[Finalized and signed with transmittal memorandum by Steve Herman on January 17, 2001]

GUIDANCE ON THE ENFORCEMENT PRINCIPLES OUTLINED IN THE 1984 INDIAN POLICY

On November 8, 1984, the U.S. Environmental Protection Agency (EPA) issued its "EPA Policy for the Administration of Environmental Programs on Indian Reservations" ("Indian Policy"). The Indian Policy establishes, among other things, a policy of graduated response when addressing instances of noncompliance by facilities owned or managed by Tribal Governments or by facilities in which a Tribal Government has a substantial proprietary interest (and in some instances, a substantial interest that is not proprietary) or over which a Tribal Government has control ("Tribal facilities"). In a memorandum dated March 14, 1994, Administrator Browner formally reaffirmed the Indian Policy.[1]

In keeping with the United States' policy of operating within a government-to-government relationship[2] with federally recognized Indian Tribes[3] and consistent with its trust responsibility to such Tribes, EPA remains committed to working with Tribal facilities to enhance human health and environmental protection. Additionally, EPA continues to express its resolve, as originally described in the Indian Policy, to use compliance and technical assistance to help Tribal facilities achieve compliance with environmental laws and regulations. Nonetheless, there may be situations when such assistance does not result in compliance. In those situations, consistent with the Indian Policy criteria and this guidance, EPA may consider taking civil judicial and administrative enforcement actions against Tribal facilities in order to protect human health and the environment.

EPA's Office of Enforcement and Compliance Assurance (OECA) has developed this guidance document to implement the enforcement principles outlined in the Indian Policy and to clarify EPA's internal coordination process in such matters. This guidance applies to actions that EPA may take in response to civil violations of EPA's regulatory programs but does not apply to criminal enforcement situations. This document supercedes the "Guidance on the Process for Review of Enforcement Actions Against Tribal Facilities," from Steven A. Herman, Assistant Administrator (OECA) to Deputy Regional Administrators *et al*. (Feb. 16, 1996). Unless the exigencies of the situation require otherwise, this guidance applies to actions that

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[1] *See also*, Memorandum, "Indian Policy Implementation Guidance," from Alvin L. Alm, Deputy Administrator, to Assistant Administrators *et al*. (November 8, 1984).

[2] *See, e.g.*, Memorandum, "Government-to-Government Relations with Native American Tribal Governments," from President Clinton to the Heads of Executive Departments and Agencies (April 29, 1994) (59 Fed. Reg. 22951 (May 4, 1994)); Executive Order (No. 13084) on Consultation and Coordination with Indian Tribal Governments (May 14, 1998) (63 Fed. Reg. 27655 (May 19, 1998)).

[3] "Indian Tribe" means an Indian Tribe, band, nation, pueblo, community or Alaska Native Village that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479a. Maintained by the Department of the Interior, the list of federally recognized Tribes is updated periodically and published in the Federal Register.

EPA may consider taking under statutory "imminent and substantial endangerment" authorities[4] and other civil remedial authorities. During exigent situations, the Agency should follow this guidance to the extent practicable and follow all other applicable procedures, and the Regions should ensure prompt communication with OECA and the appropriate Tribal Government regarding any actions for which prior communication and consultation was not possible.[5]

I. Conditions Generally Necessary For Enforcement Actions

The Indian Policy sets forth the following conditions for certain relevant enforcement actions:

> In those cases where facilities owned or managed by Tribal Governments are not in compliance with Federal environmental statutes, EPA will work cooperatively with Tribal leadership to develop means to achieve compliance, providing technical support and consultation as necessary to enable Tribal facilities to comply. Because of the distinct status of Indian Tribes and the complex legal issues involved, direct EPA action through the judicial or administrative process will be considered where the Agency determines, in its judgment, that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion.
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> In those cases where reservation facilities are clearly owned or managed by private parties and there is no substantial Tribal interest or control involved, the Agency will endeavor to act in cooperation with the affected Tribal Government, but will otherwise respond to noncompliance by private parties on Indian reservations as the Agency would to noncompliance by the private sector elsewhere in the country. Where the Tribe has a substantial proprietary interest in, or control over, the privately owned or managed facility, EPA will respond as described in the first paragraph above.

