

# EPA Region 1 – New England



## Tribal Consultation Policy Implementation Guidance Document

v.1.1



October 1<sup>st</sup>, 2013

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## I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) Region 1 developed this guidance document to establish regional procedures to facilitate consultation with the ten federally recognized tribes within Region 1 under the *EPA Policy on Consultation and Coordination with Indian Tribes* issued on May 4, 2011. These tribes include the Mashantucket Pequot Tribal Nation, the Aroostook Band of Micmacs, the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe of Indians: Indian Township Reservation, the Passamaquoddy Tribe of Indians: Pleasant Point Reservation, the Penobscot Indian Nation, the Mohegan Tribe, the Mashpee Wampanoag Tribe, the Wampanoag Tribe of Gay Head (Aquinnah), and the Narragansett Indian Tribe.

The goals of this guidance document are to: (1) establish clear EPA Region 1 procedures for the tribal consultation process, including defining the “why, what, when, and how” of tribal consultation; (2) identify roles and responsibilities of those involved in tribal consultation to promote consistency in, and coordination of, the consultation process; and (3) establish oversight and reporting processes to strive for regional accountability and transparency.

## II. BACKGROUND

The *EPA Policy on Consultation and Coordination with Indian Tribes* was developed in response to a Presidential Memorandum (Memorandum) issued November 5, 2009 (see Appendix B), directing agencies to develop a plan to implement fully Executive Order 13175, which was issued on November 6, 2000 (see Appendix A).

The Executive Order specifies that each federal agency must have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. The new consultation policy reflects the principles expressed in both the Executive Order and the 1984 *EPA Policy for the Administration of Environmental Programs on Indian Reservations* (1984 Policy) for interacting with tribes. The 1984 Policy remains the cornerstone for EPA’s Indian program and “assure[s] that tribal concerns and interests are considered whenever EPA’s actions and/or decisions may affect” tribes (1984 Policy, p. 3, principle no. 5 – Appendix A).

Through the issuance of the consultation policy in May 2011 that builds upon these earlier documents, EPA Region 1 strengthens its commitment to provide consultation on a government-to-government basis with federally recognized tribal governments when EPA actions and decisions may affect tribal interests. 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 the broad standard established by the national consultation policy, past and current practices, procedures outlined in this guidance document, the continuing dialogue between EPA Region 1 and tribal governments, and other applicable program and regional office consultation procedures and plans.

The primary goal of this policy is to fully implement both the Executive Order and the 1984 Indian Policy, with the ultimate goal of strengthening the consultation, coordination, and partnership between New England tribal governments and EPA Region 1, ensuring that tribal interests are considered whenever the Region takes an action that may affect these tribal interests.

While this document describes the procedures that EPA Region 1 (herein referred to as “Region 1” or “the Region”) expects to follow in consulting with our federally recognized tribes, it does not alter or create any legal rights or obligations. Tribes are free to suggest or request different procedures when they deem it appropriate, and the Region retains its discretion to tailor approaches to consultation on a case-by-case basis.

### **III. FUNDAMENTAL PRINCIPLES**

There are certain foundational principles included in EPA’s January 2010 *Plan to Develop a Tribal Consultation and Coordination Policy Implementing Executive Order 13175* that define the role of EPA in the engagement of environmental activities in Indian Country:

EPA’s fundamental objective in carrying out its responsibilities in Indian country is to protect human health and the environment.

EPA recognizes and works directly with federally recognized tribes as sovereign entities with primary authority and responsibility for each tribe’s land and membership, and not as political subdivisions of states or other governmental units.

EPA recognizes the federal government’s trust responsibility, which derives from the historical relationship between the federal government and Indian tribes as expressed in certain treaties and federal Indian law.

EPA strives to ensure the close involvement of tribal governments and gives special consideration to their interests whenever EPA’s actions may affect Indian country or other tribal interests.

When EPA issues involve other federal agencies, EPA carries out its consultation responsibilities jointly with those other agencies, where appropriate.

In order to apply these principles, EPA Region 1 is committed to comprehensive consultation with tribal governments before making decisions or changing policy on environmental matters that may affect tribal interests.

#### **IV. NEED FOR AN ESTABLISHED CONSULTATION PROCESS**

Consultation with Tribes has taken place within the Region by the various programs since the 1984 Indian Policy was issued. However, there is a need for consistency among all programs in the implementation of the new national consultation policy, so that all Region 1 Tribes are consulted adequately and afforded the opportunity to provide meaningful input on EPA Region 1 actions or activities that may affect tribal interests prior to the Region making decisions on those actions or activities.

Meaningful tribal consultation is an essential component of the federal government's general trust relationship with federally recognized tribes. The federal government recognizes the right of each tribe to self-government, with sovereign powers over their members and their territory. President Obama's November 5, 2009, Executive Memorandum on Tribal Consultation, notes that:

*History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.*

Access to pertinent, governmental process is integral to the government-to-government relationship between the region and the tribes in New England. This process is expressly designed to give the tribes the opportunity to participate in the design and modification of EPA Region 1 activities that may affect them.

#### **V. CONSULTATION DEFINED**

The *EPA Policy on Consultation and Coordination with Tribes* defines consultation as 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.

In Region 1, consultation includes seeking, discussing, and considering the views of federally recognized tribal governments in New England, regarding a Region 1 action or decision. Consultation consists of respectful, meaningful, and effective two-way communication in an effort to achieve mutual understanding between the Region and the tribes of their respective interests and perspectives, before Region decisions are made.

The process of effective tribal consultation may include a wide range of communication over the course of developing an EPA Region 1 decision or action. This communication can include meetings, telephone conferences, and written or internet-based communication to exchange information as appropriate.

Formal structured meetings between EPA Region 1 and tribal leaders may be an essential part of the consultation process, particularly if the consultation involves issues of tribal sovereignty.

## **VI. CONSULTATION AS DISTINGUISHED FROM PUBLIC PARTICIPATION**

Tribal consultation is distinct from the EPA Region 1 public participation and community involvement processes. Whenever possible, consultation should occur before a planned Region 1 public meeting or workshop related to the activity, to offer Region 1 the opportunity to incorporate the views of interested tribal governments prior to seeking public comment.

A tribe may benefit from participating in the EPA Region 1 public participation process, separate and apart from any consultation. Additionally, a tribe may choose to submit oral and written comments made during the consultation process into the public record during the public comment period. This may be necessary for the tribe to preserve its appeal rights, or to preserve a particular issue for appeal.

## **VII. PHASES OF CONSULTATION**

The *EPA Policy on Consultation and Coordination with Indian Tribes* establishes four distinct phases of consultation that define the consultation process:

- a. **Identification Phase:** EPA Region 1 identifies activities that *may be* appropriate for consultation. The identification phase should include a determination of the complexity of the activity, its potential implications for tribes, and any time and/or resource constraints relevant to the consultation process. This phase should also include an initial identification of the potentially affected tribe(s). Tribal officials may request consultation in addition to the Region's identification of what requires consultation. The Region will endeavor to honor the tribal government's request with consideration of the nature of the activity, past consultation efforts, available resources, timing considerations, and other relevant factors. Appendix C includes a consultation decision tree and worksheet tool to assist Region 1 with the consultation identification process.
- b. **Notification Phase:** EPA Region 1 notifies the tribes of activities that *may be* appropriate for consultation. Notification within Region 1 will typically be accomplished through the issuance of a notification letter to the affected tribe(s), using the model notification letter format provided in Appendix E.

Region 1 notification includes sufficient information for tribal officials early enough in the process to make an informed decision about the desire to continue with consultation and sufficient information to understand how to provide informed input. The notification may also include applicable information about time constraints under which the Region is operating, such as litigation deadlines that may affect the timing of the process.

- c. **Input Phase:** Tribes provide input to EPA Region 1 on the consultation matter. This phase may consist of a range of interactions including written and oral communications and exchanges of information, phone calls, meetings, and other appropriate interactions depending upon the specific circumstances involved. EPA Region 1 coordinates with tribal officials during this phase to be responsive to their needs for information and to provide opportunities to provide, receive and discuss input. During this phase, EPA Region 1 considers the input regarding the activity in question. EPA Region 1 may need to undertake subsequent rounds of consultation if there are significant changes in the originally-proposed activity or as new issues arise.
- d. **Follow-up Phase:** EPA Region 1 provides feedback to the tribes(s) involved in the consultation to explain how their input was considered in the final action. This feedback should be a formal, written communication from a senior Regional EPA official (Regional Administrator or respective program office manager) involved to the most senior tribal official involved in the consultation.

## VIII. IDENTIFICATION OF ACTIVITIES WARRANTING CONSULTATION

- a. **Mechanisms for determining which matters are appropriate for consultation:** The following mechanisms are potential avenues for identifying matters appropriate for consultation:
  - Regulatory Steering Committee (RSC). This committee oversees EPA's Action Development Process (ADP), which covers all EPA regulations and non-regulatory actions of national significance. The RSC identifies matters appropriate for consultation on the Comprehensive Regulatory Data Form, and may involve Region 1 participation to the extent appropriate. These forms are available to tribes in the semiannual Regulatory Agenda as well as in the subset of rules on the Regulatory Gateway accessed through the EPA website:  
[http://yosemite.epa.gov/opei/RuleGate.nsf/content/phasescomments.html?open\\_document](http://yosemite.epa.gov/opei/RuleGate.nsf/content/phasescomments.html?open_document)
  - National and Regional Tribal Partnership Groups. EPA meets regularly with a number of national and regional tribal partnership groups. These groups assist in the identification of matters that may be appropriate for consultation.

- National Program Offices. For those actions and decisions originating from national program offices but not in the ADP process, identification of these actions and decisions as appropriate for consultation may come directly from these offices. EPA's National Program Managers initiate actions that may affect tribes in Region 1. For any such action, EPA's National Program Managers undertake consultation pursuant to EPA's Consultation Policy and not the Region 1 procedures.
- EPA Region 1 – New England. As determined by regional program offices, where EPA actions may affect tribes and tribal consultation has been deemed appropriate, pursuant to the protocol established in this document. Additionally, Region 1 may be asked to lead for consultation on an activity that originates from an EPA national program office.
- Requests Initiated by Tribal Government. Tribal officials may request consultation in addition to EPA Region 1's ability to determine what requires consultation. The Region attempts to honor the tribal government's request with consideration of the nature of the activity, past consultation efforts, available resources, timing considerations, and all other relevant factors.

**b. General categories of activities appropriate for consultation:** The following categories represent a non-exclusive list of potential activities normally appropriate for consultation. As stated in the EPA Consultation Policy, “the final decision on consultation is normally made after examining the complexity of the activity, its implications for tribes, time and/or resource constraints, an initial identification of the potentially affected tribe(s), application of the mechanisms for identifying matters for consultation, described below, and interaction with tribal partnership groups and tribal governments.”

- Regulations or rules
- Policies, guidance documents, directives
- Budget and priority planning development
- Legislative comments
- Permits
- Civil enforcement and compliance monitoring actions<sup>1</sup>
- Response actions and emergency preparedness
- State or tribal authorizations or delegations
- EPA activities in implementation of U.S. obligations under an international treaty or agreement

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<sup>1</sup> Primary guidance on civil enforcement matters involving tribes can be found in “Guidance on the Enforcement Priorities Outlined in the 1984 Indian Policy,” and “Questions and Answers on the Tribal Enforcement Process.” This guidance is intended to work with the Tribal Consultation Policy in a complementary fashion to ensure appropriate consultation with tribes on civil enforcement matters.

In dealing with authorized state programs, wherein EPA Region 1 holds oversight authority and the proposed action has the potential to affect a tribe, the Region generally agrees to consult with the tribe on state-led actions if a dispute arises that cannot be resolved between the tribe and the state, and consultation is requested by the affected tribe. The Region's approach is to work with both the tribe and state to address potential effects on tribal rights, resources or interests. The Region endeavors to take tribal concerns and impacts into account in exercising its oversight authority.

- c. **Identifying tribal interest for consultation:** At the beginning of an EPA activity or action, the regional program lead (see Section XIV Consultation Roles and Responsibilities) should make a determination whether a tribe or multiple tribes might be affected by the action. The following non-exclusive list of factors should be considered in identifying a potentially affected tribe or tribes:

*Tribal Sovereignty and Self-Determination*

- Action that may affect the tribe's jurisdiction or authority to regulate the environment in its territories
- Action that involves a state's assertion that the state has authority to regulate the environment in a tribe's territories
- Action that could affect how the boundaries of a tribe's territories are interpreted

*Direct Implementation in Indian Country*

- Action that involves EPA Region 1 implementing an environmental program in the territories of an Indian tribe
- Issuance of a direct implementation tribal cooperative agreement

*Geographic Considerations*

- Action on or adjacent to Indian Country, or nearby if the action may affect a tribe's resources, rights, or traditional way of life. Maps of tribal reservations are included in Appendix D.
- Action within tribal usual and accustomed areas that could potentially affect a tribe's resources, rights, or traditional way of life, including properties of cultural or historical significance to a tribe that may be located beyond the current reservation boundaries, on non-tribal lands for which a tribe may claim cultural affiliation from past inhabitance. There may be instances when multiple tribes claim cultural affiliation over an area. The program lead may request that the regional program tribal contact, the respective regional tribal coordinator, or the regional Indian Program Manager help determine if a project beyond the reservation boundaries may affect a tribe's historic or cultural resources.

*Tribal Health and Resources*

- Action that may impact treaty-reserved resources of a tribe
- Action that may impact the health of a tribe
- Action that may impact the cultural, traditional or subsistence resources of a tribe or a tribe's traditional way of life

*Policy, Rulemaking, and Adjudication*

- Changes to regional EPA policy that may affect tribes
- Rulemaking or adjudication<sup>1</sup> by the Region that may affect tribes or their rights or resources

The regional program lead may review maps of federally recognized tribal government locations, Indian Country, tribal reservations (see Appendix D), and maps of watersheds to assist in the initial determination of whether a tribe or multiple tribes may be affected by the action. When in doubt, the regional program lead may contact the respective tribe(s) to gauge tribal interest.

Consultation may not be warranted for certain EPA Region 1 actions or activities. Under Appendix C, decision-making tools including a worksheet and a consultation decision tree are made available to assist regional program leads in determining if consultation is appropriate or not.

## IX. TIMING OF CONSULTATION

The EPA Consultation Policy states that “consultation should occur early enough to allow tribes the opportunity to provide meaningful input that can be considered prior to EPA deciding whether, how, or when to act on the matter under consideration.” To ensure that consultation is meaningful and timely, the regional program lead should initiate communication early enough in the decision-making process that tribal input could affect the regional decision. This would often involve notifying a tribe of an expected action or decision, providing information to the tribe about the decision, discussing major policy and environmental considerations, and exchanging information and viewpoints at a technical level. As proposals and options are developed, consultation and coordination should be continued, to ensure that the overall range of options and decisions is shared

<sup>1</sup> Under the Administrative Procedures Act, an administrative agency such as EPA serves in an adjudicatory capacity when it is making a decision that determines the rights, liabilities, or responsibilities of particular parties pursuant to a delegation from Congress, typically in a statute such as the Clean Water Act or the Clean Air Act.

and deliberated by all concerned parties, including additions or amendments that occur later in the process. External timing constraints on Regional actions, such as responses to congressional deadlines, emergency responses, and actions subject to consent decree deadlines may force or shorten the consultation process, and can define the timing and

duration of consultation. The regional program lead should carry out the consultation process as thoroughly and timely as possible, given these constraints.

In addition, it may often be important to provide an opportunity for meetings with tribal leadership at a point in the decision-making process where EPA Region 1 can provide significant detail about the decision or action it is considering. In some cases, there may be a single time period when this objective can be achieved; in other cases, it may be necessary to consult early in the Region's process, and then consult again at a later point when the Region's action is more developed. The ideal approach is to have open and active communication with interested or affected tribes throughout the decision-making process about the scope and nature of consultation that the tribe desires.

## X. INITIATION OF CONSULTATION

**a. Consultation initiated by EPA Region 1:** Once an action is determined to warrant consultation, the Region should issue a notification letter to the affected tribe(s) to initiate the consultation process. Alternatively, if tribal interest in consultation activity is not immediately evident, a notification letter or a letter of inquiry may be issued to a potentially affected tribe(s) at the discretion of the program, as a means to gauge tribal interest in consultation. The regional program lead should draft the notification letter and may request review from the regional Indian Program Manager prior to finalization of the letter. The letter should be addressed from the Regional Administrator to the tribal leader(s) if the consultation is regarding an issue of sovereignty, or from a senior program manager (office director) to the appropriate delegated tribal official (environmental director, historic preservation officer, etc.) for other matters warranting consultation. Examples of consultation notification letters are found in Appendix H. The consultation notification should:

- Include a courtesy copy to the Regional Indian Program Manager and the respective regional tribal coordinator;
- Describe the issue at hand clearly, avoiding or clearly defining legal and technical terms and acronyms;
- Include maps, technical data, and other explanatory or supporting information as appropriate and available;
- Relay process timelines and time considerations, including a consultation plan (see example in Appendix H);
- Identify the regional program lead who will coordinate with the tribe to arrange all aspects of the consultation;
- Request that the tribe respond to the signatory of the notification letter with a courtesy copy to the identified regional program lead indicating whether or not the tribe desires consultation;

- Request a response by a specific date that allows adequate time for a tribal council meeting or other internal deliberations by the tribe where possible (usually at least four weeks from receipt of letter);
- Request that the tribe provide the name of a tribal representative who will serve as their point of contact for planning the consultation, if the tribe wishes to go forward with consultation;
- Request any policy that the tribe may have regarding how they want us to consult with them; and
- Request that the tribe provide any declination in writing for documentation.

Wherever possible, the regional program lead should follow up with a phone call or email to the appropriate tribal department after the written correspondence has been sent to ensure receipt of the letter and to open dialogue about the consultation.

1. **Tribal declination procedures:** If a tribe declines consultation on a given matter, the Region's consultation efforts are normally concluded. The regional program lead should document in the program file the tribe's declination, with a courtesy copy to the regional Indian Program Manager and the respective regional tribal coordinator. Finally, if at any point during the Region's action the tribe desires to revisit tribal consultation, the tribe can submit this request to EPA Region 1; however, this request may come at a time when it is too late to influence the Region's decision or for the Region to engage in meaningful consultation. In such situations, the Region will decide the degree to which meaningful consultation is still feasible.
  2. **Tribal non-response procedures:** If a tribe does not respond by the date provided in the consultation notification letter, the regional program lead should work with the respective regional tribal coordinator to reach out to the tribe to determine the tribe's interests and the level of involvement the tribe would prefer to have. A recommended minimum response time of two weeks is recommended for this follow-up exercise; if a response is still not received, the Region's attempts should be documented and the Region can conclude its efforts to initiate tribal consultation.
- b. Consultation initiated by a tribe:** The Region generally agrees to consult when such a request for consultation is made by a tribe, assuming the proposed action or lack of action may affect that tribe. In some cases, the Region may propose to defer the consultation until a later date when more information would be available to support more effective consultation. In addition, EPA Region 1 may defer, limit, or not agree to consultation requests related to compliance monitoring and enforcement as indicated in EPA's "Guidance on the Enforcement Priorities Outlined in the 1984 Indian Policy" and "Questions and Answers on the Tribal Enforcement Process."

When the Region receives a written request from a tribal leader, it should be forwarded to the appropriate regional program office, which should provide a written response to the tribe within two weeks of receipt of the correspondence. If it is not clear which program office should take the lead, the regional Indian Program Manager can assist with this determination. The response letter from the Region should designate the point of contact to work with the tribe to arrange the tribal consultation, and request that the tribe identify a tribal point of contact for that purpose. The respective regional tribal coordinator and regional Indian Program Manager should be copied on the correspondence.

- c. **EPA Region 1 and tribal representation:** The designated Regional and tribal points of contact should discuss who will represent each party at each point during the consultation process. Each tribe will determine who will represent its government during various stages of tribal consultation. Written verification from tribal leadership is recommended to ensure that the tribal representative is authorized to represent the tribe for the purposes of consultation with EPA Region 1, to avoid misunderstandings that can arise from dealing with consultants, attorneys, or tribal staff members that may not be authorized by the tribal leadership to represent the tribe as a whole.

The main point of contact for the Region during the course of the consultation is ordinarily the regional program lead. During any leadership meetings, a senior regional official should normally be designated to represent EPA Region 1, usually the Regional Administrator, an Office Director, or one of their deputies. This can depend on the level of representation on the tribe's part. If a tribal leader participates personally, it is generally expected that EPA Region 1 will be represented by the Regional Administrator, depending on the availability of both leaders and any timing or other constraints under which the consultation process must operate.

## XI. CONSULTATION PLANNING PROCESS

Each tribe has its own governmental structure, and exercises sovereign powers over its members and territories in a manner consistent with its unique culture and political structure. Therefore, there is no single consultation process template. Consultation is most effective when the approach is individualized to that tribe and that particular action, and designed by both EPA Region 1 and the tribe.

After a matter is identified as appropriate for consultation, the Region should work with the tribal points of contact to develop a mutually-acceptable approach to planning, preparing and implementing the consultation process. The points of contact should work closely with each other, while at the same time communicating with their own leadership to ensure their support for the developing approach.

The Region and tribal points of contact should summarize key decisions and plans in writing to ensure shared understanding and documentation of decisions reached. In some cases, the points of contact may summarize their mutually developed approach in a written consultation plan or a Memorandum of Understanding (MOU). When the issue is highly complex, controversial, resource intensive and/or may involve several phases of consultation over a long period of time, development of a signed MOU may be the preferred approach, taking into consideration time to prepare and negotiate the MOU.

The Region 1 and tribal points of contact should discuss the following elements of the consultation:

- **Goals and expectations of each party**

The Region 1 and tribal points of contact should work with their respective leadership to identify their goals and expectations, and to determine how to structure the process to address those goals and expectations.

- **Use of EPA or tribal consultation policies and procedures**

The Region 1 and tribal points of contact should discuss whether the tribe has developed its own consultation policy and/or procedures. Tribally-developed consultation policies and/or procedures should be incorporated into the consultation planning and implementation, where possible.

In addition to the Consultation Policy, some EPA regional programs also may have national tribal consultation guidance that may apply. (For example, the Office of Air Quality Planning and Standards developed *Consulting with Indian Tribal Governments* in 2009). Region 1 program offices should contact their respective national program offices to determine if such a policy exists and, if so, should incorporate those procedures into the consultation process to the extent practicable.

- **Scope and number of meetings**

The EPA Region 1 and tribal points of contact should determine whether the consultation topics can be covered in a single meeting or whether multiple meetings over time are preferred. This might include a series of technical exchange meetings and may involve one or more leadership meetings. The parties should decide whether a written consultation plan is needed, or a more formal MOU, or whether verbal/email planning will suffice.

The points of contact should begin setting the meeting date(s) at the earliest opportunity, as it may take time to align calendars with the schedules of the project or proposed action and the appropriate participants. In some cases, external timing constraints or an emerging or urgent environmental or human health matter may place extraordinary demands on the parties' schedules.

Timing of meetings should take into account EPA Region 1's calendar as well as the tribe's administrative and cultural events calendars.

The points of contact should discuss in detail what information each party will need in order to participate in the consultation effectively. Both Region 1 and the tribe may have authored or possess scientific studies, technical assessments or other reviews that might pertain to the consultation, and these documents should be shared between the parties, in advance, to the maximum extent possible.

