

# RESPONSES TO TRIBAL COMMENTS ON PROPOSED EPA CONSULTATION POLICY

## Introduction

This document contains the Environmental Protection Agency's (EPA) responses to the comments received during consultation with tribal governments on EPA's proposed consultation policy. EPA thanks all of the tribal, tribal organizations and other commenters, all of whom provided very valuable input on EPA's proposed consultation policy.

The response document is organized into three parts: a section on general, process-oriented comments; a section on specific comments that relate directly to the proposed consultation policy and organized in accordance with the sections of the proposed policy; and a section of additional comments.

Since November 2009 when President Obama directed federal agencies to develop plans to ensure regular and meaningful consultation with federally-recognized tribal governments, EPA solicited and received many constructive and helpful comments on how it can improve efforts to consult and coordinate. EPA gathered this input through numerous listening sessions and meetings with tribes and tribal organizations, two sets of national consultation conference calls held in January and July 2010, and written submissions.

EPA has a long history of working in partnership with federally-recognized tribes, a relationship guided by our 1984 EPA Indian Policy. We realize, however, that there is room for improvement in how we consult and coordinate. As a result, EPA is now developing an EPA-wide consultation policy.

The goals of EPA's proposed consultation policy are to: 1) establish clear EPA standards for the consultation process, including defining the what, when, and how of consultation; 2) designate specific EPA personnel responsible for serving as consultation points of contact in order to promote consistency in, and coordination of, the consultation process; and 3) establish a management-oversight and reporting structure that will ensure accountability and transparency. Moreover, the proposed consultation policy sets a broad standard for when EPA should consider consulting with federally-recognized tribal governments. Notably, the scope of EPA's proposed consultation policy is intended to be broader than that found in Executive Order 13175.

Many of the early comments EPA received cited a lack of consistency in how EPA consults with federally-recognized tribal governments across its various program and regional offices and a lack of opportunity to provide meaningful input in certain situations where EPA attempted to consult. Accordingly, in developing the proposed consultation policy, EPA sought to address these and related issues and to incorporate many of the comments and suggestions. We are happy to report that the overall response to the proposed consultation policy has been positive with most who have commented or provided input supporting the EPA's efforts.

Several tribal commenters and a state agency provided their own consultation policies for our consideration or cited other reference materials, such as the United Nations Declaration on the Rights of Indigenous Peoples. EPA reviewed these materials in developing the proposed consultation policy, and believes that the proposed consultation policy reflects the same general principles and

elements of those documents. Moreover, EPA reviewed other relevant materials on tribal consultation from across federal and state government all of which were helpful in developing a document that will be best tailored for EPA's work with our tribal partners.

Many of the comment letters that EPA received contained suggestions on specific ways EPA could improve the consultation process with tribes. EPA is already moving forward to review and consider how to incorporate these suggestions. On November 30, 2010, Deputy Administrator Bob Perciasepe directed all EPA program and regional offices to designate a Tribal Consultation Advisor (TCA). The fundamental role of TCAs is to ensure adherence to the proposed consultation policy and ensure its consistent application across EPA. The TCAs will form a consultation policy implementation workgroup that will take up the suggestions referenced above, as well as develop any additional guidelines and tools necessary for effective and meaningful consultation.

Please note that this document represents EPA's responses to all written comments received since President Obama's November 2009 meeting and that similar comments have been grouped and summarized for clarity and efficiency.

### **General Comments**

#### **Comment: Establish an advisory committee to guide development of the consultation policy.**

Response: Some early comments requested that EPA establish an advisory group to guide development of the consultation policy. Although EPA did not establish a new advisory group specifically for this purpose, the Agency communicated frequently with standing tribal partnership groups such as the National Tribal Caucus and Regional Tribal Caucuses. EPA also engaged in numerous communications with tribes during the early phases of development of the proposed consultation policy, including holding two national teleconferences in January 2010, as well as attending several consultation meetings hosted by the United States Department of the Interior. In addition, EPA held two national teleconferences in July 2010 and discussed the proposed consultation policy at a number of meetings with tribes through September 2010.