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[4] Examples of these authorities are currently found at, 42 U.S.C. § 6973 (§ 7003) of the Resource Conservation and Recovery Act; 42 U.S.C. § 7661c (§ 504) of the Clean Water Act; 42 U.S.C. § 1431 (§ 300i) of the Safe Drinking Water Act; 42 U.S.C. §9606 (§ 106(a)) of the Comprehensive Environmental Response, Compensation and Liability Act; and 42 U.S.C. §§ 7603 and 7412 (§§ 303 and 112(r)) of the Clean Air Act.

[5] While exigent circumstances will vary from case to case, they are the types of circumstances requiring an immediate response to protect human health or the environment. For example, an immediate risk of drinking water contamination or ongoing releases of toxins which have an immediate risk of injury to neighboring persons may constitute exigent circumstances.

The following subsections address the key compliance and enforcement elements of the Indian Policy.

A. "<u>. . . facilities owned or managed by Tribal Governments. . .</u>" and facilities in which a Tribal Government has a "substantial proprietary interest" or over which a Tribal Government has "control"

1. Tribal facilities

For purposes of this guidance document, the term "Tribal facilities" means (1) facilities owned or managed by Tribal Governments, and (2) non-Tribally-owned or managed facilities in which a Tribal Government has a substantial proprietary interest or over which a Tribal Government has control. Consistent with the Indian Policy, Tribal facilities can also include facilities in which the Tribal interest is "substantial," although not "proprietary." Whether the interest a Tribe has in a facility is sufficiently "substantial" (although not proprietary) for the facility to qualify as a Tribal facility will be decided on a case-by-case basis. In making such a determination, the Region is encouraged to consult with the appropriate Headquarter's contact(s). "Tribal facilities" can include facilities located within or outside Indian country.[6]

2. Non-Tribally owned or managed facilities

In cases of noncompliance by facilities located within Indian country but not owned or managed by a Tribal Government (and in which a Tribal Government does not have a substantial proprietary interest, substantial non-proprietary interest, and over which a Tribal Government does not have control), EPA will generally respond in the same manner as it would toward such facilities outside Indian country. EPA will notify the affected Tribal Government of any anticipated Agency action and consult with that Tribal Government on a government-to-

[6] "Indian country" is defined under 18 U.S.C. § 1151 as: (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Under this definition, EPA treats as reservations trust lands validly set aside for the use of a Tribe, even if the trust lands have not formally been designated as a reservation. Further, Tribal facilities can be located within or outside Indian country. While the Indian Policy speaks to Agency responsibilities on Indian reservations, this guidance addresses facilities located within or outside Indian country, which is consistent with the policy of operating in a government-to-government relationship with Tribal Governments.

government basis to the greatest extent practicable and to the extent permitted by law.[7]

B. "<u>. . . EPA will work cooperatively with Tribal leadership to develop means to achieve compliance, providing technical support and consultation as necessary. . .</u>"

When addressing issues of noncompliance at Tribal facilities, EPA will establish and maintain cooperative government-to-government relationships with Tribal Governments. Such relationships focus on consultation, compliance assistance, the sharing of information, and EPA's consideration of Tribal views regarding any Agency action that may affect Tribal interests or resources. The Agency's consultation with the Tribal Government should emphasize EPA's expectations for improvements in compliance at the facility and any expected enforcement response by EPA if the facility's compliance status does not improve according to EPA's stated expectations.

To ensure communication between the Agency and the Tribal Government is facilitated, the EPA regional Tribal program office, as well as other interested offices, should be notified of, and offered an opportunity to be included in, all discussions with the Tribe relating to compliance issues at or potential enforcement actions against Tribal facilities.

