



## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[RTID 0648-XV194]

#### Final National Oceanic and Atmospheric Administration Tribal Consultation Policy and Procedures

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice.

**SUMMARY:** On January 26, 2021, the White House issued a Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships that reaffirmed the Executive order on Consultation and Coordination with Indian Tribal Governments (2000). In response, NOAA sought review and comment on its Tribal consultation policy and procedures in November 2021. NOAA revised its Consultation Handbook describing procedures for government-to-government consultation with federally recognized Indian tribes, and updated an associated NOAA Administrative Order (NAO 218-8) and the Indigenous Knowledge (IK) guidance.

**DATES:** The policy and procedures took effect on June 28, 2023.

**ADDRESSES:** Requests for additional information or an electronic copy of the revised Consultation Handbook, the associated NOAA Administrative Order (NAO 218-8), and/or the Indigenous Knowledge (IK) guidance should be directed to Becky Cruz Lizama, NOAA Senior Tribal Liaison, NOAA Office of Legislative and Intergovernmental Affairs, U.S. Department of Commerce, NOAA, 1401 Constitution Ave. NW, Station Number 62006FB, Washington, DC 20230.

**FOR FURTHER INFORMATION CONTACT:** Becky Cruz Lizama, NOAA Senior Tribal Liaison, telephone (202) 482-0809; email at [OLIA.Tribal@noaa.gov](mailto:OLIA.Tribal@noaa.gov).

**SUPPLEMENTARY INFORMATION:** The revised Handbook is intended to assist

NOAA, including its regional and field staff, in conducting effective government-to-government consultations and fulfill NOAA's obligations under E.O. 13175 and associated Presidential memorandums, the Department Administrative Order 218-8 on Consultation and Coordination with Indian Tribal Governments, and the Department of Commerce Tribal Consultation and Coordination Policy. The IK guidance will facilitate inclusion of IK into the line offices' environmental science, policy and decision making process, and build partnerships with Indigenous peoples.

On January 26, 2021, the White House issued a Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships. The Memorandum requires the Secretary of Commerce to submit to the Director of the Office of Management and Budget (OMB), a detailed plan of actions the agency will take to implement the policies and directives of E.O. 13175 (2000) and the Presidential Memorandum on Tribal Consultation issued in November 2009.

NOAA's mission is to understand and predict changes in climate, weather, oceans, and coasts, to share that knowledge and information with others, and to conserve and manage coastal and marine ecosystems and resources. NOAA has established policies and guidance to provide for meaningful and timely input from federally recognized Indian tribes into NOAA's decision-making process on policy matters that have tribal implications. In addition, NOAA offers its employees training and other guidance to support a consistent, effective, and proactive approach to conducting government-to-government consultations with federally recognized Indian tribes under E.O. 13175, the Department of Commerce (DOC) Department Administrative Order 218-8 Consultation and Coordination with Indian Tribal Governments (2014), and the DOC Tribal Consultation and Coordination Policy (78 FR 33331, June 4, 2013).

While much of NOAA's existing policy and guidance has been developed in consultation with federally recognized Indian tribes, NOAA recognized that these

documents could benefit from a review and update. As part of its effort to implement the January 26, 2021 Presidential Memorandum, NOAA requested comments from Tribal Nations, tribal officials, members of the public, and other interested parties to help identify appropriate updates or revisions to the following existing NOAA policies and guidance documents, which facilitate NOAA's implementation of E.O. 13175: (1) Tribal Consultation Handbook titled NOAA Procedures for Government-to-Government Consultation With Federally Recognized Indian Tribes and Alaska Native Corporations (2013); (2) NOAA Administrative Order 218-8 titled Policy on Government-to-Government Consultation with Federally Recognized Indian Tribes and Alaska Native Corporations (Reaffirmed in 2018); and (3) a traditional ecological knowledge (TEK) guidance currently titled NOAA Fisheries and National Ocean Service Guidance and Best Practices for Engaging and Incorporating Traditional Ecological Knowledge in Decision-Making (2019). NOAA proposed revisions to its Tribal Consultation Handbook reflect lessons learned and improved practices to better facilitate meaningful and effective tribal consultations. NOAA also proposed minor revisions to Administrative Order 218-8 to reflect necessary updates since its issuance in 2014. We also sought comments on the existing TEK Guidance, which had not been previously made available for public comment. Though the TEK Guidance was originally only implemented by NOAA Fisheries and the National Ocean Service, NOAA is now extending the applicability of the TEK Guidance to all NOAA Offices and renaming it the IK guidance. Based on written and oral comments received, NOAA revised its Tribal Consultation Handbook, Administrative Order, and IK guidance. All three documents can be found on the NOAA website

*<https://www.noaa.gov/legislative-and-intergovernmental-affairs/noaa-tribal-resources-updates>.*

NOAA's revised Handbook and NAO also reflect the recent Presidential

Memorandum on Uniform Standards for Tribal Consultation (November 30, 2022), which among things, commits agencies to conducting government-to-government consultation in a manner that recognizes and respects Tribal self-government and sovereignty; identifies and considers Tribal treaty rights, reserved rights, and other rights; respects and elevates IK, including cultural norms and practices relevant to such consultations; and meets the responsibilities that arise from the unique legal relationship between the Federal Government and Tribal governments.

NOAA is also releasing guidance on the recognition and application of IK to improve decision making for our partners and within NOAA. Through the IK guidance, NOAA encourages the inclusion of IK, as appropriate and to the extent practicable and permitted by law, in the line offices' environmental science, policy and decision making process, to better facilitate consultations, fulfill Federal trust responsibilities, respect treaty rights, understand environmental justice concerns as directed by E.O. 12898, inform agency decision making, and to build partnerships with indigenous peoples.

The consultation policy and procedures are intended only for NOAA internal management purposes and does not create any right or benefit, substantive or procedural, enforceable against the United States, its agencies, entities, or instrumentalities, its officers or employees, or any other person.

### **Summary of Comments Received in Response to the Draft Policy and Procedures**

On November 24, 2021, NOAA published a notice and request for information on NOAA's Tribal consultation draft policy and procedures in the Federal Register (86 FR 67036). In response, NOAA received 18 written comments on the revised Tribal Consultation Handbook and the updated IK guidance. A summary of comments received and NOAA's responses to those comments are presented below.

Comments received, and responses thereto, from two national consultation webinars held

on January 10, 2022, and January 11, 2022, are also included.

### **General Comments and Recommendations (Consultation Handbook and Policy)**

*Comment 1:* The definition of consultation should include “with a goal of reaching consensus.”

*Response:* NOAA’s Handbook is designed to ensure that NOAA implements a consistent and accountable process for meaningful and timely consultation on policies with tribal implications. The Handbook notes the Agency’s commitment to working with the federally recognized Indian tribe(s) to reach agreement during the consultation process on a path forward or course of action to the extent practicable. NOAA has determined, however, that in some circumstances, it may not be possible to reach consensus on actions subject to consultation. In such circumstances, and as consistent with the Handbook, NOAA will provide the consulted tribe(s) with notice of the course of action adopted by the Agency and the rationale for that decision. This approach is consistent with NOAA’s long-standing implementation of E.O. 13175 and the general approach to government-to-government consultation across the Federal Government. See, e.g., Presidential Memorandum on Uniform Standards for Tribal Consultation (November 30, 2022).

*Comment 2:* Delete “Consultation is not necessarily a format for consensus decision-making” as it falls short of trust obligations.

