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If you provide public comments in writing, please submit one unbound original, with pages numbered consecutively, and three copies. For attachments, provide an index, number pages consecutively with the main text, and submit an unbound original and three copies.

Dated: December 22, 2004.

Peter W. Preuss,

Director, National Center for Environmental Assessment.

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ENVIRONMENTAL PROTECTION AGENCY

[FRL-7858-8]

Notice of Guidance Issuance: Direct Implementation Tribal Cooperative Agreements (DITCAs) Guidance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The U.S. Environmental Protection Agency finalized the Direct Implementation Tribal Cooperative Agreements (DITCAs) Guidance on November 24, 2004. A copy appears below. The purpose of this guidance is to describe the concept of DITCAs and their use by EPA when performing direct implementation activities in Indian country. EPA believes that the DITCA authority makes available an important tool for tribes who wish to work with EPA in the implementation of environmental programs in Indian country by allowing tribes to be involved in assisting EPA as EPA

implements federal programs for tribes. DITCAs are intended to provide a method to accomplish program implementation that is in addition to the Federal delegation of authority method, also referred to as the "treatment in a manner similar to states" or "TAS" approach to implementation. The degree of tribal involvement in assisting with EPA's direct implementation is flexible depending upon the tribe's interest and ability in carrying out specific work.

FOR FURTHER INFORMATION CONTACT: Jeff Besougloff, U.S. Environmental Protection Agency, EPA East Building (MC 4104M), 1200 Pennsylvania Avenue, NW, Washington, DC 20460. Telephone: (202) 564-0292. Facsimile Number: (202) 564-0298. E-mail: *besougloff.jeff@epa.gov*. Information is also available on EPA's American Indian Environmental Office Web site: <http://www.epa.gov/indian/>.

Dated: December 23, 2004.

Benjamin H. Grumbles,

Assistant Administrator, Office of Water.

SUPPLEMENTARY INFORMATION:

Guidelines for Direct Implementation Tribal Cooperative Agreements (DITCAs) November 2004

I. Summary

This document replaces the "Guidelines for Direct Implementation Tribal Cooperative Agreements (DITCAs) for Fiscal Year 2001" (FY 2001 Guidance) for awarding Direct Implementation Tribal Cooperative Agreements (DITCAs) to assist EPA in directly implementing federal environmental programs for Indian tribes. The most substantial clarifications and changes to the FY 2001 Guidance are:

(1) Clarification of the kinds of activities eligible for funding under the DITCA statutory authority (*see* Section VI), and

(2) Recommendation to consult with the following offices to insure successful DITCA development:

- American Indian Environmental Office (AIEO)
- Grants Administration Division (GAD)
- Office of General Counsel (OGC)
- Office of Regional Counsel (ORC)
- Office of Enforcement and Compliance (OECA) for DITCAs with enforcement or compliance components
 - Relevant regional and/or program offices

II. Statutory Authority

The statutory authority for DITCAs was included in the Consolidated

Appropriations Act, 2004, Pub. L. 108-199 (2004), which provided:

For fiscal year 2004, notwithstanding 31 U.S.C. 6303(1) and 6305(1), the Administrator of the Environmental Protection Agency, in carrying out the Agency's function to implement directly Federal environmental programs required or authorized by law in the absence of an acceptable tribal program, may award cooperative agreements to federally-recognized Indian tribes or Intertribal consortia, if authorized by their member tribes, to assist the Administrator in implementing Federal environmental programs for Indian tribes required or authorized by law, except that no such cooperative agreements may be awarded from funds designated for State financial assistance agreements.

Consolidated Appropriations Act, 2004, Pub. L. 108-199 (2004).

The current statutory authority for DITCAs is controlled by the Continuing Resolution for Fiscal Year 2005, Pub. L. 108-309 (2004), in effect until November 20, 2004, which adopts the FY2004 statutory language on DITCAs.

Bills regarding continuing appropriations for FY 2005 in the U.S. House of Representatives (H.J. Res. 107) and the U.S. Senate (S. 2825) would adopt the existing statutory language on DITCAs.

These guidelines will continue to be applicable as written. In the event the DITCA statutory language is modified or omitted, EPA will consider appropriate responses. Contact AIEO at (202) 564-0303 regarding future developments.

