



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

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OFFICE OF
WATER

MEMORANDUM

SUBJECT: Guidelines for Direct Implementation Tribal Cooperative Agreements (DITCAs)

FROM: Benjamin H. Grumbles, Assistant Administrator
Office of Water

A handwritten signature in black ink, appearing to read "B. H. Grumbles", written over the typed name and title.

TO: Assistant Administrators
General Counsel
Inspector General
Chief Financial Officer
Associate Administrators
Regional Administrators
Staff Office Directors

Please find attached new guidelines for Direct Implementation Tribal Cooperative Agreements (DITCAs). They are effective immediately. These Guidelines are meant to assist regional and headquarters personnel in developing and funding DITCAs and replace previously issued guidance. If the DITCA authority is extended in future years, these guidelines will continue to apply until new guidelines or revisions to these guidelines are created.

DITCAs were initially authorized in the FY 2001 Appropriations Act (Pub. L. No. 107-73, 115 Stat. 686 (2001)) to enable EPA to award cooperative agreements to federally recognized Indian tribes and eligible intertribal consortia to assist EPA in implementing federal environmental programs for Indian tribes in the absence of an acceptable tribal program. The approach was developed with the recognition that some tribes are not implementing environmental programs, such as under tribal authority through EPA's "treatment in a manner similar to states" (TAS) process for a variety of reasons. DITCAs provide another avenue for tribes and EPA to partner in implementing meaningful environmental protection in Indian country. Additionally, DITCAs provide tribes with the flexibility and opportunity to develop staff capacity to manage environmental programs, to address specific tribal environmental needs and priorities that are within EPA's authority for direct implementation, and to determine the scope and pace of tribal involvement, all through a DITCA work plan.

After several years of EPA experience managing DITCA applications and programs, we believe this new guidance will promote clarity in the understanding of DITCAs and consistency of their use. DITCAs will continue to play a prominent role in the implementation of environmental protection programs in Indian country.

Attachment

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. No. 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. No. 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 C.F.R. Part 31. The regulations at 40 C.F.R. 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 C.F.R. 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.

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.

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. No.107-73, 115 Stat. 686 (2001). It does not refer to funds for other tribal grants included in other earmarks in the STAG account.

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.