*Response:* Partially accepted. As discussed in NOAA’s Handbook, consultation supports NOAA’s efforts to fulfill its trust responsibility to Indian tribes. There may, however, be situations where reaching consensus on policies that have tribal implications is not possible as discussed in the response to *Comment 1* above. In such situations, NOAA will comply with the policies described in the Handbook to provide an explanation as to why NOAA will not or cannot address the concern(s) raised by the tribe.

*Comment 3:* Explicitly state in policies and procedures that meaningful consultation's goal should always be obtaining tribal informed consent when a project would impact tribal land or resources on or off a reservation.

*Response:* NOAA's Handbook describes the Agency's commitment to working with the federally recognized Indian tribe(s) to reach agreement during the consultation process on a path forward or course of action to the extent practicable.

*Comment 4:* The current language in the Handbook indicates that the goal of consultation is simply the exchange of information – essentially that the goal is the process itself. We recommend that NOAA update this section to align more closely with the Makah Ocean Policy: “The goal of early engagement and formal consultation is to enhance governing and management efficiencies by avoiding, minimizing, or mitigating adverse impacts a federal, state, or local decision may have on [Tribal] treaty rights, resources, or interests. The ultimate goal is to engage [Tribal] interests at the earliest development of scoping or planning activities by identifying possible solutions that avoid any adverse impact to the [delete tribe name] Tribe's treaty rights, resources, or governing interests.” The goal of consultation should go beyond the process itself and include the protection of treaty rights, resources, and interests.

*Response:* Accepted and modified slightly to include all tribes and focus on Federal rule making. The following was added to the Handbook “The goal of early engagement and formal consultation is to enhance governing and management efficiencies by avoiding, minimizing, or mitigating adverse impacts a federal decision may have on tribal treaty rights, resources, or interests. The ultimate goal is to engage tribal interests at the earliest stage of scoping or planning activities by identifying possible solutions that avoid adverse impacts to the tribe's treaty rights, resources, or governing interests.”

*Comment 5:* Ensure decisions are not made when consultation occurs.

*Response:* Accepted. Text added to pages 6-7 of the Handbook: “Regardless of whether it is an informal engagement or a consultation, such discussions should happen prior to a decision being made.” In addition, on page 12 the Handbook states “it should always occur at the earliest time practicable, well before a final policy or regulatory decision with tribal implications is made.”

*Comment 6:* Training should also include training from tribes. In addition, strike “as financial resources allow” as it is critically important that all employees of Federal departments and agencies receive comprehensive training on working with and communicating effectively with Tribal Nations. Federal actions impact Tribal Nations and our citizens.

*Response:* NOAA agrees that effective employee training is an important component of successful implementation of the Handbook and meeting NOAA’s Tribal Trust Responsibilities. NOAA has established a team of Tribal Liaisons within each Line Office to help facilitate employee training. In addition, online and regional trainings are available to staff. However, there are currently no specific funds appropriated for tribal consultation training in NOAA’s budget. Therefore, we have retained “as financial resources allow”.

*Comment 7:* NOAA personnel in the role of liaison need clear guidance that their role is facilitation of communication. The position of liaison should have guidance that articulates the breadth of the role: “Information exchange” to “Request to initiate Government-to-Government.”

*Response:* The Position Description for the Senior NOAA Tribal Liaison describes the responsibilities of this position, including communications responsibilities. NOAA does not agree this information is necessary to include in the Consultation Handbook.

*Comment 8:* Edit sentence as follows “If a NOAA line office or staff office deems

necessary, or by request from a Tribal government, they also may consider establishing a tribal liaison within a program or region.”

*Response:* Accepted. Added “or by request from a Tribal government....” See Handbook Section IV.D.

*Comment 9:* NOAA line offices, staff offices, and Regional Teams should designate more than one staff person in each department as a tribal liaison. These liaison positions should be separate positions from existing staff positions. Communicating, coordinating, and consulting with tribes in culturally appropriate and meaningful ways is year-round, full time work. Moreover, it is not possible for one regional tribal liaison to adequately engage with all the tribes in their region; for instance, consider that the NOAA Alaska Region has 229 federally recognized Indian Tribes with whom NOAA is directed to consult.

*Response:* NOAA line offices, staff offices, and Regional Teams have the ability to designate a Tribal Liaison and other staff to support consultation efforts where there is a need and funding is available.

*Comment 10:* Include involvement of Tribes in the hiring process for Tribal Liaisons wherever possible to ensure that they have the appropriate experience and relationships. Given the important role of Headquarters and Regional Tribal Liaisons in consultation processes, engaging tribes in selecting and building relationships with these important staff people will help facilitate effective consultation.

*Response:* No changes. Comments regarding Federal hiring processes are beyond the scope of this Handbook.

*Comment 11:* NOAA’s consultation policy should require an office of tribal liaison be created. NOAA should have high level staff with expertise in Indian law and policy. NOAA’s institutional structure should have Indian law and policy built into it.

*Response:* NOAA has a number of senior positions with responsibility for tribal

matters. These include a Senior Advisor to the Under Secretary on Fisheries and Tribal Engagement, a Senior NOAA Tribal Liaison, and each line office and relevant staff office has a Headquarters Tribal Liaison which forms the NOAA Headquarters Tribal Team. The NOAA Office of the General Counsel also maintains a Tribal Team of Indian law practitioners. In addition, many line offices have additional Tribal Liaisons. For example, every NOAA Fisheries Science Center and National Marine Fisheries Service (NMFS) Regional Offices and Science Centers have a Tribal Liaison, one of which is a full time position (*i.e.*, the NMFS West Coast Tribal Liaison).

*Comment 12:* We recommend that Tribal Liaison positions be independent positions (*i.e.*, not duties assigned to staff already fulfilling other duties, such as fishery analysts) that are filled by highly-qualified individuals with the specific training, expertise and skillsets related to the tasks such a position is assigned to. Tribes and Tribal organizations in Alaska have requested positions like these be established at the NMFS Alaska Region and at Alaska Fisheries Science Center (AFSC) for many years.

*Response:* As noted in response to *Comment 11*, NOAA employs a number of staff with a specific focus on the Agency's work with tribes and tribal organizations. These staff include a Senior Advisor to the Under Secretary on Fisheries and Tribal Engagement, a NOAA Senior Tribal Liaison, and a full time NMFS West Coast Tribal Liaison.

*Comment 13:* Provide more information on Tribal Tracker.

*Response:* The Tribal Tracker is an internal tracking system that allows NOAA to collect summary information on consultations conducted by the Agency. This system is used, in part, to support NOAA's tribal engagement reporting obligations.

*Comment 14:* Strengthen the statement "NOAA should provide available information to the tribes in advance of the consultation to allow the tribes to prepare: by changing it to "NOAA must provide all necessary and available information."

*Response:* Accepted. Edit made: “In order to have a meaningful consultation, NOAA will provide available information to the tribes in advance of the consultation to allow the tribes to prepare. NOAA will work with tribes in an effort to ensure that the information is provided to tribes in a format that tribes can access and use.” See Handbook Section V.A. In addition, NOAA added language that NOAA will work with tribes to ensure that the information is provided to tribes in a format that tribes can access and use. NOAA has received comments previously that there are some constraints that might limit the ability to access and use information, such as lack of internet access or sufficient bandwidth to access or download materials, such as lengthy PDFs. In light of these constraints, NOAA will endeavor to work with tribes to make sure tribes can access and use the materials. For example, in some cases, NOAA may mail materials in advance.

*Comment 15:* NOAA must make the utmost effort to protect TEK and other sensitive cultural information from public disclosure and ensure Tribal Nations have the ability to control what is shared by the Agency, including through Freedom of Information Act (FOIA) requests.

