

# Infrastructure Consultation

The National Tribal Water Council

Recommendations for consideration by Tribal Leaders in response to infrastructure consultation, Autumn 2016

“Furthermore, this case has highlighted the need for a serious discussion on whether there should be nationwide reform with respect to considering tribes’ views on these types of infrastructure projects. Therefore, this fall, we will invite tribes to formal, government-to-government consultations on two questions: (1) within the existing statutory framework, what should the federal government do to better ensure meaningful tribal input into infrastructure-related reviews and decisions and the protection of tribal lands, resources, and treaty rights; and (2) should new legislation be proposed to Congress to alter that statutory framework and promote those goals.”

The National Tribal Water Council respectfully submits this package of recommendations for Tribal Leaders consideration whether to advocate for these provisions during this historic consultation. In our view, these provisions, if enacted and fully implemented, would “better ensure meaningful tribal input into infrastructure-related reviews and decisions and the protection of tribal lands, resources, and treaty rights...”

1. **Close the mining loopholes in the Clean Water Act**  
Executive Summary  
White paper  
Copy of Waste Treatment System provision in Clean Water Act
2. **Review all existing pipeline infrastructure to require compliance with current regulations in order to permit continued operation, and in the case where compliance is not possible, decommission**  
Executive Summary  
White paper
3. **Enact provisions to mitigate the disproportionate impacts of climate change on tribal nations, including a. an indefinite moratorium on new carbon fuel extraction, transportation, or processing infrastructure, and b. a NEPA requirement to carry out a carbon impact study in EA or EIS documents**  
Executive Summary  
White paper

4. **Insert a requirement for Free, Prior, and Informed Consent into consultation language for all infrastructure projects that cross tribal homelands or affect treaty-affirmed retained rights, whether trust land or ceded territory.**

Executive Summary

White paper

UN definition of FPIC

E.O. 13175

Obama memorandum

List of Federal Agencies' policies on consultation

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Recommendations for consideration by Tribal Leaders in response to infrastructure consultation -  
National Tribal Water Council

**Recommendation 1. Close the mining loopholes in the Clean Water Act**

Executive Summary

- Mines and mining impacts disproportionately impact Tribes, due to our proximity to public lands where mining is prioritized, and our court-affirmed treaty rights on these lands.
- Mining, mineral processing, and mine tailings disposal result in cyanide, lead, zinc, and other heavy metal contamination in water, fish, and wildlife.
- The Clean Water Act (1973) was intended to prevent further degradation of natural waters. Modern mines had been meeting CWA regulations, avoiding water pollution, and operating at a profit.
- However, loopholes were inserted into its implementing regulations in 1992 and 2002, enabling new mine development that pollutes waters receiving mine tailing waste.
- There are two loopholes: the first redefines a “waste treatment system” to include an impoundment of a natural stream or lake being used to store mine tailings. This allows it to receive pollution that would not be permitted if it were not a “waste treatment system.”
- The second loophole redefines “fill material” in a way that allows contaminated mine tailings to be used to fill wetlands and lakes under a Corps of Engineers permit.
- These two loopholes have allowed mining companies to continue to directly discharge pollution into our nation’s waters as they have been doing for over a century. To redefine a lake or a river as a “waste treatment system” is shameful, an abomination of the natural order of things, and a giant step back in time.
- To close these loopholes does not require a Congressional Act. The two federal agencies responsible for these regulations, the U.S. Environmental Protection Agency, and the U.S. Army Corps of Engineers can change their regulations governing hardrock mining, tailings disposal, and fill in wetlands permits.

Recommendations for consideration by Tribal Leaders in response to infrastructure consultation -  
National Tribal Water Council

**Recommendation 1. Close the mining loopholes in the Clean Water Act**

White paper

The Hardrock mining industry creates severe environmental impacts to wetlands, streams, rivers, and lakes. This has caused hardships not only on Indian reservations but on communities located near these mines. However, Indian communities have for over a century suffered the greatest assaults from mining impacts.

Federal land use policies that prioritize mining result in disproportionate burdens on native communities. Reservations are often located in remote areas, adjacent to the public lands where mining is prioritized. Tribes and tribal members rely on natural resources for food and livelihoods, both on reservation and in court-affirmed treaty rights to hunt and fish on public lands adjacent to reservations – the very lands where mining is being given priority. Tribes suffer from poisoned rivers, contaminated fish and wildlife, and destruction of sacred sites due to mining.

While existing, abandoned, or closed mines continue to pollute native lands and resources, new mines being proposed or developed present new threats. We have learned from past mistakes and must prevent further contamination – laws must be enforced to prevent this from continuing. Meanwhile the EPA and the Army Corps of Engineers have colluded to modify the Clean Water Act's (CWA) implementing regulations explicitly to provide two enormous loopholes for mining operations. These loopholes allow hardrock mines to discharge and store massive amounts of contaminants in our nation's wetlands, rivers, and lakes.

As we are all well aware, mining impacts in Indian Country and throughout the United States have had a profound negative effect on water quality. Proportionally, native villages and Indian Tribes bear the brunt of these impacts because many mines are located within tribal homelands and Tribal members rely, to a greater degree, on using natural resources for their subsistence. Although this is true, it does not discount the fact that the general population as a whole is also subjected to mining pollution. Many of the problems we currently face are the result of "legacy" mining pollution and were done in a time when technology was far less refined, scientific understanding of ecosystem function and the effects of mining wastes were unknown, and regulations were absent. These legacy impacts will continue to plague our nation and will need to be addressed for decades, if not centuries. EPA is well aware of this, since a large part of their Superfund program is devoted to remediation at such sites.

With the enactment of the CWA in 1973, hope had been restored that the federal government had recognized that past mining practices were harmful to the environment, and future practices would have to be regulated to better protect our environment. Although the CWA certainly helped change the nature of mining practices, after its passage two loopholes were inserted into regulation which undermine the spirit and intent of the CWA. The first loophole allows mine developers to define natural lakes, rivers, streams and wetlands as "waste treatment systems" which thereby are exempt from the CWA. The second loophole introduced in 2002, redefined the

term, “fill material” under Section 404 of the CWA to allow for tailings and overburden to be placed in our waterways. Section 404 was intended to regulate the placement of rock, clay, sand and other inert materials in water for construction, not to permit disposal of contaminated materials.

These two loopholes have allowed mining companies to continue to directly discharge pollution into our nation’s waters as they have been doing for over a century. To redefine a lake or a river as a “waste treatment system” is shameful, an abomination of the natural order of things, and a giant step back in time.

We believe that these loopholes have resulted from industry politics and a lack of oversight by EPA in the protection of our nation’s waters. The waste treatment system exclusion had explicitly stated this was not to be used to exclude impoundments related to mine tailings. A note added in July 1992 suspended that provision, clearly violating the spirit and intent of the Clean Water Act. This note must be removed and the provisions of the CWA enforced as they were originally designed, to protect headwater streams from mining pollution.

Furthermore, the definition of “fill material” to include mine waste was added as late as 2002 - the Clean Water Act had protected our natural waters from reactive and contaminated mine waste for nearly thirty years before this change. We call upon EPA to directly return to the previous definitions of “fill material” that explicitly excluded disposal of mine waste.

It does not require a Congressional Act. The two federal agencies responsible for these regulations, the U.S. Environmental Protection Agency, and the U.S. Army Corps of Engineers can change their regulations governing hardrock mining, tailings disposal, and fill in wetlands permits.

#### **A. Removing the Waste Treatment System “Note”**

On May 19, 1980, the Environmental Protection Agency (EPA) revised its regulations defining waters of the United States, providing an exclusion for “waste treatment systems” as follows:

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States.

According to EPA, the intent of the final sentence of the exclusion was to “ensure that dischargers did not escape treatment requirements by impounding waters of the United States and claiming the impoundment was a “waste treatment system”, or by discharging wastes into wetlands. This clarification of the waste treatment system (WTS) exclusion was later suspended by EPA without public notice or comment. 45 Fed. Reg. 48620 (July 21, 1980). The Corps adopted the WTS exclusion without the explicit manmade waters limitation in 1986. 33 C.F.R. § 328.3(a)(8).

When legally challenged in the late 1980's by the West Virginia coal mining industry, EPA maintained that "under current EPA regulations, discharges into these instream impoundments continue to be discharges into waters of the U.S., and, therefore, NPDES permit limitations must be met prior to treatment in the impoundment, rather than after. EPA then proposed an "alternative approach" in which the Corps would review impoundments of waters pursuant to section 404, and EPA would revise its regulations so that "where such a review has been conducted and section 404 criteria have been met, a 402 permit will only be required for discharges from the instream impoundment, not into it.

In 1992, EPA adopted this alternative approach, specifically for the AJ and Kensington gold mines in Alaska which had proposed impounding wetlands and streams behind earthen dams for purposes of tailings disposal. EPA and the Corps agreed that as long as the Corps approved the construction of the tailings impoundment under section 404, the waters within the impoundment would no longer be considered waters of the United States, and tailings discharges would not require either a section 402 or 404 permit. EPA and the Corps subsequently relied on a similar rationale to authorize tailings disposal for the Fort Knox open pit gold mine near Fairbanks, other Alaska hard rock mines, and ferrous mines in Minnesota's Mesabi Iron Range.

