

USACE Civil Works Tribal Consultation Policy Update

List of Changes

3 March 2023

Paragraph	Revision	Purpose
1	Added Reference: Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), 18 Dec 1971, as amended	Consistency with with the Consolidated Appropriations Act of 2004, as amended, USACE will consult with Alaska Native Corporations on the same basis as Indian Tribes under Executive Order 13175
	Added Reference: 33 CFR part 325, Processing of Department of the Army Permits, 13 Nov 1986, as amended	Consultation Policy applies to Regulatory permitting activities
	Added Reference: Consolidated Appropriations Act, 2004, as amended, Public Law 108-199, Division H., Section 161	The Consolidated Appropriations Act of 2004, as amended required OMB to consult with Alaska Native Corporations on the same basis as Indian Tribes under Executive Order 13175.
	Added Reference: Consolidated Appropriations Act, 2005, as amended, Public Law 108-447, Division H., Section 518	The Consolidated Appropriations Act of 2005, as amended requires USACE to consult with Alaska Native Corporations on the same basis as Indian Tribes under Executive Order 13175.
	Added Reference: Section 1129 of the Water Resources Development Act of 2018	Expanded Planning Assistance to States program to tribes; consultation policy supports Tribal self-determination, self reliance, and capacity building, which can be accomplished through partnering.
	Added Reference: Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, January 26, 2021	New since 2012 policy.
	Added Reference: Advisory Council on Historic Preservation, Consultation with Indian Tribes in the Section 106 Review Process: The Handbook, June 2021.	New since 2012 policy.
	Added Reference: Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights, November 15, 2021	New since 2012 policy.
	Added Reference: Guidance for Federal Department and Agencies on Indigenous Knowledge, November 30, 2022	New since 2012 policy.
	Added Reference: Presidential Memorandum on Uniform Standards for Tribal Consultation, November 30, 2022	New since 2012 policy.
2	Purpose updated to include new Presidential Memo, reaffirm EO 13175; requires each agency to formulate a detailed plan of action to implement the policies and directives of EO 13175	USACE affirms commitment to engage in consultation.

4	Added Definition: Alaska Native Corporation (ANC)	Consistency with with the Consolidated Appropriations Act of 2004, as amended, USACE will consult with Alaska Native Corporations on the same basis as Indian Tribes under Executive Order 13175.
	Expanded definition for "consultation"	Highlights that consultation is regular, meaningful, and robust between decision-makers. Also establishes triggers for consultation for federally recognized Tribes and ANCs. Consistency with Presidential Memo and DOI policy.
	Added Definition: "Policies that have Tribal implications"	Lowers threshold for triggering consultation for federally recognized Tribes and identifies specific actions requiring consultation.
6	Added how the six Tribal Policy Principles will be incorporated into USACE CW business processes.	Cradle to grave incorporation of Tribal Policy Principles into USACE Civil Works processes.
6a	Added under Tribal Sovereignty: USACE recognizes and respects the distinct, unique, and individual cultural traditions and values of Alaska Native peoples and the statutory relationship between ANCSA Corporations and the Federal Government.	Feedback from Tribes: no two tribes are the same. Shouldn't be treated as such.
6b	Added under Trust Responsibility: acknowledges that Trust Responsibility is rooted in treaties, laws, EOs, and the Constitution. USACE cannot authorize, approve, or carry out actions or activities that violate treaties. Must ensure reasonable access to sacred sites, share non-privileged information when requested; FOIA requests are not required to share this information; Indigenous Knowledge is welcomed and will be respected throughout Civil Works implementation.	Updated policy to include an Appendix on Best Practices for Tribal Treaty Rights, Reserved Rights, and Other Similar Rights in Federal Actions and Federal Decision-Making. Integrated Section 304 of NHPA and 36 CFR 800.11(c) to protect sensitive cultural resources; made more consistent with DoD policy. Access to non-privileged information should not be overly burdensome to Tribal Nations. Indigenous Knowledge is a valuable and needed for making better decisions on federal actions.
6c	Encourages USACE to establish Tribe-specific processes separate from the public or other governmental agencies with existing tools and with the assistance of Tribal experts, such as District Tribal Liaisons.	Feedback from Tribes: Meeting need of having someone who understands and works regularly with Tribes.
6d	Clarifying that policy applies to all Civil Works projects and programs and provides more examples of types of activities that may trigger Tribal consultation. USACE does analysis to determine if there may be impacts, but should consider conducting consultation if there may not be an impact (or specifically at the request of a Tribe(s)).	Goal is to have consistent expectations across the agency. Includes Regulatory and draft AJDs, and the value Indigenous Knowledge may bring to informing decision making processes.
	Public Notices are an insufficient method of initiating consultation with tribes.	Refocus that Tribes are sovereign nations and are not the same as the public or other local, state or federal agencies.
	Defined "sufficiently early" and protocols referenced in Appendix B with established timelines and requirements.	Goal is to have consistent expectations across the agency.

	Tribal Liaisons should develop and maintain a list of Tribal and ANC contacts, preferred method of communication, exchange of information and positions before and during decision making.	Goal is to have consistent expectations across the agency.
	Lack of response from a Tribe or ANC is not consent or approval.	Goal is to have consistent expectations across the agency.
	Written protocols are encouraged on an individual or programmatic basis for Tribal Nations to facilitate more meaningful consultations.	Tailor engagements with each Tribe as separate sovereign Nations with different needs. Builds better relationships and creates consistency.
6e	Incorporation of Indigenous Knowledge.	Incorporating Administration Memo: "Implementation of Guidance for Federal Department and Agencies on Indigenous Knowledge" - critical to informing decision making processes.
7b	Knowledge transfer planning.	Goal is to create seamless transfer of command within USACE; facilitated by the Tribal Liaison.
	Added: correspondence level and where routine engagement can be delegated.	
	Added: Responsibility of Commanders includes understanding the treaties in order to uphold them.	Goal is to have consistent expectations across the agency and increase knowledge of specific trust responsibilities within the Commander's area of responsibility.
8	New Requirement: documentation of consultation and providing written response to Tribal Nations on how their input was considered in the decision making process. This includes if mutual consensus was reached or why it was not. Use of Non-Disclosure Agreements may be a useful tool for this requirement.	Important to convey how decisions are made in a timely and transparent manner. Presidential Memorandum states such communication occurs at conclusion of consultation after decision is made.
9	When consulting with ANCs, threshold is higher for consulting with ANCs. USACE will also give due consideration to the sovereign Tribes in light of the unique legal status and rights of ANCs.	USACE is acknowledging the need to consult with both federally recognized Tribes and ANCs and the nuances of engagement/decision making.
10	New Requirement: Added Protocols consistent with the Presidential Memorandum on Uniform Standards for Tribal Consultation - Consider Tribal protocols and ceremony; when certain culturally sensitive information is discussed, review and input on agendas, appropriate attendees (elders, translators), etc. - Information can be provided information in any format the Tribe chooses, as appropriate, and should be respected. - Confidentiality - FOIA implications, use of agreements to safely discuss culturally sensitive information and protection of such, including the use of orally-provided information.	References DOD policy and NHPA. This section addresses protection of cultural and natural resources and culturally sensitive information.
11	Focus on Consistency and Training	District Tribal Liaison and the Tribal Nations Technical Center of Expertise are great resources to systemically improve in these two areas.
12	Added new requirement by Congress to report on an annual basis on Tribal Consultations.	Required by Section 1120 of Public Law 114-332.