*Response:* While information shared between NOAA and a tribe may be beneficial for the consultation process, it is generally not protected from disclosure under FOIA, especially if this information is used in the decision-making process and becomes part of the administrative record. As such, the Handbook notes the importance of advance notification to tribes of the limited capacity of NOAA to protect the confidentiality of information provided by the tribe consistent with the requirements of FOIA or litigation.

*Comment 16:* Language should be added to the FOIA section to protect information shared by tribal religious and cultural leaders as well as tribal government officials such as Tribal Historic Preservation Officers and

environmental, cultural, and natural resource managers.

*Response:* While information shared between NOAA and a tribe may be beneficial for the consultation process, it is generally not protected from disclosure under FOIA, especially if this information is used in the decision-making process and becomes part of the administrative record. As such, the Handbook notes the importance of advance notification to tribes of the limited capacity of NOAA to protect the confidentiality of information provided by the tribe consistent with the requirements of FOIA or litigation. The applicable requirements for disclosure of information subject to FOIA are not modified by the internal procedures identified in this Handbook. While NOAA does make efforts to safeguard sensitive information submitted by tribes, it must comply with applicable Federal information disclosure requirements.

*Comment 17:* Make this sentence stronger “NOAA will make reasonable efforts to provide adequate information about its actions and policies at the earliest practical time,” by changing it to “NOAA will provide adequate information about its actions and policies at the earliest practical time in advance of consultation to provide the tribe adequate time to review and reflect on it.”

*Response:* Accepted in part. Edit made: NOAA will provide available information about its actions and policies at the earliest practical time. See Handbook Section V.A.

*Comment 18:* NOAA recommends that line offices and regions establish consultation protocols with tribal governments consistent with this Handbook as necessary. Consultation protocols should not just be made when NOAA deems necessary.

*Response:* No changes made. The Handbook provides that “it may be useful and expeditious for those tribes and NOAA offices to develop protocols reflecting their mutually preferred timeline for and means of communication and exchange of information” and authorizes such protocols consistent with the Handbook.

*Comment 19:* The Federal Government must also recognize that it has become the norm in recent years that tribes and other community organizations are faced with having to engage with multiple agencies regarding multiple major projects almost continuously. NOAA must acknowledge, and actively work to reduce, this extraordinary burden on our people.

*Response:* The Handbook acknowledges this issue and includes a new Section V.C., which directs staff to coordinate and cooperate with interested Federal agencies to ensure the most efficient and expeditious manner of consultation with tribes on a particular matter.

*Comment 20:* Our experience and observations, consultations are usually scheduled for certain dates and times that prioritize the needs of the Federal regulatory process over those of Native communities, and those appointments rarely consider or appreciate the often competing, conflicting, and overriding obligations associated with sustaining our communities.

*Response:* Accepted. Added the following sentence “Timelines should reflect that tribal members often have competing, conflicting and overriding obligations associated with sustaining tribal communities.” See Handbook Section VI.D.

*Comment 21:* Document is missing the direct recognition of the unique role, and often multiple roles, that tribal officials and other local leaders play in their communities, and how that reality can significantly impact engagement with Federal agencies and others. It is critical to understand that often for these leaders, and particularly for Alaskan Tribal leaders, their leadership activities are not their primary employment. Beyond that employment, virtually all of them also contribute significant time and energy to the demands inherent to a subsistence lifestyle.

*Response:* Accepted. Added the following sentence: “Timelines should reflect that tribal members often have competing, conflicting and overriding obligations associated

with sustaining tribal communities.” See Handbook Section VI.D.

*Comment 22:* Better recognize the difference and mandates of Treaty Tribes in documents including case law.

*Response:* As noted above, NOAA has added additional content to explain the need to account for tribal treaty rights, reserved rights, and similar rights when considering actions that may have tribal implications. See Handbook Section VI.A. Discussion has also been added to note the importance of NOAA staff becoming familiar with relevant treaties and other sources of reserved and similar rights. The new discussion also includes a resource for assisting with the identification of relevant treaties. See Handbook Section VI.A.

*Comment 23:* We recommend that NOAA construe the consultation mandate broadly. If NOAA is unsure whether an action may have tribal implications, the appropriate approach would be for NOAA to communicate with the tribe and determine, based on an informed exchange of views with the tribe, whether the action affects the tribe.

*Response:* The Handbook provides that an invitation to consult on a proposed policy should be sent to the appropriate representative of the governing body of the tribe for NOAA actions “that may have tribal implications.” See Handbook at Section VII.A. NOAA believes this directive provides adequate direction for NOAA staff to invite consultation on actions for which there may be tribal implications.

*Comment 24:* In the list of examples of policies where consultation with tribes is appropriate, NOAA should amend the first bullet point to include the text: “A policy or action that will have effects within or near a reservation or Alaska Native Village.”

*Response:* Accepted in part. However, this statement should be broader than AK Natives. The third bullet was changed to read “[a] policy or action affecting a tribal entity, or facility, land, or resources owned or operated by a tribal government, or held in

trust for a federally recognized tribe.” See Handbook Section VII.A.

*Comment 25:* Move this sentence “While books and other documents may serve as useful secondary references for understanding the political and cultural history of an indigenous people, agency staff should remember that the tribal members themselves are the best source of knowledge about their particular tribe” to the beginning of the consultation section and emphasize the importance of reaching out to a tribe for this information first.

*Response:* Accepted. Text moved to the beginning of the consultation section.

*Comment 26:* Make clear that consultation should be early and often.

*Response:* The Handbook states that consultation “should always occur at the earliest time practicable, well before a final policy or regulatory decision with tribal implications is made.” See Handbook Section VII.

*Comment 27:* Not enough detail on the consultation process to ensure it is not a “check the box” effort. For example the Handbook does not provide guidance or elaboration on how NOAA offices should address and incorporate the substantive elements of consultation in order to inform Federal policy and regulatory development. Instead, the Handbook identifies a range of factors that can either enhance or inhibit effective consultation, and provides detailed guidance on the procedural elements of consultation.

*Response:* The Handbook is a process document designed to provide - per E.O. 13175 - an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. The Handbook is designed to address procedural aspects of this obligation and not necessarily the substantive points suggested by the commenter.

*Comment 28:* There may be two phases in a consultation: Tribal Consultation and Tribal G2G Consultation. Tribal Consultation is viewed as a process of sharing

information, coordination, dialogue, and considering the tribal viewpoint. This occurs before an agency commits to a path of action and provides for a tribe to identify if an action will affect tribal rights, lands, governance, resources, or interests. Often the completion of a Tribal Consultation can ensure that should a Tribal G2G Consultation between decision makers be necessary, it is meaningful and productive. We encourage NOAA to review: “Guidance and Responsibilities for Effective Tribal Consultation, Communication, and Engagement”: A guide for Agencies Working with West Coast Tribes on Ocean & Coastal Issues developed by members of the West Coast Tribal Caucus of the West Coast Ocean Alliance.

*Response:* In the Handbook we have distinguished the first phase as “engagement” and the second and formal phase as “consultation”.

*Comment 29:* Timeline: Often tribal decisions are two and sometimes three tiered in structure, this allows for our leadership access to available expertise both within staff and within its community. To provide for multiple discussions could easily occupy a 90 days or more timeline.

*Response:* Agree. NOAA believes the Handbook addresses this concern. The Handbook provides that NOAA staff should be knowledgeable and respectful of the decision-making practices of the tribe. This may require a departure from highly-structured agendas and timeframes. It further provides that consultation should be initiated at the earliest practicable time and that an explanation of any time constraints known to the Agency, such as statutory deadlines, should be disclosed at the initiation of the consultation. See Handbook at Section VII.