Given the numerous opportunities to engage with tribes and tribal organizations available to EPA, we determined that establishing a new advisory committee for the purpose of helping develop the proposed consultation policy was neither necessary nor practicable.

#### **Comment: Hold regularly-scheduled meetings between tribal leaders and EPA leaders.**

Response: Several tribes requested that EPA hold regularly-scheduled annual or semi-annual meetings between tribal and EPA leaders, especially within EPA's regions. EPA currently holds regular meetings with tribal officials, including at the regional level. The Agency is considering and will develop measures to enhance the role of these meetings in the consultation process.

## Specific Comments

### *Background*

**Comment: Use existing tribal relationships for consultation as much as possible.**

**Response:** Some tribes cited the various tribal partnership groups that EPA meets with regularly, including the national and regional tribal caucuses, and suggested we use these meetings for consultation and coordination as much as possible. EPA agrees with this comment and intends to continue communicating and coordinating with tribal partnership groups. While discussions with these groups are not a substitute for government-to-government consultation, these interactions nonetheless add significant value to EPA's consultation process.

EPA did receive one comment requesting that we consider including an inter-tribal organization in government-to-government consultations for a certain group of tribes. Specifically, one inter-tribal organization requested that EPA include its personnel in consultations on matters that affect its member tribes because those member tribes authorized the inter-tribal organization to represent those tribes on certain issues. EPA has noted this and intends to include this organization in government-to-government consultations on relevant issues until EPA is directed otherwise by the member tribal governments.

**Comment: Value the input from tribal governments.**

**Response:** EPA agrees that tribal input is valuable, and the proposed consultation policy seeks to ensure that tribal input is duly considered by the Agency in its decision-making processes. The follow-up process described in the proposed consultation policy is an important part of ensuring that EPA values tribal input by directing Agency officials to inform tribes about how their input was considered.

### *Principles*

**Comment: EPA owes a duty to tribes under the trust responsibility of the federal government.**

**Response:** Tribes cited the trust responsibility in support of the duty to consult with tribes and to protect human health and the environment in Indian country. Moreover, one commenter requested further definition of EPA's duties under the doctrine. The trust responsibility is noted in the Guiding Principles section of the proposed consultation policy, and EPA continues to recognize this responsibility as it carries out its work in Indian country.

With respect to EPA's duties under the federal government's trust responsibility, the Agency is guided by applicable case law, federal statutes, and executive orders that set forth the framework of the trust responsibility. Given the complex and varied nature of the trust responsibility in differing circumstances, it is difficult to articulate a simple definition that fits all circumstances that might arise.

## ***Terms and Definitions***

**Comment: Use “Indigenous Nation” or other terms when referring to Indian governments rather than “Tribe.”**

Response: The official list of tribes published by the United States Department of the Interior refers to “tribal entities,” while various federal laws refer to “federally recognized Indian tribes.” There is little consensus on how Indian governments should be addressed. Some governments are officially named “tribes” in their government documents. Other governments are officially named as “nations” in their government documents. Still others are referred to as villages, pueblos, or rancherias. To simplify EPA documents and ensure consistency with federal law and Executive Order 13175, EPA utilizes the term “Indian tribe” in many of its publications. When consulting directly with a tribal government, however, EPA endeavors to refer to the government by its chosen, official term whether that term is tribe, nation, or other title.

**Comment: Include within the scope of tribal interests off-reservation reserved rights and subsistence gathering/use a broad interpretation of tribal land.**

Response: EPA intends to construe the term tribal interests broadly when implementing the proposed consultation policy and that includes encompassing reserved rights and subsistence gathering where appropriate. EPA applies this broad interpretation consistent with any applicable limits imposed by law.

**Comment: Include aboriginal territories within the scope of tribal interests.**

Response: EPA considers consulting with tribes when Agency actions may affect tribal interests, and that may include interests or reserved rights in ceded territories or areas eligible for protection under the National Historic Preservation Act. As EPA may not always be aware of a particular tribe’s interest in aboriginal lands, EPA urges the affected tribe to promptly bring those interests to the attention of EPA officials.

