



UNITED SOUTH AND EASTERN TRIBES, INC.

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USET Resolution No. 2006:063

**COMMENTS TO THE U.S. ENVIRONMENTAL PROTECTION AGENCY DRAFT GUIDANCE ON  
CONSULTATION WITH TRIBAL GOVERNMENTS**

- WHEREAS,** United South and Eastern Tribes, Incorporated (USET) is an intertribal organization comprised of twenty-four (24) federally recognized Tribes; and
- WHEREAS,** the actions taken by the USET Board of Directors officially represent the intentions of each member Tribe, as the Board of Directors comprises delegates from the member Tribes' leadership; and
- WHEREAS,** the U.S. Environmental Protection Agency (EPA) has issued notice of Draft Guidance for Implementing Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (Draft Guidance) for comment; and
- WHEREAS,** the USET Natural Resources Committee and the USET Culture and Heritage Committee have reviewed this Draft Guidance and have compiled joint comments (attached); therefore, be it
- RESOLVED** the USET Board of Directors approves the submission of the attached comments in response to the Draft Guidance for Implementing Executive Order 13175 to the EPA and requests the presence of an EPA representative at the October 2006 USET Annual Meeting and EXPO for a full presentation on the Draft Guidance; and be it further
- RESOLVED** the USET Board of Directors approves and authorizes the USET Executive Director and USET staff, as directed, to work in consultation with USET Natural Resources and Culture and Heritage Committees to assist EPA in developing the final guidance document.

**CERTIFICATION**

This resolution was duly passed at the USET Semi-Annual Meeting, at which a quorum was present, in Verona, NY, on Thursday, June 8, 2006.

Keller George, President  
United South and Eastern Tribes, Inc

Eddie L. Tullis, Secretary  
United South and Eastern Tribes, Inc

*“Because there is strength in Unity”*

June 7, 2006

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

Re: Docket ID No. EPA-HQ-OA-2006-0248; EPA Draft Guidance for Implementing Executive Order 13175, Consultation and Coordination with Indian Tribal Governments

To Whom It May Concern:

United South and Eastern Tribes, Inc. (USET), is an inter-tribal consortia comprised of 24 Tribes in EPA Regions 1, 2, 4 and 6. We have reviewed EPA's Draft Guidance for Implementing Executive Order 13175 Consultation and Coordination with Indian Tribal Governments (Guidance Document) and have the following comments:

USET is concerned that this Guidance Document may be utilized as a means to circumvent Government-to-Government consultation requirements as set forth by the Native American Graves Protection and Repatriation Act (NAGPRA) and Section 106 of the National Historic Preservation Act (Section 106). We recommend that language be inserted at the beginning of this Guidance Document which will clearly state that this Guidance Document does not apply to cultural resources, traditional sites, ceremonial sites, religious sites, or traditional cultural properties as relates to NAGPRA and Section 106 consultation. USET reminds EPA that all consultation requirements of the National Environmental Policy Act, especially those regarding cultural resources, still apply. This Guidance Document applies only to environmental and other interests as it affects the Tribes.

Specific comments are requested regarding substantial direct effects that Tribes may have experienced due to prior EPA issued guidance and similar actions. EPA guidance documents are often implemented as policy, not guidance, and therefore do have substantial direct effects on tribal governments. For example, the EPA Section 106 Water Quality Guidance requires that data collected be input into STORET. This requirement is especially burdensome on Tribes who do not have the resources to devote an FTE to data input and to those Tribes who do not wish to participate in data sharing activities. EPA's Tribal Drinking Water Operator Certification Program Final Guidelines, although a "voluntary" program, requires a certified operator for the Tribe to be eligible for Drinking Water Infrastructure Grant Tribal Set-Aside. Similarly, the Indian General Assistance Program guidance document is and has been implemented as policy since the program development in 1992. These examples clearly show that guidance documents in effect become policy and potentially have substantial direct effects on tribal governments.

With respect to EPA's position on permits and licensing, we disagree that permit/licensing actions of non-tribal permittees do not potentially have direct substantial effects on a Tribe.

Tribes should be notified of activities that may potentially affect the Tribal community, such as hydropower dams and discharge activities that occur upstream of the Tribe. When a permit is issued to a Tribe, the Tribe should be treated as sovereign nation, not commercial industry. For example, wetland permits used to develop tribal housing and/or governmental infrastructures are not for commercial development or economic gain.

This Guidance Document is intended for use by EPA managers and staff; however, the document should state that all levels of EPA, from Administrator to staff, should be aware of and active in the practices outlined in the Guidance. There may be times when true Government-to-Government consultation will occur at levels higher than the Division.

We agree that tribal duly authorized officials may be necessary. However, the Guidance Document should require that such duly authorized officials be named in official correspondence from the Tribe and signed by the Tribal Leader. Informal authorization, such as emails, should not be considered as acceptable authorization. Similarly, if consultation should occur with an inter-tribal organization, that consultation should be project specific and only occur on behalf of a Tribe who has provided formal authorization in a letter signed by the Tribal Leader specifying the project on which consultation is authorized. Blanket authorization is not acceptable.

The Guidance Document states that documentation of the consultation process will be required and may not be privileged. Privileged information needs to be defined to include confidential discussions regarding compliance concerns, interim discussion on achieving compliance, and any information regarding culturally sensitive sites.

USET will be convening the Annual Meeting and EXPO hosted by the Mississippi Band of Choctaw Indians in October. We request that EPA attend this meeting to take further comments on the Guidance Document. This will present EPA with the opportunity to enter into meaningful Government-to-Government consultation with Tribes who are present at the meeting. Lisa Berrios, USET Environmental Liaison Officer, will follow-up with the American Indian Environmental Office with additional meeting information.

Thank you in advance for your sincere consideration of these comments. We look forward to future dialogue with you regarding the development of a final guidance document.

Sincerely,



Keller George  
USET President

PC: Carol Jorgenson, AIEO Director  
Jose Aguto, AIEO  
Brian F. Mannix, OPEI