*Comment 30:* Should include an appeals process if NOAA determines that a formal consultation is not needed due to an action not having tribal implications.

*Response:* Section VI.H. added to address dispute resolution procedures.

*Comment 31:* If the scope changes, consultation is required. “Although

consultation need not occur at every step of the Federal decision-making process, it should always occur at the earliest time practicable, well before a final policy or regulatory decision with tribal implications is made.”

*Response:* The following sentence was added: “If the scope of action changes, that change should be addressed as part of the ongoing consultation.” See Handbook Section VII.A.

*Comment 32:* Revise bullet in Section VII.A., to read: “A policy or action affecting a facility or entity land or resources owned or operated by a tribal government” to account for those areas that may affect lands that are tribal lands.

*Response:* Accepted. Added “land or resources” to the bullet.

*Comment 33:* Under “[e]xamples of policies where consultation with tribes is appropriate include but are not limited to”, there should be an inclusion of “a policy or action that impacts Treaty areas” under the bullet points listed.

*Response:* Accepted. A new paragraph was added to this section on treaty rights.

*Comment 34:* Page 14, Section B mentions instances and factors NOAA takes into consideration when responding to a request for consultation. NOAA should amend the second sentence to include “change in tribal government” as a factor to be considered.

*Response:* Accepted. Added “change in tribal government” to the second sentence. See Section VII.B.

*Comment 35:* We request that NOAA clarify what circumstances would lead NOAA to make the determination to decline to consult.

*Response:* Accepted in part. Added the following sentence “NOAA may only decline a consultation if it is determined that an issue of interest does not have tribal implications.” Given the unique aspects of each determination, providing an exhaustive list in the Handbook is not feasible.

*Comment 36:* NOAA should invite inter-tribal bodies to consultation along with

the tribes they represent. Excluding tribal bodies only hinders NOAA's attempts to meaningfully include tribal participation and promote environmental justice in its work, as directed by Executive Order 13175.

*Response:* Information regarding the permissible role of tribal organizations in consultations can be found on page 14 at Section VII.E., of the Handbook. NOAA notes that, where expressly authorized by a tribe, such an organization may represent or conduct consultation on behalf of an authorizing tribe.

*Comment 37:* If a Tribe does not respond to an initiation of Tribal Consultation within the requested time frame, NOAA should consider reaching out to the tribe at least once more and extending the response time period. It is likely that the tribe has many pressing matters to attend to within their community and/or is participating in subsistence fishing, hunting, and gathering seasons. This underscores the need for NOAA to reach out to tribes regularly and well before any deadlines to include tribal input in policy decisions.

*Response:* Accepted. The following sentence was added “[i]t may be that the tribe has pressing matters to attend to within their community and/or is participating in subsistence fishing, hunting, and gathering seasons. This underscores the importance for NOAA to reach out to tribes regularly and well before any deadlines to include tribal input in policy decisions.”

*Comment 38:* Include a vetting process for Tribal Organizations that includes reaching out to affective tribes.

*Response:* The Handbook includes the following statement “If a tribe wants to authorize a tribal organization to represent it or conduct consultation on its behalf, NOAA should confirm that in writing with the appropriate tribal officials and with the tribal organization. NOAA should also confirm in writing the scope of that representation (*e.g.*, which tribes are represented by the tribal organization) and the role

that the tribal organization will fulfill during the consultation process.” See Handbook Section VII.E.

*Comment 39:* This requirement should be mandatory “if NOAA believes its action will have substantial direct effects on that tribe, NOAA staff should consider following the written invitation with a phone call, site visit, and/or an email/fax (assuming those forms of communication are available to the tribal points of contact).”

*Response:* Accepted. Replaced “should consider” with “will”.

*Comment 40:* Ensure adequate funding for consultations (e.g., travel for tribes).

*Response:* NOAA does not have a standing appropriation available for tribal consultations. Where appropriate, and consistent with federal law, individual NOAA program offices may consider requests for funding activities associated with consultations.

*Comment 41:* “If it becomes clear that NOAA and the tribe have divergent views about the issues and topics appropriate for the consultation, effort should be made by both parties to agree upon a single statement of the issues. If the parties cannot reach an agreement, the record of the consultation should reflect the different view” and reiterate we should aim for consensus and differing views should be last resort.

*Response:* Agree. As previously noted, the NOAA 13175 Handbook describes the Agency’s commitment to working with the federally recognized Indian tribe(s) to reach agreement during the consultation process on a path forward or course of action to the extent practicable and consistent with NOAA’s legal requirements. There may, however, be situations where reaching consensus on policies that have tribal implications is not possible. In such situations, NOAA will comply with the policies described in the Handbook to provide an explanation as to why NOAA will not or cannot address the concern(s) raised by the tribe.

*Comment 42:* We strongly disagree that a tribe's choice of participants necessarily indicates how important the issues and consultation are to the tribe, as many other considerations (capacity, expertise, availability, *etc.*) all may play into the decision as to who participates. If a tribe has decided to engage in Consultation on an issue, NOAA should consider the issue of utmost importance unless the tribe states otherwise.

*Response:* Accepted. Deleted: "will indicate how important the issues and consultation are to the tribe."

*Comment 43:* True consultation should occur at a Leader-to-Leader level. Duly elected or appointed Tribal Leaders must be afforded the respect and opportunity to directly voice Tribal Nation concerns to those Federal officials with actual decision-making authority. In addition, the Federal Government must not delegate its consultation obligation to third party (*e.g.*, non-profit organizations, industries/corporations, hired consultants and contractors); the Federal Government must exercise appropriate oversight in ensuring tribal interests are not adversely impacted.

*Response:* Accepted in part. In response to this comment, NOAA updated Handbook Section VII.F.2., to provide that: "if the tribe designates its leader or members of the tribal council as representatives in the consultation, it is important that a NOAA official with decision-making authority participate in the consultation. The Handbook further provides that NOAA should "identify and prepare consultation participants who are able to fully address the concerns and issues articulated for discussion through government-to-government consultation." Handbook at Section VII.F.2.

*Comment 44:* In the sentence that states NOAA "should acknowledge and discuss the limited capacity of NOAA to protect the confidentiality of information

provided by the tribe consistent with the requirements of [FOIA] or litigation[,]” the use of the term “limited” should be struck from this section since it could be interpreted by NOAA staff that the Agency will not make the utmost effort to protect the confidentiality of sensitive Tribal government and cultural information. Upon removal of the term ‘limited’, this language should also be referenced under Section IV(A).

*Response:* Accepted. Sentence revised to: “NOAA should, however, in advance notify tribes of the information disclosure requirements that may apply to information shared by tribes with the Federal Government (examples include FOIA and litigation discovery). Although NOAA will endeavor to comply with a tribe’s request that information be kept confidential, there may be applicable Federal disclosure requirements that compel its release.”

*Comment 45:* Modify sentence to read “5) reach agreement with tribes on the method of recordkeeping and documentation of the consultation....”

*Response:* Accepted. Added “and reach agreement on” to Handbook Section VII.F.5.

*Comment 46:* The draft consultation handbook provides one way of closing a consultation with a one-way-response letter that does not meet a trust responsibility. Edit to read “written notice from NOAA and consent from affected tribes or the absence of any tribal objections by a predetermined time.”

*Response:* NOAA agrees that transparency is an important aspect of government-to-government consultation. In response to this comment, NOAA added the following sentence Handbook Section VII.G.: “As a best practice, NOAA should share a draft of the closing record for review and comment with the tribe before it is finalized.”

*Comment 47:* Add “6) Prior to beginning consultation inform the Tribe of NOAA’s obligations under FOIA.”