## **B. Revising the Fill Rule**

Under the Clean Water Act (CWA), a person who discharges "fill material" into waters of the U.S. must obtain a section 404 permit from the Army Corps of Engineers (Corps). Anyone who wants to discharge other pollutants must obtain a section 402 permit from the Environmental Protection Agency (EPA) or a state that has been delegated authority to issue such permits. In 1982, EPA adopted a zero discharge standard under section 402 for new copper and gold mines using froth-flotation, cyanidation, and similar processes. EPA found that mines operating in the early 1980s were already achieving zero discharge and that it was therefore practicable for new mines to operate without discharging untreated waste into natural waters.

Hardrock mining would be a far less destructive industry if section 402's discharge limitations were strictly applied. Mines produce huge quantities of chemically-treated wastes. Typically, the cheapest places to store these wastes are valleys and other low-lying areas near the mine sites. Of course, these are also the places where the wetlands, rivers, and lakes protected by the CWA are found. As a result of a change in the definition of fill material, mining companies are currently able to avoid complying with section 402's rigorous pollution limitations and use waters of the U.S. as industrial waste dumps.

As noted above, fill material is subject to the Corp's section 404 program. Prior to 2002, EPA and the Corps had different definitions for this type of pollutant. The Corps, which administers section 404, defined fill as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body. *The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act.*" 33 C.F.R. § 323.2(e) (2001) (emphasis added).

Under this definition, tailings and other mining wastes were not fill material because they were not used for the primary purpose of replacing an aquatic area with dry land. Pollutants discharged into waters primarily as a form of waste disposal were explicitly regulated under the

more rigorous section 402 program. All this changed in 2002 when EPA and the Corps adopted identical definitions of fill material to include discharges that *have the effect* of either replacing any portion of a water body with dry land or changing the bottom elevation of any portion of a water. The regulatory examples included overburden from mining. *See 33 C.F.R. § 323.2; 40 C.F.R. § 232.2.*

The new fill definition was the subject of a U.S. Supreme Court decision finding that EPA and the Corps had acted lawfully in authorizing the Kensington mine in southeast Alaska to use Lower Slate Lake as a tailings reservoir in which it could discharge slurry and other wastes. Relying upon the 2002 regulation redefining fill material, the agencies concluded that these discharges should be treated as fill under section 404, rather than waste under section 402, because they would change the bottom elevation of Lower Slate Lake. The decision means that as long as the current definition of fill material is in effect, mine wastes discharged into waters of the U.S. are regulated under section 404 where permits are approved more than 99% of the time instead of under section 402 with its strict pollution standards.

We are asking EPA and the Corps to revise the fill rule to again exclude waste discharges (any pollutant subject to effluent limitations under section 402).

*Standards for sewage sludge use or disposal* means the regulations promulgated pursuant to section 405(d) of the CWA which govern minimum requirements for sludge quality, management practices, and monitoring and reporting applicable to sewage sludge or the use or disposal of sewage sludge by any person.

*State* means any of the 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, the Trust Territory of the Pacific Islands, or an Indian Tribe as defined in these regulations which meets the requirements of §123.31 of this chapter.

*State Director* means the chief administrative officer of any State or interstate agency operating an "approved program," or the delegated representative of the State Director. If responsibility is divided among two or more State or interstate agencies, "State Director" means the chief administrative officer of the State or interstate agency authorized to perform the particular procedure or function to which reference is made.

*State/EPA Agreement* means an agreement between the Regional Administrator and the State which coordinates EPA and State activities, responsibilities and programs including those under the CWA programs.

*Storm water* is defined at §122.26(b)(13).

*Storm water discharge associated with industrial activity* is defined at §122.26(b)(14).

*Total dissolved solids* means the total dissolved (filterable) solids as determined by use of the method specified in 40 CFR part 136.

*Toxic pollutant* means any pollutant listed as toxic under section 307(a)(1) or, in the case of "sludge use or disposal practices," any pollutant identified in regulations implementing section 405(d) of the CWA.

*Treatment works treating domestic sewage* means a POTW or any other sewage sludge or waste water treatment devices or systems, regardless of ownership (including federal facilities), used in the storage, treatment, recycling, and reclamation of municipal or do-

mestic sewage, including land dedicated for the disposal of sewage sludge. This definition does not include septic tanks or similar devices. For purposes of this definition, "domestic sewage" includes waste and waste water from humans or household operations that are discharged to or otherwise enter a treatment works. In States where there is no approved State sludge management program under section 405(f) of the CWA, the Regional Administrator may designate any person subject to the standards for sewage sludge use and disposal in 40 CFR part 503 as a "treatment works treating domestic sewage," where he or she finds that there is a potential for adverse effects on public health and the environment from poor sludge quality or poor sludge handling, use or disposal practices, or where he or she finds that such designation is necessary to ensure that such person is in compliance with 40 CFR part 503.

*TWTDS* means "treatment works treating domestic sewage."

*Upset* is defined at §122.41(n).

*Variance* means any mechanism or provision under section 301 or 316 of CWA or under 40 CFR part 125, or in the applicable "effluent limitations guidelines" which allows modification to or waiver of the generally applicable effluent limitation requirements or time deadlines of CWA. This includes provisions which allow the establishment of alternative limitations based on fundamentally different factors or on sections 301(c), 301(g), 301(h), 301(i), or 316(a) of CWA.

*Waters of the United States or waters of the U.S.* means:

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate "wetlands;"

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or



### § 122.3

### 40 CFR Ch. I (7-1-11 Edition)

could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.] Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

*Wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

*Whole effluent toxicity* means the aggregate toxic effect of an effluent measured directly by a toxicity test.

NOTE: At 45 FR 48820, July 21, 1980, the Environmental Protection Agency suspended

until further notice in §122.2, the last sentence, beginning "This exclusion applies . . ." in the definition of "Waters of the United States." This revision continues that suspension.<sup>1</sup>

(Clean Water Act (33 U.S.C. 1251 *et seq.*), Safe Drinking Water Act (42 U.S.C. 300f *et seq.*), Clean Air Act (42 U.S.C. 7401 *et seq.*), Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*))

[48 FR 14153, Apr. 1, 1983, as amended at 48 FR 39619, Sept. 1, 1983; 50 FR 6940, 6941, Feb. 19, 1985; 54 FR 254, Jan. 4, 1989; 54 FR 18781, May 2, 1989; 54 FR 23895, June 2, 1989; 58 FR 45039, Aug. 25, 1993; 58 FR 67980, Dec. 22, 1993; 64 FR 42462, Aug. 4, 1999; 65 FR 30905, May 15, 2000]

#### § 122.3 Exclusions.

The following discharges do not require NPDES permits:

(a) Any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel. This exclusion does not apply to rubbish, trash, garbage, or other such materials discharged overboard; nor to other discharges when the vessel is operating in a capacity other than as a means of transportation such as when used as an energy or mining facility, a storage facility or a seafood processing facility, or when secured to a storage facility or a seafood processing facility, or when secured to the bed of the ocean, contiguous zone or waters of the United States for the purpose of mineral or oil exploration or development.

(b) Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA.

(c) The introduction of sewage, industrial wastes or other pollutants into publicly owned treatment works by indirect dischargers. Plans or agreements to switch to this method of disposal in the future do not relieve dischargers of the obligation to have and comply with permits until all discharges of pollutants to waters of the United States are eliminated. (See also §122.47(b)). This

<sup>1</sup> EDITORIAL NOTE: The words "This revision" refer to the document published at 48 FR 14153, Apr. 1, 1983.



Recommendations for consideration by Tribal Leaders in response to infrastructure consultation - National Tribal Water Council

**Recommendation 2. Review all existing pipeline infrastructure to require compliance with current regulations in order to permit continued operation, and in the case where compliance is not possible, decommission.**

Executive Summary

- There are over a half million miles of pipelines transporting natural gas, oil, and hazardous liquids across the United States. More than half of these miles of pipe are more than 50 years old, pre-dating environmental and safety laws that do not therefore apply to them.
- According to the US Department of Transportation, Pipeline Hazardous Materials Safety Administration (PHMSA), the majority of pipeline significant incidents for the transmission lines portion are caused by weld failures or corrosion (or both).
- Laws and regulations are inconsistently applied. PHMSA is a small agency, and is poorly funded to carry out responsibilities for oversight of such a vast network of pipelines, so inspections are carried out by company operators. With only a maximum of 137 pipeline inspectors, PHMSA only rarely does independent line inspections.
- In addition, most pipelines are not even subject to regular inspections. Only 44% of hazardous liquid lines, the ones deemed to be flowing through a “high consequence area” (near population centers or drinking water sources) are tested and inspected regularly.
- Many larger, newer pipelines have detection equipment and automatic shutoff valves but these features aren’t required despite decades of discussions about regulations. They are strictly voluntary measures, many of them placed into service only after a major spill. And these safety features can only detect a full blown rupture, not the myriad small leaks that go undetected and poison ecosystems over long periods of time.
- Gas and hazardous liquid pipelines must be brought under the regulatory framework of environmental and safety laws, no matter when they were installed. Older pipelines pose a grave risk to our environment, our lives, our health, and our treaty rights. With the combination of old welds, old technology, old materials, and corrosion with age, they are riskier and riskier as time goes by. There is no reason to give them a pass from meeting environmental and safety standards that newer pipelines, with new technology, new steel, new welds must meet.
- Any existing pipelines that cannot meet current environmental and safety regulations must be decommissioned. They are a threat to our court-affirmed treaty rights to our natural resources and your government has no right to threaten our rights in this way.