- **Consultation facilitation**

The Region 1 and tribal points of contact should discuss and agree on whether there will be a facilitator for any meetings during the course of the consultation. The parties may decide upon someone from their respective staff, often the regional Indian Program Manager, or may choose to hire an independent third-party, if resources allow. If the parties elect to forgo a facilitator, it is important to ensure that one party does not dominate the meeting.

## **XII. CONDUCTING THE CONSULTATION**

- a. **Communication and Information Exchange:** Most tribe-EPA Region 1 communication takes the form of information sharing, technical discussion, and joint planning, and involves staff and management of both the Region and a tribe. EPA Region 1 is committed to timely and efficient dissemination of information to tribes, and a reciprocal receipt of information from tribes is needed to ensure timeliness of the consultation process. When the Region and a tribe are effectively communicating and coordinating in a timely, meaningful way, conflict is reduced or avoided, and in some cases a tribe may feel its interests have been met without the need for further consultation at the leadership level. In other cases, this will serve as an important preliminary step to a productive leadership meeting.

There may be situations where the tribe lacks the resources to conduct a technical or legal review. Depending on the degree of tribal interest, and practical considerations such as timing and resources, it may be beneficial to provide an additional technical meeting or workshop where information can be exchanged. The regional program lead should identify the various decision points and potential topics or issues that may be of particular interest to the tribe. For example, in the development of a permit there may be technical support documents created that assist Region 1 in making decisions. The tribe may wish to conduct a workshop about the technical support document so that input can be provided and the parameters of EPA Region 1's authority can be best understood. This often will help the tribe understand where EPA Region 1 may be able to institute different controls that will strive to protect tribal resources.

**b. Leadership meetings:** When a consultation matter involves tribal sovereignty, a leadership meeting between the Regional Administrator and the tribal leader(s) is generally appropriate. Leadership meetings should be held face-to-face whenever possible, preferably on tribal homelands. The executive leadership of the Region and the tribal government officials may conduct one or more meetings. The meeting agenda for each leadership meeting should be discussed and agreed upon between the tribal and Regional points of contact in advance of the meeting. Generally, the agenda should include:

- Introductions
- Statement of meeting purpose and desired outcomes, including acknowledgement of government-to-government consultation
- Statements from each party, usually focused on goals and expectations for the consultation
- Presentation of information from both EPA Region 1 and the tribe
- Discussion and input
- Identification of next steps, including follow-up meetings

**c. Consultation involving multiple tribes:** When extending a notification of consultation to multiple tribes in the Region, a letter should be sent to each tribe. Depending on the situation and as resources permit, EPA Region 1 may decide to carry out the consultations in a centralized location or through conference calls. Hub consultations normally are arranged in areas that can accommodate a large meeting and are central to the maximum number of tribes, and in locations where tribes have expressed interest, to the extent practical. It is important for the Region to know who the designated tribal representative is for each tribe.

**d. Timing and location of consultation:** Timing of meetings should involve consideration of the tribe's administrative, subsistence, commercial fishing, and cultural events calendars, and Region 1's schedule, which is often dictated by timing constraints inherent in the decision that is the subject of the consultation. If travel money or time constraints make such a visit impossible, the parties may agree to meet via video or telephone conference.

**e. Telephone Conferences:** Regional participants in telephone conferences should take care to ensure the consultation retains appropriate protocol, and should be aware of differences in communication styles that may be less apparent than during a face-to-face meeting. Consultation by telephone can present communication challenges such as determining when someone wishes to speak and inability to read body language. It is important to allow periods of silence to ensure participants have the opportunity to speak, and to avoid interrupting another person when speaking. It is also helpful to stop occasionally to ask if anyone has points or questions they would like clarified or addressed.

- f. Tribal reservation visits:** If the consultation will involve a visit by the Region to a tribe's reservation, the Regional and tribal points of contact should consider building other activities, aside from the consultation, into the visit. The tribe may wish to host a tour of environmental sites and projects for Regional representatives. Other options may include working with the tribe to host a public meeting or workshop, visiting the tribe's cultural center/museum or meeting with traditional tribal leaders/elders to learn more about the tribe's worldview and culture. If possible, such activities should be scheduled before the consultation, so that Regional personnel can acquire a richer understanding of the tribe and its environmental issues.

When attending the consultation meetings with tribal leaders and tribal staff, the regional leadership, regional program lead and accompanying program representatives should exhibit cultural sensitivities and appropriate etiquette, including refraining from interrupting during discussions, texting during the tribal meetings, and should silence all mobile phones and Blackberries, refrain from side conversation at the table or in the room, and refrain from glancing at watches or concerning oneself with strict adherence to the agenda times. Please refer to Appendix J for a comprehensive list of considerations.

- g. Consultation involving other federal agencies:** EPA Region 1 should actively seek opportunities to conduct joint or multi-party federal consultations with tribes on multi-faceted or related government actions, so that EPA Region 1 and other agencies consult as one federal government party. This type of federal partnership could reduce the burden on a tribe and may also result in improved ability to address potential impacts on tribal rights, tribal resources and tribal lands. Identification of the lead federal agency, coupled with the execution of a memorandum of agreement or a communication and coordination plan which identifies roles and responsibilities of each party, including the lead federal agency, is recommended. Assignment of a partner federal agency as the lead agency, however, does not exonerate EPA Region 1 from the responsibility of consultation with the affected tribe(s) when EPA has an independent obligation to consult within the context of a larger activity, consistent with the Consultation Policy.
- h. Sensitive Information, Record-keeping and FOIA Procedures:** The points of contact, in coordination with their respective leadership, should discuss confidentiality and FOIA issues in advance. The tribe may wish to share information with the Region that it considers sensitive and not for public release. Some examples of cultural issues and resources may include protection of cultural and historic sites, protection of subsistence resources and traditional hunting, fishing and gathering areas, and protection of the ability of the tribe to carry out traditional and cultural practices. While information shared between the Region and a tribe may be beneficial for the consultation process, it is generally not protected from disclosure under FOIA, especially if this information is used in the decision-making process and becomes part of the

administrative record, unless the content is specifically protected under federal law (e.g., some types of information related to cultural resources, and confidential business information).

The Regional and tribal points of contact should work together to ensure information exchange around sensitive issues is planned and supported. Some cultural information belonging to a tribe cannot be shared with the Region. To the extent allowed by law, the Region should defer to tribal policies on confidentiality and management of cultural resources. EPA Region 1 and tribes have been able to address the protection of cultural resources and confidentiality concerns through working together to outline a process before consultation meetings take place. For example, a tribe may have mapped the general area of a cultural resource without identifying a specific location, allowing the Region to take that area into account.

- i. **Outside party involvement in the consultation process:** Participation and attendance at consultation meetings is generally limited to the representatives of the Region and the tribe. Consultants employed by the Region or the tribe, or third parties such as intertribal organizations, tribal consortia, environmental/non-profit organizations and state/local governments, may be included as long as there is no objection from either side. In some cases, the Region and the tribe may agree to grant a party “observer status” where that party can listen to the proceedings but not participate, in order to provide the third party an opportunity to better understand the Regional and tribal issues and priorities. Media are excluded from consultation unless both parties agree prior to the consultation.

### XIII: CONSIDERATIONS FOR EFFECTIVE CONSULTATION

To make consultation meaningful, the Regional participant(s) should enter consultation with an open mind and a commitment to collaboration and creativity. Consultation should be conducted in good faith throughout the decision-making process and a climate of mutual respect should be realized. The Region should aim to understand the priorities and constraints of the affected tribe(s).

EPA Region 1 should make a concerted effort to support solutions that do not negatively impact a tribe’s rights, resources and interests. The regional program lead should understand and apply the contents of U.S-tribe agreements (treaties, MOAs, etc.), applicable statutes and regulations, as well as the general trust responsibility when identifying and evaluating decision alternatives. The regional program lead should also apply the policy goals of the 1984 EPA Indian Policy.

EPA Region 1’s authority is often subject to specific statutory and regulatory limitations, and the extent to which the Agency can address tribal concerns may vary on a case-by-case basis. The Region intends to work with a tribe in a reciprocal manner in addressing issues and matters that might affect them, striving toward consensus. There may be times

when the Region's decision will not agree with the tribe's input or preferred outcome. Where differences exist, the Region should strive to reach a decision that reconciles the tribe's position, interests, and concerns with the responsibilities of the Agency, consistent with federal law and EPA policy.

## XIV: CONSULTATION ROLES AND RESPONSIBILITIES

- a. **Regional Program Lead:** The regional program lead plays the central role in tribal consultation. The regional program lead is typically the project manager, permit writer or lead staff person assigned to the particular action at hand. Once the regional program lead determines, using the criteria discussed and guidance provided in this document, that tribal consultation should be initiated, or once a consultation request is received from a tribe, the regional program lead should notify appropriate personnel in his or her own unit, including the respective program tribal contact (if such a contact is assigned this role in the program), as well as the regional Indian Program Manager and the respective tribal coordinator. A list of regional program contacts can be found at <http://www.epa.gov/region1/govt/tribes/contact.html>. The regional program lead will enter information about the consultation activity into the AIEO consultation database.
- b. **Regional Tribal Coordinator:** Regional Tribal Coordinators serve as the liaisons between the Region and tribal governments in New England. Tribal Coordinators also serve as Project Officers for Indian Environmental General Assistance Program and Performance Partnership grants, some Clean Water Act Section 106 and 319 grants, and have other program duties as assigned.

The role of a regional tribal coordinator in tribal consultation is to provide expertise and advice to the program lead and overall team, to the greatest extent possible, on the following subjects:

- Tribal environmental goals & priorities
- Tribal political structure and community overview
- Political and jurisdictional issues (if applicable)
- EPA funding and project work with tribe
- General history of the tribe's relationship with EPA
- Information about any working protocols the tribe has developed with EPA Region 1, including tribal environmental agreements or work plans
- Tribal contact information
- General information on tribal culture and language, when appropriate
- Advice on approach and tribal consultation process
- Logistical information about travel to tribal reservations

Including the regional tribal coordinator in consultation meetings is typically very valuable, as the coordinator maintains strong working ties with the tribe and possesses considerable knowledge about how to work effectively with that

tribe. The regional tribal coordinator may help establish a trusting atmosphere, and increase productivity of the tribal consultation. A list of current regional tribal coordinators can be found at:

<http://www.epa.gov/region1/govt/tribes/contact.html>

- c. **Regional Indian Program Manager:** The regional Indian Program Manager inventories all tribal consultations undertaken in the Region, monitors the effectiveness of the Region's tribal consultation procedures, and recommends procedural improvements as necessary. The regional Indian Program Manager should be notified of every tribal consultation, and is available to assist regional tribal coordinators and program staff with all aspects of tribal consultation. The regional Indian Program Manager also reviews and approves consultation database entries made by program staff as discussed below.
- d. **Office of Regional Counsel:** The Office of Regional Counsel should be consulted whenever questions arise over application of federal Indian law and/or EPA policies, or the potential liability of a tribal government or of EPA. If the tribal government plans to have an attorney present at an individual tribal consultation, the EPA regional attorney may elect to participate as well.

## XV. REGION 1 OFFICE- AND PROGRAM-SPECIFIC CONSULTATION CONSIDERATIONS

- a. Historical or Archaeological Resources: Where an EPA Region 1 action may affect historical or archaeological resources, there are a number of laws and procedural requirements that might be triggered, including the *American Antiquities Act of 1906*, the *Historic Sites, Buildings, Objects, and Antiquities Act of 1935*, the *National Historic Preservation Act of 1966 (NHPA)*, and the *Native American Graves Protection and Repatriation Act of 1990 (NAGPRA)*. These laws contain a number of requirements, some of which are very detailed, and may tie closely to tribal consultation procedures and/or environmental review procedures under the *National Environmental Policy Act (NEPA)*. Often the NEPA process may involve an initial screening as to whether any historical or archaeological resources might be impacted. When working on a project that might involve any resources of this nature, it is very important to consult with the Office of Regional Counsel and include the regional Indian Program Manager to determine whether tribal consultation needs to be coordinated with any additional procedures related to resources protected by law.
- b. Civil Compliance Monitoring and Enforcement Actions: The Consultation Policy reads: "Primary guidance on civil enforcement matters involving tribes can be found in *Guidance on the Enforcement Priorities Outlined in the 1984 Indian Policy, and Questions and Answers on the Tribal Enforcement Process*. This guidance is intended to work with the Tribal Consultation Policy in a complementary fashion to ensure appropriate consultation with tribes on civil enforcement matters."

EPA Region 1 follows the Consultation Policy's approach and the relevant program office in the Technical Enforcement Office and the Legal Enforcement Office identifies whether consultation is appropriate. If and when consultation is appropriate, the relevant program office in the Technical Enforcement Office and the Legal Enforcement Office maintain the lead for the notification, input, and follow-up phases.

EPA Region 1 consultations should not divulge privileged, enforcement-sensitive, or confidential information; refer to *Restrictions on Communicating with Outside Parties Regarding Enforcement Actions* in Appendix I.

EPA Region 1 enters into memoranda of agreement with tribes regarding criminal enforcement of the environmental programs that the tribe is authorized to administer. These agreements are meant to ensure that federal investigators and tribal law enforcement work cooperatively to ensure that EPA Region 1 can successfully discharge its continuing duty to enforce against criminal violations of the program. Authorization of a state or tribal environmental program does not divest EPA Region 1 of primacy with respect to criminal enforcement.

For reporting enforcement consultation on the TCOTS database, EPA Region 1 defers to the current interim guidance established by the EPA Office of Enforcement and Compliance Assistance (OECA) via memo dated March 16, 2012 (see Appendix I). In summary, formal civil administrative enforcement is defined as the filing of an administrative complaint, issuance of a unilateral order, or the filing of an administrative order on consent or consent agreement and formal order. OECA has indicated that regions should not report on civil enforcement actions in negotiation, under development, or those that have been referred to the Department of Justice, or ongoing, anticipated, or past criminal enforcement actions.

- c. Emergency Response Actions: During an emergency response, such as an oil spill or hazardous substance release, the EPA Regional On-Scene Coordinator (OSC), considering the situational exigencies and priorities, should endeavor to, as soon as practicable, notify all potentially affected tribal governments. Consultation between tribes and EPA Region 1 emergency response should be achieved through a regional Tribal Incident Commander position within the Unified Command established for the incident. In addition, the OSC may establish a regional Tribal Liaison Officer (TLO) position within the Command Staff to ensure adequate government-to-government consultation on his/her behalf. The OSC would request from the Region that an appropriate regional staff member serve in the TLO capacity during the course of the emergency response.

The establishment of these positions would be incident-specific and would be at the discretion of the OSC. Protracted emergency responses generally provide greater opportunity for tribal consultation.

In the case of time-critical removal actions, the OSC should notify, verbally or in writing, those tribal governments potentially affected by the planned activities. The OSC should consult with potentially affected tribal governments prior to the initiation of a removal action regarding affected tribal lands and/or resources. Due to the nature of time-critical removal actions, any consultation prior to the initial action may need to be conducted expeditiously.

While comprehensive consultation with tribes during an emergency response in a timely fashion may prove difficult to achieve, the New England tribes have an opportunity for involvement in planning for emergency response actions through a regional forum. The Federal Regional 1 Response Team (RRT I) is a component of the National Response System that covers Maine, Vermont, New Hampshire, Massachusetts, Rhode Island and Connecticut. It is a planning, policy, and coordinating body which does not respond directly to the scene of a spill or release, but, if requested, will provide assistance to the on-scene coordinator during an incident. RRT I is made up of representatives from 16 federal departments and agencies, and, each of the six states. It meets at least twice a year at varying locations across New England. Tribal staff has and will continue to be invited to RRT I meetings; their participation is encouraged. More information can be found at <http://www.rrt1.nrt.org/production/NRT/RRT1.nsf/AllPages/rrt1Plans.html>.

## XVI. TRACKING THE CONSULTATION ACTIVITY

In accordance with the requirements of the Consultation Policy, as consultation with Indian Tribes is conducted, Region 1 tracks consultation activities for a semiannual report submitted to the Office of International and Tribal Affairs every October and April. The American Indian Environmental Office (AIEO) maintains a national database on the tribal portal section of the EPA website wherein all consultation activities are to be logged. This database is called the Tribal Consultation Opportunities Tracking System (TCOTS) and is located at <http://yosemite.epa.gov/oita/TConsultation.nsf/TC?OpenView> and can also be accessed through the AIEO tribal consultation site at <http://www.epa.gov/indian/consultation/index.htm>. The respective program lead should log a particular consultation activity onto the database, after discussion of the details of the consultation activity with the regional Indian Program Manager, who is responsible for reviewing and approving the consultation database entry. Once approved by the regional Indian Program Manager, the consultation database entry is forwarded to AIEO for review and approval, after which time the consultation information should be made public for viewing on the AIEO tribal portal. If a letter gauging tribal interest is issued before formal notification (with a due date for response), the program lead should notify the regional Indian Program Manager, who will withhold approval of the TCOTS database entry until tribal interest is confirmed and a formal notification letter is

subsequently sent to the tribe. If there is no tribal interest after the letter gauging tribal interest is issued, the database entry should be deleted by the program lead.

With respect to tribal consultation under Section 106 of the National Historic Preservation Act (NHPA), many programs (Brownfields, Superfund, and others) follow the protocols established under the Act which require EPA to invite tribal consultation when and where a federal undertaking might affect cultural resources. In these cases, EPA Region 1 does not endorse duplication of effort by requiring a formal notification letter per the Consultation Policy. However, any letter inviting consultation under the Section 106 review process should include language that references the Agency's Tribal Consultation Policy and Executive Order 13175. Requests for consultation under NHPA should be entered into the database and submitted to the regional Indian Program Manager as draft and only if the tribes respond affirmatively to the request for consultation should the consultation record be sent to AIEO for publishing. In these cases, only the NHPA letter shall be linked to the TCOTS database.

## **XVII. CONCLUSION OF CONSULTATION**

When consultation has concluded, a follow-up letter should be issued from a senior EPA Region 1 official to the most senior tribal official involved in the consultation, thanking the tribe for its participation in consultation. A summary of tribal concerns and how tribal input was considered in the final action should be included in the letter or as an attachment. The letter, which should be reviewed by the regional Indian Program Manager prior to its being issued to the tribe, constitutes formal follow-up notification and should be entered into the tracking database as the date tribal consultation ended.

## **XVIII. CONSULTATION RECORD-KEEPING**

In addition to the tracking of consultation activity on the AIEO Database, the Region should keep a record of consultation proceedings, including all letters and pertinent e-mail related to the consultation, in accordance with the Federal Records Act. The record should also include an attendance list of participants in consultation meetings and substantive phone calls, any documents exchanged and retained, and a brief summary of the discussions. These records would be maintained with the regional program office that initiated or responded to the initial consultation request, in accordance with their programmatic and federal record-keeping procedures and laws. Refer to Section XII for additional guidance related to sensitive information, FOIA, and record-keeping procedures.

## **XIX. DISPUTE RESOLUTION**

If a dispute arises between one or more tribes and the Region, the Region should strive to address the matter informally within the respective program office(s). In the event that the program representative is unable to resolve the dispute, the issue should be presented to immediate supervisor(s), who should attempt to resolve the dispute. If the dispute is not resolved, the staff should present the matter to progressively higher levels of

management in an effort to reach consensus. In the event consensus is not reached, the Regional Administrator, after consulting with the elected leader(s) of the tribe(s), will make the final decision for matters delegated to the Region.

## **Appendix A:**

### **National Executive Orders and Policy Related to Tribal Consultation**

- 1984 Indian Policy
- Executive Order 13175
- President Obama Memo dated November 2009

## EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS

### INTRODUCTION

The President published a Federal Indian Policy on January 24, 1983, supporting the primary role of Tribal Governments in matters affecting American Indian reservations. That policy stressed two related themes: (1) that the Federal Government will pursue the principle of Indian "self-government" and (2) that it will work directly with Tribal Governments on a "government-to-government" basis.

The Environmental Protection Agency (EPA) has previously issued general statements of policy which recognize the importance of Tribal Governments in regulatory activities that impact reservation environments. It is the purpose of this statement to consolidate and expand on existing EPA Indian Policy statements in a manner consistent with the overall Federal position in support of Tribal "self-government" and "government-to-government" relations between Federal and Tribal Governments. This statement sets forth the principles that will guide the Agency in dealing with Tribal Governments and in responding to the problems of environmental management on American Indian reservations in order to protect human health and the environment. The Policy is intended to provide guidance for EPA program managers in the conduct of the Agency's congressionally mandated responsibilities. As such, it applies to EPA only and does not articulate policy for other Agencies in the conduct of their respective responsibilities.

It is important to emphasize that the implementation of regulatory programs which will realize these principles on Indian Reservations cannot be accomplished immediately. Effective implementation will take careful and conscientious work by EPA, the Tribes and many others. In many cases, it will require changes in applicable statutory authorities and regulations. It will be necessary to proceed in a carefully phased way, to learn from successes and failures, and to gain experience. Nonetheless, by beginning work on the priority problems that exist now and continuing in the direction established under these principles, over time we can significantly enhance environmental quality on reservation lands.

### POLICY

In carrying out our responsibilities on Indian reservations, the fundamental objective of the Environmental Protection Agency is to protect human health and the environment. The keynote of this effort will be to give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands. To meet this objective, the Agency will pursue the following principles:

1. THE AGENCY STANDS READY TO WORK DIRECTLY WITH INDIAN TRIBAL GOVERNMENTS ON A ONE-TO-ONE BASIS (THE "GOVERNMENT-TO-GOVERNMENT" RELATIONSHIP), RATHER THAN AS SUBDIVISIONS OF OTHER GOVERNMENTS.

EPA recognizes Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace. Accordingly, EPA will work directly with Tribal Governments as the independent authority for reservation affairs, and not as political subdivisions of States or other governmental units.

2. THE AGENCY WILL RECOGNIZE TRIBAL GOVERNMENTS AS THE PRIMARY PARTIES FOR SETTING STANDARDS, MAKING ENVIRONMENTAL POLICY DECISIONS AND MANAGING PROGRAMS FOR RESERVATIONS, CONSISTENT WITH AGENCY STANDARDS AND REGULATIONS.

In keeping with the principle of Indian self-government, the Agency will view Tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as EPA's deliberations and activities have traditionally involved the interests and/or participation of State Governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments.

3. THE AGENCY WILL TAKE AFFIRMATIVE STEPS TO ENCOURAGE AND ASSIST TRIBES IN ASSUMING REGULATORY AND PROGRAM MANAGEMENT RESPONSIBILITIES FOR RESERVATION LANDS.

The Agency will assist interested Tribal Governments in developing programs and in preparing to assume regulatory and program management responsibilities for reservation lands. Within the constraints of EPA's authority and resources, this aid will include providing grants and other assistance to Tribes similar to that we provide State Governments. The Agency will encourage Tribes to assume delegable responsibilities, (i.e. responsibilities which the Agency has traditionally delegated to State Governments for non-reservation lands) under terms similar to those governing delegations to States.

Until Tribal Governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations (unless the State has an express grant of jurisdiction from Congress sufficient to support delegation to the State Government). Where EPA retains such responsibility, the Agency will encourage the Tribe to participate in policy-making and to assume appropriate lesser or partial roles in the management of reservation programs.