*Response:* Accepted. Added the following: "NOAA and tribes should not create

or share recorded information, such as summaries, transcripts or recordings, without first discussing the government's obligations under applicable law, including the Federal Records Act, FOIA and the Privacy Act, as well as in response to litigation obligations or as required by court order. This discussion should occur prior to beginning consultation."

*Comment 48:* NOAA agencies do not abide by the close out guidance which is disrespectful to the tribe.

*Response:* NOAA appreciates the comment. The Handbook Section VII.G., describes the process for closing out government-to-government consultations. It states that government-to-government consultation is closed through a formal, written communication from the lead NOAA official to the most senior tribal official.

*Comment 49:* This title should be amended to state: "Completing and recording the government-to-government consultation." Consultation process should include a follow-up phase. Consultation is an on-going process, and "closing" carries a connotation that prompts the consultation process to come to an end once formal, written communication has recounted the agreed-upon issues. Follow-up and follow-through are key components for a healthy government-to-government relationship. Follow-up and follow-through will also provide validation for the record that the consultation was engaging and meaningful.

*Response:* Accepted. NOAA changed the title of Section VII.G., to include the term "completing."

*Comment 50:* Recognize the unique status of Native land tenure in Alaska and the value of the unique and diverse systems of Native governance in Alaska.

*Response:* Accepted in part. NOAA included additional language requested concerning the unique system of Native governance and Native land tenure in Alaska. The following paragraph was added to the Handbook Section: There is a unique system

of Native governance in Alaska, and a variety of entities represent the interests of Alaska Native communities, including Alaska Tribes and governments, Alaska Native corporations, Alaska Native non-profits, and Alaska Native organizations. The purpose and structure of some of these entities is dictated in part by Federal law, such as the Alaska Native Claims Settlement Act (ANCSA) and the Marine Mammal Protection Act (MMPA). Moreover, the status of land ownership in Alaska is similarly defined in part by Federal law, including ANCSA. Pursuant to ANCSA, Alaska native corporations hold title to land in Alaska; as such, ANCSA lands are not held in trust by the United States and do not qualify as Indian Country. There is one reservation located in Alaska, the Annette Islands Reserve of the Metlakatla Indian Community. However, the lands and reservation defined under Federal law may not represent the traditional homelands of Alaska Native tribes.

In response to this comment, NOAA added clarification to the following existing sentence: “NOAA recognizes the distinct and individual cultural traditions and values of Alaska native peoples and their representative tribal governments” Handbook Section IV.B. (Emphasis added). Commenter requested that NOAA include additional information about ANCSA. We added an explanation of how ANCSA altered land ownership in Alaska, with corporations holding land, and we added a reference to the statute and a website with more information about ANCSA; however, additional details about ANSCA are beyond the scope of this Handbook. Handbook Section IX.D.

*Comment 51:* Tribal Consultation should not occur after a Fishery Management Council has taken Action. Tribes should inform recommendations. Provisions in the Magnuson-Stevens Fishery Conservation and Management Act (MSA) do not supersede tribal trust responsibilities.

*Response:* Accepted. Handbook Section IX.F., was revised to include: “NOAA and the tribes should continue to work together to develop specific, proactive, and

effective processes and procedures to better integrate the outcomes from tribal consultation between NOAA Fisheries and tribes with the appropriate Council process(es), with the goal that consultation outcomes would be shared with the appropriate Council before the Council takes action. Consultation should always occur at the earliest time practicable, well before a final policy or regulatory decision with tribal implications is made.”

*Comment 52:* Agencies have increasingly moved to the electronic distribution of documents. With internet connectivity often a challenge in small remote Alaskan communities, the digital transfer of documents, and particularly large complex documents featuring many maps, is impossible. Zoom and comparable virtual meetings are also often not an option given the extremely limited availability of broadband in rural Alaska. Accommodations must be made, and appropriate time must be allowed, for the distribution and review of all materials necessary for meaningful consultation to occur.

*Response:* NOAA appreciates the concerns expressed in this comment. There are a number of flexibilities in the Handbook for this reason. Specifically, the Handbook states “[t]he Department and operating units’ consultation processes may include one or more of the following: meetings, letters, conference calls, webinars, on-site visits, or participation in regional and national events.” In addition, NOAA added language that NOAA will work with tribes to ensure that the information is provided to tribes in a format that tribes can access and use. As this comment reflects, there are some constraints that might limit the ability to access and use information, such as lack of internet access or sufficient internet bandwidth to access or download materials, such as lengthy PDFs.

In light of these constraints, NOAA will endeavor to work with tribes to make sure tribes can access and use the materials. For example, in some cases, NOAA may

mail materials in advance. In response to this comment, NOAA made the following edits to the Handbook at Section V.A.: In order to have a meaningful consultation, NOAA will provide available information to the tribes in advance of the consultation to allow the tribes to prepare. NOAA will work with tribes in an effort to ensure that the information is provided to tribes in a format that tribes can access and use.

*Comment 53:* Add The United Nations Declaration on Rights of Indigenous Peoples to Appendix to emphasize consent in consultation.

*Response:* This is outside the scope of NOAA's consultation procedures. As noted in the "Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples," the United States recognizes the significance of the Declaration's provisions on free, prior and informed consent, which the United States "understands to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken." NOAA's 13175 Handbook reflects this view, and as such, the Agency does not believe inclusion of the Declaration as an appendix to the Handbook is necessary or appropriate.

*Comment 54:* NOAA Fisheries and National Ocean Service (NOS) are obligated, among other things, to follow Federal statutes regarding tribal resources, lands, and waters. This includes the Alaska National Interest Lands Conservation Act (ANILCA) of 1980; specifically, NOAA must adhere to Title VIII of ANILCA, which designates that subsistence fish, wildlife, and other resources used by Alaska Natives and non-Natives must be federally protected and prioritized when experiencing a conservation threat. The subsistence uses of these resources are prioritized during conservation closures and shortages means NOAA Fisheries and NOS management bodies must prioritize Alaska Native and non-Native subsistence users before commercial interests when multi-use fisheries are in decline, such as

Western Alaska salmon populations.

*Response:* No edits made. This comment is beyond the scope of the Handbook.

*Comment 55:* Add Religious Freedom Act.

*Response:* This comment is outside the scope of the Handbook. Although relevant to Tribal Rights, NOAA does not believe inclusion of the Religious Freedom Act as an appendix to the Handbook is necessary or appropriate.

*Comment 56:* Mass Dear Tribal letters are not ideal for consultations.

*Response:* Noted for implementation. NOAA values direct correspondence. Frequently in regional consultations individual letters are sent, however, for National Policies that may have tribal implications for hundreds of federally recognized Indian tribes, direct correspondence is not always feasible.

*Comment 57:* NOAA must recognize the authority of Tribal Nations to designate cultural resources and landscapes for protection similar to those guaranteed by treaty, statute, judicial decisions, and executive orders.

*Response:* This comment is outside the scope of the Handbook.

*Comment 58:* NOAA's consultation policy should explicitly affirm and differentiate treaty rights issues and the government-to-government process from the public and administrative process.

*Response:* NOAA has added additional language to the Handbook to highlight the need to account for tribal treaty rights, reserved rights, and similar rights when considering actions that may have tribal implications. See Handbook Section VI.A. In addition, the Handbook notes that "Consultation recognizes and distinguishes the views and policies of tribes from those of the general public and considers those views in the context of the responsibilities of federally recognized tribes to their people and tribal members." Consultation Handbook Section VI.

*Comment 59:* Provide a redline of document in the future.