III. Applicable Regulations and OMB Cost Circular

The regulations that govern the award and administration of DITCAs, including the requirements for the development of work plans, are the "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments" set forth at 40 CFR part 31. The regulations at 40 CFR part 31 apply to the award and administration of tribal cooperative agreements awarded to any intertribal consortium, including intertribal consortia recognized as non-profit organizations. Allowable costs under DITCAs are governed by OMB Circular A-87.

DITCA documentation should specifically indicate that the activities to be carried out by a tribe or intertribal consortium are consistent with environmental program regulations governing the implementation of Federal environmental programs. For example, if a DITCA is awarded to a tribe to assist EPA in implementing a Federal public water supply program under the Safe Drinking Water Act,

National Pollutant Discharge Elimination System permitting under the Clean Water Act, or a Federal Implementation Plan under the Clean Air Act, then the DITCA should indicate that the activities to be carried out under the DITCA work plan are consistent with the regulations governing those Federal programs.

IV. Delegation of Authority and Approval Requirements

The authority to approve DITCAs is delegated to Assistant Administrators and Regional Administrators under a one-time delegation through 9/30/05. A permanent delegation is being completed. It is recommended that the program and regional offices contemplating DITCAs consult with the following offices, as appropriate, throughout the process of development and finalization of the DITCA:

- American Indian Environmental Office (AIEO).
- Grants Administration Division (GAD).
- Office of General Counsel (OGC).
- Office of Regional Counsel (ORC).
- Office of Enforcement and Compliance (OECA) for DITCAs with enforcement or compliance components.
- Relevant regional and/or program offices.

V. Eligible Recipients

DITCAs may be awarded to: (1) federally recognized Indian tribes and (2) intertribal consortia consistent with applicable provisions. In order for an intertribal consortium to be eligible to receive cooperative agreements under this authority, an intertribal consortium should be consistent with the provisions in 40 CFR part 35.

VI. Eligible Activities

As noted in Section II, the annual DITCA statutory authority states that EPA may award cooperative agreements to assist EPA "in implementing Federal environmental programs for Indian Tribes required or authorized by law. * * *" The 2001 Guidance stated that DITCAs would be awarded only for Federal programs required by law in the absence of an acceptable tribal program. Provisions within some Federal environmental laws clearly require EPA to implement programs where a tribe is unwilling or unable. Other laws, however, are less clear as to whether EPA is required to directly implement a program in the absence of an acceptable tribal program. In that context, EPA will look at the statute to determine if, in the State context, EPA would be required to directly implement the program. If so,

EPA is authorized to award a DITCA to fund activities for those environmental programs.

Thus, EPA may award DITCAs to fund activities for environmental programs that meet either one of the following criteria: (1) Federal programs under environmental laws that EPA is clearly required to directly implement in the tribal context; or (2) Federal programs under environmental laws that in the State context EPA is required to directly implement in the absence of an acceptable State program.

For example, activities under the following programs may be eligible for DITCA funding:

- Water quality standards promulgation and review and the National Pollutant Discharge Elimination System permit program under the Clean Water Act.
 - Implementation plan development and the Title V permit program under the Clean Air Act.
 - The Public Water System program and the Underground Injection Control program under the Safe Drinking Water Act.
 - The Underground Storage Tank program and the Subtitle C permit program under the Resource Conservation and Recovery Act.
 - The Certification and Training program for pesticide applicators under the Federal Insecticide, Fungicide, and Rodenticide Act.
 - The Lead-Based Paint program under the Toxic Substances Control Act.
- Due to resource and funding limitations, EPA must work closely with tribes to identify those direct implementation activities where there is a joint tribal and EPA priority for program implementation.

VII. Limitations

There are several limitations on DITCA awards. Among them are:

- The statutory authority for DITCAs is found in appropriations acts. In the event the appropriation authority is extended by continuing resolution(s), the DITCA authority will also be extended.
- The project period of the DITCA may extend beyond the period of the appropriations act under which it was created, but all funds must be awarded prior to the expiration of the appropriations act authorizing the DITCA.
- DITCA funded personnel may not perform inherently Federal functions.
- EPA personnel can provide assistance to DITCA representatives based on the written DITCA work plan which may include daily direction. EPA cannot treat DITCA representatives as

EPA employees by participating in hiring, disciplining, or firing decisions.

- DITCA funded personnel cannot operate vehicles which are either owned or leased by the Federal government.