When EPA becomes aware that a Tribal facility is not in compliance with federal environmental laws, the Agency will notify the affected Tribal Government of the noncompliance and indicate the Agency's willingness to work cooperatively to resolve the matter (for example, by offering compliance assistance). In appropriate circumstances, and where the Tribal Government concurs, EPA may also contact and/or work directly with the facility manager.[8] Emphasizing compliance assistance activities aimed at returning the facility to compliance will be EPA's first response to violations at Tribal facilities.

In consultation with the Tribe, the Region should develop and implement a short <u>written</u> plan for providing compliance assistance to the facility.[9] The plan should specify the nature of

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[7] Notice and consultation are particularly important in cases of noncompliance at non-Tribal facilities that offer goods or services that are vital to a Tribe's economy or welfare (for example, at the sole gasoline station located on a particular reservation).

[8] This guidance is not intended to, and should not, impede the information-gathering authority of EPA in order to determine compliance or the presence of potential harm to human health or the environment. However, consistent with the Indian Policy and the Presidential Memorandum dated April 29, 1994, EPA will inform the Tribal Government when it issues an information request and consult with the Tribe regarding plans to inspect a Tribal facility.

[9] This does not include cases of non-compliance identified prior to the issuance of this guidance in circumstances where EPA has already provided substantial compliance assistance.

the assistance to be provided to the facility and the time frame for providing the various assistance activities, and establish EPA's expectations for improvements in compliance at the facility. To address situations in which EPA's initial efforts do not result in compliance, the plan should set forth the additional cooperative measures to be taken to assist the Tribal facility in resolving all violations. Such efforts could include additional offers of compliance assistance, including the development of informal compliance agreements that neither assess penalties nor constitute consent orders. The plan should also describe any expected enforcement response by EPA if the facility's compliance status does not improve according to EPA's stated expectations. Throughout implementation of the plan, the Region should consult with the affected Tribal Government about important developments regarding compliance at the facility.

Consistent with the government-to-government relationship, consultation with the affected Tribal Government will likely include both oral and written communications. When oral communication occurs with the affected Tribal Government or, where appropriate, the facility manager, these discussions should be memorialized in writing. Copies of correspondence and memorialized discussions with the facility manager should be sent to the affected Tribal Government.

C. When EPA will consider taking an enforcement action

EPA will consider taking an enforcement action when it determines that (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion. Each of these factors is discussed below. Although these factors establish threshold criteria for EPA's consideration of enforcement action against Tribal facilities, they are not intended to, and should not, result in a lesser degree of human health and environmental protection in Indian country than elsewhere in the U.S. Instead, consistent with the Indian Policy, EPA should ensure equivalent protections through increased focus on the cooperative measures, including compliance assistance activities, described in Section I.B. above.

If EPA is considering an enforcement action against a Tribal facility, the Agency will continue consultation with the Tribal Government concerning the need for the action and will consider the Tribe's views regarding the effects that such an action, and any resolution thereof, may have on the Tribe's interests, including the possibilities that the action could affect Tribal assets or result in the Tribe being named as a defendant.[10]

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[10] EPA's consideration of enforcement action should focus on the Tribal facility in the first instance, and any direct action against a Tribal Government should be considered only where the Agency determines such action is necessary to achieve compliance at the facility. Where EPA pursues an enforcement action against a Tribal facility, the Agency should look initially to the facility, and not to the Tribal Government, with respect to the calculation and/or assessment of any penalty or participation in any settlement. Any subsequent proposal to involve the Tribal Government directly in the action or settlement or to consider the Tribe's financial resources should be coordinated with appropriate offices through the Headquarters concurrence process discussed in Section II of this guidance.

1. "<u>. . . a significant threat to human health or the environment exists. . .</u>"

EPA will consider taking enforcement action against a Tribal facility where EPA determines, among other things, that a significant threat to human health or the environment exists at the time the enforcement decision is being made because of the noncompliance. The existence of such a threat, which may be an actual or potential source of harm, as well as the factors creating the threat and the way such factors create the threat should be described in the appropriate enforcement documents submitted by the Region to Headquarters offices as part of the concurrence process discussed in Section II below. Threats to human health or the environment can include direct threats posed by the release of contaminants into the environment and the exposure of humans or the environment to pollutants, and also indirect threats to human health or the environment such as threats to the regulatory program and threats posed by circumstances such as the failure to monitor or to maintain proper records.