Recommendations for consideration by Tribal Leaders in response to infrastructure consultation - National Tribal Water Council

**Recommendation 2. Review all existing pipeline infrastructure to require compliance with current regulations in order to permit continued operation, and in the case where compliance is not possible, decommission**

White paper

There are approximately 2.6 million miles of pipelines that carry oil, natural gas, and other hazardous liquids across the United States. Of this number, about 2 million miles are in natural gas distribution systems, called “mains,” that bring gas to individual homes and businesses. Much of this infrastructure is small diameter, as small as an inch, and located in urban areas. Safety and environmental issues can be divided between the larger oil/gas/hazardous liquids transmission and gathering pipelines, and the small diameter gas mains, because the two kinds of lines have a very different safety/environmental risk profile. For the remainder of this paper, we will be discussing the transmission and gathering pipelines exclusively.

According to the US Department of Transportation, Pipeline Hazardous Materials Safety Administration (PHMSA), the majority of pipeline significant incidents for the transmission lines portion are caused by weld failures or corrosion (or both). (See attached charts.)

This is a concern given the age of the US pipeline infrastructure. According to PHMSA, well over half the existing infrastructure is over 50 years old, pre-dating US environmental and safety regulations. To add insult to injury, these regulations do not apply to pipelines that had been installed prior to their enactment in the 1970s – the very pipelines at greatest risk due to aging welds, corrosion, and old technology.

Pipelines are generally considered to be the safest way to transport oil, gasoline, natural gas, and other hazardous materials. However, risks are difficult to characterize and vary greatly with a number of factors.

Pipeline safety must be evaluated in two ways: the probability of a breakdown, and the consequences of a breakdown. The problem is, it is very difficult to determine both of those things.

First, note that it is very difficult to determine the probability of a breakdown. Pipeline operators often point to past incident rates, causes, and the type of care given to the pipelines by industry and regulators. Unfortunately, past performance does not reflect future incidents since factors change over time (factors like pipe maintenance, pipe operational changes, regulations, and laws). Not only do operators use past incidents to determine potential future problems, but they also focus on actions taken throughout a geographical area (ie what happens along the “average pipeline”) to forecast what is likely to happen in a specific area. Determination of the probability of a breakdown needs to take into account specific issues: ie how the composition of a specific type of pipe is impacted by surface or underwater conditions and changes in weather; how the

pipeline materials hold up to the specific conditions of a specific route; how the pipeline is operated, maintained, and inspected; the safety culture of the company and its operators; etc.

Source: "Thinking about Risk," Pipeline Briefing Paper #6, Pipeline Safety Trust, September 2015.

Second, note that it is difficult to determine the potential consequences of a breakdown. The loss of life, property and environmental damages that will result in the case of a catastrophic breach are difficult to determine. For natural gas lines, it is possible to predict impact *areas* by using a model that considers the diameter of the pipeline and the pressure at which it operates. But for pipelines carrying hazardous liquids, such a model does not exist. Consequence of *previous incidents* can be reviewed. See the National Transportation Safety Board investigations at <http://www.nts.gov/investigations/AccidentReports/Pages/pipeline.aspx>  
As per the short and long -term health effects upon humans, livestock, and the environment, few, if any, investigations have been done.

Laws and regulations are inconsistently applied. PHMSA is a small agency, and is poorly funded to carry out responsibilities for oversight of such a vast network of pipelines, so inspections are carried out by company operators. With only a maximum of 137 pipeline inspectors, PHMSA only rarely does independent line inspections. Instead, PHMSA will simply review the records kept by pipeline companies and their safety protocols.

Many larger, newer pipelines have detection equipment and automatic shutoff valves but these features aren't required despite decades of discussions about regulations. They are strictly voluntary measures, many of them placed into service only after a major spill. And these safety features can only detect a full blown rupture, not the myriad small leaks that go undetected and poison ecosystems over long periods of time.

In addition, most pipelines are not even subject to regular inspections. Only 44% of hazardous liquid lines, the ones deemed to be flowing through a "high consequence area" (near population centers or drinking water sources) are tested and inspected regularly.

Furthermore, the agency has adopted many safety standards written by the oil and gas industry. The Executive Director of Pipeline Safety Trust described it as "This isn't like the fox guarding the hen house. It's like the fox designing the hen house."

The PIPES Act of 2016 (Protecting our Infrastructure of Pipelines and Enhancing Safety) made a few changes. Among them are specifically recognizing the added hazard of pipelines functioning under waterways covered by ice, and formally designating the Great Lakes as "high consequence area," begging the question why this had not long since been established.

In addition, the PIPES Act calls for a Working Group to consider the development of a voluntary information-sharing system to encourage collaborative efforts to improve inspection information feedback and information sharing with the purpose of improving gas transmission and hazardous pipeline facility integrity risk analysis.

While there is not a Tribal requirement to be included as part of the working group, the Secretary of DOT can include other entities as deemed appropriate. Tribal leaders insist on a seat at this table to ensure that appropriate risk analysis on pipelines be conducted with the goal of developing regulations for pipeline abandonment.

More fundamentally, gas and hazardous liquid pipelines must be brought under the regulatory framework of environmental and safety laws, no matter when they were installed. Older pipelines pose a grave risk to our environment, our lives, our health, and our treaty rights. With the combination of old welds, old technology, old materials, and corrosion with age, they are riskier and riskier as time goes by. There is no reason to give them a pass from meeting environmental and safety standards that newer pipelines, with new technology, new steel, new welds must meet. This is simply absurd.

Any existing pipelines that cannot meet current environmental and safety regulations must be decommissioned. They are a threat to our court-affirmed treaty rights to our natural resources and your government has no right to threaten our rights in this way.

## PROTECTING OUR INFRASTRUCTURE OF PIPELINES AND ENHANCING SAFETY ACT OF 2016 (PIPES Act of 2016)

### SEC. 18. RESPONSE PLANS.

Each owner or operator of a hazardous liquid pipeline facility required to prepare a response plan pursuant to part 194 of title 49, Code of Federal Regulations, shall—

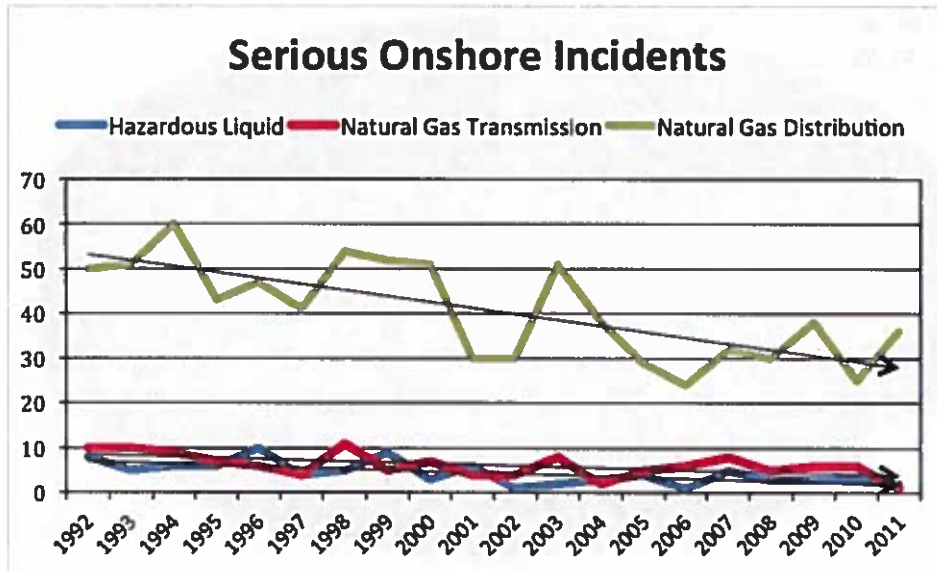
- (1) consider the impact of a discharge into or on navigable waters or adjoining shorelines, including those that may be covered in whole or in part by ice; and
- (2) include procedures and resources for responding to such discharge in the plan.

### SEC. 19. UNUSUALLY SENSITIVE AREAS.

(a) AREAS TO BE INCLUDED AS UNUSUALLY SENSITIVE.—Section 60109(b)(2) of title 49, United States Code, is amended by striking “have been identified as” and inserting “are part of the Great Lakes or have been identified as coastal beaches, marine coastal waters,”.

(b) UNUSUALLY SENSITIVE AREAS (USA) ECOLOGICAL RESOURCES.—The Secretary of Transportation shall revise section 195.6(b) of title 49, Code of Federal Regulations, to explicitly state that the Great Lakes, coastal beaches, and marine coastal waters are USA ecological resources for purposes of determining whether a pipeline is in a high consequence area (as defined in section 195.450 of such title)

Here is basically the same graph but for only Serious Incidents, which are only incidents that cause a death or hospitalization. As you can see while hazardous liquid lines have many more significant incidents, they actually have the fewest serious incidents.