4. THE AGENCY WILL TAKE APPROPRIATE STEPS TO REMOVE EXISTING LEGAL AND PROCEDURAL IMPEDIMENTS TO WORKING DIRECTLY AND EFFECTIVELY WITH TRIBAL GOVERNMENTS ON RESERVATION PROGRAMS.

A number of serious constraints and uncertainties in the language of our statutes and regulations have limited our ability to work directly and effectively with Tribal Governments on reservation problems. As impediments in our procedures, regulations or statutes are identified which limit our ability to work effectively with Tribes consistent with this Policy, we will seek to remove those impediments.

5. THE AGENCY, IN KEEPING WITH THE FEDERAL TRUST RESPONSIBILITY, WILL ASSURE THAT TRIBAL CONCERNS AND INTERESTS ARE CONSIDERED WHENEVER EPA'S ACTIONS AND/OR DECISIONS MAY AFFECT RESERVATION ENVIRONMENTS.

EPA recognizes that a trust responsibility derives from the historical relationship between the Federal Government and Indian Tribes as expressed in certain treaties and Federal Indian Law. In keeping with that trust responsibility, the Agency will endeavor to protect the environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations.

6. THE AGENCY WILL ENCOURAGE COOPERATION BETWEEN TRIBAL, STATE AND LOCAL GOVERNMENTS TO RESOLVE ENVIRONMENTAL PROBLEMS OF MUTUAL CONCERN.

Sound environmental planning and management require the cooperation and mutual consideration of neighboring governments, whether those governments be neighboring States, Tribes, or local units of government. Accordingly, EPA will encourage early communication and cooperation among Tribes, States and local governments. This is not intended to lend Federal support to any one party to the jeopardy of the interests of the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals and neighbors often serves the best interests of both.

7. THE AGENCY WILL WORK WITH OTHER FEDERAL AGENCIES WHICH HAVE RELATED RESPONSIBILITIES ON INDIAN RESERVATIONS TO ENLIST THEIR INTEREST AND SUPPORT IN COOPERATIVE EFFORTS TO HELP TRIBES ASSUME ENVIRONMENTAL PROGRAM RESPONSIBILITIES FOR RESERVATIONS.

EPA will seek and promote cooperation between Federal agencies to protect human health and the environment on reservations. We will work with other agencies to clearly identify and delineate the roles, responsibilities and relationships of our respective organizations and to assist Tribes in developing and managing environmental programs for reservation lands.

8. THE AGENCY WILL STRIVE TO ASSURE COMPLIANCE WITH ENVIRONMENTAL STATUTES AND REGULATIONS ON INDIAN RESERVATIONS.

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.

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.

9. THE AGENCY WILL INCORPORATE THESE INDIAN POLICY GOALS INTO ITS PLANNING AND MANAGEMENT ACTIVITIES, INCLUDING ITS BUDGET, OPERATING GUIDANCE, LEGISLATIVE INITIATIVES, MANAGEMENT ACCOUNTABILITY SYSTEM AND ONGOING POLICY AND REGULATION DEVELOPMENT PROCESSES.

It is a central purpose of this effort to ensure that the principles of this Policy are effectively institutionalized by incorporating them into the Agency's ongoing and long-term planning and management processes. Agency managers will include specific programmatic actions designed to resolve problems on Indian reservations in the Agency's existing fiscal year and long-term planning and management processes.



William D. Ruckelshaus

# Presidential Documents

Title 3—

The President

**Executive Order 13175 of November 6, 2000**

## **Consultation and Coordination With Indian Tribal Governments**

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

**Section 1. Definitions.** For purposes of this order:

(a) “Policies that have tribal implications” refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

(b) “Indian tribe” means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community 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.

(c) “Agency” means any authority of the United States that is an “agency” under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(d) “Tribal officials” means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

**Sec. 2. Fundamental Principles.** In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

(a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

**Sec. 3. Policymaking Criteria.** In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

(a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;

(2) where possible, defer to Indian tribes to establish standards; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

**Sec. 4. Special Requirements for Legislative Proposals.** Agencies shall not submit to the Congress legislation that would be inconsistent with the policy-making criteria in Section 3.

**Sec. 5. Consultation.** (a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation,

(A) consulted with tribal officials early in the process of developing the proposed regulation;

(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

(1) consulted with tribal officials early in the process of developing the proposed regulation;

(2) in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the

need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

**Sec. 6. Increasing Flexibility for Indian Tribal Waivers.**

(a) Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

**Sec. 7. Accountability.**

(a) In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

(c) Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

**Sec. 8. Independent Agencies.** Independent regulatory agencies are encouraged to comply with the provisions of this order.

**Sec. 9. General Provisions.** (a) This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A-19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.

(b) This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).

(c) Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.

(d) This order shall be effective 60 days after the date of this order.

**Sec. 10. Judicial Review.** This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.



THE WHITE HOUSE,  
November 6, 2000.

[FR Doc. 00-29003  
Filed 11-8-00; 8:45 am]  
Billing code 3195-01-P

**THE WHITE HOUSE**  
Office of the Press Secretary

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For Immediate Release  
2009

November 5,

**MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES**

**SUBJECT:** Tribal Consultation

The United States has a unique legal and political relationship with Indian tribal governments, established through and confirmed by the Constitution of the United States, treaties, statutes, executive orders, and judicial decisions. In recognition of that special relationship, pursuant to Executive Order 13175 of November 6, 2000, executive departments and agencies (agencies) are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes.

History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.

My Administration is committed to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications including, as an initial step, through complete and consistent implementation of Executive Order 13175. Accordingly, I hereby direct each agency head to submit to the Director of the Office of Management and Budget (OMB), within 90 days after the date of this memorandum, a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175. This plan shall be developed after consultation by the agency with Indian tribes and tribal officials as defined in Executive Order 13175. I also direct each agency head to submit to the Director of the OMB, within 270 days after the date of this memorandum, and annually thereafter, a progress report on the status of each action included in its plan together with any proposed updates to its plan.

Each agency's plan and subsequent reports shall designate an appropriate official to coordinate implementation of the plan and preparation of progress reports required by this memorandum. The Assistant to the President for Domestic Policy and the Director of the OMB shall review agency plans and subsequent reports for consistency with the policies and directives of Executive Order 13175.

In addition, the Director of the OMB, in coordination with the Assistant to the President for Domestic Policy, shall submit to me, within 1 year from the date of this memorandum, a report on more (OVER) 2 the implementation of Executive Order 13175

across the executive branch based on the review of agency plans and progress reports. Recommendations for improving the plans and making the tribal consultation process more effective, if any, should be included in this report.

The terms "Indian tribe," "tribal officials," and "policies that have tribal implications" as used in this memorandum are as defined in Executive Order 13175.

The Director of the OMB is hereby authorized and directed to publish this memorandum in the Federal Register.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Executive departments and agencies shall carry out the provisions of this memorandum to the extent permitted by law and consistent with their statutory and regulatory authorities and their enforcement mechanisms.

BARACK OBAMA

**Appendix B:**

**National EPA Tribal Consultation Policy and  
accompanying draft Rule Aid**

***EPA POLICY***

***ON***

***CONSULTATION AND COORDINATION***

***WITH***

***INDIAN TRIBES***

*May 4, 2011*



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## **I. Policy Statement**

EPA's policy is to consult on a government-to-government basis with federally recognized tribal governments when EPA actions and decisions may affect tribal interests. 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 program and regional office consultation procedures and plans.

This Policy establishes national guidelines and institutional controls for consultation across EPA. EPA program and regional offices have the primary responsibility for consulting with tribes. All program and regional office consultation plans and practices must be in accord with this Policy. This Policy seeks to strike a balance between providing sufficient guidance for purposes of achieving consistency and predictability and allowing for, and encouraging, the tailoring of consultation approaches to reflect the circumstances of each consultation situation and to accommodate the preferences of tribal governments. The consultation process is further detailed in Section V of this document.

## **II. Background**

To put into effect the policy statement above, EPA has developed this proposed *EPA Policy on Consultation and Coordination with Indian Tribes* (Policy). The Policy complies with the Presidential Memorandum (Memorandum) issued November 5, 2009, directing agencies to develop a plan to implement fully Executive Order 13175 (Executive Order). The Executive Order specifies that each Agency must have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.

This Policy reflects the principles expressed in the *1984 EPA Policy for the Administration of Environmental Programs on Indian Reservations* (1984 Policy) for interacting with tribes. The 1984 Policy remains the cornerstone for EPA's Indian program and "assure[s] that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect" tribes (1984 Policy, p. 3, principle no. 5).

One of the primary goals of this Policy is to fully implement both the Executive Order and the 1984 Indian Policy, with the ultimate goal of strengthening the consultation, coordination, and partnership between tribal governments and EPA.

The most basic result of this full implementation is that EPA takes an expansive view of the need for consultation in line with the 1984 Policy's directive to consider tribal interests whenever EPA takes an action that "may affect" tribal interests.

The Policy is intended to be implemented using existing EPA structures to the extent possible. The use of current EPA business processes, such as the Action Development Process, National and Regional Tribal Operations Committees, and tribal partnership groups is purposeful so that consultation with tribal governments becomes a standard EPA practice and not an additional requirement.

The issuance of this Policy supports and guides the development and use of program and regional office consultation plans and practices consistent with this Policy.

### **III. Definitions**

- A.** “Indian tribe” or “tribe” means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1944, 25 U.S.C. 479a.
- B.** “Tribal official” means an elected, appointed, or designated official or employee of a tribe.
- C.** “Indian country” means:
1. All land within limits of any Indian reservation<sup>1</sup> under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;
  2. 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
  3. All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

### **IV. Guiding Principles**

To understand both the purpose and scope of the Policy as well as the integration of the Policy, Memorandum, and Executive Order, it is helpful to list principles found in EPA’s January 2010 *Plan to Develop a Tribal Consultation and Coordination Policy Implementing Executive Order 13175*:

EPA’s fundamental objective in carrying out its responsibilities in Indian country is to protect human health and the environment.

EPA recognizes and works directly with federally recognized tribes as sovereign entities with primary authority and responsibility for each tribe’s land and membership, and not as political subdivisions of states or other governmental units.

EPA recognizes the federal government’s trust responsibility, which derives from the historical relationship between the federal government and Indian tribes as expressed in certain treaties and federal Indian law.

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<sup>1</sup> EPA’s definition of “reservation” encompasses both formal reservations and “informal” reservations, i.e., trust lands set aside for Indian tribes. *See for example* Oklahoma Tax Comm’n v. Sac and Fox Nation, 508 U.S. 114, 123 (1993); 56 Fed. Reg. 64876, 64881 (1991); or 63 Fed. Reg. 7254, 7258 (1998).

EPA ensures the close involvement of tribal governments and gives special consideration to their interests whenever EPA's actions may affect Indian country or other tribal interests.

When EPA issues involve other federal agencies, EPA carries out its consultation responsibilities jointly with those other agencies, where appropriate.

In addition, it is helpful to note the distinction between this Policy, federal environmental laws pertaining to public involvement, and Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*. Under this Policy, EPA consults with federally recognized tribal governments when Agency actions and decisions may affect tribal interests. EPA also recognizes its obligations to involve the public as required by federal environmental laws. Finally, EPA recognizes the need to be responsive to the environmental justice concerns of non-federally recognized tribes, individual tribal members, tribal community-based/grassroots organizations and other indigenous stakeholders.

## V. Consultation

**A. The Consultation Process.** To the fullest extent possible, EPA plans to use existing EPA business operations to put this Policy into effect.

Tribal officials may request consultation in addition to EPA's ability to determine what requires consultation. EPA attempts to honor the tribal government's request with consideration of the nature of the activity, past consultation efforts, available resources, timing considerations, and all other relevant factors.

Consultation at EPA consists of four phases: Identification, Notification, Input, and Follow-up:

1. **Identification Phase:** EPA identifies activities that *may be* appropriate for consultation, using the mechanisms described in section B.2, below. The identification phase should include a determination of the complexity of the activity, its potential implications for tribes, and any time and/or resource constraints relevant to the consultation process. This phase should also include an initial identification of the potentially affected tribe(s).

2. **Notification Phase:** EPA notifies the tribes of activities that may be appropriate for consultation.

Notification can occur in a number of ways depending on the nature of the activity and the number of tribes potentially affected. For example, EPA may send out a mass mailing to all tribes, may contact the tribal governments by telephone, or provide notice through other agreed upon means. EPA normally honors tribal preferences regarding the specific mode of contact.

Notification includes sufficient information for tribal officials to make an informed decision about the desire to continue with consultation and sufficient information to understand how to provide informed input.

*Notification should occur sufficiently early in the process to allow for meaningful input by the tribe(s).*

3. **Input Phase:** Tribes provide input to EPA on the consultation matter. This phase may include a range of interactions including written and oral communications including exchanges of information, phone calls, meetings, and other appropriate interactions depending upon the specific circumstances involved. EPA coordinates with tribal officials during this phase to be responsive to their needs for information and to provide opportunities to provide, receive, and discuss input. During this phase, EPA considers the input regarding the activity in question. EPA may need to undertake subsequent rounds of consultation if there are significant changes in the originally-proposed activity or as new issues arise.

4. **Follow-up Phase:** EPA provides feedback to the tribes(s) involved in the consultation to explain how their input was considered in the final action. This feedback should be a formal, written communication from a senior EPA official involved to the most senior tribal official involved in the consultation.

## B. *What Activities May Involve Consultation?*

1. **General Categories of Activities Appropriate for Consultation:** The broad scope of consultation contemplated by this Policy creates a large number of actions that *may* be appropriate for consultation.

The following list of EPA activity categories provides a general framework from which to begin the determination of whether any particular action or decision is appropriate for consultation. The final decision on consultation is normally made after examining the complexity of the activity, its implications for tribes, time and/or resource constraints, an initial identification of the potentially affected tribe(s), application of the mechanisms for identifying matters for consultation, described below, and interaction with tribal partnership groups and tribal governments.

The following, non-exclusive list of EPA activity categories are normally appropriate for consultation if they may affect a tribe(s):

- Regulations or rules
- Policies, guidance documents, directives
- Budget and priority planning development
- Legislative comments<sup>2</sup>
- Permits

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<sup>2</sup> Legislative comments are a special case where, due to short legislative timeframes, consultation in advance of comment submission may not always be possible. Nevertheless, EPA will strive to inform tribes when it submits legislative comments on activities that may affect Indian country or other tribal governmental interests.

- Civil enforcement and compliance monitoring actions<sup>3</sup>
- Response actions and emergency preparedness<sup>4</sup>
- State or tribal authorizations or delegations
- EPA activities in implementation of U.S. obligations under an international treaty or agreement.

**2. EPA's Mechanisms for Identifying Matters for Consultation:** The mechanisms EPA uses for identifying matters appropriate for consultation are as follows:

- a. Tribal Government-Requested Consultation. Tribal officials may request consultation in addition to EPA's ability to determine what requires consultation. EPA attempts to honor the tribal government's request with consideration of the nature of the activity, past consultation efforts, available resources, timing considerations, and all other relevant factors.
- b. Action Development Process (ADP). Early in the process, the lead program office assesses whether consultation is appropriate for the subject action. Its determination is available to tribes in the semiannual Regulatory Agenda as well as in the subset of rules on the Regulatory Gateway accessed through the EPA website.

This Policy is not intended to subject additional Agency actions to the ADP process for the sole purpose of a consultation analysis. Non-ADP actions are subject to consultation analysis through other mechanisms identified within the Policy.

- c. National Program Offices and Regional Offices. For those actions and decisions not in the ADP process, program and regional offices also determine if consultation is appropriate under this Policy. EPA's Tribal Consultation Advisors, described below, provide assistance with that determination. Such determination includes coordination with national and/or regional tribal partnership groups.
- d. National and Regional Tribal Partnership Groups. EPA meets regularly with a number of national and regional tribal partnership groups. These groups assist in the identification of matters that may be appropriate for consultation.

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<sup>3</sup> Primary guidance on civil enforcement matters involving tribes can be found in "Guidance on the Enforcement Priorities Outlined in the 1984 Indian Policy," and "Questions and Answers on the Tribal Enforcement Process." This guidance is intended to work with the Tribal Consultation Policy in a complementary fashion to ensure appropriate consultation with tribes on civil enforcement matters.

<sup>4</sup> The term "response" as defined under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) includes removals and remedial actions.

**C. When Consultation Occurs.** Consultation should occur early enough to allow tribes the opportunity to provide meaningful input that can be considered prior to EPA deciding whether, how, or when to act on the matter under consideration. As proposals and options are developed, consultation and coordination should be continued, to ensure that the overall range of options and decisions is shared and deliberated by all concerned parties, including additions or amendments that occur later in the process.

**D. How Consultation Occurs.** There is no single formula for what constitutes appropriate consultation, and the analysis, planning, and implementation of consultation should consider all aspects of the action under consideration. In the case of national rulemaking, a series of meetings in geographically diverse areas may be appropriate. For more routine operational matters, a less formal process may be sufficient.

## **VI. Managing the Consultation Process**

### **A. Roles and Responsibilities**

The following roles and responsibilities have been defined to allow EPA to effectively implement this Policy. These roles and responsibilities reflect the fact that, while oversight and coordination of consultation occurs at EPA headquarters, as a practical matter, much of the actual consultation activity occurs in EPA's program and regional offices. The responsibility for initially analyzing the need for consultation and then subsequently carrying it out, resides with these offices.

**1. Designated Consultation Official:** In addition to being the EPA's National Program Manager for the EPA Tribal Program, EPA's Assistant Administrator for the Office of International and Tribal Affairs (OITA) is the EPA-Designated Consultation Official under the Executive Order. These responsibilities include coordination and implementation of tribal consultation in accordance with this Policy and Agency compliance with the 1984 Indian Policy.

The Designated Consultation Official has the authority for: (1) defining EPA actions appropriate for consultation, (2) evaluating the adequacy of that consultation, and (3) ensuring that EPA program and regional office consultation practices are consistent with this Policy.

Per the Memorandum, the Designated Consultation Official reports annually to OMB on the implementation of the Executive Order.<sup>5</sup> Further, the Designated Consultation Official certifies compliance with the Executive Order for applicable EPA activities. The American Indian Environmental Office (AIEO) is located within OITA and coordinates the operational details of the Policy and compiles consultation-related information for the Designated Consultation Official.

**2. Assistant Administrators:** Assistant Administrators oversee the consultation process in their respective offices including analysis for potential

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<sup>5</sup> Report is filed annually by August 3<sup>rd</sup>.

consultation and the consultation process. Each program office is directed to prepare a semi-annual agenda of matters appropriate for consultation and a brief summary of consultation that has occurred. The program offices provide this information to AIEO for reporting to OMB. Each office is directed to designate a Tribal Consultation Advisor.

3. **Regional Administrators:** Regional Administrators oversee the consultation process in their respective offices including analysis for potential consultation and the consultation process. Each region is directed to prepare a semi-annual agenda of matters appropriate for consultation and a brief summary of consultation that has occurred. The regions provide this information to AIEO for reporting to OMB. Each region is directed to designate a Tribal Consultation Advisor.

4. **Tribal Consultation Advisors:** Tribal Consultation Advisors (TCAs) assist in identifying matters appropriate for consultation and prepare summary information on consultation activities and provide it to AIEO. TCAs receive and provide advice within their respective program offices and regions on what actions may be appropriate for consultation. TCAs also serve as a point-of-contact for EPA staff, tribal governments, and other parties interested in the consultation process. TCAs are the in-office subject matter experts to assist staff and management in the implementation of the Policy.

## **B. National Consultation Meeting**

OITA/AIEO may convene a periodic National Consultation Meeting to be chaired by the Designated Consultation Official to review the consultation process across the Agency.

## **C. Reporting**

Pursuant to the Memorandum, EPA submits annual progress reports to OMB on the status of the consultation process and actions and provides any updates to this Policy.

## **D. EPA Senior Management Review**

The Designated Consultation Official communicates regularly with the Assistant and Regional Administrators to review the consultation system, to consider any matters requiring senior management attention, and to make adjustments necessary to improve the Policy or its implementation.

EPA plans to receive ongoing feedback on the Policy from all parties to assess its effectiveness and implement improvements.



# Rule Aid: EPA Policy on Consultation and Coordination with Indian Tribes

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The EPA Policy on Consultation and Coordination with Indian Tribes (EPA Consultation Policy), effective May 4, 2011, responds to the Presidential Memorandum on Tribal Consultation, issued November 5, 2009, directing agencies to develop a plan to fully implement Executive Order 13175.<sup>1</sup> The EPA Consultation Policy sets a broad standard for when EPA should consider consulting with federally-recognized tribal governments. This standard for consultation applies to a wide range of Agency activities and is based on the directive for tribal consultation established under Executive Order 13175 and the principles expressed in the 1984 EPA Policy for the Administration of Environmental Programs on Indian Reservations. Executive Order 13175 applies to a narrower set of activities (primarily rulemakings) than the EPA Consultation Policy, but when it does apply additional procedural requirements beyond those set out in the EPA Consultation Policy must be met.

This is the first of two Rule Aids on tribal consultation. Once a determination is made that an action warrants consultation under the broader EPA Consultation Policy, Rule Aid: Executive Order 13175, Consultation and Coordination with Indian Tribal Governments must be referenced to determine whether the additional procedural requirements apply under Executive Order 13175.

## The Standard for Consultation under the EPA Consultation Policy:

The standard under the EPA Consultation Policy is to consult on a government-to-government basis with federally recognized tribes when EPA actions and decisions *may affect tribal interests*. For example, a tribe's interests may be affected if a proposed action impedes the tribe's ability to implement and execute its own environmental programs, or a tribe is charged with the day-to-day management of a program or regulation. Tribal interests may be affected in a variety of ways, directly or indirectly, on or off reservations and/or Alaskan Native Villages. Activities that are normally appropriate for consultation if they may affect one or more tribes include, but are not limited to:

- Regulations or rules
- Policies, guidance documents, directives
- Budget and priority planning development
- Legislative comments

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<sup>1</sup> Exec. Order No. 13,175, 3 C.F.R. 304 (2000), *reprinted in* 25 U.S.C. § 450 (2000).

- Permits
- Civil enforcement and compliance monitoring actions
- Response actions and emergency preparedness
- State or tribal authorizations or delegations
- EPA activities in implementation of U.S. obligations under an international treaty or agreement

Examples of Specific Activities that EPA Has Consulted On:

- OW – “Revisions to the Unregulated Contaminant Monitoring Regulation for Public Water Systems” (UMCR 3) – affects tribes operating water treatment systems.
- OW – “Proposed Revision of the Total Coliform Rule” (RTCR) – minimal expected average annual tribal household water cost increase of \$4.50.
- OAR’s Office of Atmospheric Programs – “Proposed Transport Rule” – reduction of transport of air pollution to downwind areas could have potential future impacts on Tribes that build new power plant units (e.g., ability to trade and distribution of allowances).
- OAR, Climate Change Division – “Green House Gas Reporting Program (GHG RP), Petroleum and Natural Gas Systems Rule (Subpart W)” – would impact and require one Tribe to report.
- OEI – “Toxic Release Inventory (TRI) Industry Sectors Expansion Rule” – gives tribes the opportunity to receive TRI data on sources on or near their reservations.
- OSWER – “Revising Underground Storage Tank (UST) Regulations” - revisions to existing requirements and new requirements for secondary containment and operator training that will apply in Indian country in states that have not obtained state program approval.
- OCSPP – “National Certification and Training Plan” – establishes a federal certification program for applicators of restricted use pesticides on tribal lands.