**Comment: Include a comprehensive definition of consultation.**

Response: Some tribes requested that EPA’s proposed consultation policy include a formal definition of consultation. EPA directs those tribes to the opening paragraph of the proposed consultation policy, which provides a definition. The proposed consultation policy states:

Consultation is a process of meaningful communication and coordination between EPA and tribal officials prior to EPA taking actions or implementing decisions that may affect tribes. As a process, consultation includes several methods of interaction that may occur at different levels. The appropriate level of interaction is determined by past and current practices, adjustments made through this policy, the continuing dialogue between EPA and tribal governments, and EPA national, regional, and program office policies and plans.

The proposed consultation policy then further describes specific details of the consultation process.

**Comment: Recognize that consultation represents an ongoing process, including a back-and-forth exchange, not simply “notice and comment.”**

Response: EPA agrees with this comment and understands that effective consultation involves two-way communication. As noted by a number of tribes, the consultation process should be flexible and

be tailored to the specific needs of tribes and the issues involved. Some consultations may involve multiple communications between EPA and tribes potentially including workshops, webinars, teleconferences, or face-to-face meetings. Multiple communications may be particularly appropriate for highly technical and complex actions. The proposed consultation policy recognizes this fact and states that there is no “one-size fits all” approach to consultation.

### *Identification Phase*

**Comment: The triggers for consultation are too ambiguous – be specific as to which actions require consultation.**

Response: The proposed consultation policy proposes a broad standard for when EPA should consider consulting with tribes. The scope of EPA’s proposed consultation policy is intended to be broader than that articulated in Executive Order 13175. Rather than creating a list of specific issues requiring consultation, the proposed consultation policy instead provides a list of categories that may warrant consultation. EPA believes that its approach captures a wider range of activities and minimizes the possibility of missing specific issues that may be appropriate for consultation, but were not included on a list. Under the proposed consultation policy, each program and regional office is directed to conduct an analysis of its upcoming activities semi-annually to determine which of them may warrant consultation. The proposed consultation policy also provides for the designation of Tribal Consultation Advisors across the Agency to ensure consistency in how these analyses are conducted.

### *Notification Phase*

**Comment: Tribes receive notification of issues they are interested in too late in the process.**

Response: The proposed consultation policy is designed to minimize occurrences of late notice. The proposed consultation policy makes it very clear that notification should occur sufficiently early in the process to ensure meaningful input by tribes. EPA intends to monitor timeliness of consultation closely to ensure correct implementation.

**Comment: Provide early scoping.**

Response: Similar to the previous comment, several tribes requested that EPA conduct early scoping meetings with tribes before preliminary decisions are made on any particular consultation matter. EPA understands that for consultation to be meaningful, tribes should be afforded an opportunity to provide input prior to the Agency making decisions on a particular action. Again, EPA will strive to notify tribes sufficiently early in the process to allow for meaningful input. As mentioned previously, EPA interacts with tribes in a number of venues. These meetings afford an opportunity for EPA to give early notice to tribes of future Agency actions that may warrant consultation and to get initial feedback on these actions. These approaches are used to supplement and inform consultation activities and not replace them.

**Comment: Recognize that tribes have limited resources to participate in consultations. Provide tribes with resources to allow tribal personnel to travel to consultations or other necessary meetings. Also consider alternative methods to distant face-to-face meetings.**

Response: Several tribes pointed out that they have limited resources to participate in the consultation process. Several requested that EPA provide them financial assistance and still other tribes suggested that EPA consider alternative methods for consultation (e.g., videoconferencing). EPA will strive to minimize the resource investment required by tribes to participate in the consultation process. For example, we will consider holding meetings at tribal offices or piggybacking off other meetings that tribes attend. We will also encourage the use of alternative methods for consultation across EPA such as those suggested by tribes.

**Comment: Do not use time and resource constraints as a potential caveat to when/how EPA will consult with tribes.**

Response: EPA is provided a budget by Congress and must operate within that budget. EPA prefers to be honest about those limitations, and instead work directly with tribes to maximize the resources EPA does have to ensure sufficient and meaningful consultation with tribes on issues that tribes find important. If tribes have suggestions regarding ways to ensure consultation on certain matters while accounting for resource constraints, EPA is open to considering those suggestions.