**PHMSA Pipeline Incidents: (1995-2014)**  
Incident Type: Significant System Type: ALL State: ALL

Calendar Year	Number	Fatalities	Injuries	Property Damage
1995	259	21	64	\$74,291,229
1996	301	53	127	\$160,065,297
1997	267	10	77	\$108,382,011
1998	295	21	81	\$171,394,251
1999	275	22	108	\$175,046,770
2000	290	38	81	\$253,056,430
2001	233	7	61	\$77,717,793
2002	258	12	49	\$125,156,634
2003	295	12	71	\$164,206,832
2004	309	23	56	\$310,036,267
2005	333	16	46	\$1,450,053,109
2006	257	19	34	\$155,261,146
2007	267	16	46	\$149,596,100
2008	278	8	54	\$580,403,703
2009	275	13	62	\$177,671,037
2010	263	19	103	\$1,602,295,620
2011	288	12	51	\$414,085,015
2012	251	10	54	\$228,398,883
2013	300	9	45	\$345,193,585
2014	304	19	95	\$297,501,170
<b>Totals</b>	<b>5,598</b>	<b>360</b>	<b>1,365</b>	<b>\$7,019,812,881</b>

transmission pipelines, the predominant failure causes for line pipe are corrosion, material/weld failures, and excavation damage.

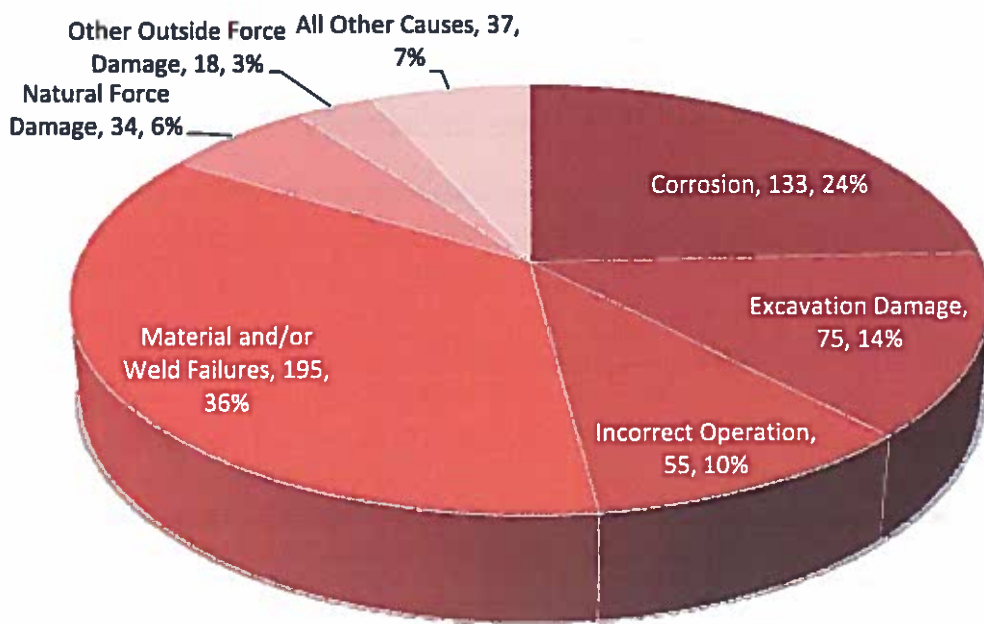
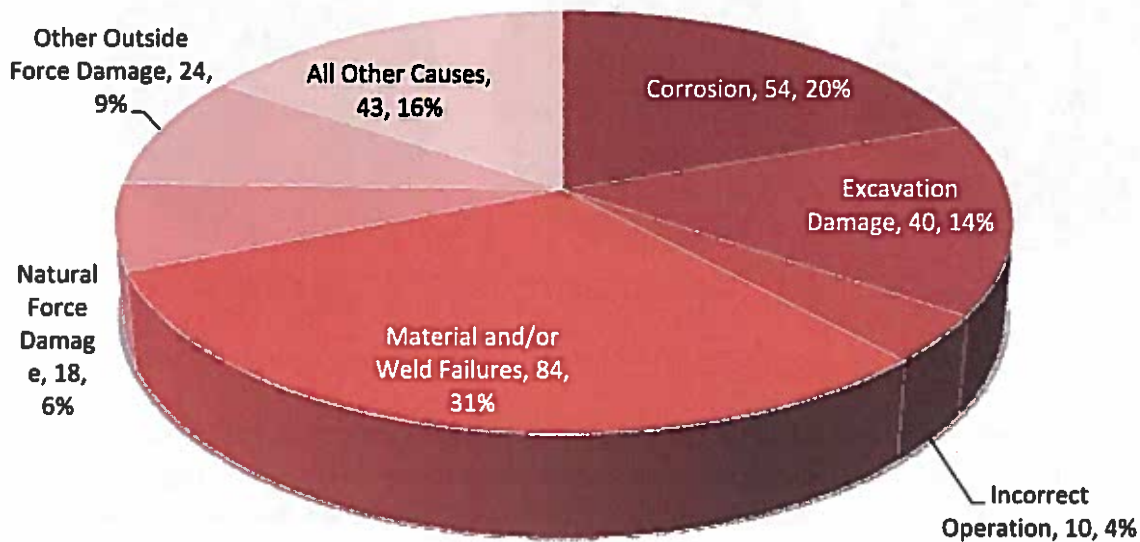


Figure 1 Causes of Significant Onshore Hazardous Liquid Pipeline Incidents





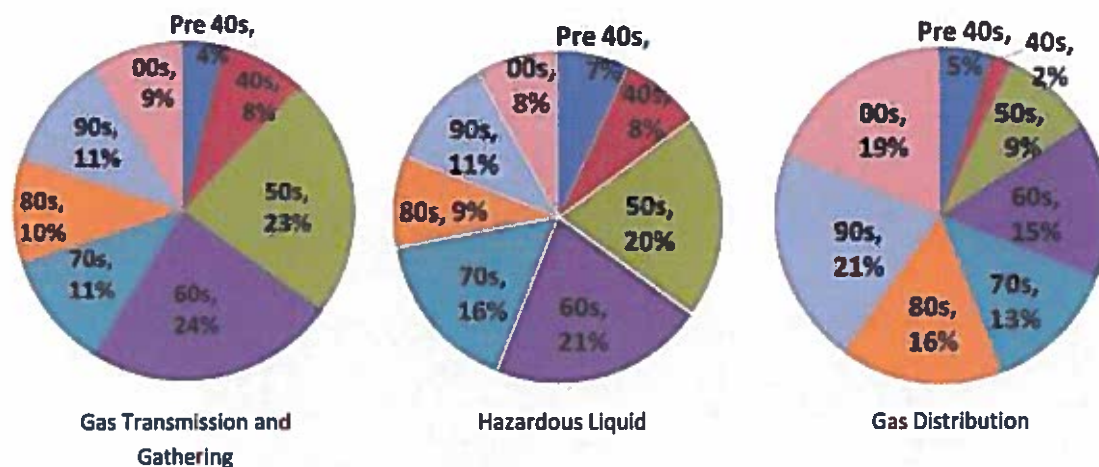
**Figure 2 Causes of Gas Transmission Pipeline Significant Incidents**

*Gas Distribution Incidents*

Figure 3 below shows that for U.S. distribution pipeline systems, the most significant individual cause categories for significant incidents are excavation damage, other outside force damage, and other unspecified causes. The major contributor to the other outside force damage is damage by a vehicle not engaged in excavation. The category “all other causes” represents a major fraction of significant incidents. This category is comprised of any cause that does not fit into another category, and includes incidents caused by deterioration of the pipe material.

*Gas Distribution Leaks*

Gas distribution systems have leaks. The approach distribution operators take to ensure these leaks do not lead to incidents is to conduct periodic leak surveys and remove or repair leaks that have the potential to result in damage. While different operators have different philosophies regarding whether all leaks are removed and exactly how removed leaks are reported, it is illustrative to consider the typical number of leaks removed from distribution systems annually. Reported data on leaks removed or repaired in 2009 indicate there were 0.12 leaks repaired per mile of mains (about one leak for every eight miles of main), and 0.47 per mile of service lines (about one leak for every two miles of service line).



**Figure 5 Age Distribution of U.S. Pipeline Infrastructure**

The first federal pipeline safety regulations were put in place for gas pipelines in 1968 based on the standard that had been adopted by most states - the American Society of Mechanical Engineers standard ASME B31.8 - Gas Transmission & Distribution Piping Systems. Soon thereafter, similar regulations were added covering hazardous liquid pipelines, based on ASME B31.4 - Pipeline Transportation Systems for Liquid Hydrocarbons and Other Liquids. Prior to these rules, operating companies generally used the accepted industry standards for pipe materials, manufacturing, construction, testing, and operation that were considered state-of-the-art at the time of installation. Pipeline materials, corrosion protection methods, and construction technologies and standards changed and by and large improved over time. For example, modern coating materials for steel pipe have greatly improved over those used decades ago. In the very early decades of pipeline construction, no coating was used at all. In addition, pipe welding, inspection and testing techniques have evolved. Many of the welding techniques used earlier have been phased out and replaced by newer, more reliable, and more effective techniques. That means that some of our current pipeline infrastructure was built using materials and welding techniques that – though considered acceptable and state-of-the-art at the time - are no longer used today.

Recent incidents in San Bruno, California and Allentown, Pennsylvania have raised questions in the public's mind about the safety of older pipelines. PHMSA is taking a hard look at the causes and characteristics of these failures to identify means to prevent future incidents. Individual states are also examining the need to accelerate the replacement of high risk pipe to ensure public safety and the reliability of our critical pipeline infrastructure into the future.

*Where Should We Be Most Concerned?*

There is no simple formula for determining which parts of our nation's pipeline infrastructure should be our greatest concern. Factors often associated with higher risk include pipeline age, materials of construction, and an operator's practices in managing the integrity of its pipeline system. Certainly each of these factors can contribute to a pipeline's risk, but effective integrity management can counterbalance the impact of ageing and construction materials.