## **When Consultation Should Occur:**

Consultation should occur early enough in the action development process (ADP) to allow tribes the opportunity to provide meaningful input prior to EPA deciding whether, how, or when to act on the matter under consideration. As proposals and options are developed, consultation and coordination should be continued to ensure that the overall range of options and decisions is shared and deliberated by all concerned parties, including additions or amendments that occur later in the process.

EPA's Action Development Process Guidance (revised March 2011) states that consultation should occur "at appropriate points during the process."<sup>2</sup> Specifically,

- **Tier 1 and Tier 2 Actions:** Ideally, consultation occurs during the period after the approval of the detailed analytic blueprint (DABP) and before options selection.
- **Tier 3 Actions:** Consultation should precede major decisions in the action development process.

Please refer to the ADP Guidance for additional information about consultation in the rulemaking process.

Tribal officials may also request consultation. EPA attempts to honor requests from tribal governments, considering the nature of the activity, past consultation efforts, available resources, timing considerations, and all other relevant factors.

## **Responsibilities of Tribal Consultation Advisors:**

Each headquarters and regional office has a designated Tribal Consultation Advisor (TCA) who acts as a point of contact for EPA staff, tribal governments, and other parties interested in the consultation process in their office/region. In addition, TCAs are responsible for:

- Assisting in identifying matters appropriate for consultation;
- Preparing summary information on consultation activities;
- Receiving and providing advice within their respective program offices and regions on what actions may be appropriate for consultation; and
- Serving as in-office subject matter experts to assist staff and management in the implementation of the Agency's consultation policy.

## **Additional information sources:**

- EPA's Tribal Portal: <http://www.epa.gov/indian>
- EPA's Tribal Portal Consultation Page: <http://www.epa.gov/indian/consultation>
- EPA's Policy on Consultation and Coordination with Indian Tribes, May 4, 2011. <http://www.epa.gov/indian/pdf/cons-and-coord-with-indian-tribes-policy.pdf>
- Presidential Memorandum on Tribal Consultation, November 5, 2009. <http://www.epa.gov/indian/pdf/tribal-consultation-memorandum-09.pdf>
- TCAs:

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<sup>2</sup> "EPA's Action Development Process: Guidance for EPA Staff on Developing Quality Actions". U.S. EPA, Office of Policy, OP Action Development Series. Revised: March 2011.  
[http://yosemite.epa.gov/sab/sabproduct.nsf/5088B3878A90053E8525788E005EC8D8/\\$File/adp03-00-11.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/5088B3878A90053E8525788E005EC8D8/$File/adp03-00-11.pdf).

<b>ORGANIZATION</b>	<b>TCA</b>	<b>ALTERNATE</b>
Region I	Mike Stover	
Region II	Janice Whitney	
Region III	Terry Gallagher	
Region IV	Cindy J. Nolan	
Region V	Kestutis Ambutas	
Region VI	Jeannine Hale	Randy Gee
Region VII	Wolfgang Brandner	
Region VIII	Alfreda Mitre	
Region IX	Nate Lau	Gilbert Pasqua
Region X	Sally Thomas	
OARM	Raul Soto	
OAR	C. Darrel Harmon	
OCFO	MaryJo Blumenfeld	Marc Vincent
OCSPP	Caren Robinson	
OECA	Jonathan Binder	Fran Jonesi
OEI	Beth Jackson	
OGC	Jessica Scott	
OITA	David Guest	
OP	Ken Munis	
ORD	Monica Rodia	
OSWER	Andrew Baca	
OW	Felicia Wright	

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## **Appendix C:**

### **National EPA Consultation Policy**

# *EPA Region 1-New England Consultation Decision Worksheet*

## Consulting/Coordinating with Federally Recognized Indian Tribes

*This document which consists of a worksheet and decision tree is an internal planning tool intended to assist regional program leads and/or project managers determine whether or not consultation is warranted or not for an EPA action, and if so, the type/level of consultation and timeline for consultation.*

### I. Mechanisms for identifying matters for consultation: Identify the mechanism for identifying actions or activities that may warrant consultation, and provide as much of a description as possible.

#### **EPA initiated consultation:** Check appropriate box or indicate other:

- Regulatory Steering Committee (RSC)
- National Tribal Partnership/Group/Committee: \_\_\_\_\_
- Regional Tribal Partnership/Group/Committee: \_\_\_\_\_
- EPA National Program Office: \_\_\_\_\_
- Other Federal Agency: \_\_\_\_\_
- Region 1 Program Office: \_\_\_\_\_
- Other: \_\_\_\_\_

#### **Tribal-requested or tribal organization-requested consultation:** Check appropriate box or indicate other: Maine Tribes:

- Aroostook Band of Micmacs
- Penobscot Indian Nation
- Houlton Band of Maliseet Indians
- Passamaquoddy Tribe of Indians: Indian Township Reservation
- Passamaquoddy Tribe of Indians: Pleasant Point Reservation

#### Massachusetts Tribes:

- Wampanoag Tribe of Gay Head (Aquinnah)
- Mashpee Wampanoag Tribe

#### Connecticut Tribes:

- The Mohegan Tribe
- Mashantucket Pequot Tribal Nation

#### Rhode Island Tribe:

- Narragansett Indian Tribe

Other Organizations:

- National Tribal Organization: (United Southern and Eastern Tribes, Native Fish & Wildlife Service, etc.): \_\_\_\_\_
- Other: \_\_\_\_\_

**II. Initial determination if activities/actions may affect tribes:**

- a. Determine if the proposed action or activity falls under the following non-exclusive list of categories appropriate for consultation: (*Note: routine administrative and staff-to-staff level interactions and communications between EPA and tribal government employees, including funding recipient-EPA staff interactions do not require consultation; see FAQ #17*)

- Regulations or rules;**
  - Policies, guidance documents, directives;**
  - Budget and priority planning development;**
  - Legislative comments;**
  - Permits;**
  - Civil enforcement and Compliance monitoring actions;**
  - Response actions and emergency preparedness;**
  - State or tribal authorizations or delegations,**
  - EPA activities in implementation of U.S. obligations under an international treaty or agreement;**
  - EPA-identified activities through the Action Development Process (ADP) – see FAQ #18**
  - Other- provide explanation**
- 
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- b. Determine if the EPA action in question may affect a tribe or tribes in any of the following ways:

- Tribal Sovereignty and Self-Determination:** Action that may affect how the tribe's jurisdiction or its authority to regulate in its territories would be interpreted; action that involves a state's assertion that the state has authority to regulate the environment in a tribe's territories; action that could affect how the boundaries of a tribe's territories are interpreted;
- Direct Implementation in Indian Country:** Action that involves EPA implementing an environmental program in the territories of a tribe; action that involves a direct implementation tribal cooperative agreement;
- Geographic Considerations:** Actions on, adjacent, or nearby to Indian Country, or within a tribe's or tribes' historical preservation areas that could potentially affect a tribe's resources, rights, or traditional way of life, including properties of cultural or historical significance to a tribe;

- Tribal Resources:** Actions that may impact treaty-reserved resources, tribal health, and cultural, traditional or subsistence resources of a tribe or a tribe's traditional way of life;
- Tribal Ownership:** Actions related to a facility owned or managed by a tribal government, except during certain stages of the EPA enforcement process, such as during the investigation phase and when levying appropriate penalties;
- Policy, Rulemaking, and Adjudication:** Changes to EPA regional policy that may affect tribes, especially when policy is specific to tribes. Rulemaking or adjudication by EPA Region 1 that may affect tribes or their rights or resources.

c. If the activity involves other federal partners, list them below:

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**III. Type/Level of Consultation/Facilitation:** If the above assessment determines that an EPA action or activity may affect a tribe, then assess what level of consultation would be appropriate, and add notes/justification as appropriate (note a tribe's desired level of interaction may differ from the results of the assessment and should be taken into consideration):

	<b>High</b>	<b>Medium</b>	<b>Low</b>
<b>Complexity of the activity</b>			
<b>Potential implications for tribes</b>			
<b>Time and/or resource constraints relevant to the consultation process</b>			
<b>Magnitude of potential tribal impacts</b>			
<b>Number of potentially impacted tribes</b>			
<b>Involvement of tribal sovereignty or self-determination</b>			

**IV. Determination of Consultation Mechanism:** Circle the most appropriate mechanism(s) for consultation (note a tribe's desired level of interaction may differ from the results of the assessment and should be taken into consideration):

All Low	More informal mailing of information or teleconference meeting(s) with tribal environmental director(s) or THPO(s) and associated staff involving communication and information exchange
Low/Medium	More informal teleconference meetings with tribal environmental director(s) or THPO(s) and associated staff involving communication and information exchange, as well as accompanying webinars or other enhanced educational communication tools
All Medium	Face-to-face or teleconference meetings with tribal environmental director(s) or THPO(s) and associated staff, as well as senior EPA program officials in a support role to the program lead, as appropriate
Medium/High	Face-to-face meetings, facilitated as appropriate, with tribal environmental director(s) or THPO(s) and associated staff, as well as senior EPA program officials in the lead, as appropriate
All High	Higher-level face-to-face meetings, facilitated as appropriate, with tribal leader(s) and Regional Administrator with senior EPA program official and program lead in support

**V. Tribal Consultation and Coordination Process and Timeline:** Consider consultation in the context of the project timeline for the EPA action or activity, beginning with the date that the formal notification letter is issued to the tribe. This information will be incorporated into the notification letter. *Note: The consultation policy was issued on May 4<sup>th</sup>, 2011, and is not intended to be retroactive; however, program leads should exercise judgment in determining in certain cases whether consultation in accordance with the policy is appropriate for activities initiated after May 4<sup>th</sup>, 2011.*

Date	Event	Contact information

**VI. Program Lead Recommendation for Consultation:** Based on this initial assessment the program lead recommends the following:

- Tribal Consultation is recommended
- Tribal Consultation is not recommended

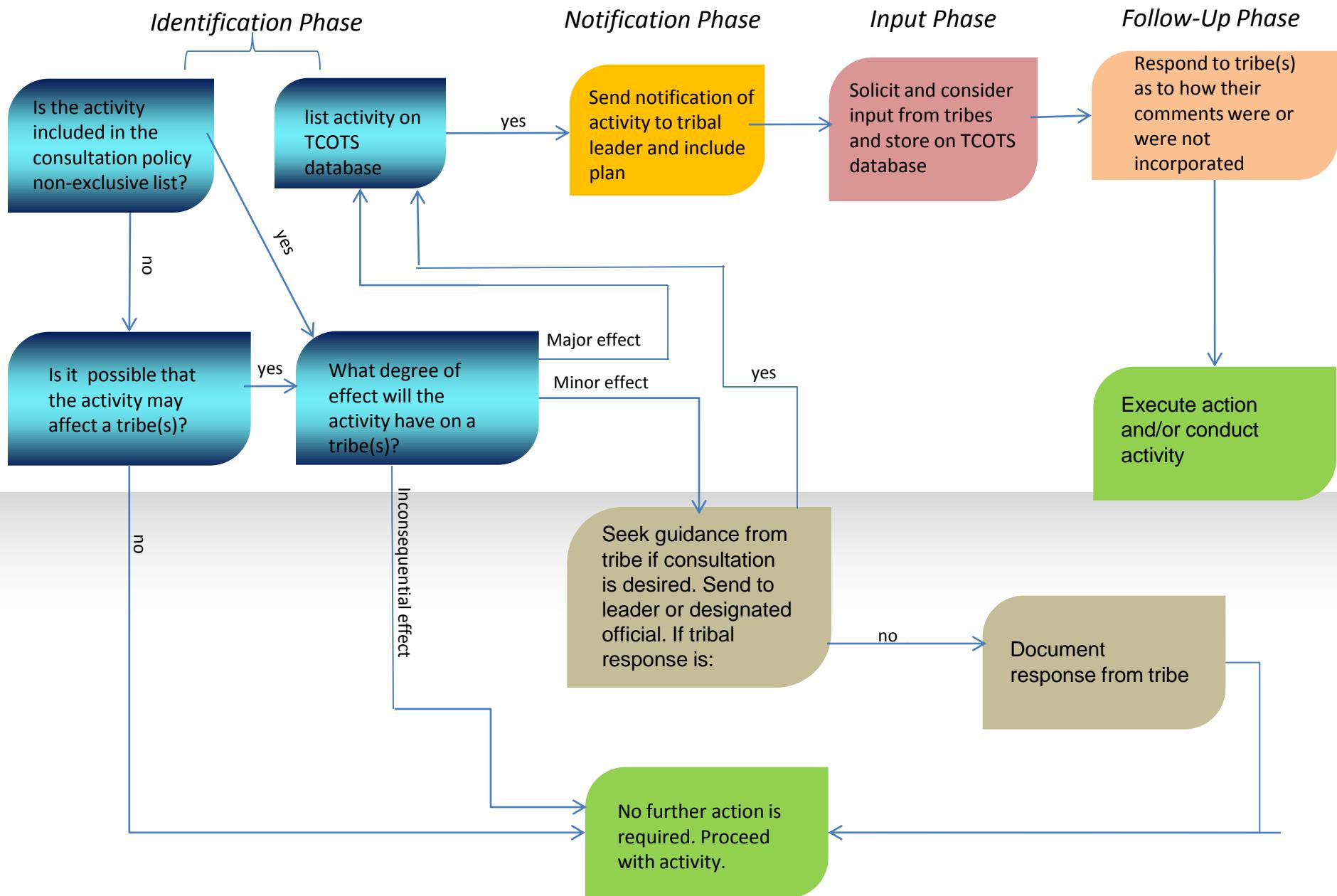
Additionally, the program lead may recommend the following actions to accompany the process decision, if consultation is either recommended or not recommended by the program lead:

- Briefing with Indian Program Manager is recommended
- Briefing with Program Manager is recommended
- Briefing with RA/DRA is recommended

**VII. Reporting Requirements:** A database known as TCOTS (Tribal Consultation Opportunities Tracking System) is located in the tribal portal and is accessible through Lotus Notes. This database is intended to serve as a tracking system for consultation activities from tribal notification through completion of consultation (see FAQ #9), and will require the entry of a small set of standardized information including dates associated with the consultation, the formal notification letter, any applicable supporting documentation if appropriate, and a summary of consultation completed. The following check boxes are intended to assist with the reporting process.

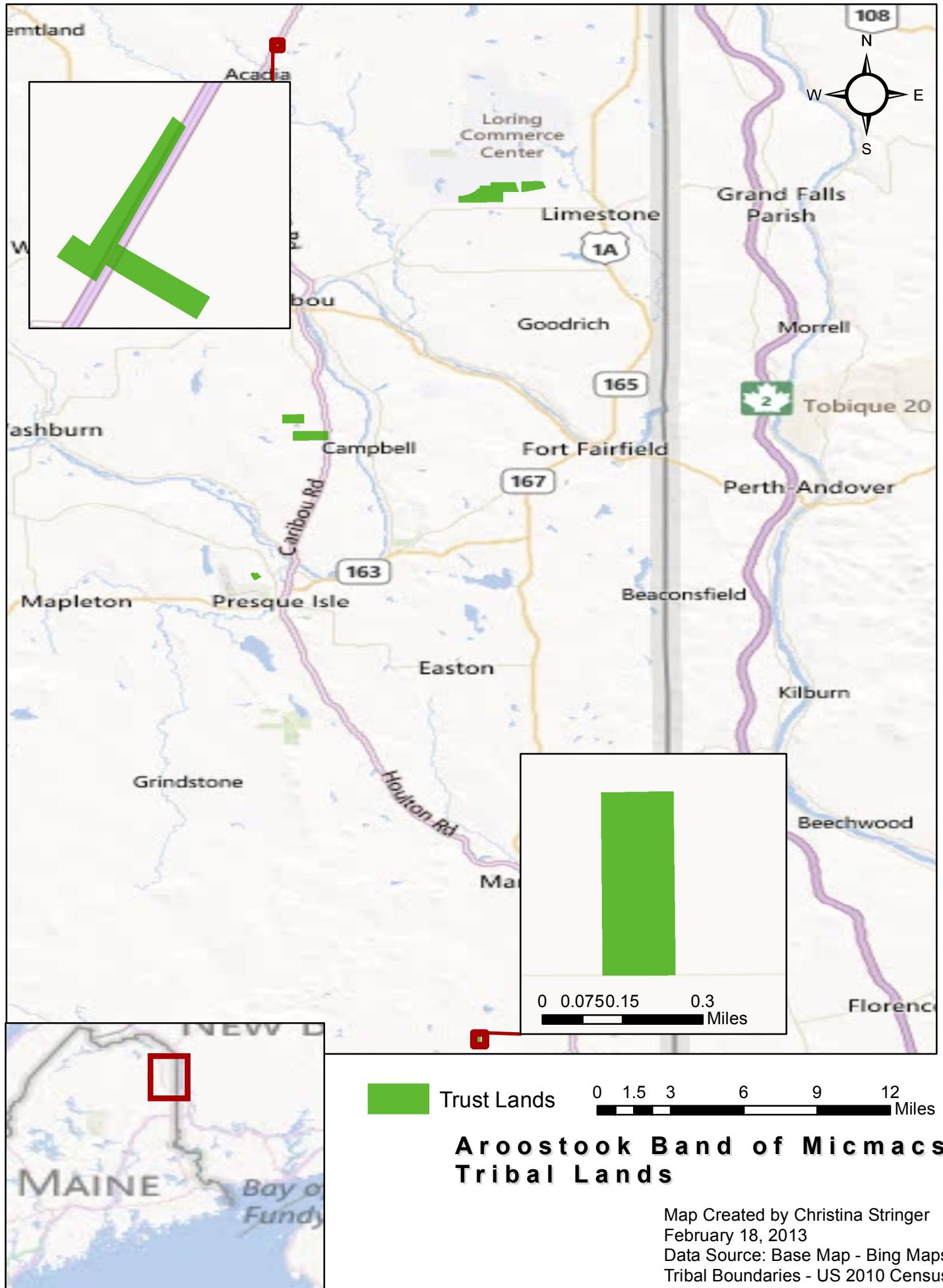
- Has the initial data from Section V above and the notification letter been uploaded to the database? Once this is completed, the Region 1 Tribal Consultation Advisor (TCA) will review and approve the data prior to submission to American Indian Environmental Office (AIEO).
- Have any modifications to the dates been updated in the database?
- Has any applicable documentation been linked to the database (program leads shall use discretion before linking sensitive documents, and if in doubt should consult the Region 1 TCA – see FAQs #11 and #12)?
- Has the consultation summary been uploaded to the database, and has the Region 1 TCA been notified?

