes.*

One commenter stated that USACE should be able to directly contract with Tribes without going through third-party consultants. This should be allowed for Traditional Cultural Monitoring, and other professional traditional knowledge-based services< receipt of mitigation funding, and inventory, evaluation and treatment documents.

11.0 Approved JDs

11.1 *Indigenous knowledge should not be used to inform Approved JDs.*

One commenter stated that the Corps should not use Indigenous knowledge to inform Approved JDs which are legal determinations. It may result in delays in issuance of Approved JDs. IK could be used to inappropriately delay or stop a project. A definition of IK is needed. Be more specific on what IK is and how it will be used.

11.2 *Approved JDs process does not need tribal consultation.*

One commenter stated that EO 13175 indicates consultation occurs during development of Federal policy which includes development of regulations. The commenter indicated that, while AJDs provide an official conformation of whether WOTUS exists on a property, the legal status of the property was determined by the CWA and the Agencies' WOTUS definition, which included tribal consultation during the rulemaking. Another commenter addressed concern regarding Tribal Consultation requirements for approved jurisdiction determinations (AJDs). They believe there is relatively little to be gained by consulting with tribes with respect to AJDs, but there is a significant prospect that such consultation would further delay an already lengthy project. The commenter states that while ITEK may be important in assessing whether an area is of cultural importance to tribes, it has minimal relevance to the first aspect of a JD, in the determination as to whether an area currently qualifies as a wetland or non-wetland water.

11.3 *Tribal consultations should include Approved JDs.*

One commenter stated that the Corps should consult on approved JDs as a negative approved JD can eliminate many procedural requirements and federal protections for tribal, cultural, natural, and historic resources. Another commenter stated that the Corps must include jurisdictional determinations in the scope of the Tribal Consultation Policy. The commenter states that the JD will determine whether or not the Corps will require a permit for the activity and can play a critical role for tribes protecting tribal resources off reservation land. Several other commentors stated that the Corps should conduct tribal consultation on jurisdictional determinations prior to all activities that affect or could affect Tribes, their lands or their citizens.

12.0 Scope

12.1 *Clear Scope.*

A commenter recommended the Corps must outline the scope of tribal consultation in its new Tribal Consultation Policy and make explicit that tribal consultation must encompass all aspects of the proposed project. The commenter also states that the Policy should require tribal consultation for the

entirety of the scope of the proposed project, including direct and indirect effects. A commenter stated that the Corps must consider indirect and cumulative effects of a project on a Tribes, its people, homelands, and treaty-reserved rights. A commentor stated that the Corps should consult with Tribes on the impacts that a project will have on tribal resources as a whole; tribal cultural and natural resources are often interconnected and pre-exist non-Indian artificial jurisdiction. The scope of the Corps review should accurately capture the scope of tribal interests in proposed projects or regulations.

14 Treaty Rights

14.1 *Consider treaty rights.*

A commentor stated that the Corps should consider the importance of treaty-reserved rights when a project or permit is in a tribal homeland or treaty area.

14.2 *Consultation triggered for treaty rights interpretations.*

A commentor stated that the Corps should consult with tribes on policy regarding the Corps interpretation of treaty-rights, treaty reserved areas and impacts, including cumulative impacts, to treaty rights.

14.3 *DoD Memorandum on Treaty Rights*

A commentor stated that the Department of Defense signed the *Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights* to “Integrate consideration of tribal treaty and reserved rights into the Parties’ ongoing work to address climate change.” This commitment and how the Corps will implement this commitment, must be included in the Tribal Consultation Policy, and included in all Corps’ decision making for projects that impact tribal resources.

14.4 *Standards for determining adverse impacts.*

One commenter indicated the tribal consultation policy should address when a proposed action has adverse impacts on Treaty reserved rights and should therefore be denied. The commenter indicated the standard should be based on the *de minimus* standard mandated by federal law (and not a “substantial evidence” standard) and that these considerations should be independent from the Corps’ public interest consideration.