Recommendations for consideration by Tribal Leaders in response to infrastructure consultation -  
National Tribal Water Council

**Recommendation 3. Enact provisions to mitigate the disproportionate impacts of climate change on tribal nations, including a. Enact an indefinite moratorium on new carbon fuel extraction, transportation, or processing infrastructure, and b. Amend NEPA to include a requirement to carry out a carbon impact study in EA or EIS documents**

Executive Summary

- Tribes within the US and our tribal members suffer the greatest impacts from climate change, for several reasons. One, our treaty rights are tied to our land base – if the animals and plants we hunt, fish, and gather must move to survive, we cannot gather them in their new places. Two, we rely on our treaty natural resources for our survival to a greater extent than other people do.
- Climate change is happening. The scientific consensus has been confirmed over and over, and the changes we are seeing are greater, and faster, than even the models had predicted. Immediate action is vital to preserving life on earth.
- The amount of carbon we can still put into the sky, while we figure out how to stop burning it, and still stay under 1.5 degrees Celsius global temperature rise is now lower than the amount in currently operating oil and gas fields.
- We have reached the point that no new carbon infrastructure can be safely developed. No new wells, no new mines, no new pipelines, no new refineries. We have explored and tapped all that we may tap without dooming ourselves.
- There is no more compelling thing that the US government could do, than to place an indefinite moratorium on new carbon-fuels infrastructure projects.
- Many federal actions do not take into consideration impacts on carbon budgets. The specific procedures and requirements that each federal agency has put in place to meet the requirements of NEPA were established decades ago and minor adjustments have been made since then – and they do not require addressing the carbon impact of the proposed action.
- The federal government should amend the NEPA to explicitly require carbon impacts studies as part of the analysis and documentation, whenever an Environmental Assessment or Environmental Impact Statement is required under terms of any agency's NEPA process and procedures.

Recommendations for consideration by Tribal Leaders in response to infrastructure consultation -  
National Tribal Water Council

**Recommendation 3. Enact provisions to mitigate the disproportionate impacts of climate change on tribal nations, including a. an indefinite moratorium on new carbon fuel extraction, transportation, or processing infrastructure, and b. a NEPA requirement to carry out a carbon impact study in EA or EIS documents**

White paper

Native Tribes throughout the world are doing all we can to prevent climate change and to prepare our people for its effects. We know that the Tribes within the US and our tribal members suffer the greatest impacts from climate change, for several reasons. One, our treaty rights are tied to our land base – if the animals and plants we hunt, fish, and gather must move to survive, we cannot gather them in their new places. Two, we rely on our treaty natural resources for our survival to a greater extent than other people do. If they are gone, we are gone.

As stated by Frank Ettawageshik, in the closing plenary of the UNFCCC COP21 summit in Paris last December, “Indigenous peoples are those who least contribute to climate change, having safeguarded our traditional lands, territories, and resources for millennia. Because our lives are inextricably and intimately related to the natural world, every adverse effect on that world acutely affects our lives.”

Climate change is happening. The scientific consensus has been confirmed over and over, and the changes we are seeing are greater, and faster, than even the models had predicted. Immediate action is vital to preserving life on earth.

September's numbers aren't out yet, but August and July of this year were tied for the hottest months in recorded history. August marked the sixteenth straight month of record-breaking global temperatures. Records that had been made over 137 years have been shattered in the past twelve months.

According to NOAA:

The combined average temperature over global land and ocean surfaces for August 2016 was the highest for August in the 137-year period of record, marking the 16th consecutive month of record warmth for the globe. The August 2016 temperature departure of 0.92°C (1.66°F) above the 20th century average of 15.6°C (60.1°F) surpassed the previous record set in 2015 by 0.05°C (0.09°F). August 2016 was also the highest monthly land and ocean temperature departure since April 2016 and tied with September 2015 as the eighth highest monthly temperature departure among all months (1.640) on record. Fourteen of the 15 highest monthly land and ocean temperature departures in the record have occurred since February 2015, with January 2007 among the 15 highest monthly temperature departures.

The average global temperature across land surfaces was 1.29°C (2.32°F) above the 20th century average of 13.8°C (56.9°F)—the highest August global land temperature on record, besting the previous record set in 2015 by 0.19°C (0.34°F). This was also the highest monthly global land temperature departure since April 2016.

In February of 2015, we reached another dubious milestone – it was the 360<sup>th</sup> straight month of above-average global temperatures. Thirty years, in which every single month's temperatures were above average, not a single month of below average. If things were statistically normal, one would expect roughly half of those months to have been below average. The significance of this cannot be understated. The thirty year average in a weather parameter, for a given location, is the definition of climate. With thirty straight years of above average temperatures, the climate of planet Earth, by definition, has changed.

The 360 month milestone in 2015 were for measurements that were “above average.” This summer's milestone is far worse. Global monthly average temperatures have been not merely above average, but breaking all prior records, for sixteen months in a row.

**a. Enact an indefinite moratorium on new carbon fuel extraction, transportation, or processing infrastructure**

We depend on carbon-based fuels. We have a carbon economy. We are making changes, and moving away from carbon fuels, but we can't change overnight. Simply grounding all vehicles until we find a better way is not an option. However, climate disaster is looming.

In a report released in September,

[http://priceofoil.org/content/uploads/2016/09/OCI\\_the\\_skys\\_limit\\_2016\\_FINAL\\_2.pdf](http://priceofoil.org/content/uploads/2016/09/OCI_the_skys_limit_2016_FINAL_2.pdf)

Oil Change International examined current temperature rise, models and trajectories, to calculate the carbon budget that is still possible under the targets of the Paris accord. The amount of carbon we can still put into the sky, while we figure out how to stop burning it, and still stay under 1.5 degrees Celsius global temperature rise is now lower than the amount in currently operating oil and gas fields. To add currently operating coal mines means broaching the 2.0 Celsius mark.

It is essential that all currently operating wells and mines cannot and must not be fully utilized. No new wells or mines may be opened. This reality can no longer be ignored.

It is critical for the survival of human civilization and life on earth, that no new carbon infrastructure may be developed. No new wells, no new mines, no new pipelines, no new refineries. We have explored and tapped all that we may tap without dooming ourselves. Humanity depends upon this.

At a consultation aimed at showing how regulations can be implemented better or new regulations or statutes put in place to address protection of treaty rights, there is no more compelling thing that the US government could do, than to place an indefinite moratorium on new carbon-fuels infrastructure projects.

**b. Amend NEPA to include a requirement to carry out a carbon impact study in EA or EIS documents**

The National Environmental Policy Act of 1970 (NEPA), was the first major environmental law in the United States, and established US environmental policy.

The President's Council on Environmental Quality published a Citizens' Guide to NEPA in 2007. An excerpt from this Guide is attached, describing the purposes and applicability of NEPA. Unlike other environmental laws, responsibility for implementation of NEPA is not assigned to any specific federal

government agency or program. All federal agencies have a responsibility for implementing NEPA in all of their actions, permits, and funding programs.

NEPA requirements include review of federally funded or federally permitted actions to ensure they are not violating any environmental statute, and that certain procedures are followed to allow for a role for other agencies and the public to participate in that review. As such, there is room in NEPA procedures to address any and all significant environmental concerns.

Many federal actions, nevertheless, do not take into consideration impacts on carbon budgets. The specific procedures and requirements that each federal agency has put in place to meet the requirements of NEPA were established decades ago and minor adjustments have been made since then – and they do not require addressing the carbon impact of the proposed action.

This is a grave oversight in the current world threatened by climate change. Impacts on peatlands, on methane budgets, on transportation matters, etc. can be profound for a given federal action, and must not be ignored. Capture of these impacts in NEPA review is essential.

It is therefore recommended that the federal government amend the NEPA to explicitly require carbon impacts studies as part of the analysis and documentation, whenever an Environmental Assessment or Environmental Impact Statement is required under terms of any agency's NEPA process and procedures.

International Indigenous Peoples Forum on Climate Change  
Statement at Closing Plenary of UNFCCC COP21  
Paris, France December 12, 2015

Presented by Frank Ettawageshik, supported by Chief Bill Erasmus, Hindou Oumarou Ibrahim, and Saoudata Aboubacrine

Aanii, Nakwegeshik N'diznikas. Pipigwa Ododem. Waganakising n'doonjibaa. (Hello. Noonday is my name. The Sparrow Hawk is the mark of my family. I am from the Land of the Crooked Tree.)

Mr President, I greeted you in my native language. My name is Frank Ettawageshik and I represent the National Congress of American Indians. Thank you for this opportunity to address you on behalf of the International Indigenous Peoples Forum on Climate Change. Indigenous Peoples are those who least contribute to climate change, having safeguarded our traditional lands, territories and resources for millenia. Because our lives are inextricably and intimately related to the natural world, every adverse effect on that world acutely affects our lives.

The members of our caucus come from all the regions of the world. Indigenous peoples came here with three key messages. We are pleased that during these negotiations all of our points were addressed to some degree.

1. It is essential that the rights of indigenous peoples be recognized, protected and respected within a broad human rights framework. We sought such assurance in the operative section of the Agreement. We are keenly disappointed that the Parties did not see fit to accommodate this request in which we joined with a broad constituency. The Parties do recognize the importance of such rights in the Preamble and we intend to insist on our rights at every turn. We are sovereign governments with international treaties and rights to land territories, and resources toward which we have a sacred duty which we intend to fulfill.