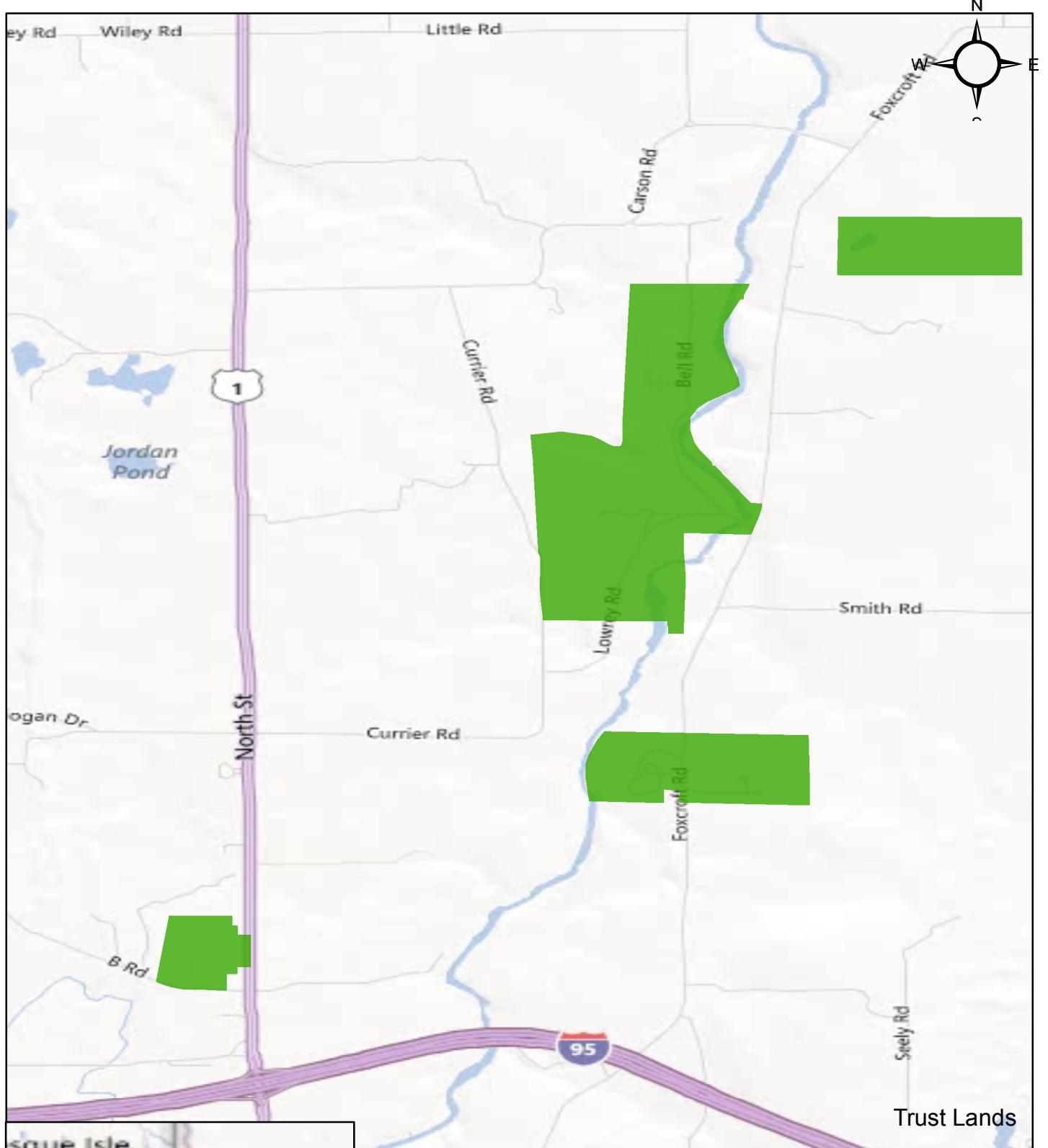
# CONSULTATION DECISION TREE



## **Appendix D:**

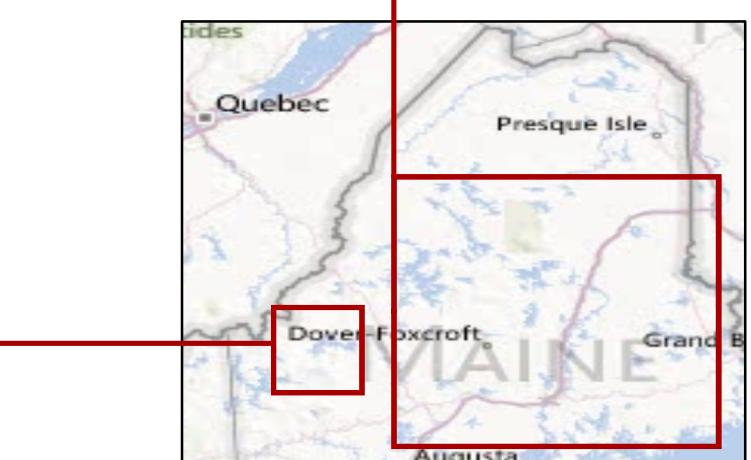
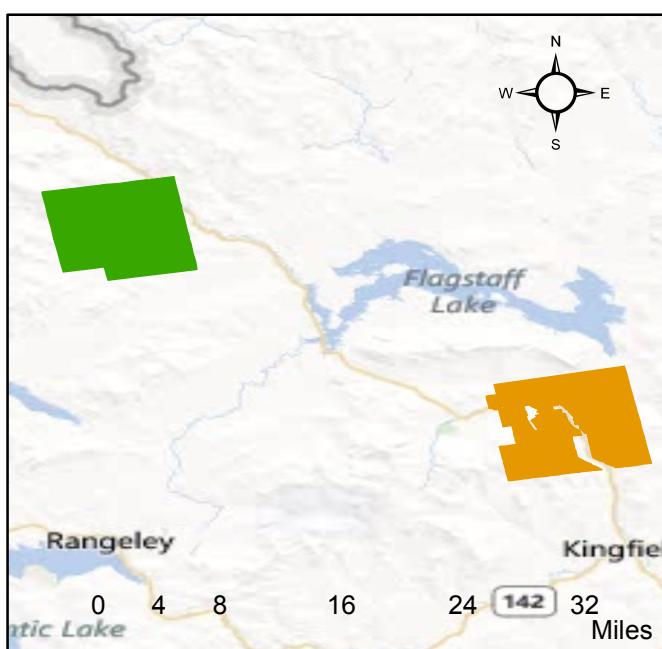
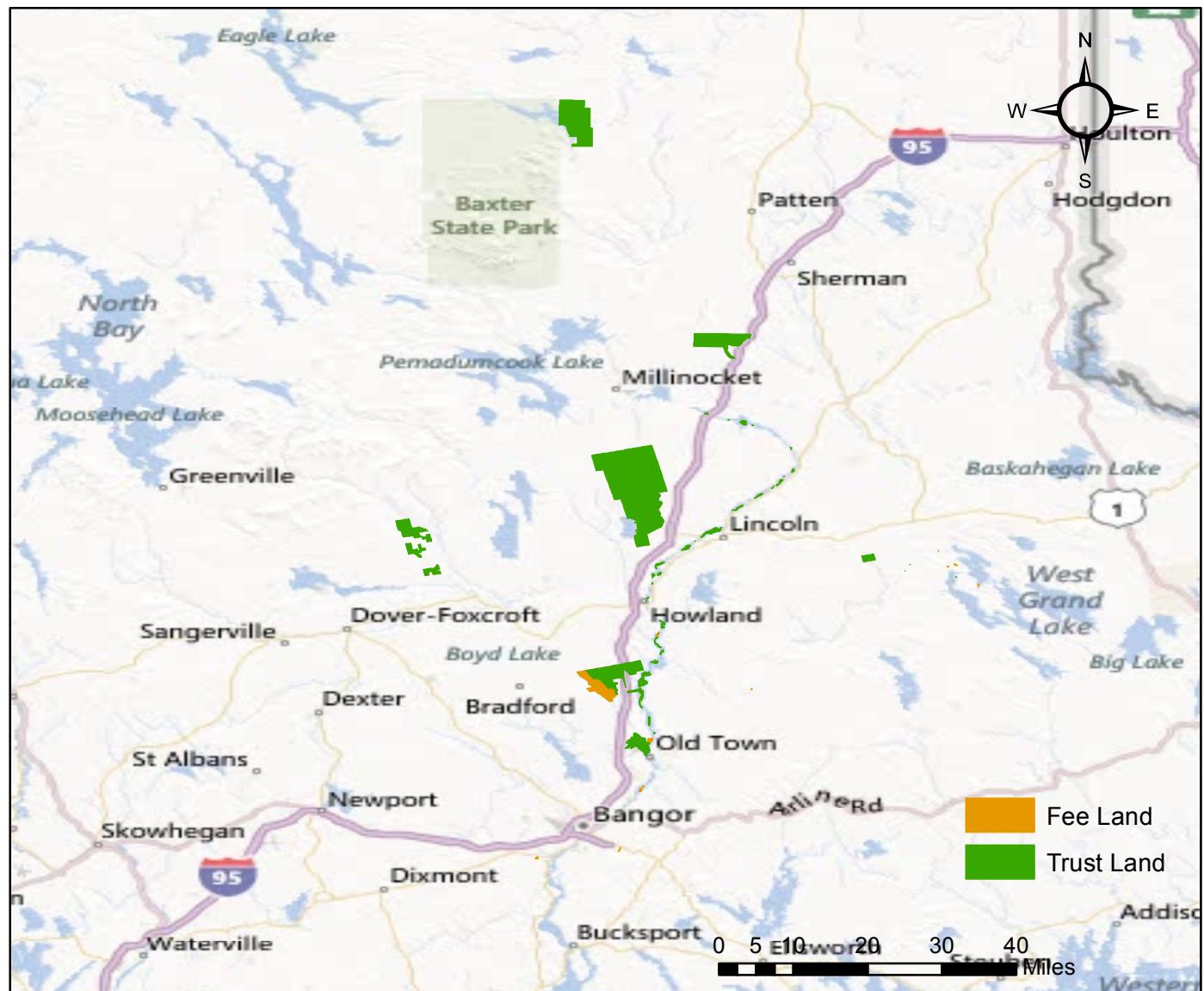
### Maps of Tribal Lands





## Houlton Band of Maliseet Indians Tribal Lands

Map Created by Christina Stringer  
February 18, 2013  
Data Source: Base Map - Bing Maps  
Tribal Boundaries - US 2010 Census



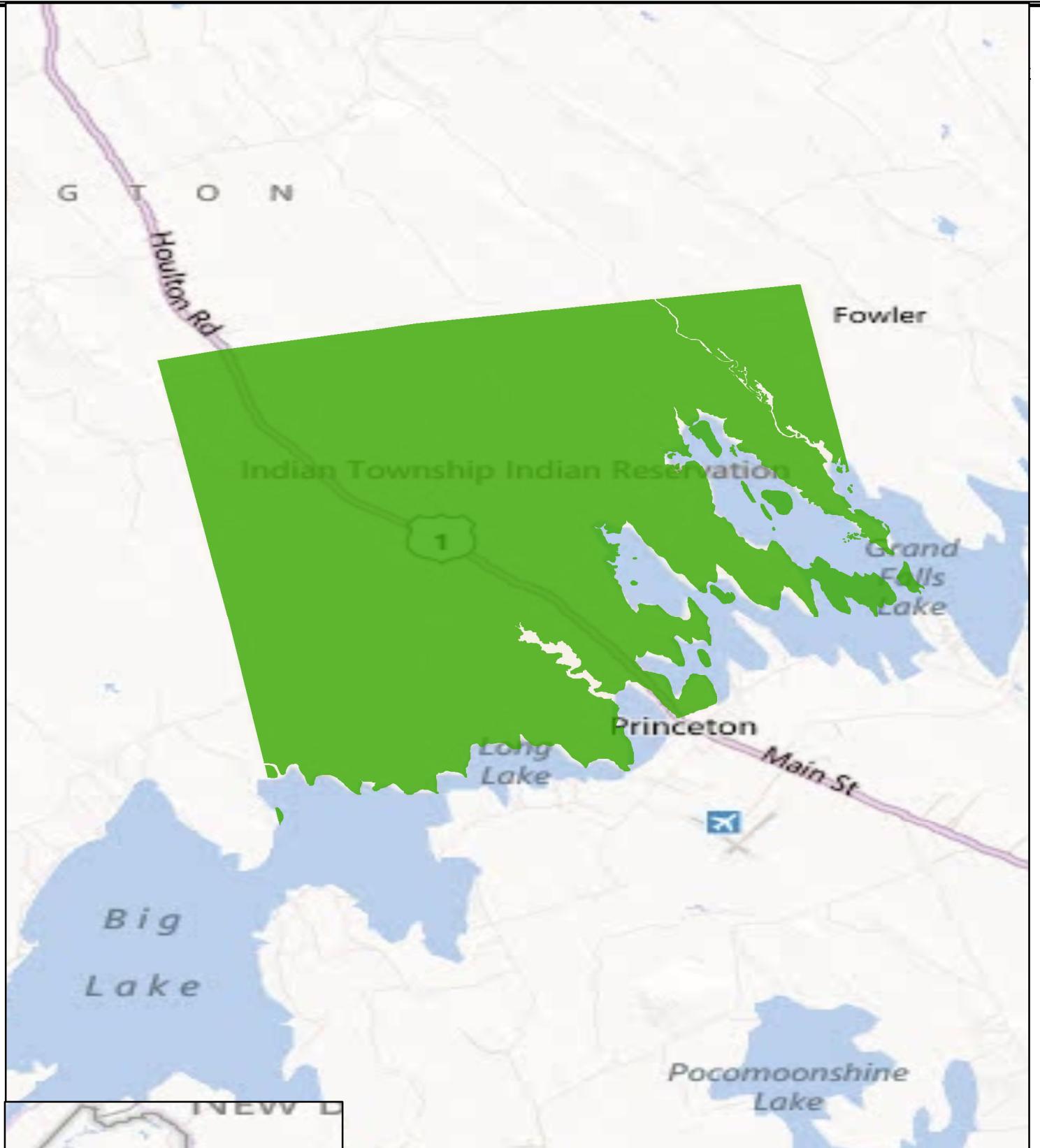
## Penobscot Indian Nation Tribal Lands

Map Created by Christina Stringer  
July 24, 2013

Data Source: Base Map - Bing Maps

Tribal Boundaries - US 2010 Census &

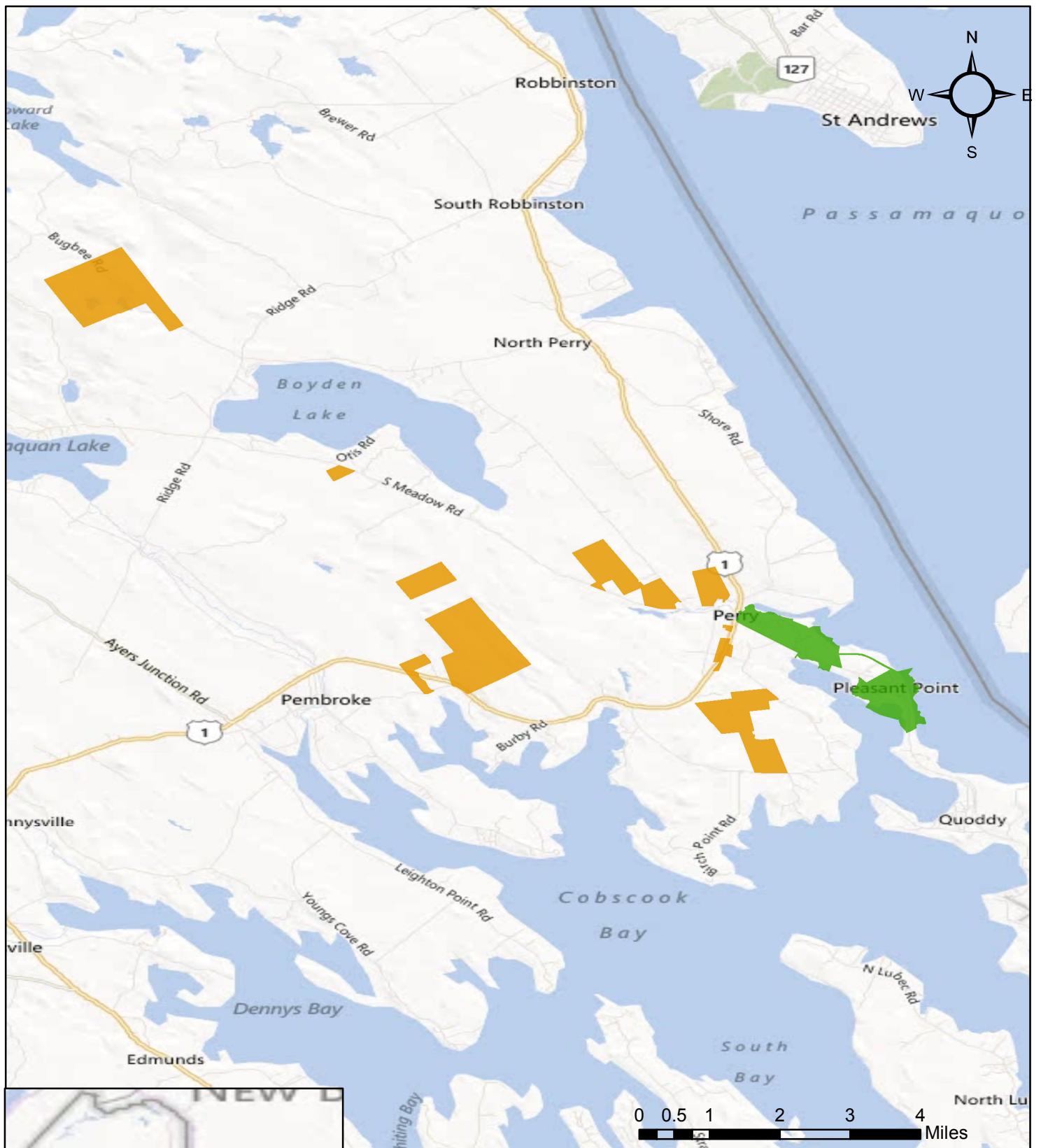
Penobscot Indian Nation  
Department of Natural Resources



### Passamaquoddy Tribe - Indian Township Tribal Trust Lands

0 0.5 1 2 3 4 Miles

Map Created by Christina Stringer  
February 18, 2013  
Data Source: Base Map - Bing Maps  
Tribal Boundaries - US 2010 Census

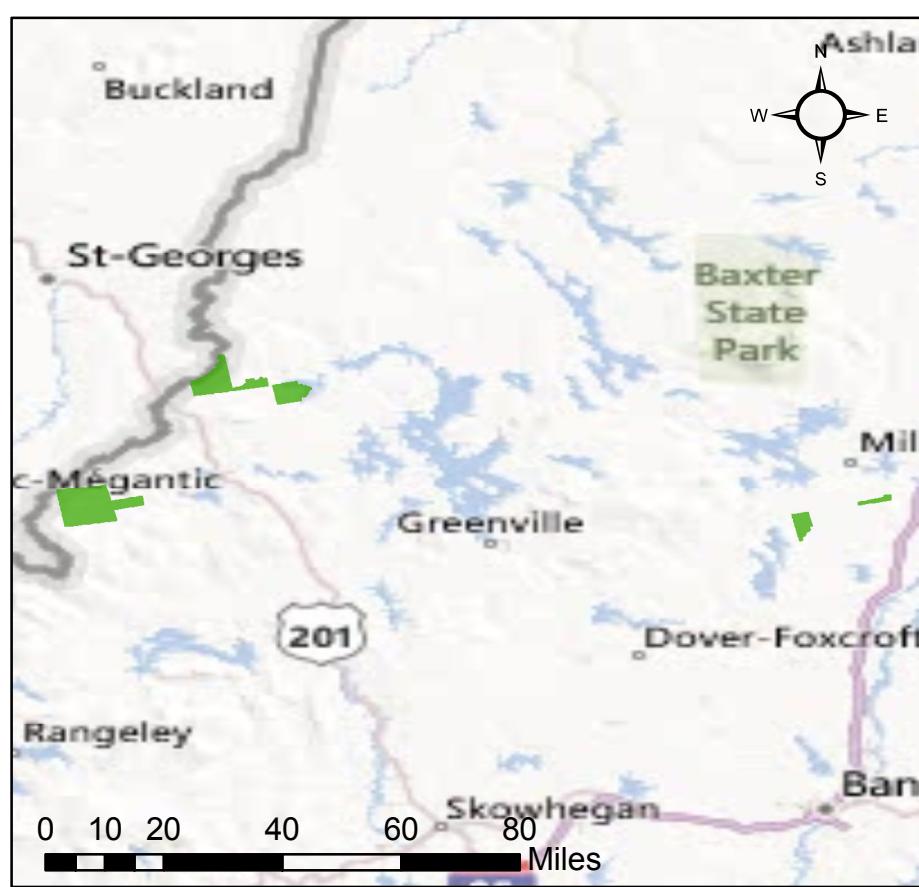
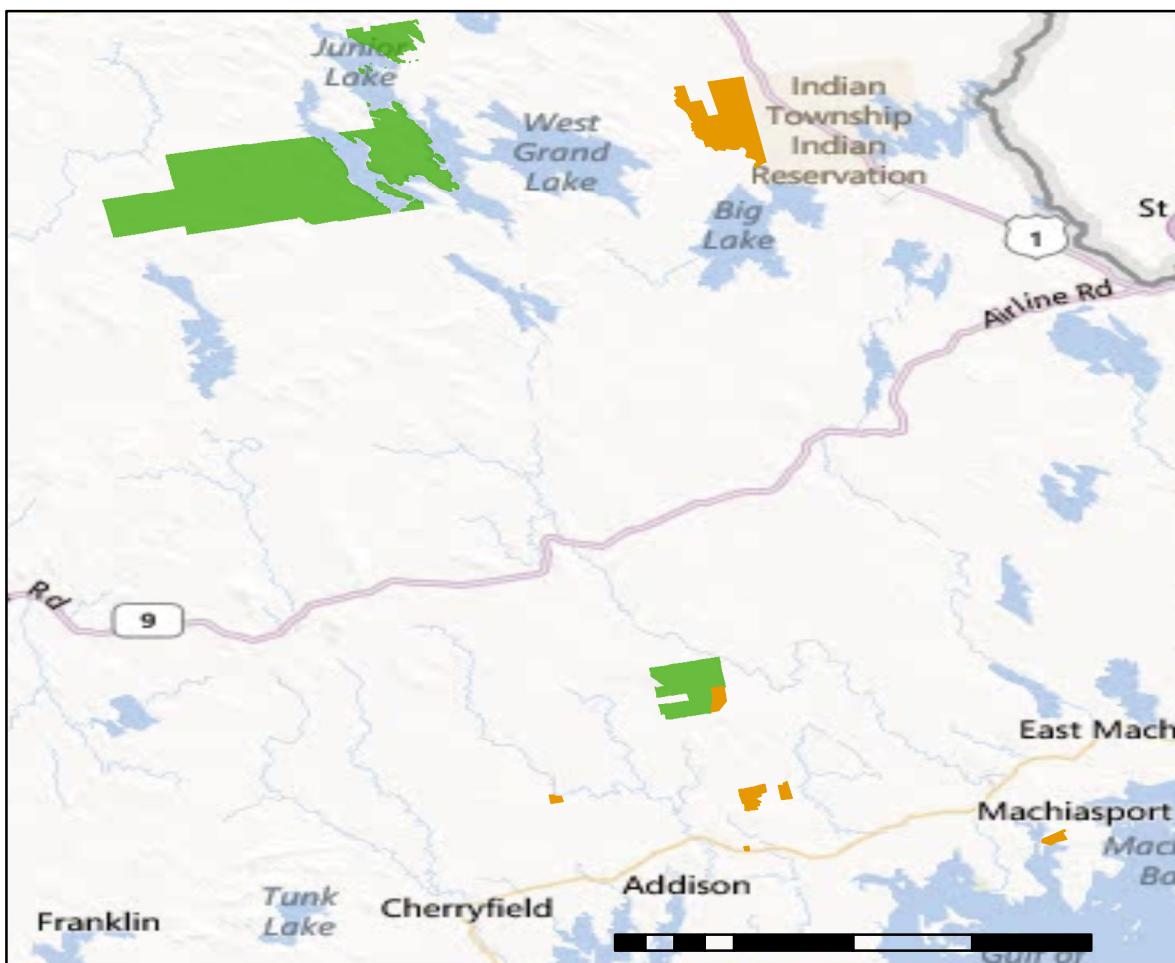


## Passamaquoddy Tribe - Pleasant Point Tribal Lands



Map Created by Christina Stringer  
February 18, 2013  
Data Source: Base Map - Bing Maps  
Trust Boundaries - US 2010 Census  
Fee Boundaries- Passamaquoddy Tribe

## Passamaquoddy Joint Tribal Lands

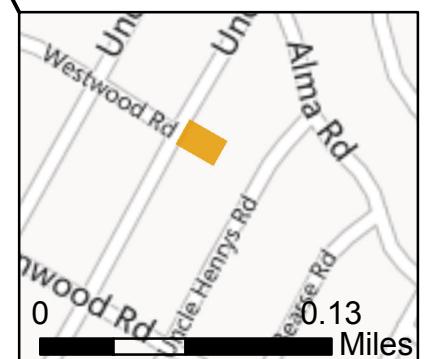
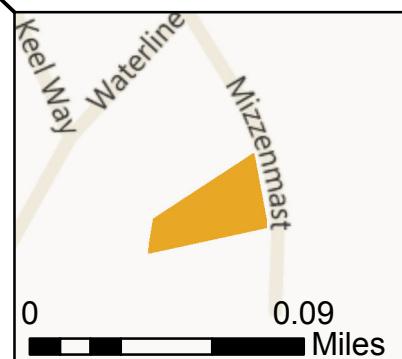
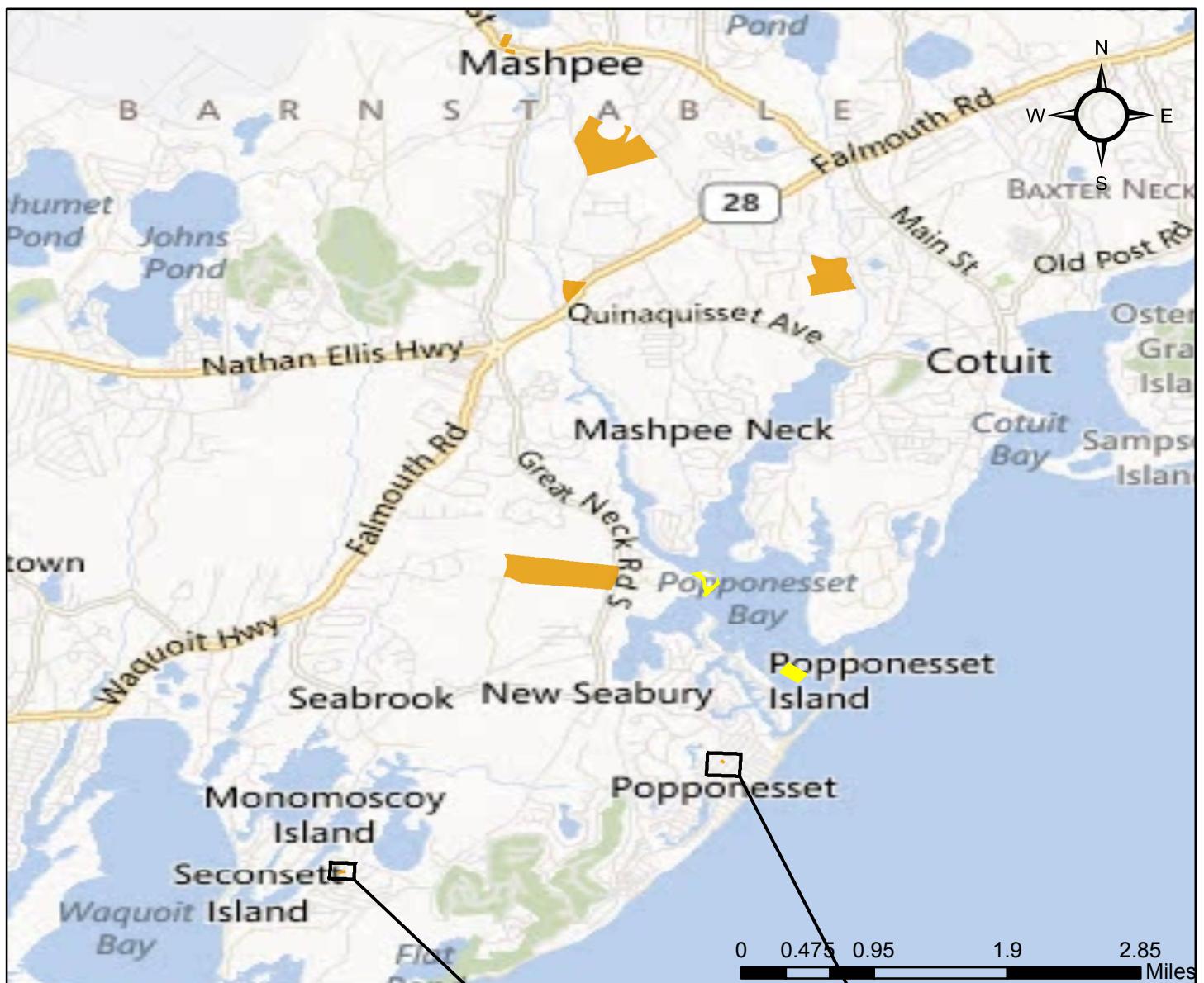