2. "<u>. . . such action would reasonably be expected to achieve effective results in a timely manner. . .</u>"

EPA will consider taking an enforcement action against a Tribal facility where EPA determines such action would reasonably be expected to achieve effective results in a timely manner. As a general matter, enforcement proceedings seeking injunctive relief are reasonably expected to achieve effective results in a timely manner if the relief requested is specific and appropriate to the violations and includes a time frame for attaining compliance. EPA should seek penalties for violations at Tribal facilities or include stipulated penalties in administrative orders or consent decrees related to Tribal facilities only when those penalties are necessary to secure effective, timely results and other efforts to achieve timely compliance have failed. In appropriate cases, EPA should be guided by program-specific penalty policies, as well as policies on small business, small communities, or other applicable policies, to determine the penalty for a violation and the weight to be given to such factors as an inability to pay, an economic benefit from noncompliance, the impact to Tribal financial resources, and compliance history. Additionally, EPA should consider supplemental environmental projects in arriving at a settlement. A description of how the enforcement action is expected to achieve effective results in a timely manner should be included in the appropriate enforcement documents submitted by the Region to Headquarters offices as part of the concurrence process discussed in Section II below.

3. "<u>. . . the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion.</u>"

Before considering enforcement action, EPA should consider reasonable ways to assist a Tribal facility to come into compliance and should determine that other alternatives cannot be utilized by the Federal government to correct the problem in a timely fashion. Where appropriate, EPA should include other federal agencies in its compliance assistance efforts as early as is reasonable under the circumstances. EPA should involve federal agencies generally charged with American Indian affairs (such as the Bureau of Indian Affairs and the Indian Health Service) or other federal agencies with an interest in the particular matter (such as the Army Corps of Engineers regarding dredge-and-fill permits) whenever EPA reasonably expects such involvement to facilitate a Tribal facility's compliance and cooperation in an acceptable time frame.

Regions should include in the appropriate enforcement documents submitted to Headquarters as part of the concurrence process discussed in Section II below a description of the alternatives considered and utilized by the Federal government to correct the problem in a timely fashion and the basis for the determination that the Federal government cannot utilize other alternatives to correct the problem in a timely fashion.

4. <u>Other factors EPA should consider</u>

EPA retains the enforcement discretion not to proceed with an enforcement action in cases where the above three factors have been satisfied. The following factors should be considered to determine whether it is appropriate to delay enforcement and, instead, consider other alternatives appropriate to the particular circumstances of a case. The additional factors EPA should consider include: (1) the Tribal facility's good faith efforts to remedy noncompliance in a timely manner, including expenditure of resources; (2) resources and time expended by EPA on compliance assistance activities; (3) relevant history of noncompliance with EPA regulatory requirements, including any requirements stated in administrative or judicial orders previously issued to facilities owned or operated by the same Tribal Government; and (4) the degree of willfulness pertaining to the violation.

Additionally, as described in this guidance, in addressing alleged violations at Tribal facilities, EPA will consult with the affected Tribe and consider the Tribe's views regarding appropriate responses including the potential need for enforcement action. In certain cases, the Tribal Government may express the view that EPA should pursue prompt enforcement action against the facility as the most appropriate response, without undertaking the cooperative measures and compliance assistance otherwise contemplated by this guidance. Consistent with the federal trust responsibility to federally-recognized Tribes, the obligation to consult with the Tribal Government on a government-to-government basis, and the Indian Policy, EPA will consider this view and take it into account in developing its response. Where the Region determines that it is appropriate to pursue such prompt enforcement consistent with the Tribal Government's views, the Region should include in the enforcement documents submitted to