2. A temperature goal of no more than 1.5 degrees Celsius. We are disappointed this was not adopted as the Structured Expert Dialog stated that our traditional livelihoods will be severely affected at two degrees. However, we are thankful that the vital importance of achieving the 1.5 degree Celsius goal is recognized in the agreement language.

3. Recognition, respect for, and use of our traditional knowledge, with our free, prior, and informed consent. We appreciate that a provision appears in the operative section under adaptation, but it should apply everywhere in the Agreement and Decision without the qualification "where appropriate".

We must remember we are here as nations to uphold the future for our children! We recognize the hope in all children's eyes and we work so that this hope will remain through the future generations.

Miigwetch (Thank You), Merci Beaucoup

# EXECUTIVE SUMMARY

In December 2015, world governments agreed to limit global average temperature rise to well below 2°C, and to strive to limit it to 1.5°C. This report examines, for the first time, the implications of these climate boundaries for energy production and use. Our key findings are:

- The potential carbon emissions from the oil, gas, and coal in the world's currently operating fields and mines would take us beyond 2°C of warming.
- The reserves in currently operating oil and gas fields alone, even with no coal, would take the world beyond 1.5°C.
- With the necessary decline in production over the coming decades to meet climate goals, clean energy can be scaled up at a corresponding pace, expanding the total number of energy jobs.

One of the most powerful climate policy levers is also the simplest: stop digging for more fossil fuels. We therefore recommend:

- No new fossil fuel extraction or transportation infrastructure should be built, and governments should grant no new permits for them.
- Some fields and mines – primarily in rich countries – should be closed before fully exploiting their resources, and financial support should be provided for non-carbon development in poorer countries.
- This does not mean stopping using all fossil fuels overnight. Governments and companies should conduct a managed decline of the fossil fuel industry and ensure a just transition for the workers and communities that depend on it.

In August 2015, just months before the Paris climate talks, President Anote Tong of the Pacific Island nation of Kiribati called for an end to construction of new coal mines and coal mine expansions. This report expands his call to all fossil fuels.



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## History and Purpose of NEPA

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Congress enacted NEPA in December, 1969, and President Nixon signed it into law on January 1, 1970. NEPA was the first major environmental law in the United States and is often called the “Magna Carta” of environmental laws. Importantly, NEPA established this country’s national environmental policies.

To implement these policies, NEPA requires agencies to undertake an assessment of the environmental effects of their proposed actions prior to making decisions. Two major purposes of the environmental review process are better informed decisions and citizen involvement, both of which should lead to implementation of NEPA’s policies.

## Who is Responsible for Implementing NEPA?

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Every agency in the executive branch of the Federal Government has a responsibility to implement NEPA. In NEPA, Congress directed that, to the fullest extent possible, the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in NEPA.<sup>2</sup> To implement NEPA’s policies, Congress prescribed a procedure, commonly referred to as “the NEPA process” or “the environmental impact assessment process.”

NEPA’s procedural requirements apply to all Federal agencies in the executive branch. NEPA does not apply to the President, to Congress, or to the Federal courts.<sup>3</sup>

Because NEPA implementation is an important responsibility of the Federal Government, many Federal agencies have established offices dedicated to NEPA policy and program oversight. Employees in these offices prepare NEPA guidance, policy, and procedures for the agency, and often make this information available to the public through sources such as Internet websites. Agencies are required to develop their own capacity within a NEPA program in order to develop analyses and documents (or review those prepared by others) to ensure informed decisionmaking.<sup>4</sup> Most agency NEPA procedures are available on-line at the NEPA website <http://ceq.eh.doe.gov/nepa/regs/agency/agencies.cfm>). Agency NEPA procedures are published in

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<sup>2</sup> Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. §4332.

<sup>3</sup> CEQ NEPA Regulations 40 C.F.R. §1508.12.

<sup>4</sup> Council on Environmental Quality, “Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act” 40 C.F.R. section 1507.2, available at [www.nepa.gov](http://www.nepa.gov). Future references to the CEQ NEPA Regulations will be cited as : CEQ NEPA Regulations, 40 C.F.R. §1507.2.

**National Environmental Policy Act Sec. 101**  
**[42 USC § 4331]**

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may —

1. fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
2. assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
4. preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
5. achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
6. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

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the Federal Register for public review and comment when first proposed and some are later codified and published in the Code of Federal Regulations.<sup>5</sup> If you experience difficulty locating an agency's NEPA procedures, you can write or call the agency NEPA point of contacts and ask for a copy of their procedures.<sup>6</sup>

## To What Do the Procedural Requirements of NEPA Apply?

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In NEPA, Congress recognized that the Federal Government's actions may cause significant environmental effects. The range of actions that cause significant environmental effects is broad and includes issuing regulations, providing permits for private actions, funding private actions, making federal land management decisions, constructing publicly-owned facilities, and many other types of actions. Using the NEPA process, agencies are required to determine if their proposed actions have significant environmental effects and to consider the environmental and related social and economic effects of their proposed actions.

NEPA's procedural requirements apply to a Federal agency's decisions for actions, including financing, assisting, conducting, or approving projects or programs; agency rules, regulations, plans, policies, or procedures; and legislative proposals.<sup>7</sup> NEPA applies when a Federal agency has discretion to choose among one or more alternative means of accomplishing a particular goal.<sup>8</sup>

Frequently, private individuals or companies will become involved in the NEPA process when they need a permit issued by a Federal agency. When a company applies for a permit (for example, for crossing federal lands or impacting waters of the United States) the agency that is being asked to issue the permit must evaluate the environmental effects of the permit decision under NEPA. Federal agencies might require the private company or developer to pay for the preparation of analyses, but the agency remains responsible for the scope and accuracy of the analysis.

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<sup>5</sup> The draft agency implementing procedures, or regulations, are published in the Federal Register, and a public comment period is required prior to CEQ approval. Commenting on these agency regulations is one way to be involved in their development. Most agencies already have implementing procedures; however, when they are changed, the agency will again provide for public comment on the proposed changes.

<sup>6</sup> See Appendices A and D for information on how to access agency points of contact and agency websites.

<sup>7</sup> CEQ NEPA Regulations, 40 C.F.R. § 1508.18. Note that this section applies only to legislation drafted and submitted to Congress by federal agencies. NEPA does not apply to legislation initiated by members of Congress.

<sup>8</sup> CEQ NEPA Regulations, 40 C.F.R. § 1508.23.



Recommendations for consideration by Tribal Leaders in response to infrastructure consultation -  
National Tribal Water Council

**Recommendation 4. Insert a requirement for Free, Prior, and Informed Consent into consultation language for all infrastructure projects that cross tribal homelands or affect treaty-affirmed retained rights, whether trust land or ceded territory.**

Executive Summary

- The United Nations Declaration on the Rights of Indigenous Peoples includes the language “Free, Prior, and Informed Consent.”
- The United States is one of only four nations that did not vote to adopt this Declaration at the UN General Assembly on 13 September 2007.
- President Bill Clinton issued Executive Order 13175 of November 6, 2000, *Consultation and Coordination With Indian Tribal Governments*, without the language of Free, Prior, and Informed Consent.
- President Barack Obama reaffirmed E.O. 13175 with a *Memorandum on Tribal Consultation* on November 5, 2009, but failed to update its language by including the United Nations standard of Free, Prior, and Informed Consent.
- None of the Federal agencies, in their response to the memorandum from President Obama, included Free, Prior, and Informed Consent in their policies and procedures for meaningful consultation and collaboration.
- Free, Prior, Informed Consent, and its working definition, needs to be incorporated into all of the consultation and coordination documents of Federal agencies. The current Administration should make this explicitly clear in a further Memorandum requiring Federal agencies to revise their consultation documents to include these concepts.

Recommendations for consideration by Tribal Leaders in response to infrastructure consultation - National Tribal Water Council

**Recommendation 4. Insert a requirement for Free, Prior, and Informed Consent into consultation language for all infrastructure projects that cross tribal homelands or affect treaty-affirmed retained rights, whether trust land or ceded territory.**

White Paper

The General Assembly of the United Nations adopted its Declaration on the Rights of Indigenous Peoples on 13 September 2007, calling it "a triumph for justice and human dignity" following more than two decades of negotiations between governments and indigenous peoples' representatives.

The UN Declaration was adopted by a majority of 143 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).

The Declaration establishes a universal framework of minimum standards for the survival, dignity, well-being and rights of the world's indigenous peoples. The Declaration addresses both individual and collective rights; cultural rights and identity; rights to education, health, employment, language, and others. It outlaws discrimination against indigenous peoples and promotes their full and effective participation in all matters that concern them. It also ensures their right to remain distinct and to pursue their own priorities in economic, social and cultural development. The Declaration explicitly encourages harmonious and cooperative relations between States and indigenous peoples.

Fundamental to the Declaration is the concept of Free, Prior, and Informed Consent (FPIC) to guide states' relationships with indigenous peoples, particularly with respect to project development such as infrastructure projects, mining, etc. Attached is a description of what FPIC means in this context, prepared by the Office of the High Commissioner on Human Rights.

The United States of America, which prides itself on being a world leader in human rights, nevertheless voted against adoption of the Declaration. This is a failing it shared with few other States - the majority of the world supported the Declaration. It is hardly surprising, then, that the issues raised in the standoff over the Dakota Access Pipeline have emerged. A State cannot fail to understand, consult, and respect the rights of indigenous peoples, while styling itself as a defender of human rights. Before long it will be called on this failure.