Fee Lands  
Trust Lands



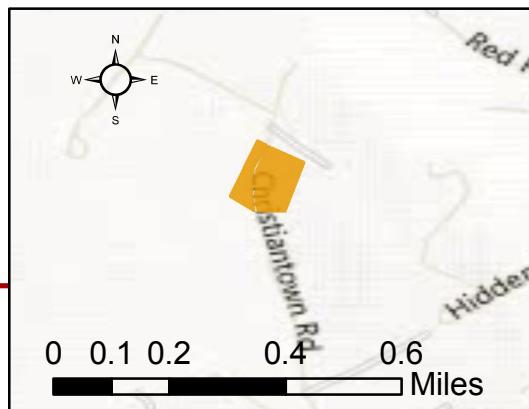
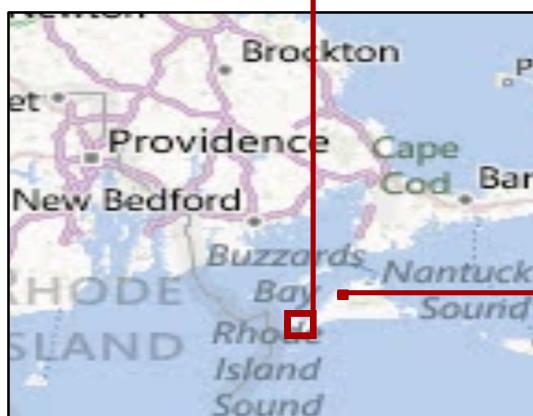
Map Created by Christina Stringer  
April 15, 2013  
Data Source: Base Map - Bing Maps  
Trust Boundaries - US 2010 Census  
Fee Boundaries- Passamaquoddy Tribe

# Mashpee Wampanoag Tribal Lands



Map Created by Christina Stringer  
March 13, 2013  
Data Source: Base Map - Bing Maps  
Tribal Boundaries - MassGIS Data Service  
Aquaculture Leases- Town of Mashpee

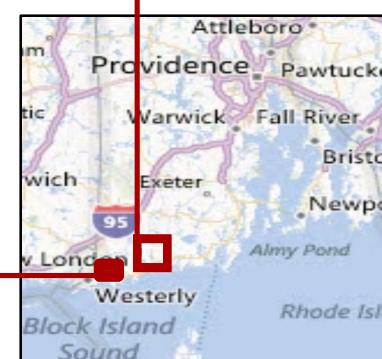
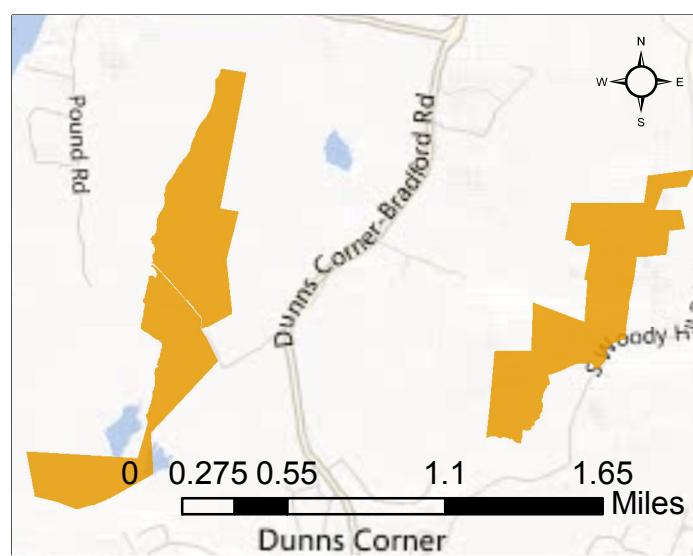
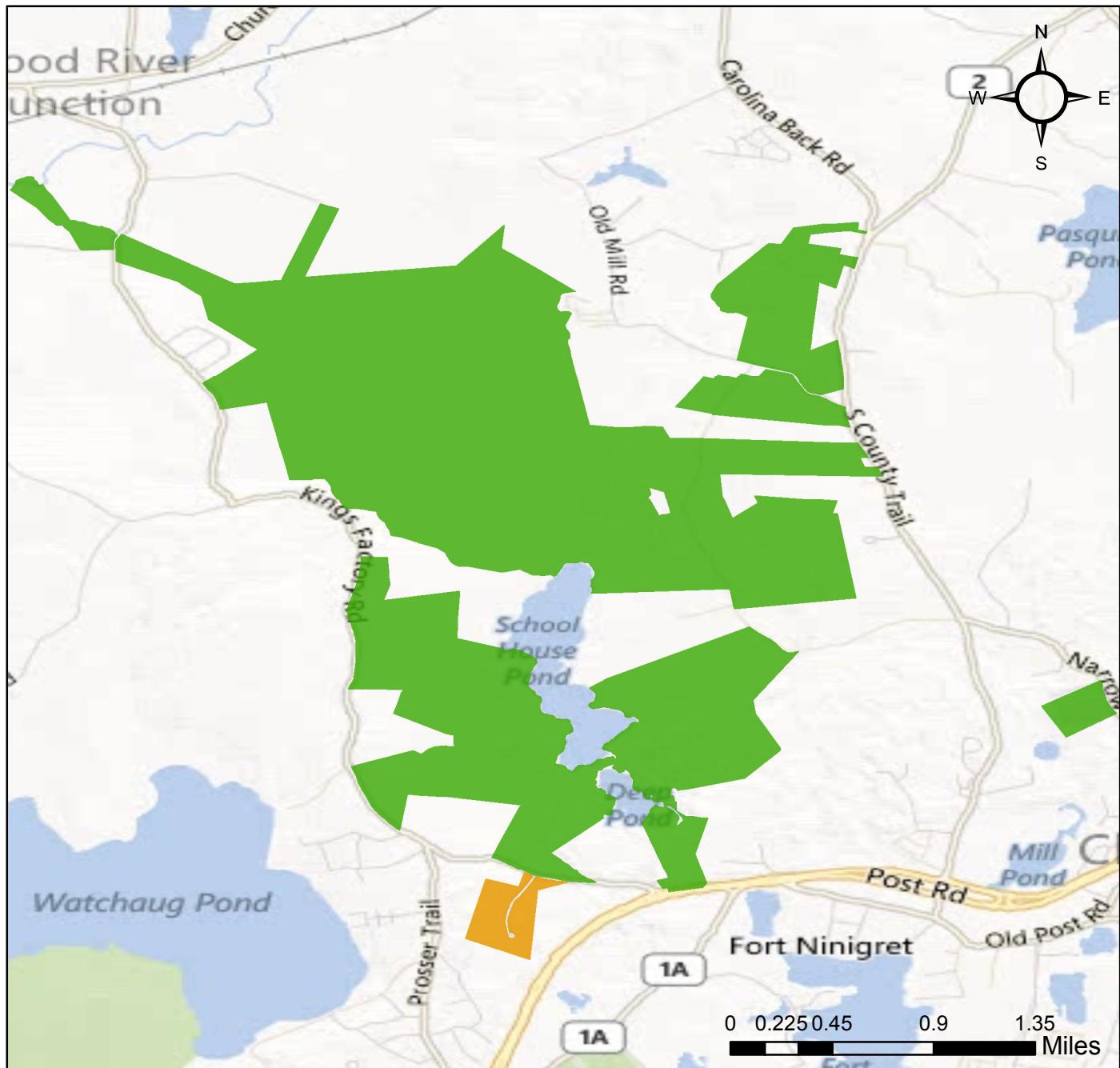
# Wampanoag Tribe of Gay Head (Aquinnah) Tribal Lands



Fee Lands  
Trust Lands

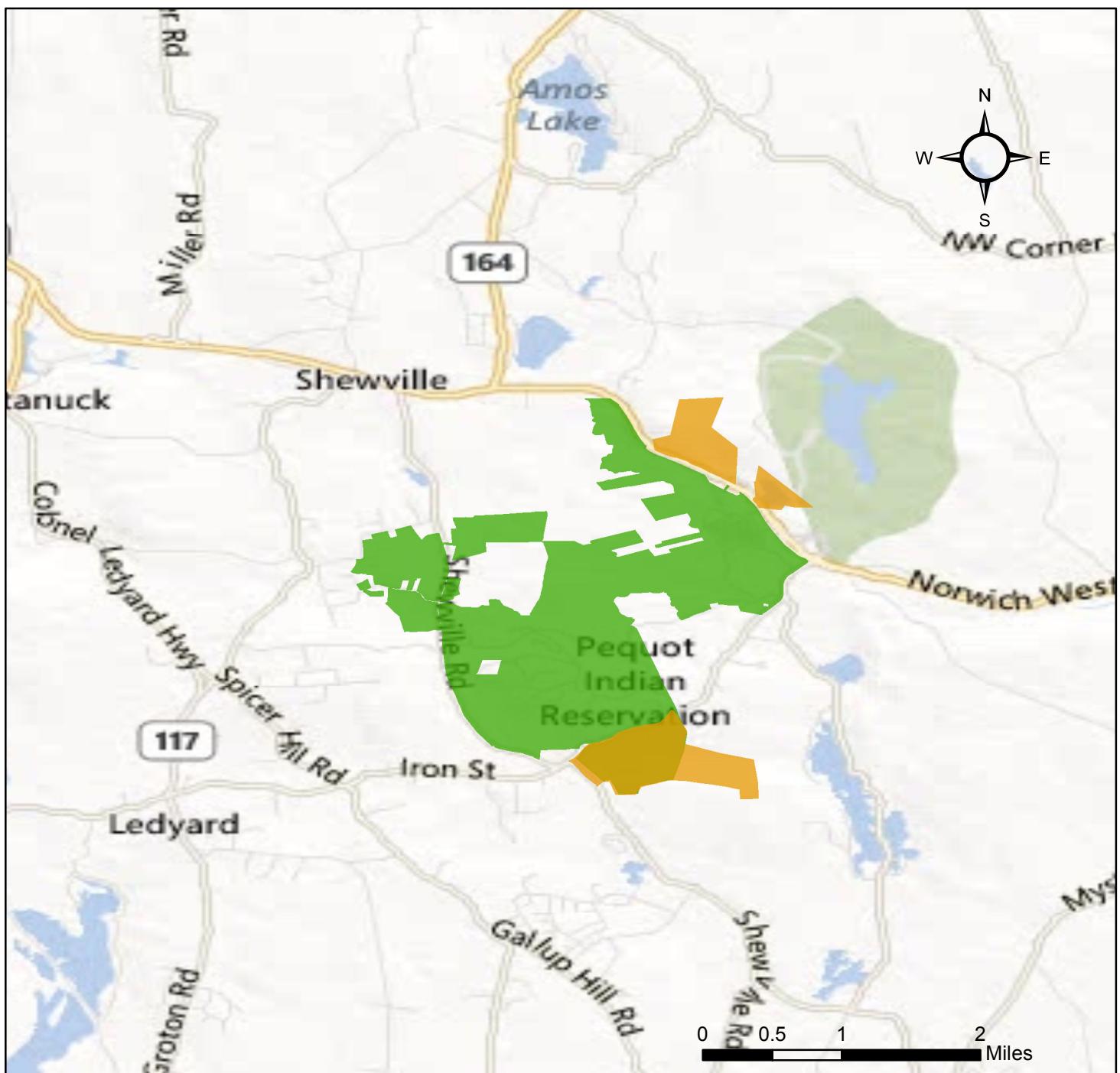
Map Created by Christina Stringer  
March 11, 2013  
Data Sources: Base Map -Bing Maps  
Trust Boundaries -US 2010 Census  
Fee Boundaries -Wampanoag Tribe  
of Gay Head  
(Aquinnah)

# Narragansett Indian Tribal Lands



Map Created by Christina Stringer  
January 31, 2013  
Data Source: Base Map - Bing Maps  
Trust Land Boundaries - US 2010 Census  
Fee Land Boundaries - Narragansett Indian Tribe

# Mashantucket Pequot Tribal Nation Lands

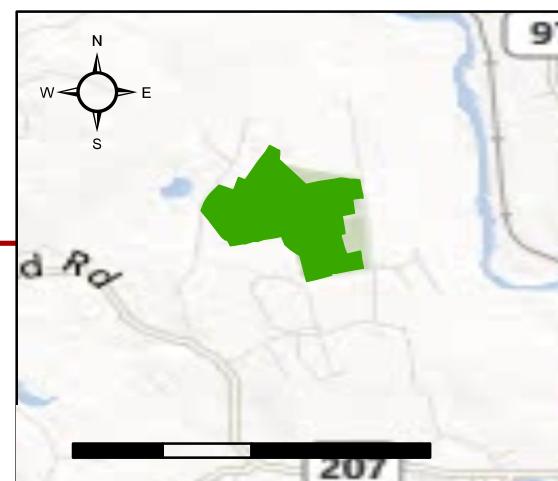
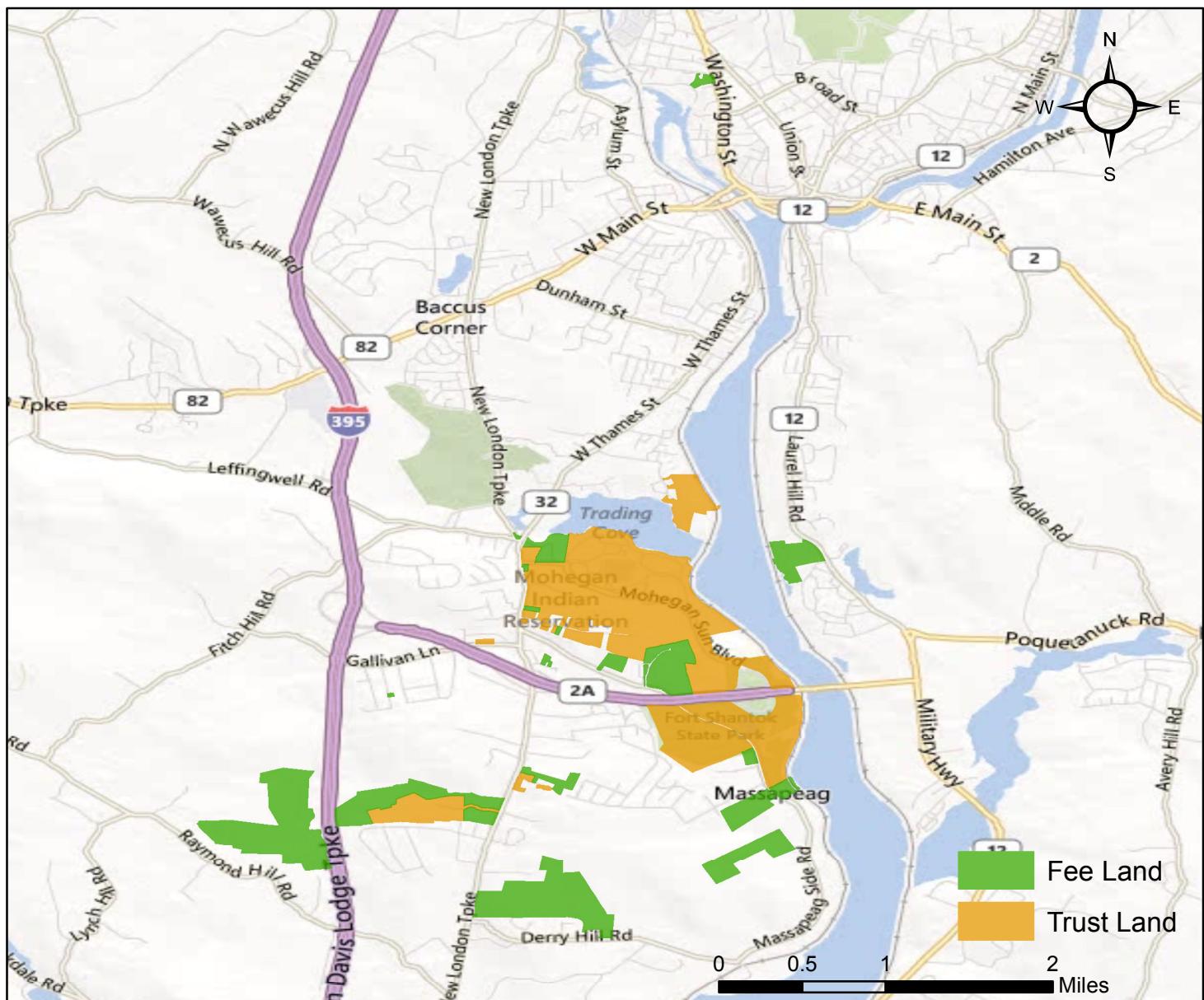


Fee Lands

Trust Lands

Map Created by Christina Stringer  
July 24, 2013  
Data Source: Base Map - Bing Maps  
Tribal Boundaries - US 2010 Census  
EPA GIS Database

# Mohegan Tribe of Indians Tribal Lands



Map Created by Christina Stringer  
July 24, 2013  
Data Source: Base Map - Bing Maps  
Tribal Boundaries - Mohegan Tribe of Indians

## **Appendix E:**

### **Model Notification Letter**

**Mailing Address**

Re: Notification of Consultation and Coordination on [title of action].

Dear Honorable Leader [or Insert Tribal Leader Name],

The U.S. Environmental Protection Agency (EPA) is initiating consultation and coordination with federally-recognized Indian Tribes [may add qualifier here such as “in this Region” or in coordination with another federal agency, or etc.] on [Brief paragraph on what the action is, what it means/what it does, and why tribes might be interested].

This consultation and coordination process will be conducted in accordance with the *EPA Policy on Consultation and Coordination with Indian Tribes* ([www.epa.gov/tribal/consultation/consult-policy.htm](http://www.epa.gov/tribal/consultation/consult-policy.htm)). EPA invites you and your designated consultation representative(s) to participate in this process. EPA’s anticipated timeline for the consultation and coordination period is expected to extend from [date of letter to closure date].

Enclosed is a consultation and coordination plan for this action that includes a description of the action under consultation and the process EPA intends to follow, including a timeline for the consultation and coordination period and information on how you can provide input on this action. *This information is also available on EPA’s Tribal Portal*  
<http://www.epa.gov/tribal/consultation>

The official EPA contact person for this consultation and coordination process is [name, title]. Please do not hesitate to contact [contact person’s name, email address and phone number] should you have any questions this action

I look forward to hearing from you on this important matter.

Sincerely,

[Name of Senior EPA official]<sup>1</sup>  
[Title of Senior EPA official]

cc:

Enclosures

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<sup>1</sup> The notification should be from the highest ranking official in your Office that will be the decision maker for this action

Background information - Optional

**Tribal Consultation and Coordination Process and Timeline- REQUIRED**

Date	Event	Contact Information <sup>i</sup>

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<sup>i</sup> For interactions insert Date and Time and Time Zone). Call(s) should include phone number and access code# using call this format (XXX) XXX-XXXX, XXXX#. Webinars should all information needed for registration, and meetings give location with zip code.

## **Appendix F:**

### Frequently Asked Questions

*[internal EPA document]*

***INTERIM***  
**FREQUENTLY ASKED QUESTIONS**

**EPA Policy on Consultation and Coordination with Indian Tribes**

**- 19 August 2011 -**

Note: This document presents answers to general questions that might arise regarding the *EPA Policy on Consultation and Coordination with Indian Tribes* (Policy). Any additional questions should be directed to the Tribal Consultation Advisor (TCA) in your office or the American Indian Environmental Office (AIEO). This document is considered an interim version as the answers given may change as the Agency develops more experience with the use of the Policy. As such, the document may be updated from time to time. It is intended for internal use only.

Key terms, abbreviations, and definitions and the list of TCAs can be found at the end of this document.

**List of Frequently Asked Questions in this Document**

1. Why does the U.S. government consult with tribes?
2. How is the Policy related to Executive Order 13175?
3. How is the Policy related to EPA's 1984 Indian Policy?
4. What is EPA's definition of consultation?
5. When did the Policy go into effect?
6. Does the Policy apply to activities initiated prior to the effective date?
7. What responsibilities do EPA national program offices and regions have under the Policy?
8. What are the roles and responsibilities of Tribal Consultation Advisors?
9. What reporting requirements do EPA programs and regional offices have under the Policy?
10. Who is responsible for maintaining consultation records?
11. Are there steps I can take to address a tribe's concerns about sensitive information exchanged in the course of a consultation?
12. How does EPA address concerns about the release of confidential information when consulting with a tribe on civil compliance monitoring or enforcement matters?
13. What is the relationship between the Policy and regional and program office plans?
14. How should the EPA program office work with regions when an action originates in a program office?
15. How should the regions work with program offices when an action originates in a region?
16. What EPA activities are subject to the Policy?
17. What types of EPA activities are not subject to the Policy?

18. How do you determine whether consultation is appropriate for an activity?
19. How will EPA construe the term tribal interests?
20. How will EPA respond to tribal requests for face-to face consultation meetings?
21. How do we obtain the names and addresses of tribal leaders?
22. What comments did tribes have on the Policy?
23. How does EPA consult with Alaska Native Corporations?
24. Where can I find more information about working with tribal governments?
25. Where can I find the Policy and related Indian country material?

## **FREQUENTLY ASKED QUESTIONS**

### **1. Why does the U.S. government consult with tribes?**

The U.S. government has a unique legal relationship with federally recognized tribes (tribes). This relationship recognizes tribes as sovereign governments and the federal government's trust responsibility to tribes. The *EPA Policy for the Administration of Environmental Programs on Indian Reservations*, November 8, 1984 (EPA's 1984 Indian Policy) sets out a number of principles for how EPA works with tribes as co-regulators and how the Agency gives special consideration to tribes in making policies that may affect their interests. These principles include honoring a direct government-to-government relationship with tribes and consulting with tribal governments before making decisions that may affect them. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (Executive Order 13175) was issued to provide federal agencies specific guidelines on consultation with tribal governments for certain actions. One of the goals of the EPA Policy on Consultation and Coordination With Indian Tribes (Policy) is to fully implement Executive Order 13175 and certain aspects of EPA's 1984 Indian Policy.