Headquarters offices as part of the concurrence process discussed in Section II below a written narrative description memorializing the substance of the consultation with the Tribe and, in particular, the Tribal Government's view that prompt enforcement would be an appropriate response. The Region should also obtain, and submit to Headquarters as part of the concurrence process, a written statement from the Tribal Government expressing that Government's view that prompt enforcement is appropriate as well as that Government's understanding of the nature of the enforcement action that the Region will propose including the a list of the violations that will be alleged, the potential penalty and injunctive relief that will be sought, and the fact that assets of the Tribal Government may be affected by the potential action. Where Headquarters concurs in the proposed action, and EPA pursues enforcement action against the Tribal facility, EPA will continue to consult with the Tribe regarding the action to the greatest extent practicable and permitted by law. In certain cases, the Tribal Government may change its view regarding the need for the prompt enforcement action and may express the view that the cooperative measures and compliance assistance previously omitted should be pursued in lieu of further enforcement. EPA will consider this view and take it into account in determining whether to continue with the enforcement response or pursue such cooperative measures.

II. Coordination Within EPA

The 1984 Indian Policy Implementation Guidance provides that when proposing to initiate direct EPA action through the judicial or administrative process against a Tribal facility, a Regional Administrator should first obtain concurrence from the Assistant Administrator for OECA, who will act in consultation with the American Indian Environmental Office (AIEO) and the General Counsel.[11] The following subsections describe types of actions for which OECA concurrence is, or is not, called for, and the procedures for obtaining such concurrence when it is called for.

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[11]The Office of Regulatory Enforcement (ORE), or where appropriate and in coordination with ORE, the Office of Site Remediation Enforcement (OSRE) or the Federal Facilities Enforcement Office (FFEO), will consult on behalf of the Assistant Administrator for OECA with the Office of General Counsel and AIEO to coordinate legal, policy, and management issues of proposed actions against Tribal facilities.

Prior to making enforcement recommendations to the Assistant Administrator of OECA, ORE, OSRE, or FFEO will directly communicate and coordinate with the Office of Criminal Enforcement, Forensics, and Training (OCEFT) and OECA's Senior Indian Program Manager, and consult with the Office of Compliance (OC) and the Office of Environmental Justice (OEJ). ORE, or where appropriate and in coordination with ORE, OSRE or FFEO will then make appropriate recommendations and advise the Assistant Administrator regarding options for civil judicial or administrative actions.

Nothing in this Guidance is intended to infringe upon the delegated authority of OCEFT to determine which alleged environmental violations warrant investigation or referral to the U.S. Department of Justice.

A. Actions For Which OECA Concurrence Is Called For

Subject to the three exceptions described in Section II.B., below, the Regions should first obtain OECA concurrence before initiating any formal enforcement action against a Tribal facility, including, but not limited to, issuing an administrative enforcement complaint, order, or citation (including field citations), or referring any enforcement matter to the Department of Justice.

B. Actions For Which OECA Concurrence Is Not Called For

Unless the enforcement action involves a nationally significant issue or assesses a penalty, OECA concurrence is not called for with respect to the following actions when undertaken against Tribal facilities: (1) an informal enforcement action as defined below, (2) the issuance of an administrative consent order, and (3) the issuance of a consent agreement with final order or filing of an administrative complaint in one situation described below. Although OECA concurrence is not called for in these cases, the cooperative measures described in Section I.B. of this guidance continue to apply prior to pursuing these types of actions. However, Regions do not need to demonstrate that the three threshold criteria for bringing an enforcement action (described in Sections I.C.(1), (2), and (3)) have been met prior to pursuing these types of actions.

In cases where OECA concurrence is not called for, all communications relating to the relevant action with the affected Tribal Government, facility, or other parties external to EPA, should be made through the appropriate Regional Office and, in all cases where the Tribal Government is involved, should include representatives from the EPA regional Tribal program office.

Informal Enforcement Action. Informal enforcement actions for which OECA concurrence is not called for include letters or notices that contain only a recitation of the violation(s), a schedule for returning the facility to full compliance with all substantive and procedural requirements of applicable statutes, regulations, and permits, and an indication that failure to correct the violation(s) may result in a formal enforcement action. Examples of informal enforcement actions include notices of violation (NOVs), notices of warning and notices of noncompliance. However, if such letter or notice is a statutorily required step for formal enforcement action, or is otherwise an integral part of an enforcement action (such as the case with violations of an implementation plan under the Clean Air Act), OECA concurrence is called for.