The various documents governing consultation with native peoples in the United States fall far short of the UN standard. Executive Order 13175 of November 6, 2000, *Consultation and Coordination With Indian Tribal Governments* (attached), does not include the concept of FPIC. It merely discusses "regular and meaningful consultation and collaboration," without defining "meaningful." This is possibly due to its pre-dating the UN Declaration by almost seven years.

However, nine years later, the further *Memorandum on Tribal Consultation* of November 5, 2009, from President Barack Obama (attached), missed the opportunity to address this deficiency, by continuing the language of the Executive Order, and requiring Federal agencies to prepare and adopt policies on consultation and collaboration.

An examination of the documents prepared by each of these Federal agencies (list of 45 documents searched, attached), turns up none that includes the language of Free, Prior, Informed Consent.

While tribal nations honor the current administration for its historic advances in respect and treatment of native people's rights and concerns, this is a significant lack. If we are to move forward in collaboration, full recognition of the concepts of FPIC is needed. Treaty rights do not go away because they are ignored, not understood, and not protected. Conflicts over use of court-affirmed treaty-protected resources, infrastructure decisions, etc. are inevitable without free, prior, and informed consent of the sovereign nations whose rights will be affected by those decisions.

If the United States were considering projects which would cross territory held by Canada, or affect significant resources utilized by Canada, it would not simply proceed without the consent of Canada. "Meaningful consultation" is simply not enough.

Free, Prior, Informed Consent, and its working definition, needs to be incorporated into all of the consultation and coordination documents of Federal agencies. The current Administration should make this explicitly clear in a further Memorandum requiring Federal agencies to revise their consultation documents to include these concepts.

# Free, Prior and Informed Consent of Indigenous Peoples

**“At the national level, the Declaration has inspired new legislation and mechanisms for dialogue with indigenous peoples. Despite these positive signs, the promise of the Declaration is far from being universally fulfilled. (...) Rights of indigenous peoples are frequently the first victims of development activities in indigenous lands, often pursued with no regard to the principle of free, prior and informed consent and other guarantees of the Declaration.”**

*Ms. Navi Pillay, United Nations High Commissioner for Human Rights, August 2013. Foreword to the Manual for National Human Rights Institutions.*

## What is free, prior and informed consent?

The Declaration on the Rights of Indigenous Peoples requires States to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them (article 19). States must have consent as the *objective* of consultation before any of the following actions are taken:

- The adoption of legislation or administrative policies that affect indigenous peoples (article 19)
- The undertaking of projects that affect indigenous peoples' rights to land, territory and resources, including mining and other utilization or exploitation of resources (article 32).

In certain circumstances, there is an obligation to *obtain* the consent of the indigenous peoples concerned, beyond the general obligation to have consent as the objective of consultations. For example, the Declaration explicitly requires States to obtain consent of indigenous peoples in cases of:

- The relocation of indigenous peoples from their lands or territories (article 10)
- The storage or disposal of hazardous materials on indigenous peoples' lands or territories (article 29)

Furthermore, indigenous peoples who have unwillingly lost possession of their lands, when those lands have been “confiscated, taken, occupied or damaged without their free, prior and informed consent” are entitled to restitution or other appropriate redress (article 28).

## Normative foundations of the requirement for free, prior and informed consent

The principle of free, prior and informed consent is linked to treaty norms, including the right to self-determination affirmed in common Article 1 of the International Human Rights Covenants. When affirming that the requirement flows from other rights, including the right to develop and maintain cultures, under article 27 of the International Covenant on Civil and Political Rights (ICCPR) and article 15 of the International Covenant on Economic Social and Cultural Rights (ICESCR), the treaty bodies have increasingly framed the requirement also in light of the right to self-determination.

The principle of non-discrimination is also relevant. In its 1997 General Recommendation No 23 on indigenous peoples, the Committee on the Elimination of Racial Discrimination (CERD), calls on States parties to ensure that indigenous peoples have equal rights to participate in public life and stresses that no decisions relating directly to indigenous peoples are to be taken without their informed consent. With specific reference to land and resource rights, the Committee calls for restitution in situations where decisions have already been taken without the prior and informed consent of the affected indigenous peoples. It has also highlighted the obligation of States to ensure that the right of indigenous peoples to free, prior and informed consent is respected in the planning and implementation of projects affecting the use of their lands and resources. More recently, the Committee on Economic, Social and Cultural Rights (CESCR) has further expanded on free, prior and informed consent in general comment No. 21. In its interpretation of cultural rights, the Committee outlines that the right to participate in cultural life includes the right of indigenous peoples to restitution or return of lands, territories and resources traditionally used and enjoyed by indigenous communities if taken without the prior and informed consent of the affected peoples. It also calls on States parties to “respect the principle of free, prior, and informed consent of indigenous peoples in all matters covered by their specific rights” and to “obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk”.



## What is the exact meaning of free, prior and informed consent?

- *Free* implies that there is no coercion, intimidation or manipulation.
- *Prior* implies that consent is to be sought sufficiently in advance of any authorization or commencement of activities and respect is shown to time requirements of indigenous consultation/consensus processes.
- *Informed* implies that information is provided that covers a range of aspects, including the nature, size, pace, reversibility and scope of any proposed project or activity; the purpose of the project as well as its duration; locality and areas affected; a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks; personnel likely to be involved in the execution of the project; and procedures the project may entail. This process may include the option of withholding consent. Consultation and participation are crucial components of a *consent* process.

## Who should be consulted?

The issue as to from whom the State can seek consent is critical. In this regard, several communities around the world are working on establishing their own protocols on how outsiders should communicate with them to obtain their free, prior and informed consent. The consent of indigenous peoples should be determined in accordance with their customary laws and practices. This does not necessarily mean that every single member must agree, but rather that the consent process will be undertaken through procedures and institutions determined by indigenous peoples themselves. Indigenous peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities.

## Verifying free, prior and informed consent

In addition, mechanisms and procedures should be established to verify that free, prior and informed consent has been sought. In order for these mechanisms to function properly, indigenous peoples must be included in their development. States are to provide effective mechanisms for redress when the free, prior and informed consent of indigenous peoples has not been sought.

## Normative standards and further reading

- [UN Declaration on the Rights of Indigenous Peoples \(2007\)](#)
- [Indigenous Peoples and the UN Human Rights System, OHCHR fact sheet No 9 Rev 2 \(2013\)](#)
- [UNDG Guidelines on Indigenous Issues \(2008\)](#)
- [UN Guiding Principles on Business and Human Rights \(2011\)](#)
- [UN-REDD Programme Guidelines on Free, Prior and Informed Consent \(2013\)](#)
- [Reports of the Expert Mechanism on the Rights of Indigenous Peoples and the Special Rapporteur on the Rights of Indigenous Peoples to the Human Rights Council](#)
- [Reports of the Working Group on the issue of human rights and transnational corporations and other business enterprises \(2013\)](#)

## The work of OHCHR

OHCHR gives expert guidance on the practical application of the requirement of free, prior and informed consent of indigenous peoples to various key stakeholders ranging from Parliamentarians to national human rights institutions. For example:

- OHCHR has supported the development of specific laws on the rights of indigenous peoples, which clarified the content of the principle of free, prior and informed consent of indigenous peoples in the Republic of Congo and Indonesia. It has also produced training modules and provided technical assistance and expert advice to ensure that national regulations' initiatives comply with existing international standards on free, prior and informed consent in countries such as Bolivia, Mexico, Peru and Ecuador.
- OHCHR has worked closely with the indigenous experts and United Nations agencies involved in the UN Indigenous Peoples' Partnership (UNIPP) to ensure that all UNIPP country programmes are not merely about indigenous peoples, but also designed and implemented in true partnership with indigenous peoples and States.
- In September 2013, OHCHR launched a Manual for National Human Rights Institutions (NHRIs) together with the Asia-Pacific Forum of National Human Rights Institutions (APF) on the UN Declaration on the Rights of Indigenous Peoples, which benefited from inputs from indigenous peoples and contained practical guidance on how NHRIs can help operationalize the standards concerning free, prior and informed consent of indigenous peoples.
- OHCHR also supports the mandates of the Special Rapporteur on the Rights of Indigenous Peoples and the Expert Mechanism on the Rights of Indigenous Peoples, which have been advocating for the respect of the principle of free, prior and informed consent in their communications, reports, expert advice and thematic studies.

Through its Indigenous Peoples and Minorities Section and field presences, OHCHR continued to build indigenous peoples' capacities to strengthen their own institutions with a view to making respect for the principle of free, prior and informed consent a reality for indigenous peoples.

Executive Order 13175 - Consultation and Coordination With Indian Tribal Governments

[Federal Register: November 9, 2000 (Volume 65, Number 218)] [Presidential Documents]

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From the Federal Register Online via GPO Access [wais.access.gpo.gov] [DOCID:fr09no00-167]

Presidential Documents

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Title 3— The President

[[Page 67249]]

Executive Order 13175 of November 6, 2000

Consultation and Coordination With Indian Tribal  
Governments

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order 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; it is hereby ordered as follows:

Section 1. Definitions. For purposes of this order:

(a) "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.

(b) "Indian tribe" means an Indian or Alaska 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.