### **2. How is the Policy related to Executive Order 13175?**

Executive Order 13175 directs agencies to develop an accountable process to ensure meaningful and timely input by tribal officials in the development of certain regulatory actions and policies that have tribal implications. The Policy fully implements Executive Order 13175 in terms of developing an accountable consultation process but also includes a broader standard for determining when consultation may be appropriate.

Importantly, Executive Order 13175 contains requirements related to certain Agency actions that have been in effect since 2000 and with which EPA must continue to comply. These requirements apply when specific criteria are met as to a particular action's impact on tribal interests. These situations are most likely to arise with respect to rulemakings and other actions developed pursuant to the Agency's Action Development Process, which are commonly referred to as "tiered" actions. When the Executive Order 13175 criteria apply, EPA must certify to OMB that appropriate consultation with tribes was conducted on the action in question.

As a general matter, each program or regional office initiating an action pursuant to the Action Development Process must identify early in the process whether consultation is appropriate

under the Policy. During this process the program or regional office should also determine whether the Executive Order 13175 certification requirement also applies to the action. If the certification requirement applies, the responsible office must provide a Tribal Summary Impact Statement in the Federal Register notice for the action. Additionally, the Agency must certify to OMB that appropriate consultation with tribes was conducted. The Agency's Designated Consultation Official is responsible for making this certification.

For general guidance on the Action Development Process, please consult your regulatory steering committee representative. For guidance on the process for obtaining the necessary certification from the Designated Consultation Official, program and regional office staff should consult with their TCA.

### **3. How is the Policy related to EPA's 1984 Indian Policy?**

The Policy is intended to strengthen the use of EPA's 1984 Indian Policy. The broad standard for determining whether activities may warrant consultation, the "may affect tribal interests" language, is derived from principle number 5 of the 1984 Indian Policy. Principle 5 states that "the Agency, in keeping with the federal trust responsibility, will assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments."

### **4. What is EPA's definition of consultation?**

As defined in the Policy, "[c]onsultation 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."

Effective consultation provides tribes a meaningful and timely opportunity to provide input before EPA initiates activities that may affect tribal interests. To ensure that consultations are meaningful and timely, and to be responsive to input received from tribes during consultations, the Policy establishes four distinct phases for the consultation process: 1) identification phase; 2) notification phase; 3) input phase; and 4) follow-up phase.

### **5. When did the Policy go into effect?**

The Policy became effective on May 4, 2011, the date of the Administrator's announcement memorandum. As of that date, all activities initiated by EPA are subject to the Policy. This means that a determination must be made as to whether consultation on individual activities is appropriate, and, when deemed appropriate, consultations will be conducted in accordance with the Policy. The TCA Workgroup has developed, and will continue to develop, guidelines and resources to assist in this process.

**6. Does the Policy apply to activities initiated prior to the effective date?**

The Policy is not retroactive. Assistant Administrators and Regional Administrators should, however, use their judgment in determining whether consultation in accordance with the Policy is appropriate for activities initiated prior to May 4, 2011.

**7. What responsibilities do EPA program and regional offices have under the Policy?**

Each Assistant and Regional Administrator is responsible for overseeing implementation of the consultation process in their respective offices. In addition, the Policy directs program and regional offices to prepare a semi-annual agenda of matters appropriate for consultation and a brief summary of consultations that have occurred.

**8. What are the roles and responsibilities of the TCAs?**

The TCAs were appointed to act on behalf of their AA/RAs to insure that decisions taken regarding consultation are appropriate, that consultation occurring in their office or region is adequate, and that their consultation plans and procedures are consistent with the Policy. They also serve as points-of-contact for EPA staff, tribal governments, and other parties interested in the consultation process. Finally, the TCAs also serve as in-office subject matter experts that assist staff and management in the implementation of the Policy.

The TCAs serve on an Agency-wide consultation implementation workgroup chaired by AIEO on behalf of the EPA Designated Consultation Official (DCO). The Policy appoints the Assistant Administrator for the Office of International and Tribal Affairs as the Agency DCO. The workgroup purpose is to develop implementation guidelines and tools for the Policy, correlate and coordinate the Policy and regional and program office plans, and to provide recommendations on consultation implementation issues.

**9. What reporting requirements do EPA program and regional offices have under the Policy?**

Each program and regional office must develop a semi-annual agenda and submit the Agenda or an update to AIEO by October 1<sup>st</sup> and April 1<sup>st</sup> of each year. The semi-annual agenda consists of a list of pre-identified activities that each program and regional office plans to consult upon in the future. Submission of the Agenda is satisfied by entering the relevant information in the Tribal Consultation Opportunities Tracking System (TCOTS), which is accessible within Lotus Notes. TCOTS requires the entry of a small set of standardized information used to track the consultation including a start and end date and the primary point-of-contact. The information provided is used as the basis for posting consultation information outside the Agency for tribes and the public. This information includes links to the standardized consultation Notification Letter developed by the TCA Workgroup and any supporting documentation the consultation office wishes to make available.

Program and regional offices are also responsible for submitting brief summaries of completed consultations to AIEO no later than June 1<sup>st</sup> of each year. It is recommended that the summaries be completed as soon as practicable once consultation is complete. Using the information provided, the Agency's Designated Consultation Official will submit the Agency's annual

consultation progress report to OMB by August 1<sup>st</sup> of each year as required by a Presidential Memorandum dated November 5, 2010.

In addition, as detailed in FAQ Number 2, above, if an action developed through the Action Development Process requires consultation and is subject to the Executive Order 13175 consultation criteria, additional requirements apply.

**10. Who is responsible for maintaining consultation records and materials?**

Each program and regional office is responsible for maintaining the records and documents for tribal consultations it has entered in the Tribal Consultation Opportunities Tracking System and all related material. In general, these requirements are no different than EPA's standard record keeping responsibilities.

In the event the Agency is developing an administrative record based upon the underlying Agency action which is the subject of the consultation, such as for rulemakings or other actions that are subject to administrative or judicial review, letters or emails initiating consultation, meeting notes, emails, and documents exchanged and other pertinent materials from the consultation are likely to be appropriate for inclusion in the administrative record. Comments from tribes and EPA's responses should be documented for the record.

Since administrative records are primarily created for defense of an agency action in litigation, please consult OGC or ORC with any questions about what documents need to be created or retained.

**11. Are there steps I can take to address a tribe's concerns about sensitive information exchanged in the course of a consultation?**

It is important to promote a full and frank exchange of views during government-to-government consultation with tribes. These interactions may include discussions relating to issues of unique sensitivity to tribes such as cultural practices, uses of environmental resources, and locations of cultural resources. There may also be sensitivity regarding tribal relationships with surrounding states and jurisdictional issues. In preparing any records memorializing consultations with tribes, you should consider these potential sensitivities in determining the level of detail to include. You should also consider and discuss with tribes the fact that memorializations of consultations (or other documents) exchanged between EPA and Tribes ordinarily will not be privileged or otherwise protected from disclosure under the Freedom of Information Act.

For counsel on specific situations, please consult OGC or ORC.

**12. How does EPA address concerns about the release of confidential information when consulting with a tribe on civil compliance monitoring or enforcement matters?**

EPA should protect confidential information during consultation with tribes, whether internal Agency communications or communications with a private party involved in the enforcement action. Accordingly, EPA should consult with tribes to the greatest extent practicable without divulging privileged or confidential information. In certain cases, for example, enforcement actions brought jointly by EPA and the tribe, EPA has entered into special arrangements to share

information. If such an arrangement is needed, EPA should consult their OECA or regional attorneys. Confidential information includes privileged information, confidential business information, enforcement confidential information, or communications otherwise not releasable under the Freedom of Information Act.

**13. What is the relationship between the Policy and regional and program office plans?**

The Policy sets the broad parameters and tone for EPA's consultation efforts. At the time of its development the Agency decided that existing and new regional and program office plans should fall under the umbrella of the Policy. This means that there should be no contradictions, contrary definitions, or statements that are in opposition to the Policy language. That being said, the Policy was written to acknowledge the need for regional and program office plans and to recognize that a significant amount of consultation will take place under these plans that may be more specific and detailed than the Policy. Considerable effort was made during the development of the Policy to insure that established regional and program office manners of doing business would not be compromised by the Policy.

The TCAs are charged with ensuring that there is consistency amongst the Policy and plans. For example, there should not be differences in the activities that EPA consults upon, the definition of consultation, or substantive differences in the materials provided; however, there may be considerable difference in the manner, i.e. forum, mode, and timing, in which those consultations occur from region to region or from program office to program office. Regions and program offices are strongly encouraged to include TCA review from the earliest stages of development of their plans. This will help avoid situations in which a program office proposes to conduct consultations in a manner that does not correlate well with the regional plans where the consultation occurs.

**14. How should EPA program offices work with regions when an action originates in a program office?**

Generally, when an action originates in a program office, the program office will lead and execute the consultation. An important part of leading and executing consultation is coordinating with the regions. For program office lead consultations, the regional program staff/management are the main points of contact for the purpose of coordinating with regions. The regional program staff/management should notify regional TCAs of any consultations that they are working on with program offices to keep the TCAs apprised for tracking/reporting purposes.

In some circumstances, the program offices and regions may want to co-lead a consultation effort, or by mutual agreement they may determine that it is more effective for a region to lead a consultation effort even though the action originates in a program office.

**15. How should the regions work with program offices when an action originates in a region?**

Generally, when an action originates in a region, the region will be responsible for leading and executing all aspects of consultation. An important part of leading/executing consultation is

coordinating with the relevant program office(s). The program office TCAs are the main POCs for purposes of coordinating with program offices.

In some circumstances, program offices and regions may want to co-lead a consultation effort, or by mutual agreement they may determine that it is more effective for the program office to lead a consultation effort even though the action originates in a region.

**16. What EPA activities are subject to the Policy?**

A wide range of EPA activities are subject to the Policy, which includes a non-exclusive list of categories of activities that may warrant consultation. This *non-exclusive list* includes regulations, rules, permits, guidance documents, policies, directives, budget and priority planning development, legislative comments, civil enforcement and compliance monitoring actions, response actions and emergency preparedness, state or tribal authorization or delegations, and EPA activities in implementation of U.S. obligations under an international treaty or agreement. As described below, the Policy establishes several mechanisms by which program and regional offices determine whether any given activity may affect tribal interests and thus warrant consultation. Also, see the FAQ below on the types of activities not subject to this Policy. Program and regional offices should consult with their TCAs for additional guidance on what is and what is not intended to be covered by the Policy.

**17. What types of EPA activities are not subject to the Policy?**

A large number of routine administrative and staff-to-staff level interactions and communications occur between EPA and tribal government employees on a regular basis. The Policy is not intended to apply to these regular, ongoing interactions. The Policy is also not intended to cover the large number of routine funding recipient-EPA staff interactions. Again, consult with your TCA or AIEO for further guidance.

**18. How do you determine whether consultation is appropriate for an activity?**

The Policy establishes several mechanisms for identifying activities that may be appropriate for consultation. These include: 1) tribal government requested consultation; 2) EPA's identification of activities appropriate for consultation through the Action Development Process; and 3) for those activities not identified through the ADP process, the development by each EPA program or regional office of a semi-annual agenda of consultation activities. Finally, EPA will also use its many interactions with national and regional tribal partnership groups to get feedback on those activities that tribes feel are appropriate for consultation. This screening process will be essential to allow EPA and tribes to focus on those activities of most importance. If you have questions regarding your specific activity please contact your TCA or AIEO to discuss.

**19. How will EPA construe the term tribal interests?**

We intend to construe the term tribal interests broadly when implementing the proposed Policy. Therefore, we will consult with tribes when undertaking actions that may affect recognized rights and interests. These could be interests protected by treaty, statute, judicial decisions, or other legal authorities. These could also include EPA activities that may affect hunting, fishing, and gathering rights or access granted to tribes under treaties between the United States and a tribal government.

**20. How will EPA respond to tribal requests for face-to face consultation meetings?**

EPA will always consider tribal requests for face-to-face consultation meetings. In some cases face-to-face meetings may not be feasible, and EPA may rely on teleconferences or other approaches. Some tribes have requested that EPA consider alternatives to face-to-face meetings to reduce costs. The 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 a variety of factors including, but not limited to, the issues being considered, the number of tribes potentially impacted, time and resource limitations, and other pertinent factors including the regional and/or program office plans

**21. How do we obtain the names and addresses of tribal leaders?**

AIEO maintains a list of tribal leaders and their addresses. AIEO starts with the official federally recognized tribe list published by the Bureau of Indian Affairs and then updates it periodically with information supplied from a variety of sources. AIEO and the TCA's are working to improve consistency of updates and access to the tribal leader information list. Offices needing tribal contact information should go to the Consultation section of the Tribal page on the EPA intranet, <http://intranet.epa.gov/aieo/consultation.htm>, where they will find the information located under the Consultation Policy Implementation Resources tab.

**22. What comments did tribes have on the Policy?**

The Policy was drafted in a manner deemed responsive to the most common concerns raised by tribes during initial outreach on the development of the Policy beginning in November 2009. Most of the tribal commenters positively received our proposed Policy and recognized that EPA went well beyond Executive Order 13175 in defining the type of activities EPA would consider engaging in meaningful consultation with the tribes. Many of the commenters made specific suggestions as to how EPA should conduct consultations that were not adopted into the Policy. EPA's response was that the Policy seeks to establish consistent practices across the Agency, particularly in the steps involved in consultation, but it also allows flexibility for each program and regional office to determine the appropriate manner to consult given the specifics of each situation, including the preferences of the tribe(s) involved. We informed the commenters that EPA will continue to refer to their comments and suggestions as we develop guidance for implementing the Policy and as program and regional offices develop procedures and plans for consultation.

**23. How does EPA consult with Alaska Native Corporations?**

Pursuant to Public Law 108 - 199, 118 Stat. 452, as amended by Public Law 108 - 447, 118 Stat. 3267, EPA is required to consult with Alaska Native Corporations (ANCs) on the same basis as Indian tribes under Executive Order 13175. EPA intends to consult with ANCs subject to the same general considerations of practicability, expense, and scheduling that apply to our interactions with federally recognized tribal governments. Moreover, EPA interprets the term "same basis" as meaning providing a meaningful and timely opportunity to provide input and that the specific mode of consultation used for ANCs and tribal governments may vary (e.g., the number and type of meetings).

**24. Where can I find more information about working with tribal governments?**

Always check with your TCA whenever you have questions about tribal consultation. Also, we highly recommend that you take the online training course entitled *Working Effectively with Tribal Governments* (WETG). There is a link to WETG on EPA's intranet homepage under "Highlights" to the right of the page  
(<http://intranet.epa.gov/aieo/training/tribal/EPA/mainmenu/launchPage.htm>)

**25. Where can I find the Policy and related Indian country material?**

Consultation-related documents including the Policy can be found on the intranet at:  
<http://intranet.epa.gov/aieo/consultation.htm> or on the internet at: <http://www.epa.gov/indian/>.

EPA's 1984 Indian Policy can be found on the intranet at:  
<http://intranet.epa.gov/aieo/frd.htm#docs> or on the internet at:  
<http://www.epa.gov/indian/basicinfo/presidential-docs.html>.

## TERMS, ABBREVIATIONS, AND DEFINITIONS

**Action Development Process (ADP)** - The Action Development Process is a series of defined steps set out in the ADP Guidance that are taken by regulatory workgroups to ensure that Agency actions are of consistently high quality, involve senior managers early in the development process, are supported with strong analysis, and are developed via an open process. The ADP Guidance encourages workgroups to consult with tribal representatives when developing rules for which tribes are charged with actual day-to-day management of the program or regulation, or any such instance where tribes might be potentially impacted by a rule. These consultations should be conducted early in the Action Development Process.

**AIEO** – the American Indian Environmental Office, located within the Office of International and Tribal Affairs.

**Designated Consultation Official (DCO)** – Pursuant to Executive Order 13175, a designated official must be appointed to carry out an Agency's tribal consultation, coordination and implementation responsibilities. Per EPA's Plan of Action, the Assistant Administrator for the Office of International and Tribal Affairs (OITA) has been designated as the Agency consultation official. The current Assistant Administrator for OITA, Michelle DePass, is the current DCO for the EPA.

**EPA's 1984 Indian Policy** - *EPA Policy for the Administration of Environmental Programs on Indian Reservations*, November 8, 1984. The 1984 Indian Policy was developed with the goals of supporting Indian self-governance and working with tribal governments on a government-to-government basis. The 1984 Indian Policy furthers EPA's mission to protect human health and the environment on tribal lands by working in conjunction with tribal governments in the conduct of the Agency's congressionally mandated responsibilities.

**Executive Order 13175** – Executive Order 13175 of November 9, 2000, *Consultation and Coordination with Indian Tribal Governments*. Issued by President Clinton, the primary goal of Executive Order 13175 is to establish a process of regular and meaningful consultation between Tribal Governments and the Federal Government on the implementation of tribal policies that may have tribal implications.

**OMB** – Office of Management and Budget.

**POC** – Point of Contact

**Policy** – The *EPA Policy for Consultation and Coordination with Indian Tribes*.

**Presidential Memorandum on Consultation, November 5, 2009** - In conjunction with the first White House Tribal Nations Summit, President Obama issued a memorandum to all federal agencies directing them to develop plans of action for complying with and implementing Executive Order 13175. EPA's Plan of Action committed the agency to developing a tribal consultation policy.

**Tribal Consultation Advisor (TCA)** - TCAs were designated by each program and regional office and serve as a point of contact for parties interested in consultation and subject matter experts on what matters may be appropriate for consultation. The responsibilities of a TCA are referenced in the November 30, 2010 E-mail Memorandum issued by Deputy Administrator Bob Perciasepe.

**TCA Workgroup** – AIEO has convened a workgroup that includes all TCAs across the Agency. The TCA workgroup meets regularly to develop guidelines and resources for implementing the Policy.

**Tribal Interests** - EPA intends to construe the term “tribal interests” broadly when implementing the Policy. The term does not exclude reserved rights and subsistence gathering issues from its definition. EPA applies this broad interpretation consistent with any applicable limits imposed by law.

**Tribe** – This term collectively describes all federally recognized tribes. Individual tribes may use more specific terms such as Nation, Village, Pueblo, Rancheria, etc. Today, there are 565 tribes recognized by the U.S. government. This includes 226 Alaska native villages.

## Tribal Consultation Advisors

(As of 19 August 2011)

**Any Questions Regarding Particular Activities Should be Addressed to the Appropriate Office**

### **Organization**

Office of Administration and Resources Management  
Office of Air & Radiation  
Office of Chemical Safety and Pollution Prevention  
Office of Enforcement and Compliance Assurance  
Office of Environmental Information  
Office of Research & Development  
Office of Solid Waste & Emergency Response  
Office of Water  
Office of General Counsel  
Office of the Chief Financial Officer  
Office of Policy  
Region I  
Region II  
Region III  
Region IV  
Region V  
Region VI  
Region VII  
Region VIII  
Region IX  
Region X

### **Name**

Raul Soto  
C. Darrel Harmon  
Caren Robinson  
Jonathan Binder  
Beth Jackson  
Monica Rodia  
Andrew Baca  
Felicia Wright  
Jessica Scott  
Mary Jo Blumenfeld  
Ken Munis  
Mike Stover  
Janice Whitney  
Terry Gallagher  
Cindy J. Nolan  
Willie Harris  
Jeannine Hale  
Wolfgang Brandner  
Alfreda Mitre  
Nate Lau  
Sally Thomas

**Designated EPA Consultation Official: Michelle DePass, Assistant Administrator, Office of International and Tribal Affairs**

**AIEO Staff:**

**JoAnn Chase, Director**  
**Jeff Besougloff, Senior Advisor**  
**David Guest, Senior Policy Advisor (primary POC)**  
**Dona Harris, Senior Program Manager**

## **Appendix G:**

### **Website Resources**

## **Website Resources**

American Indian Environmental Office: <http://www.epa.gov/aieo/index.htm>

EPA's Tribal Portal: <http://www.epa.gov/indian>

EPA's Tribal Portal Consultation Page: <http://www.epa.gov/indian/consultation>

Advisory Council on Historic Preservation (AHP): an independent federal agency that promotes the preservation, enhancement, and productive use of our nation's historic resources, and advises the President and Congress on national historic preservation policy: <http://www.achp.gov/>

Department of Interior - Bureau of Land Management tribal consultation resources:  
[http://www.blm.gov/wo/st/en/prog/more/CRM/tribal\\_consultation.html](http://www.blm.gov/wo/st/en/prog/more/CRM/tribal_consultation.html)

Department of Health and Human Services tribal consultation resources:  
<http://www.hhs.gov/intergovernmental/tribal/tribalconsultation/tribalconsultation.html>

Department of Interior - Bureau of Indian Affairs tribal consultation resources:  
<http://www.bia.gov/WhoWeAre/AS-IA/Consultation/index.htm>

Department of Defense tribal consultation resources:  
<http://www.denix.osd.mil/na/Index.cfm>

U.S. Department of Transportation: tribal consultation plan  
<http://www.dot.gov/tribal/docs/consultationplan.pdf>

Working Effectively with Tribal Governments online course:  
<http://tribalgov.golearnportal.org/>

## **Appendix H:**

### **Example Notification Letters and Consultation Plans**



UNIT STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

JUL 27 2011

OFFICE OF  
WATER

Re: Notification of Consultation and Coordination on Proposed Regulatory Revisions to the Lead and Copper Rule

Dear Honorable Leader:

The Environmental Protection Agency (EPA) is initiating consultation and coordination with federally-recognized Indian Tribes on proposed regulatory revisions to the Lead and Copper Rule (LCR). EPA is currently evaluating potential regulatory revisions to the LCR, a drinking water regulation that requires monitoring for lead and copper in public drinking water systems. These revisions may consist of changes to the sample site selection criteria for lead and copper, changes to existing tap sampling procedures, changes to requirements for lead service line replacement, and modifications to existing corrosion control requirements.

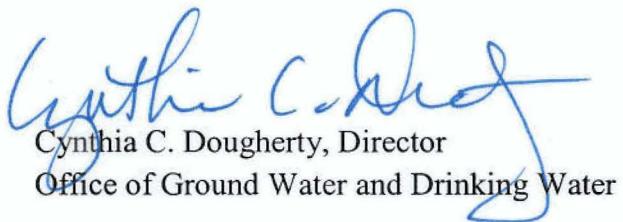
This consultation and coordination process will be conducted in accordance with the *EPA Policy on Consultation and Coordination with Indian Tribes* ([www.epa.gov/tribal/consultation/consult-policy.htm](http://www.epa.gov/tribal/consultation/consult-policy.htm)). EPA invites you and your designated consultation representative(s) to participate in this process. EPA's anticipated timeline for the consultation and coordination period is expected to extend from the date of this letter to October 28, 2011.

Enclosed is a consultation and coordination plan for this action that includes a description of the action under consultation and the process EPA intends to follow, including a timeline for the consultation and coordination period and information on how you can provide input on this action. *This information is also available on EPA's Tribal Portal*  
<http://www.epa.gov/tribal/consultation>

The official EPA contact person for this consultation and coordination process is Rebecca Allen, Office of Ground Water and Drinking Water, at (202) 564-4689, [allen.rebeccak@epa.gov](mailto:allen.rebeccak@epa.gov). Please do not hesitate to contact Rebecca Allen should you have any questions about this action or would like to request alternative arrangements to the process outlined in the consultation plan.