Issuing Administrative Consent Order. OECA concurrence is not called for with respect to the issuance of an administrative consent order involving a Tribal facility. An administrative consent order may follow the filing of an administrative complaint (in which case the filing of

the complaint would have called for OECA concurrence under section II.A. above) or memorialize an agreement between EPA and a non-compliant Tribal facility resulting from informal communication, compliance assistance offered by EPA and consultation, including, where the Tribe is not a party, consultation with the Tribal Government to the greatest extent practicable and permitted by law. Any subsequent EPA action to enforce such an administrative consent order would call for OECA concurrence under Section II.A. as well as satisfaction of the procedures and criteria of Section I.

Issuing Consent Agreement with Final Order or Filing Administrative Complaint Simultaneously with Administrative Consent Order.[12] OECA concurrence is not called for with respect to an administrative complaint filed against a Tribal facility if that complaint is filed simultaneously with an administrative consent order. In order for this exception to apply, all parties must be aware that the order and an administrative complaint will be filed with the Regional Hearing Clerk, and the administrative consent order must result from informal communication and consultation between the parties including, where the Tribe is not a party, consultation with the Tribal Government to the greatest extent practicable and permitted by law. Any subsequent EPA action to enforce such an administrative consent order would call for OECA concurrence under Section II.A. as well as satisfaction of the procedures and criteria of Section I.

C. Procedures for Obtaining OECA Concurrence

Whenever the concurrence of the Assistant Administrator for OECA is called for with respect to an enforcement action against a Tribal facility, the following procedures should be followed:

(1) *Concurrence Package.* The Office of Regional Counsel (or, as appropriate, the designated Regional enforcement office) should submit one paper copy to the Assistant Administrator for OECA, and electronic copies (unless unavailable, in which case hard copies should be sent) to the Director of the appropriate division at ORE, OSRE, or FFEO, of the following:

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[12] *See* 40 C.F.R. § 22.13 (Consolidated Rules of Practice; commencement of a proceeding), which revised the procedure to allow the filing of a single document in cases where the parties have agreed to settle the case prior to the filing of a complaint. This rule states, "(a) Any proceeding subject to these Consolidated Rules of Practice is commenced by filing with the Regional Hearing Clerk a complaint conforming to Sec. 22.14....(b) Notwithstanding paragraph (a) of this section, where the parties agree to settlement of one or more causes of action before the filing of a complaint, *a proceeding may be simultaneously commenced and concluded by the issuance of a consent agreement and final order pursuant to Sec. 22.18(b)(2)* and (3) (quick resolution; settlement; alternative dispute resolution) (emphasis added).

(a) the name and location of the facility, person, and/or other entity against whom the action is proposed;

(b) the nature of the alleged violation (including, as appropriate, (i) a citation to the statutory or regulatory provision allegedly violated, the place, time, and date of violation, the names of actors, and a description of the action giving rise to the violation, and (ii) a distinction between (A) any past violations that have been remedied but that the Region is proposing be included in the proposed action, and (B) presently continuing violations);

(c) the type of enforcement action proposed;

(d) a description of how the case meets the conditions generally necessary for enforcement action set forth in this guidance including (i) a summary of all relevant communications with the Tribe, (ii) a narrative describing the compliance assistance activities performed by the Region including a description corresponding the particular compliance assistance activities with the violation those activities sought to address, (iii) a narrative describing any violations previously remedied by the facility, and (iv) a detailed description of (A) the significant threat to human health or the environment, the factors creating the threat, and the way such factors create such threat, (B) how the enforcement action is expected to achieve effective results in a timely manner; and (C) the alternatives considered and utilized to correct the problem in a timely fashion and the basis for the determination that the Federal government cannot utilize other alternatives to correct the problem in a timely fashion;

(e) a description of any nationally significant issues present; and

(f) copies of the proposed enforcement document and relevant supporting documents.