(c) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1),

other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(d) "Tribal officials" means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Sec. 2. Fundamental Principles. In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

(a) 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. 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.

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. 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.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

**Sec. 3. Policymaking Criteria.** In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

(a) Agencies shall 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.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(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.

**Sec. 4. Special Requirements for Legislative Proposals.** Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3.

**Sec. 5. Consultation.** (a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation,

(A) consulted with tribal officials early in the process of developing the proposed regulation;

(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB 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; and

(C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

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(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

(1) consulted with tribal officials early in the process of developing the proposed regulation;

(2) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB 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; and

(3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

#### Sec. 6. Increasing Flexibility for Indian Tribal Waivers.

(a) Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

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#### Sec. 7. Accountability.

(a) In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

(c) Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Sec. 8. Independent Agencies. Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 9. General Provisions. (a) This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A-19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.

(b) This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).

(c) Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at

the time this order takes effect.

(d) This order shall be effective 60 days after the date of this order.

**Sec. 10. Judicial Review.** This order is 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.

(Presidential Sig.) THE WHITE HOUSE,  
November 6, 2000.

*Administration of Barack H. Obama, 2009*

**Memorandum on Tribal Consultation**

*November 5, 2009*

*Memorandum for the Heads of Executive Departments and Agencies Subject: Tribal Consultation*

The United States has a unique legal and political relationship with Indian tribal governments, established through and confirmed by the Constitution of the United States, treaties, statutes, executive orders, and judicial decisions. In recognition of that special relationship, pursuant to Executive Order 13175 of November 6, 2000, executive departments and agencies (agencies) are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes.

History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.

My Administration is committed to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications including, as an initial step, through complete and consistent implementation of Executive Order 13175. Accordingly, I hereby direct each agency head to submit to the Director of the Office of Management and Budget (OMB), within 90 days after the date of this memorandum, a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175. This plan shall be developed after consultation by the agency with Indian tribes and tribal officials as defined in Executive Order 13175. I also direct each agency head to submit to the Director of the OMB, within 270 days after the date of this memorandum, and annually thereafter, a progress report on the status of each action included in its plan together with any proposed updates to its plan.

Each agency's plan and subsequent reports shall designate an appropriate official to coordinate implementation of the plan and preparation of progress reports required by this memorandum. The Assistant to the President for Domestic Policy and the Director of the OMB shall review agency plans and subsequent reports for consistency with the policies and directives of Executive Order 13175.

In addition, the Director of the OMB, in coordination with the Assistant to the President for Domestic Policy, shall submit to me, within 1 year from the date of this memorandum, a report on the implementation of Executive Order 13175 across the executive branch based on the review of agency plans and progress reports. Recommendations for improving the plans and making the tribal consultation process more effective, if any, should be included in this report.

The terms "Indian tribe," "tribal officials," and "policies that have tribal implications" as used in this memorandum are as defined in Executive Order 13175.

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The Director of the OMB is hereby authorized and directed to publish this memorandum in the *Federal Register*.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Executive departments and agencies shall carry out the provisions of this memorandum to the extent permitted by law and consistent with their statutory and regulatory authorities and their enforcement mechanisms.

BARACK OBAMA

[Filed with the Office of the Federal Register, 11:15 a.m., November 6, 2009]

NOTE: This memorandum was published in the *Federal Register* on November 9. *Categories:*  
Communications to Federal Agencies : Tribal consultation, memorandum.

*Subjects:* American Indians and Alaska Natives : Tribal consultation with the Federal Government;  
American Indians and Alaska Natives : Tribal nations, relations with the Federal Government.

*DCPD Number:* DCPD200900887.

## **List of Federal Agencies' Policies on Consultation and Collaboration with Indian Tribes**

### **Department of Agriculture**

1. **Agency-wide Policy:** Departmental Regulation 1350-002: Tribal Consultation, Coordination, and Collaboration
2. **Animal Plant Health Inspection Service:** Consultation with Elected Leaders of Federally Recognized Indian Tribes
3. **Forest Service:** FSM 1500 – External Relations, Chapter 1560 – State, Tribal, Country, and Local Agencies; Public and Private Organizations
4. **Natural Resources Conservation Service:** GM\_410\_405 Part 405 – American Indians and Alaska Natives

### **Department of Commerce**

5. **Agency-wide Policy:** Tribal Consultation and coordination Policy of the U.S. Department of Commerce
6. **National Oceanic and Atmospheric Administration:** Procedures for Government-to-Government Consultation With Federally Recognized Indian Tribes and Alaska Native Corporations
7. **U.S. Census Bureau:** Handbook for Consultation with Federally-Recognized Indian Tribes

### **Department of Defense**

8. **Agency-wide Policy:** American Indian and Alaska Native Policy and Department of Defense Instruction Number 4710.02: DoD Interactions with Federally-Recognized Tribes (2006)
9. **Department of the Air Force:** AF190-2002: Air Force Interactions with Federally-Recognized Tribes (2014)
10. **Department of the Army:** Army Regulation 200-4: Cultural Resources Management (See Section 1-9(c) ) (2012)
11. **Department of the Navy:** Department of the Navy Policy for Consultation with Federally-Recognized Indian Tribes
12. **Marine Corps:** MCO P5090.2A Chapter 8: Cultural Resources Management (See p. 8-27)

### **Department of Education**

13. **Consultation Policy:** <http://www2.ed.gov/about/offices/list/oese/oie/tribalpolicyfinal.pdf>

### **Department of Energy**



14. Agency-wide Policy: <http://www.energy.gov/sites/prod/files/2016/02/f30/DOE%20%20144.1.pdf>
15. Consultation with Indian Tribes in the Section 106 Review Process (498.15 KB) <http://www.energy.gov/sites/prod/files/2016/02/f30/consultation-indian-tribe-handbook.pdf>
16. GUIDANCE FOR INDIAN TRIBES AND NATIVE HAWAIIAN ORGANIZATIONS: WHAT TO ASK THE FEDERAL AGENCY IN THE SECTION 106 PROCESS (ACHP, 2013) <http://energy.gov/nepa/downloads/guidance-indian-tribes-and-native-hawaiian-organizations-what-ask-federal-agency>

#### **Department of Health and Human Services**

17. Agency-wide Policy: U.S. Department of Health and Human Services Tribal Consultation Policy
18. Administration for Children and Families: Administration for Children and Families Tribal Consultation Policy
19. Agency for Healthcare Research and Quality: AHRQ Tribal Consultation Policy
20. Centers for Disease Control and Prevention / Agency for Toxic Substances and Disease Registry: CDC/ATSDR Tribal Consultation Policy
21. Centers for Medicare and Medicaid Services: Centers for Medicare and Medicaid Services Tribal Consultation Policy
22. Health Resources & Services Administration: HRSA Tribal Consultation Policy Indian Health Service: Indian Health Service Tribal Consultation Policy
23. National Institutes of Health: National Institutes of Health Guidance on the Implementation of the HHS Tribal Consultation Policy

#### **Department of Homeland Security**

24. Agency-wide Policy: Department of Homeland Security Tribal Consultation Policy
25. Federal Emergency Management Agency (FEMA): FEMA Tribal Consultation Policy FEMA: Tribal Policy

#### **Department of Housing and Urban Development**

26. Agency-wide Policy: Government-to-Government Tribal Consultation Policy

#### **Department of the Interior**

27. Agency-wide Policy: Department of the Interior Policy on Consultation with Indian Tribes
28. Bureau of Indian Affairs: Bureau of Indian Affairs Government-to-Government Consultation

## Policy

29. Bureau of Land Management: Tribal Consultation Under Cultural Resources
30. Bureau of Ocean Energy Management: Bureau of Ocean Energy Management Tribal Consultation Guidance
31. Bureau of Reclamation: Protocol Guidelines: Consulting with Indian Tribal Governments
32. National Park Service: Management Policies 2006 (Section 1.11, Page 19)
33. Office of Surface Mining Reclamation and Enforcement: Tribal Consultation and Protection of Tribal Trust Resources
34. US Fish and Wildlife Service: Tribal Consultation Handbook
35. US Geological Survey: Policy on Employee Responsibility Towards American Indians and Alaska Natives

## Department of Justice

36. Agency-wide Policy: Department of Justice Policy Statement on Tribal Consultation
37. Attorney General: Guidelines Stating Principles for Working with Federally Recognized Indian Tribes

## Department of Labor

38. Agency-wide Policy: Tribal Consultation Policy

## Department of State

39. Agency-wide Policy: No publicly-available tribal consultation policy.

## Department of Transportation

40. Agency-wide Policy: U.S. Department of Transportation Tribal Consultation Plan
41. Federal Aviation Administration: American Indian and Alaska Native Tribal Consultation Policy and Procedures
42. Federal Highway Administration: U.S. Code Title 23—Highways (Section 135(e)(2) and (f)(2)(c), p. 227-229)

## Department of Treasury

43. Agency-wide Policy: Department of Treasury Notice of Interim on Tribal Policy (Interim Policy serves as acting tribal consultation policy)

**Department of Veterans Affairs**

44. Agency-wide Policy: [Department of Veterans Affairs Tribal Consultation Policy](#)

**Environmental Protection Agency**

45. Agency-wide Policy: [EPA Policy on Consultation and Coordination with Indian Tribes](#)

**Small Business Administration**

46. Agency-wide Policy: [U.S. Small Business Administration American Indian and Alaska Native Policy and Tribal Consultation Plan](#)