**Comments: Develop a more consistent approach to consultation. Develop standardized procedures for conducting consultation. Set specific timelines for consultation.**

Response: Several tribes requested that EPA develop a more consistent approach to consultation across the Agency and/or develop standardized procedures, including set timelines, for how consultation is conducted. One of the primary objectives of the proposed consultation policy is to promote consistency in the consultation process, including how the Agency determines which actions warrant consultation and conducts consultation. The Agency plans to consider the development of implementing guidance for consultation while still allowing for flexibility in the consultation process to respond to the unique nature of each consultation situation. Establishing set timelines for consultation activities in advance for all such undertakings would not be practical or advisable for the aforementioned reasons, but EPA will strive to make sure the timeframes for input during any particular consultation are made clear to tribes.

**Comment: Respect tribal preferences in terms of communication and notify or copy appropriate staff.**

Response: EPA will do its best to honor a tribe's preferences regarding to whom correspondence is addressed, individuals to be copied, and other tribe-specific communication preferences. EPA's regional offices interact with tribes most directly and are frequently in the best position to capture this information. Tribes should also keep their EPA regional contacts updated when the tribe has personnel, address, email, or phone changes.

## *Input Phase*

### **Comment: Consultation is treated as a procedural rather than substantive requirement.**

Response: Several tribes remarked that at times it appears that consultation is viewed merely as a procedural requirement rather than a meaningful opportunity for tribes to provide substantive input on Agency actions. In order to ensure consultation is meaningful, the Agency has described consultation as having several phases, including an input phase. The purpose of this phase is to ensure that tribes have a meaningful opportunity to provide input on what actions warrant what level of consultation. We plan to work hard to make sure that EPA provides tribes with this opportunity. The follow-up phase ensures that the Agency informs tribes about how their input was considered.

### **Comment: Face-to-face meetings are the only true way to consult with tribes.**

Response: One commenter stated that only face-to-face meetings between EPA and tribal decision-makers constitute consultation. The proposed consultation policy is intentionally designed to accommodate the diverse range of tribal consultation needs and preferences. Moreover, the specific form that any given consultation process takes is influenced by the variety of factors including, but not limited to, the issues being considered, the number of tribes potentially impacted, time and resource limitations of the tribes involved, and other pertinent factors. In some cases, EPA may need to rely on teleconferences or other approaches in order to conduct consultation. EPA cannot commit to face-to-face meetings in all instances. However, the Agency does regularly meet face-to-face with tribes and tribal groups in a variety of settings, including the National Tribal Caucus and other national and regional tribal partnership groups, and EPA plans to continue to meet face-to-face with tribes whenever it is appropriate and feasible.

### **Comment: Honor the confidentiality of certain information provided by tribes (e.g., sacred sites).**

Response: Some tribes requested that EPA honor the confidentiality of certain information that they may provide, such as locations of sacred sites, hunting and fishing locations, or other information that tribes may consider sensitive. EPA will honor these requests to the extent allowable by law. Tribes should advise EPA of such instances prior to providing the sensitive information so that the Agency can advise the tribe as to whether it can treat the information as confidential.

### **Comment: Ensure that the correct participants attend consultation meetings.**

Response: Several tribes stated that EPA should ensure, in addition to notifying the correct people at a tribe, that the Agency has managers with decision-making authority present during consultation meetings. As a general matter, the Agency agrees that managers should be present at consultation meetings, particularly when tribal leaders are present. There may be situations, however, such as during informational meetings, where technical staff will be the sole participants in meetings. Frequently these technical meetings do not involve senior Agency decision-making officials. EPA recommends that tribes discuss, in advance, who the appropriate participants are for any consultation meeting prior to the consultation occurring.

### *Follow-Up Phase*

**Comment: EPA lacks follow-up and provides little feedback to tribes regarding actions ultimately taken.**

Response: A number of tribes cited the lack of follow-up or feedback from EPA on how their input was taken into consideration during consultations. The proposed consultation policy directs follow-up to consultation that includes formal, written communication from a senior EPA official regarding how tribal input was considered in the final EPA action.