(2) *Informing the Division Director.* In addition to submitting the documents

described above, the Regional Office should also contact (by telephone or e-mail) the Director of the appropriate division of ORE to inform that division of the potential action and that the Region has requested concurrence of the Assistant Administrator for OECA. Following such notification and where appropriate, ORE will coordinate with OSRE or FFEO.

(3) *Notice to and Consultation with the Tribal Government.* The Regional Office should notify the Tribal Government of, and consult with the Tribe about, the potential enforcement action. The notification should include, as appropriate: (i) a list of the alleged violations; (ii) the potential penalty and injunctive relief to be sought; (iii) a reminder that assets of the Tribal Government may be affected by the potential action; (iv) a statement that OECA has been notified of the potential action; (v) a statement that the alleged violations have not been remedied in a timely fashion; (vi) a statement describing (A) how the alleged violations pose a significant threat to human health or the environment, (B) how the enforcement action is expected to achieve effective results in a timely manner; and (C) the alternatives considered and utilized to correct the problem in a timely fashion and the basis for the determination that the Federal government cannot utilize other alternatives to correct the problem in a timely fashion; and; (vii) a description of the compliance assistance already provided to the facility and any progress the facility has made toward achieving compliance.

(4) *OECA Response in 20 Days.* Unless an expedited review is requested and granted, the Region should expect a response from OECA within twenty business days from the date of OECA's receipt of the copies of information described above.

(5) *Internal Communications.* OECA review, discussion with the Region, and consultation with OGC and AIEO should proceed in a timely fashion. It is strongly encouraged that all internal EPA communications between Headquarters and the Region or other offices be coordinated with the designated ORE, OSRE or FFEO enforcement contact, and that such enforcement contact be notified of and given an opportunity to participate in, all discussions between Headquarters and the Region, or other EPA offices.

(6) *External Communications.* In cases referred to Headquarters for concurrence, communications related to the case with the affected Tribal Government, facility, or other parties external to EPA

should be made through the appropriate Regional Office and, in cases where the Tribal Government is involved, should include representatives of the EPA regional Tribal program office. Additionally, the internal EPA contacts (Regional and Headquarters) should confer with each other prior to communicating with the Tribal Government, facility or other external parties. Lastly, it is strongly encouraged that the OECA enforcement contact be given an opportunity to participate in, communications with the affected Tribal Government, facility, or other parties external to EPA.

(7) *Written Concurrence Memorandum.* OECA should provide a written concurrence memorandum, or its reasons for non-concurrence, in a timely fashion. The memorandum should state the names of the EPA offices that were consulted during the Headquarters review process and indicate the concurrence of ORE, OSRE, or FFEO, as well as that consultation with OCEFT and the OECA Senior Indian Program Manager has occurred. Prior to concurring with a proposed action, OECA should forward a draft of the concurrence memorandum to AIEO and OGC for their review and timely response indicating the fulfillment of their consultation role.

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Note: This document is intended to provide internal EPA guidance regarding civil judicial and administrative enforcement actions against Tribal facilities. This guidance is designed to implement President Clinton's 1994 directive to federal departments and agencies and EPA's Indian Policy for working with federally recognized Tribal Governments on a government-to-government basis. The document does not, however, substitute for requirements in federal statutes or regulations, nor is it a requirement itself. This guidance is not intended to create any right or trust responsibility enforceable in any cause of action by any party against the Unites States, its agencies, offices or any other person. Thus, it cannot impose legally binding requirements on EPA, and may not apply to a particular situation based upon the circumstances. EPA may change this guidance in the future, as needed, without public notice. Additionally, terms and interpretations used in this guidance are unique to, and consistent with, the federal trust responsibility to federally-recognized Tribes, the obligation to consult with Tribal Governments, on a government-to-government basis, and the Indian Policy. These terms and interpretations do not apply to situations where Tribal Governments are not involved, and therefore cannot impose legally binding requirements on EPA in such situations. EPA welcomes public comment on this document at any time and will consider those comments in any future revision of this guidance document.

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