Information sharing and two-way communication between the tribe and EPA are key to a successful DITCA. EPA and the tribe should negotiate and complete a workplan prior to the awarding of the DITCA. The workplan should clearly delineates the status, roles and responsibilities of the respective parties. It must also characterize and quantify the environmental and public health benefits (*i.e.*, outputs and, to the maximum extent practicable, outcomes) to be gained from the DITCA's activities, in compliance with the EPA Order on Environmental Results Under Assistance Agreements which will go into effect in January 2005. The consulting offices listed in this guidance can assist with all these issues.

VIII. Available Funding Sources

To this point, no funds are appropriated specifically for DITCAs. Funding is available from two existing sources, subject to applicable limitations contained in the applicable appropriation act:

- STAG monies appropriated for tribal program grants¹ and,
- EPM funds available for direct implementation activities.

Either source of funding may be used for any of the eligible activities described in section VI.

DITCAs can be funded by reprogramming subject to the usual restrictions and procedures governing this action with the exception of the following situations:

- DITCAs for Title V permitting may be funded only with funds appropriated to EPA for Federal CAA Title V work, and
- The statutory authority for DITCAs expressly prohibits using funds designated for State financial assistance agreements.

The prohibition on using two general appropriations for the same activity—commonly referred to as the “pick and stick” rule—applies.

¹ The term “tribal program grants” as used in this document refers only to funds for tribal grants within the statutory earmark in the STAG account “for grants * * * for multi-media or single media pollution prevention, control and abatement and related activities.” Pub. L. 107-73, 115 Stat. 686 (2001). It does not refer to funds for other tribal grants included in other earmarks in the STAG account.

IX. Award Process (Including Proper Citation; Definition of Cooperative Agreements; Relationship to MOAs, etc.)

Each DITCA should cite only the statutory authority for the applicable fiscal year. Do not also use the citation for the relevant program's grant authority.

DITCAs are awarded and administered as “cooperative agreements” under the Federal Grant and Cooperative Agreement Act (FGCAA) and are subject to all applicable Agency assistance policies. Because the statutory authority for DITCAs is for cooperative agreements and not grants, there must be substantial Federal involvement in the performance of each DITCA project. (See EPA Order 5700.1 for a description of “substantial Federal involvement.”).

Since DITCAs are authorized by statute and are only available to tribes and eligible intertribal consortia, they are exempt from competition under section 6(c)(2) of EPA Order 5700.5, Policy for Competition in Assistance Agreements. Application of the competition policy is discretionary, not mandatory. EPA will review on an annual basis the extent to which regional and program offices apply the competition policy with regard to DITCAs to consider in the future whether the policy should or should not be applied on a consistent basis across the Agency.

A Memoranda of Agreement (MOAs), or other preliminary documentation, is not a prerequisite to a DITCA and cannot be used to transfer funds. DITCAs are awarded using the standard grant/cooperative agreement application and award forms. However, the DITCA's workplan must characterize and quantify the environmental and public health benefits (*i.e.*, outputs and, to the maximum extent practicable, outcomes) to be gained from the DITCA's activities, in compliance with the EPA Order on Environmental Results Under Assistance Agreements which will go into effect in January 2005.

X. Status of Individuals Carrying Out Direct Implementation Activities

It is important that all parties understand the status of the individuals carrying out EPA's direct implementation activities under these cooperative agreements. It is recommended that the status of such individuals be clearly stated in the work plan to accompany the DITCA. These individuals are employees of the DITCA recipient (a tribe or intertribal consortium) or its contractor. They are

not EPA employees, nor are they EPA contractors by virtue of being a DITCA recipient. These individuals may not be treated or present themselves to third parties as Federal government employees or Federal contractors based on their status as employees of DITCA recipients.

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EXECUTIVE OFFICE OF THE PRESIDENT

Office of National Drug Control Policy

Drug-Free Communities Support Program National Evaluation; Proposed Information Collection; Notice of 60-Day Public Comment Period

AGENCY: Executive Office of the President, Office of National Drug Control Policy.

ACTION: Notice of 60-day public comment period.

SUMMARY: In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Executive Office of the President, Office of National Drug Control Policy, Drug Free Communities Support Program is publishing the following summary of proposed information collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the program's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Executive Office of the President, Office of National Drug Control Policy is requesting OMB review and approval of this information collection. Written comments and/or recommendations will be accepted from the public if received by the individuals designated below within 60 days from the date of publication.

Type of Information Collection

Request: New collection;

Title: Drug-Free Communities (DFC) Support Program National Evaluation;

Use: The DFC Support Program is an integral component of the National Drug