*Response:* Accepted. A redline version of the revisions included with the final version of the Handbook is available at:

<https://www.noaa.gov/legislative-and-intergovernmental-affairs/noaa-tribal-resources-updates>.

*Comment 60:* Policy was not provided for review.

*Response:* The NOAA Policy on Government-to-Government Consultations with Federally Recognized Indian Tribes and Alaska Native Corporations is included as Appendix F to the Consultation Handbook.

*Comment 61:* This request should have been put in the **Federal Register**.

*Response:* The request was published in the **Federal Register** on November 24, 2021, at 86 FR 67036 and the comment period extended in a notice published on January 21, 2022, at 87 FR 3280.

*Comment 62:* Please capitalize Alaska Native throughout.

*Response:* Capitalization is based on Federal style guides.

Including:

<https://www.archives.gov/files/federalregister/write/handbook/ddh.pdf>.

*Comment 63:* It may be useful to add a section on threats (*e.g.*, plastics, dead zones, climate change) to the documents.

*Response:* This suggested addition is outside the scope of the Handbook.

*Comment 64:* Federal Government should standardize and codify consultation requirements. For far too long, Tribal Nations have experienced inconsistencies in consultation policies, the violation of consultation policies, and mere notification of Federal action as opposed to a solicitation of input.

*Response:* NOAA's goal for the Handbook, consistent with the requirements of E.O. 13175, is to develop an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.

The revisions to the Handbook are designed to further enhance NOAA's consultation process.

*Comment 65:* Because the U.S. is engaged in a diplomatic relationship with each federally recognized Tribal Nation, greater effort must be made to consult with Tribal Nations on an individual basis.

*Response:* See response to *Comment 57* above.

*Comment 66:* Do not use the number of tribes to consult with as a reason not to consult. Many tribes are willing to meet as a group or by video.

*Response:* Noted, NOAA will endeavor to engage and consult tribes using methods that work best for each party.

*Comment 67:* E.O. 13175, Section 3 lays out a set of policy making criteria that have been implemented unevenly over the last two decades. In particular, this includes directives to extend "maximum administrative discretion" to Tribal Nations by encouraging Tribal Nations to develop our own policies and standards to achieve objectives as well as consult with those Tribal Nations on the necessity of any Federal standards. Commenter urges NOAA and the Biden Administration to consider how this section can be better operationalized and consistently applied throughout the Federal Government.

*Response:* The aspects of this comment related to the consultation processes occurring outside of NOAA are beyond the scope of the Handbook. NOAA appreciates commenter's suggestions regarding better operationalization of the consultation process.

*Comment 68:* E.O. 13175, Section 6 encourages the Federal Government to facilitate and streamline tribal applications for waivers of statutory and regulatory requirements. With some notable exceptions, this section does not appear to be actively implemented across the Federal Government.

*Response:* This comment regarding the implementation of E.O. 13175 across the

Federal Government is beyond the scope of the Handbook. NOAA considers any tribal application for a waiver or statutory and regulatory requirements on a case-by-case basis, and as such, we do not believe it is necessary or appropriate to address waivers within the Handbook.

*Comment 69:* NOAA does not correctly quote the consultation provision. In both NOAA Administrative Order 218-8 and the Handbook, NOAA states that "[a]s defined in Section 5 of E.O. 13175, [consultation] refers to an accountable process ensuring meaningful and timely input from tribal officials on NOAA policies that have tribal implications." E.O. 13175 states that "[e]ach 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." By omitting the phrase "in the development of," NOAA appears to be discounting both the role and substance of consultation with respect to the Federal decision-making process.

*Response:* NOAA's Handbook notes the Agency's commitment to having an accountable process with the federally recognized Indian tribe(s) for development of policies and guidance. It is not NOAA's intent to discount the role or substance of consultation for the Federal decision-making process.

*Comment 70:* There is a need for a robust communication strategy with tribes.

*Response:* Noted, however the need for a robust communication strategy is beyond the scope of the Handbook.

*Comment 71:* NOAA should form a permanent Tribal Advisory Committee to advise on decision-making, policy development, and effective consultation; and support the institutionalization of education about tribes and treaty rights at the Federal level. The Tribal Advisory Committee would represent a permanent investment in NOAA's commitment to tribes that would persist beyond administration changes.

*Response:* Noted, however the recommendation to form a Tribal Advisory Committee is beyond the scope of the Handbook.

*Comment 72:* The “NOAA Tribal Team” on NOAA’s website should include Regional roles to provide context, email and phone information would be most useful.

*Response:* This comment regarding the context of NOAA’s website is beyond the scope of the Handbook. However, NOAA is updating its tribal website and will consider this comment through that process.

### **General Comments and Recommendations (IK Guidance)**

*Comment 1:* It is the sole authority of Tribal Nations and cultural and religious leaders to determine how TEK can and should be used to inform these processes and NOAA must make every effort to protect the confidentiality of this sensitive cultural and religious information. Commenter requested that the recommendations provided in these comments on the 2021 draft Tribal Consultation Handbook regarding FOIA requests also be referenced in the TEK Guidance to ensure that NOAA staff understand that these documents are inextricably connected.

*Response:* The current Guidance references the Handbook and vice versa, establishing the connections between these two documents. While information shared between NOAA and a tribe may be beneficial for the consultation process, it is generally not exempt from disclosure under FOIA, especially if this information is used in the decision-making process and becomes part of the administrative record. As such, the Guidance notes the importance of advance notification to tribes of the limited capacity of NOAA to protect the confidentiality of information provided by the tribe consistent with the requirements of FOIA or other applicable legal obligations.

*Comment 2:* We also support expanding the TEK Guidance to be implemented agency-wide at NOAA.

*Response:* NOAA agrees that the Guidance should be implemented agency-wide.

This change is reflected in the finalized TEK Guidance.

*Comment 3:* Commenter recommends the inclusion of language in the TEK Guidance to require NOAA offices to promote the incorporation and use of TEK to inform policy and decision-making processes when collaborating with other Federal departments and agencies on projects that may have direct or indirect implications for Tribal Nations.

*Response:* NOAA agrees that a discussion of interagency coordination should be included in the TEK Guidance. A new section on Interagency Coordination was added to TEK Guidance on page 13.

*Comment 4:* TEK must be respected and protected as Tribal proprietary knowledge, as Tribal Nations and cultures carry the responsibility of its application for the well-being of our communities, homelands, and seascapes. NOAA must make the utmost effort to protect TEK and other sensitive cultural information from public disclosure and ensure Tribal Nations have the ability to control what is shared by the Agency, including through FOIA requests.

*Response:* Accepted in part. NOAA added in the “Guidance” section, 1st paragraph: “IK should be respected as belonging to the IK holder(s).” Under Data Confidentiality, first paragraph, added, “NOAA employees should not begin collecting IK without establishing mutual trust, respect, and recognition of knowledge sovereignty.” NOAA acknowledges that IK holders may not support public disclosure of this information, however, the Agency has limited ability under existing public disclosure obligations to prevent disclosure of information shared with NOAA. For this reason, the IK Guidance describes the need to clearly disclose any constraints or limitations regarding the ability to protect sensitive or confidential information before NOAA seeks access to IK.

*Comment 5:* Currently NOAA is largely unequipped to collect and engage TEK in

a meaningful way. Fixing this will involve more than revision to the TEK Guidance, it will involve continuous employee training, extensive tribal engagement, and a change in the culture at NOAA and other Federal agencies.

*Response:* Accepted. NOAA agrees that guidance should reference NOAA capacity. A new section was added on, “Building Capacity Within NOAA.”