**Comment: Include accountability mechanisms to track when and how consultation occurred.**

Response: All EPA program and regional offices are accountable to the EPA Designated Consultation Official, currently the Assistant Administrator for International and Tribal Affairs. Offices are expected to provide summary information to this Official semi-annually. Moreover, EPA has a senior-leadership workgroup that considers Indian policy issues and can provide oversight of consultation as needed.

### **Other Comments**

**Comment: Consult with/don't consult with Alaska Native Corporations**

Response: Alaska Native Village representatives have voiced concerns about EPA consulting with the Alaska Native Corporations. Conversely, Alaska Native Corporations have reminded EPA of its obligation to consult with them in certain circumstances. This proposed consultation policy only describes how EPA intends to consult with federally-recognized Indian tribes. EPA consults with Alaska Native Corporations as required by Public Law 108 - 199, 118 Stat. 452, as amended by Public Law 108 - 447, 118 Stat. 3267.

**Comment: Ensure consultation by states when states are implementing authorized programs.**

Response: Several tribes raised concerns about consultation by states with tribes when states are implementing federal programs. EPA recognizes these concerns and will explore what steps, if any, can be taken to address this situation. EPA can certainly encourage states to consult with tribes whenever possible. Notably, some states, including New Mexico and New York, actually have tribal consultation policies and can potentially serve as models.

**Comment: Improve interagency coordination of consultation for multi-agency actions.**

Response: Several tribes raised concerns about the lack of consistency and other problems with how federal agencies consult with tribal governments on actions involving more than one agency. EPA frequently engages the Bureau of Indian Affairs, the Indian Health Service, the National Indian Gaming Commission, the Department of Justice, and other federal agencies on issues that potentially impact Indian country. EPA does acknowledge, however, that consultation on interagency actions may not have been well-coordinated in the past. We will continue searching for opportunities to improve interaction with other federal agencies on Indian country issues. As other federal agencies also develop formal procedures to consult per the Obama Memorandum and Executive Order 13175 the opportunities to coordinate better should increase.

**Comment: Conduct cultural resource and other appropriate training of Agency employees working with tribes.**

Response: EPA has developed a training course entitled Working Effectively with Tribal Governments (WETG) that has now been adapted for use across the federal government. EPA intends to develop a module in WETG specifically on consultation and will consider adding information on the protection of tribal cultural resources. Moreover, as EPA develops implementation plans for the proposed consultation policy, we will consider what additional training would be appropriate for personnel involved in the consultation process.

**Comment: Issue progress reports on implementation of the policy.**

Response: As stated in Section VI, subsection D of the proposed consultation policy, EPA plans to receive ongoing feedback about the effectiveness of the proposed consultation policy from all parties, and particularly tribes. EPA plans numerous opportunities for the Agency to gather input from tribes and intertribal organizations on the implementation of the proposed consultation policy, including through the standing tribal partnership meetings mentioned previously. In addition, the Agency will consider other opportunities for sharing information with tribes on implementation of the proposed consultation policy and for obtaining feedback from tribes.

**Comment: Include “consensus” as the goal of consultation.**

Response: The purpose of consultation is to allow tribes to provide meaningful input so the Agency may consider that input in its final decisions on actions that may affect tribal interests. While the goal of some consultation efforts may be to reach consensus on a matter where there is a disagreement between EPA and a tribe, some consultation efforts may have other purposes such as communicating Agency research or receiving tribal input on an upcoming EPA activity. While the Agency will strive toward mutually acceptable outcomes, an agreed upon outcome will not always be possible.

**Comment: Add a dispute resolution provision.**

Response: The EPA consultation policy implementation workgroup will explore what additional dispute resolution processes might be appropriate above-and-beyond the consultation steps outlined in the proposed policy. Tribal governments can always communicate any concerns about a specific consultation or the consultation process in general to a Tribal Consultation Advisor, the head of the program or regional office conducting the consultation (i.e., the Assistant Administrator or Regional Administrator), or to the Agency’s Designated Tribal Consultation Official, Assistant Administrator for International and Tribal Affairs.