*Comment 6:* When approaching tribes regarding TEK, NOAA officials must view tribes as knowledge co-producers and co-owners and engage tribes as true partners in acquiring the information necessary for informed decision-making. NOAA must inform tribes of the specific, tangible benefits of such information sharing and refrain from making only broad claims that it will "inform policy."

*Response:* NOAA appreciates the views expressed in this comment.

*Comment 7:* The TEK Guidance should also cite to Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) that relates specifically to traditional knowledge: Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games, and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. In conjunction with indigenous peoples, states shall take effective measures to recognize and protect the exercise of these rights.

*Response:* Accepted. NOAA added a reference to Knowledge Sovereignty and UNDRIP language from Article 31 in a renamed “Principles” section.

*Comment 8:* Tribes should have an opportunity to review and object to any use

or recitation of TEK by NOAA. Provision needs to be stronger by removing "should" and replacing it with "must."

*Response:* Disagree. While the Guidance is premised on the principle of "Free, Prior and Informed Consent," it is designed to provide best practices to help ensure that the sharing and application of IK is responsible, effective, and mutually beneficial. It does not create binding or enforceable rights, and as such, NOAA does not believe inclusion of mandatory directives such as "must" is appropriate.

*Comment 9:* TEK must come directly from tribes. On page 4 of the TEK Guidance, "literature review" is listed as the first method of identifying and collecting TEK. If NOAA officials utilize this method, tribes need to guide the literature review to ensure that the right sources are being reviewed. Further, literature review should always be used in conjunction with outreach to tribes to identify and collect TEK.

*Response:* Accepted. Added to "literature review" section: "Researchers should work with IK holder(s) to share information about the project and seek their guidance on sources."

*Comment 10:* Confidentiality is important in order for tribes to candidly share TEK. In some cases, anonymity may be appropriate to prevent resource damage, backlash, enforcement action, legal risk, or other harms. Before any information is shared, NOAA and tribes should fully understand how such information will be shared. NOAA personnel should also explain to tribes if any of that information is subject to disclosure under the FOIA. NOAA should not approach individual tribal members for TEK without first receiving consent from the tribe through its formal, identified institutions. The qualifier "Ideally" should be removed, since collection outside a method established by a tribe does not amount to free, prior, and informed consent from the tribe to provide such TEK.

*Response:* Accepted. Removed word "ideally" from "Identifying and/or collect

IK” section. The section now includes the following sentence: “No data should be collected until a preferred method is established with indigenous group leaders and, through them or previous fieldwork, with IK holder(s).”

*Comment 11:* The TEK Guidance provides one example of successful use of TEK in decision-making. Providing additional examples in more detail may help NOAA personnel and tribes understand the benefits of sharing TEK and what TEK may be useful for NOAA decision-makers.

*Response:* Accepted. NOAA has included four examples of the benefits of using IK in decision making.

*Comment 12:* NOAA should include TEK as the best available science. NOAA should be more forthright in its TEK Guidance and state that the “best available science shall incorporate TEK and other related indigenous practices.”

*Response:* Partly accepted. Under Guidance, the first paragraph has been changed to substitute the word “should” for “can.” Under the new Interagency Coordination section, the second sentence reads: “When conducting formal or informal consultations with other Federal agencies on issues with implications for tribes and indigenous communities, NOAA should include and acknowledge IK as part of best available science and as part of the administrative record.” As noted in the response to *IK Comment 8*, NOAA does not believe inclusion of mandatory directives such as “shall” is appropriate in this Guidance document.

*Comment 13:* NOAA should ensure that TEK is properly incorporated into decision-making. One impediment to the sharing of TEK is that knowledge holders frequently do not understand or observe how their information or data are incorporated into Federal decision-making. Final results used to inform Federal decision making and policy development should also be shared. We urge NOAA to adhere to these provisions in the TEK Guidance and foster true scientific

collaboration with TEK holders.

*Response:* Accepted. NOAA will undertake training and outreach to ensure that staff are aware of the guidance. In addition, a section on “Building Capacity within NOAA” was added.

*Comment 14:* We encourage NOAA to conduct additional engagement directly with tribes, Alaska Native corporations, and other holders of Indigenous knowledge to further develop substantive guidance addressing the incorporation and consideration of TEK along with other scientific information.

*Response:* NOAA appreciates the recommendation provided in this comment. NOAA conducted tribal consultation on this guidance in January 2022, and does not believe additional consultation is needed at this time to finalize the IK Guidance, particularly given the additional consultation conducted by the White House Council on Environmental Quality (CEQ) in developing its interagency guidance on IK. As noted, the IK Guidance is intended to be a living document that will be updated and improved over time. NOAA anticipates continued engagement with tribes on this document as it continues to mature.

*Comment 15:* We request that the agency, through regulation or other means, more formally recognize indigenous knowledge in its definition of “best available science” under the Endangered Species Act, 16 U.S.C. 1531 *et seq.*, and other applicable laws.

*Response:* Guidance updated to note that Indigenous Knowledge should be included in the definition of “best available science” where possible, but does not specifically reference the Endangered Species Act. Under Guidance, the first paragraph has been changed to substitute the word “should” for “can.” New text reads: “Best available science should incorporate IK and other related indigenous practices.”

*Comment 16:* Commenter requests that NOAA revise its “Guidance and Best Practices for Engaging and Incorporating Traditional Ecological Knowledge in Decision-Making” to reflect an acceptance of indigenous knowledge on their own terms.

*Response:* Addressed in new “Context” section.

*Comment 17:* NOAA also should repudiate any perceived need to integrate or assimilate indigenous knowledge into a Western science format. What is needed instead is a multiple evidence base approach that recognizes and respects the inherent value and worth of indigenous knowledge systems. We encourage NOAA to review and integrate Two-Eyed Seeing into its tribal policies and procedures.

*Response:* Reference to, and discussion of, “Two-Eyed Seeing” has been added to the Guidance section.

*Comment 18:* To the extent the Agency has questions about the best way to do this, we suggest that NOAA invite indigenous community members to help craft the Agency’s policies and guidance documents.

*Response:* Accepted. NOAA held tribal consultation on this guidance, and incorporated most of the tribal input into the revised version. Added the Guidance section on co-production of knowledge. NOAA is interested in building partnerships with tribes to recognize and include IK.

*Comment 19:* Not all environmental concerns faced by Indigenous peoples are mere Environmental Justice concerns, but instead rise to the level of advertent cultural genocide from robbing of Environmental Sovereignty from the Indigenous population. By not clearly defining that the purpose of this document is to foster partnership and not disenfranchisement of Indigenous lifeways, this document leaves it open for industry to circumvent the Federal regulators and other Federal entities who have the fiduciary trust responsibilities to the tribes and other Indigenous peoples of the United States.

*Response:* In response to this comment, NOAA added “fulfill Federal trust responsibilities” to the purposes addressed by the inclusion of IK.

*Comment 20:* Commenter notes that the guidance leaves a big hole in this portrayal of what NOAA can do by neglecting to affirm that NOAA with its science-based objectivity have the ability to act as an advocate for the Indigenous peoples when speaking with other Federal agencies who do have the ability to ensure enforceability of rights or the ability to cause action under the law.

*Response:* Accepted. NOAA agrees that IK can be a relevant and valuable element of interagency coordination. In response to this section, NOAA has added a section on “Interagency Coordination” to acknowledge this concept and provide guidance to NOAA staff.

*Comment 21:* NOAA Fisheries should recognize generally, and in the subject documents specifically, the distinct, unique feature or attribute that distinguishes the tribe and its members from most other Americans (such as those commonly identified among “Environmental Justice” communities). We have Treaty Rights, and derived from that fact, the Federal Government has a Trust Responsibility to us.

*Response:* Accepted. A reference to treaty rights and trust responsibilities has been added to the Introduction section.

*Comment 22:* Given that “Ecology” is a relationship between an organism (or being) and its environment, NOAA needs to understand that the tribe has developed an applied First Foods management mission, and applied River and Upland Visions to guide restoration and management of First Foods (water, native fish, wildlife, plants), that are based on the ecology between and among First Foods, the ecology of the tribe and our Foods, and our relationship to the landscapes and waters that provide the Foods. Our management visions should be recognized as high level, applied “Traditional Ecological Knowledge,” and given at least equal weight to Federal agency management

guidance. Where our management goals or priorities differ, we can consult to address those differences.

*Response:* NOAA appreciates the views expressed in this comment.

*Comment 23:* Infringement on Treaty Rights and Trust Irresponsibility have occurred in the Pacific Northwest, too often under active Federal oversight, or from the lack of it. A fundamental objective of the subject documents should be to facilitate the correction of these past and continuing injustices.

*Response:* A reference to treaty rights and trust responsibilities has been added to the Introduction section.

*Comment 24:* In developing and revising the documents, it may be helpful and informative to refer to the Environmental Protection Agency's (EPA) 2016 Guidance, "EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights."

*Response:* NOAA appreciates the recommendation provided in this comment. As noted above, a reference to treaty rights and trust responsibilities has been added to the Introduction.

*Comment 25:* NOAA Fisheries' response to our petition thus far has not only completely ignored the tribe's TEK and any sense of a meaningful Government-to-Government relationship but has also misrepresented Western science.

*Response:* This fact-specific concern is beyond the scope of the IK Guidance.

*Comment 26:* We request NOAA Fisheries' leadership team to immediately convene a Government-to-Government meeting with the [tribe] and relevant NOAA staff to revisit this issue and appropriately engage in consultation and integration of our TEK into decision making to ensure Executive Order 13175 is carried out appropriately.

*Response:* See response to IK Guidance *Comment 25*.

*Comment 27:* We recommend that NOAA integrate the best available Western science with Indigenous Knowledge provided by tribes to inform decision-making and management.

*Response:* NOAA appreciates the recommendation included with this comment.

*Comment 28:* We also recommend that the TEK guidance document includes robust protective measures that ensure that sensitive information that may be shared with NOAA in the course of our work together is not made publicly available. We encourage NOAA to develop specific data-sharing agreements with tribes regarding the use of TEK that outline intellectual property and data ownership, privacy, and use.

*Response:* Accepted. Added the following to Data Confidentiality section, first paragraph: “NOAA employees should not begin collecting IK without establishing mutual trust, respect, and recognition of knowledge sovereignty, preferably in the form of a jointly developed agreement. The agreement should outline the purpose of the data collection, intellectual property and data ownership, privacy, and use.”

*Comment 29:* We further recommend that NOAA support TEK integration into management approaches by increasing dedicated and long-term capacity funding for natural and cultural research staff, including Tribal Historic Preservation Offices, to support coordinated engagement across tribal organizations. NOAA should integrate and fund opportunities for research and planning, training and capacity building, and implementation programs for the safe resumption of traditional management approaches, as these efforts would also support the integration of TEK into management.

*Response:* Comments regarding Federal funding allocation decisions are beyond the scope of the IK Guidance.

*Comment 30:* We would look forward to engaging with the NMFS Alaska Region to discuss the implementation of this guidance with Alaska Tribes, and urge you to encourage the Alaska Region to outreach to tribes and tribal organizations to

engage in such discussions.

*Response:* NOAA appreciates the views expressed in this comment.

*Comment 31:* The NOAA TEK Guidance document constitutes an excellent baseline document on this topic and we encourage NOAA staff working with tribes to be familiar with it.

*Response:* Accepted. A new section on “Building Capacity Within NOAA” has been added to the IK Guidance.

*Comment 32:* As noted above with regard to the Tribal Consultation Handbook, it is important to bear in mind that there are other aspects of Alaska Native and tribal knowledge other than TEK which are valuable and should be engaged in NOAA’s work. This includes the aspects of Traditional Knowledge (TK) outside those which are strictly considered ‘ecological,’ understanding the interlinkages between the ‘ecological’ and ‘other’ aspects of TK, and crucially important forms of Indigenous Knowledge other than TK.

*Response:* NOAA appreciates the views expressed in this comment, and notes that the terminology of the IK Guidance has been revised from TEK to IK in the final document, in part, to address considerations noted in this comment.

*Comment 33:* We encourage NOAA to look at the work on Knowledge Sovereignty and Indigenization in which the tribe has been engaged.

*Response:* NOAA appreciates the recommendation provided in this comment. Discussion of knowledge sovereignty has been added to the Principles section of the IK Guidance.

*Comment 34:* We encourage NOAA to work with tribes via a co-productive framework as pertains to knowledge-related, as well as other (*e.g.*, policy), activities.

*Response:* Accepted. Discussion of knowledge sovereignty has been added to the Principles section of the IK Guidance. NOAA has also added the following text to

the Guidance section: “NOAA staff should consider ways to co-develop and include IK for decision-making through multiple programs and approaches.”

*Comment 35:* Commenter emphasizes that “it may be inappropriate to suggest that TEK should be ‘validated,’ ” and, “rather, indigenous peoples' own internal methods of defining, valuing, and validating their own knowledge/knowledge systems should be respected.” See NOAA Handbook (Section IV) regarding the unnecessary validation of TEK by Western science.

*Response:* Accepted. In the Guidance section of the IK Guidance, NOAA states: “Depending on the situation, it may be inappropriate to suggest that IK should be “validated”. Rather, Indigenous Peoples’ own internal methods of defining, valuing, and validating their own knowledge/knowledge systems should be respected and trusted.”

*Comment 36:* TEK holders and communities have the right to review documents that include their TEK as well as the right to redact, remove, or reject how their TEK is included. Commenter requests that NOAA add a section in the TEK Guidance explicitly guiding NOAA Fisheries and NOS to let TEK holders and communities review the TEK collected and how it is included in the work and research of NOAA Fisheries and NOS before it is used or distributed.

*Response:* NOAA appreciates the views expressed in this comment and has added to the Best Practices for Identifying and Considering IK section in the IK Guidance the following addition: “NOAA should work to share and archive any data collected in cooperation with IK holder(s) and communities. IK holder(s) and communities should review NOAA products that include IK before publication. Any confidential or proprietary data that has been provided for public release solely in the aggregate form must not be shared in disaggregated form -- except under any legal requirement (*e.g.*, Freedom of Information Act) and never without prior notification of the provider of that particular IK.” NOAA also notes that the applicability of the IK

Guidance now extends to all of NOAA.

*Comment 37:* Our only suggestion is to follow the lead of the White House Office of Science and Technology Policy (OSTP) and the White House Council on Environmental Quality (CEQ) which recently released a Memorandum for the Heads of Departments and Agencies on the subject of Indigenous Traditional Ecological Knowledge and Federal Decision Making. Not only in substance, but also including the use of Indigenous Knowledge and/or Indigenous Traditional Ecological Knowledge, instead of the archaic ambiguous term TEK, both of which are a more accurate descriptor of the body of knowledge we are all referring to.

*Response:* Accepted. As noted above, the NOAA IK Guidance now uses the term “Indigenous Knowledge” in lieu of TEK.

Richard W. Spinrad,

Under Secretary of Commerce for Oceans and Atmosphere,

NOAA Administrator,

National Oceanic and Atmospheric Administration.

[FR Doc. 2023-14415 Filed: 7/6/2023 8:45 am; Publication Date: 7/7/2023]