I look forward to hearing from you on this important matter.

Sincerely,



Cynthia C. Dougherty, Director  
Office of Ground Water and Drinking Water

Enclosure

cc:      Tribal Environmental Directors  
          Regional Indian Coordinators

## **Consultation Plan**

### ***Background information on this action***

EPA is considering revisions to the Lead and Copper Rule (LCR), a drinking water regulation that requires monitoring and a treatment technique to control lead and copper corrosion in drinking water systems. The Safe Drinking Water Act (SDWA), as amended in 1996, directs EPA to review existing drinking water regulations at least once every six years and revise them, if appropriate. EPA is currently in the process of evaluating potential regulatory revisions to the existing LCR. These revisions may consist of changes to the sample site selection criteria for lead and copper, changes to existing tap sampling procedures, changes to requirements for lead service line replacement, and modifications to existing corrosion control requirements.

### ***Potential impacts to Tribes***

The LCR applies to all public water systems as defined under the SDWA. Any revisions to the LCR would impact a tribal government that operates a public water system and that must comply with the LCR. Any revisions to the LCR would also impact a tribal government that has primary enforcement authority (primacy) for public water systems on tribal lands.

### ***Tribal government involvement in the LCR regulatory revision process***

EPA is requesting input from tribal governments on how the Agency should revise the LCR while maintaining and improving public health protection. EPA is requesting input from tribal governments on the proposed regulatory revisions to the current LCR and what changes to the proposed regulatory revisions would assist tribal governments in implementing and complying with the rule while maintaining or improving public health protection. Specific regulatory revisions under consideration include:

- Changes to the tap sampling procedures for lead,
- Addition of public education requirements for copper,
- Changes to existing corrosion control requirements, and
- Changes to existing lead service line replacement requirements.

The table below outlines the process and timeline for government-to-government consultation and coordination throughout the consultation process from the date of this letter to October 28, 2011. Following consultation, EPA will work to prepare the proposed regulatory revisions for publication in the *Federal Register*.

EPA will post information for tribes on the Tribal Portal ([www.epa.gov/tribal](http://www.epa.gov/tribal)) regarding this action, including specific consultation and coordination opportunities and background information. Additional information and current activities related to the LCR proposed

regulatory revisions process can be found at:

<http://water.epa.gov/lawsregs/rulesregs/sdwa/lcr/index.cfm>

Additionally, tribal governments will also have the opportunity to submit comments on the proposed regulatory revisions as part of the public comment process for the proposed rule. The LCR proposed regulatory revisions are anticipated in 2012.

**Tribal Consultation and Coordination Process and Timeline**

<b><u>Date</u></b>	<b><u>Event</u></b>	<b><u>Contact Information</u></b>
September 15, 2011	National Consultation teleconference between tribal consultation officials and EPA management and staff	Teleconference time: 1:00 – 2:00 p.m. EDT Teleconference Call-in number: 1-866-299-3188 Conference code: 2025644689 EPA Contact: Rebecca Allen, (202) 564-4689
September – October 28, 2011	Posting of all relevant information to EPA Tribal Portal, including written responses to questions from Tribes.	EPA Tribal Portal at <a href="http://www.epa.gov/tribal">www.epa.gov/tribal</a>



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION I  
5 POST OFFICE SQUARE, SUITE 100  
BOSTON, MASSACHUSETTS 02109-3912**

12 July 2012

The Honorable Richard Getchell  
Chief of the Aroostook Band of Micmacs  
8 Northern Road  
Presque Isle, ME 04769

Re: Notification of Consultation and Coordination

Dear Chief Getchell,

The U.S. Environmental Protection Agency, Region I (EPA) is initiating consultation and coordination with the federally-recognized Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs concerning the State of Maine's application to administer the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permitting program in the Tribes' territories (Maliseet and Micmac territories).

On October 31, 2003, when EPA took action on the State of Maine's application to administer the NPDES program in the Indian territories of the Penobscot Indian Nation and the Passamaquoddy Tribe, EPA did not take action on the state's application as it applied to the Maliseet and Micmac territories. Although EPA did solicit comment on the state's application as it applies to the Maliseet and Micmac territories, those comments were filed prior to the rulings from the Federal Court of Appeals for the First Circuit in *Maine v. Johnson*, 498 F.2d 37 (1<sup>st</sup> Cir. 2007), and *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 73, 74-75 (1<sup>st</sup> Cir. 2007). Therefore, the Agency believes that the record for our decision on Maine's application would be greatly improved by providing both consultation to the Tribes and an opportunity for the general public to comment on the current state of the law, including these cases.

This consultation and coordination process will be conducted in accordance with the *EPA Policy on Consultation and Coordination with Indian Tribes* ([www.epa.gov/tribal/consultation/consult-policy.htm](http://www.epa.gov/tribal/consultation/consult-policy.htm)). EPA invites you and your designated consultation representative(s) to participate in this process. Enclosed is a consultation and coordination plan for this action that indicates the process EPA intends to follow, including a timeline for the consultation and coordination period. Additional information on how you can provide input on this action can be found on EPA's Tribal Portal <http://www.epa.gov/tribal/consultation>.

The official EPA contact person for this consultation and coordination process is Captain Michael Stover, P.E. Region I Indian Program Manager. Please do not hesitate to contact Captain Stover at (617) 918-1123 or [stover.michael@epa.gov](mailto:stover.michael@epa.gov) should you have any questions.

I look forward to meeting with you on this important matter.

Sincerely,



H. Curtis Spalding  
Regional Administrator

Enclosure:

cc: Fred Corey, Environmental Director

## Tribal Consultation and Coordination Process and Timeline

Date	Event	Contact Information <sup>i</sup>
July 10, 2012	Issuance of Tribal Notification Letter	<a href="mailto:Stover.michael@epa.gov">Stover.michael@epa.gov</a> (617)918-1123
July 24, 2012	Discussion with Tribal leaders at a meeting in Maine with the Regional Administrator	<a href="mailto:Stover.michael@epa.gov">Stover.michael@epa.gov</a> (617)918-1123
TBD	Draft Federal Register Notice send to tribes	<a href="mailto:Stover.michael@epa.gov">Stover.michael@epa.gov</a> (617)918-1123
TBD	<b>Follow-up consultation regarding the draft Federal Register Notice</b>	<a href="mailto:Stover.michael@epa.gov">Stover.michael@epa.gov</a> (617)918-1123
TBD	Final Federal Register notice issued	<a href="mailto:Stover.michael@epa.gov">Stover.michael@epa.gov</a> (617)918-1123

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## **Appendix I:**

### **Memoranda Relating to Enforcement and Consultation**



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

JAN 17 2001

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

**MEMORANDUM**

SUBJECT: Transmittal of the Final Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy

FROM: Steve A. Herman  
Assistant Administrator

TO: Regional Administrators, Regions I - X

This memorandum transmits to you the Final Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy ("guidance"). In developing this guidance, OECA coordinated with, and incorporated the comments of, the American Indian Environmental Office (AIEO), the Office of General Counsel (OGC), the Regions and Tribes.

This document provides guidance on implementation of that portion of the Agency's November 8, 1984, "EPA Policy for the Administration of Environmental Programs on Indian Reservations" ("Indian Policy") that addresses facilities owned or managed by Tribal Governments. On March 14, 1994, Administrator Browner reaffirmed the Agency's commitment to the Indian Policy. The attached guidance regarding the Indian Policy is divided into two parts:

- I. Conditions generally necessary for enforcement actions, and
- II. Coordination within the Agency.

Section I interprets the specific enforcement provisions of the Indian Policy, and section II clarifies procedures for the concurrence, communication and coordination of case issues within the Agency. Key points of the Guidance include:

- 1) an enhanced discussion of what facilities are subject to the Guidance,
- 2) the development and implementation of a written compliance plan,
- 3) clarification on when OECA concurrence is called for,
- 4) step-wise procedures for obtaining OECA concurrence,
- 5) guidance on how to proceed in cases where OECA concurrence is not called for, and

6) examples of exigent circumstances affecting the applicability of the Indian Policy.

Consistent with the federal trust responsibility to federally-recognized Tribes and the obligation to consult with Tribal Governments on a government-to-government basis, I ask that you consult with representatives of Tribal Governments in your Region regarding the finalization of this guidance. This can be accomplished by working with the relevant Regional Tribal organization (e.g., RTOC) where available or through other means of Regional/Tribal communication.

OECA is in the process of drafting "Questions & Answers" to response to questions raised by EPA offices and Tribes' regarding the guidance. As such, if you, or the Tribes in your Region, have any questions or comments, please contact Carolyn Dick of my staff at (202) 564-4007. I appreciate your continued efforts to ensure human health and environmental protection in Indian country through your work on, and implementation of, this guidance.

**ATTACHMENT:**      Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy

cc:      Eric Schaeffer, Director, Office of Regulatory Enforcement  
          Connie Musgrove, Deputy Director, Office of Regulatory Enforcement  
          Betsy Devlin, Director, RCRA Enforcement Division  
          Caroline Ahearn, Branch Chief, RCRA Enforcement Division  
          Carolyn Dick, Attorney, RCRA Enforcement Division  
          Kathy Gorospe, Director, American Indian Environmental Office  
          Anthony Hanson, Attorney, American Indian Environmental Office  
          Gary Guzy, General Counsel  
          James Nelson, Associate General Counsel  
          Tod Siegal, Attorney, Office of General Counsel  
          Deputy Regional Administrators, Regions I-X  
          Tribal Contacts, Regions I-X  
          Regional Counsel, Regions I-X  
          Enforcement Coordinators, Regions I-X

## **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.<sup>1</sup>

In keeping with the United States' policy of operating within a government-to-government relationship<sup>2</sup> with federally recognized Indian Tribes<sup>3</sup> 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 EPA may

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

<sup>2</sup> 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)).

<sup>3</sup> "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.

consider taking under statutory "imminent and substantial endangerment" authorities<sup>4</sup> 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.<sup>5</sup>

#### 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.

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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<sup>4</sup> 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.

<sup>5</sup> 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. "facilities owned or managed by Tribal Governments . . ." 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.<sup>6</sup>

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-

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<sup>6</sup> "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.<sup>7</sup>

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

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.<sup>8</sup> 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 written plan for providing compliance assistance to the facility.<sup>9</sup> The plan should specify the nature of

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<sup>7</sup> 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).

<sup>8</sup> 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.

<sup>9</sup> 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.<sup>10</sup>

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<sup>10</sup> 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

1. “...a significant threat to human health or the environment exists...”

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. “...such action would reasonably be expected to achieve effective results in a timely manner...”

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.

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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.

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

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. Other factors EPA should consider

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.<sup>11</sup> 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

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<sup>11</sup>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.

called for.

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.<sup>12</sup> 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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<sup>12</sup> 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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NOTICE: 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 United 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 revisions of this guidance document.  
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

APR 17 2007

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

**MEMORANDUM**

SUBJECT: Transmittal of the Questions and Answers on the Tribal Enforcement Process

FROM: Walker B. Smith, Director  
Office of Civil Enforcement

TO: Senior Enforcement Managers, Regions I - X  
Regional Counsel, Regions II - VII, IX, X  
Senior Legal Enforcement Managers Region I, VIII

This memorandum transmits the final “Questions and Answers on the Tribal Enforcement Process.” The Office of Enforcement and Compliance Assurance (OECA) worked with the American Indian Environmental Office, the Office of General Counsel, and the regional offices in developing this guidance. We also circulated the document to federally recognized Indian tribes and solicited their input.

This document provides assistance in implementing the “EPA Policy for the Administration of Environmental Programs on Indian Reservations” (November 8, 1984) (Indian Policy) and responds to questions raised by tribes and EPA regional offices since OECA issued the “Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy” (Enforcement Guidance) in January 2001. It covers case-specific issues surrounding compliance assistance, inspections, and enforcement. It also emphasizes points in the enforcement response process when it is particularly important to keep the affected tribe apprised of developments and to consult and coordinate with the tribal government. Key points that are expanded in this guidance include:

- what is considered a “tribal facility” for purposes of the Enforcement Guidance,
- the development and implementation of a written compliance plan,
- when enforcement action may be appropriate, and
- examples of exigent circumstances affecting the applicability of the processes set forth in the Enforcement Guidance.

We hope this document assists EPA’s regional offices in their efforts to ensure that the process of compliance assurance in Indian country, from inspection planning to formal

settlement, is as straightforward and transparent as possible. Our goal is to give Regions and tribes the tools they need to ensure protection of human health and the environment in Indian country to the same extent it is assured outside of Indian country. We reiterate our resolve to use compliance and technical assistance to help tribal facilities achieve compliance with environmental laws and regulations. However, where such compliance assistance does not achieve a timely return to compliance, we also want to ensure that the Regions carefully consider their enforcement options in a time frame that ensures that human health and the environment in Indian country are not compromised.

If you have any questions, please contact me or have your staff contact Mary Andrews of my staff at (202) 564-4011. I appreciate your continued efforts to ensure human health and environmental protection in Indian country through your work on, and implementation of, this document.

Attachment

cc: Enforcement Coordinators, Regions I-X  
Pat Hirsch, Acting Principal Deputy General Counsel  
Carol Ann Siciliano, Acting Associate General Counsel, Cross-Cutting Issues Law Office  
Carol Jorgensen, Director, American Indian Environmental Office  
Lisa Lund, Deputy Director, Office of Compliance  
Randy Hill, Deputy Director, Office of Civil Enforcement  
Rosemarie Kelley, Director, Waste and Chemical Enforcement Division  
Tod Siegal, Office of General Counsel  
Jonathan Binder, Office of Compliance

# **Questions and Answers on the Tribal Enforcement Process**

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## **Questions and Answers on the Tribal Enforcement Process**

In 1984, the U.S. Environmental Protection Agency (EPA or Agency) issued the “EPA Policy for the Administration of Environmental Programs on Indian Reservations” (Nov. 8, 1984) (Indian Policy), which sets forth principles to guide the Agency in dealing with federally recognized tribal governments and in its actions to protect human health and the environment in Indian country.<sup>1</sup> The Indian Policy established a policy of graduated response to noncompliance for facilities owned or operated by tribes, in which a tribal government has a substantial interest, or over which a tribal government has control (tribal facilities). In 2001, the Office of Enforcement and Compliance Assurance (OECA) issued a “Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy” (January 17, 2001) (Enforcement Guidance), which sets forth procedures for EPA to follow when conducting compliance evaluations in Indian country.

The Enforcement Guidance established a process whereby EPA will consult with tribal governments and allow tribal facilities an opportunity to return to compliance with EPA assistance, and if this is insufficient, to allow EPA to proceed with enforcement action so as to protect human health and the environment. This document responds to questions about compliance assistance, compliance monitoring, and enforcement at facilities in Indian country that have been raised since the Enforcement Guidance was issued.

The questions and answers in this document apply only to violations of EPA’s civil regulatory programs. They do not apply to criminal conduct, criminal investigations, or enforcement pursuant to criminal provisions of laws or regulations that are enforced by EPA.

This document is intended solely as guidance for employees of EPA. It is not a regulation and does not impose any legally-binding requirements on EPA or the regulated community. It may not be relied upon to create a right or benefit. EPA retains the discretion to adopt approaches on a case-by-case basis that differ from this guidance.

### **I. Is the Facility a Tribal Facility?**

If a facility is owned, managed, or operated by a tribal government, or a tribal government has a substantial interest in, or exercises control over, the facility, then the facility is a tribal facility and EPA should follow the process set forth in the Enforcement Guidance in proceeding with compliance assistance and enforcement. Tribal facilities can include facilities located within or outside Indian country.

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<sup>1</sup> Indian country is defined in 18 U.S.C. § 1151 to include Indian reservations, dependent Indian communities, and Indian allotments.

1        **Q:** *Who is responsible for determining whether a facility is a tribal facility? How do I coordinate with the affected tribe in determining whether the facility is a tribal facility?*

**A:** The EPA regional offices are responsible for making this determination. However, unless the tribal interest is already known, EPA Regions should give the affected tribe an opportunity to provide information regarding its interest in the facility and to consult with EPA regarding the tribe's interest. In order to obtain the tribe's views, and to obtain any other information which may be useful in assessing the facility's status, the Region may send the tribal government a letter outlining the Enforcement Guidance and soliciting the tribe's views, summarizing any information the Region already has in this regard. Informal discussions with tribal government staff, such as the tribal environmental department, prior to or after sending the letter, may also be useful and may help to obtain a prompt response. In cases where it is obvious that a non-compliant facility is a tribal facility, discussion with the tribe on this issue would be unnecessary. For example, if the facility is a tribally-operated public water supply system, such discussions would be unnecessary. EPA's analysis of this information and its determination should be sent to the tribe and documented in the case file.

2.        **Q:** *Is the facility owned, managed, or operated by a tribal government?*

**A:** A facility in which a tribe holds a substantial ownership, management, or operational interest is a tribal facility. For example, a facility operated by a tribally-owned utility service is a "tribal facility." A facility owned, managed, or operated by tribal members is not a tribal facility unless a tribal government has a substantial interest in, or exercises control over, the facility, as described further below.

3.        **Q:** *Does a tribal government have a substantial proprietary interest in or control over the facility?*

**A:** The Region should consider the nature and extent of the tribal government's ownership interest, and the tribe's input concerning its interest, when determining whether the tribe has a "substantial proprietary interest" in the facility. Depending on the circumstances of a particular facility, a significant ownership interest, corporate relationship, or other factors may give the tribe control over operations such that it is a tribal facility. For example, a manufacturing facility or agricultural operation owned and operated by a tribal development corporation would typically be a "tribal facility."

4.        **Q:** *Can a tribal government have a substantial interest in a facility that is not "proprietary"?*

**A:** The Enforcement Guidance recognizes that a tribal government may have a substantial interest in a facility that is not a proprietary interest. For example, if a facility provides a significant source of employment for the tribe, the Region may consider this interest before proceeding to address the noncompliance. The existence of a lease between a tribe and the operator of a facility does not, in itself, establish a substantial non-proprietary interest. However, the terms of a particular lease may give the tribe control over operations such that it is a tribal

facility. In addition, the income generated by the lease may in some cases give the tribe a significant financial interest in the facility such that it is appropriate for EPA to treat the facility as a tribal facility.

In these circumstances it may be appropriate to ask the tribe about the nature of its lease revenue to determine whether it constitutes a substantial interest within the meaning of the Enforcement Guidance. An inquiry into non-proprietary interests is intended to capture situations where a tribe has a sufficient interest in a facility that it is appropriate for EPA to work cooperatively with the tribal government to help the facility achieve compliance. However, since an enforcement action does not typically influence ongoing facility operations, lease payments and employment numbers are unlikely to be affected by an enforcement action against the facility. For example, in one instance, a tribe indicated that it had a substantial non-proprietary interest in an oil production facility operated by a private oil company due to the lease payments to the tribe and the number of tribal members employed at the facility. Based on this information, EPA determined that the facility should be treated as a tribal facility. However, the tribe asked EPA to proceed with enforcement action against the facility without applying its process for enforcement at tribal facilities.

5.     *Q: How do I respond if the facility is not a “tribal facility”?*

A: Once EPA has determined that a facility is not a tribal facility, EPA generally responds to noncompliance in the same manner as with a facility outside Indian country. EPA should notify and consult with the affected tribal government on a government-to-government basis to the greatest extent practicable and to the extent permitted by law. However, EPA communications with the tribal government may be constrained by the need to preserve the confidentiality of enforcement sensitive or confidential business information.

**II. What Do I Do When Planning Information Requests and Inspections of Facilities in Indian country?**

6.     *Q: Should OECA concurrence be obtained before issuing information requests?*

A: No, the OECA concurrence process does not apply to requests for information. However, the Region should inform the relevant tribal government when issuing information requests to tribal facilities, and where appropriate, may inform tribal governments of information requests issued to non-tribal facilities located in Indian country.

7.     *Q: Should OECA concurrence be obtained before conducting inspections?*

A: No, OECA concurrence is not called for before conducting inspections. Consistent with the Indian Policy and the “Presidential Memorandum on Government to Government Relations with Native American Tribal Governments” (April 29, 1994), the Region should generally notify the tribal government in advance of visiting a facility in the tribe’s Indian country, and offer the tribe an opportunity to coordinate further with EPA regarding the inspection where practicable. If advance notice is not possible or if the visit involves an unannounced inspection, EPA should

contact the tribal government as soon as possible after the inspection.

8.     *Q: Should I meet with the tribe before the inspection?*

A: Before an inspection the Region should contact the tribe to discuss the planned activities for your visit, including:

- facilities targeted for inspection during your visit;
- what you will do during your visit and what potential follow-up actions may be needed;
- tribal information and concerns regarding the facilities to be inspected; and
- verification of appropriate contacts for the tribe and EPA.

Where appropriate, the Region should also offer the tribe an opportunity to meet with EPA before the inspection. This is particularly important when the Region has not recently visited this tribe or has not established a routine working relationship with the affected tribe.

### **III. What Do I Do If I Identify Noncompliance?**

EPA should inform the tribal government of the results of each inspection in a timely manner. If EPA identifies potential non-compliance at a tribal facility, EPA should follow the procedures in the Enforcement Guidance as clarified below.

9.     *Q: What is the role of the state in which the facility is located when EPA is addressing noncompliance at a facility in Indian country?*

A: Under general principles of federal Indian law and policy, primary jurisdiction in Indian country generally rests with the federal government and the tribe inhabiting it, and not with the states. Accordingly, unless and until a tribal government is approved by EPA to implement a federal environmental program, EPA generally implements the program in Indian country. State contact may be appropriate under certain exceptions to this general rule. For example, on the Puyallup Reservation, an act of Congress allows the State of Washington to be the lead agency for administration of certain programs on non-trust land within the historic boundaries of the reservation.

At the same time, EPA's Indian Policy encourages cooperation between tribal, state, and local governments to resolve environmental problems of mutual concern. Therefore, it may be appropriate for EPA, after consulting with the affected tribe, to notify the state in which a facility is located when a facility's noncompliance may be of mutual concern to the state and tribe. In consultation with the affected tribe, EPA may also in appropriate circumstances coordinate with the state and the tribe in ensuring that adequate compliance assistance is provided. Where a state asserts jurisdiction in Indian country, EPA's regional staff should notify the Office of Regional Counsel and the Office of General Counsel, as appropriate, of the situation, consult with the relevant tribe, and confer with the state.

#### **IV. Has EPA Developed a Written Compliance Plan?**

10.     **Q:** *What is the purpose of the written compliance plan?*

**A:** The written compliance plan is used to communicate to the facility and the tribal government identified noncompliance at tribal facilities and the steps necessary to return the facility to compliance. Putting the plan in writing helps to ensure that the tribe understands its responsibilities and the opportunities for assistance EPA will make available to the tribe as it works to achieve compliance. The compliance plan also gives the facility and the tribe clear notice of EPA's expectations with respect to progress toward compliance and EPA's timeline for initiating an enforcement action if compliance is not achieved. As such, the compliance plan emphasizes EPA's compliance and enforcement expectations and should help the facility achieve compliance consistent with the Indian Policy and the Enforcement Guidance.

1       **Q:** *When should the Region develop a compliance plan?*

**A:** Regions should develop a compliance plan as soon as is practicable after non-compliance is identified. The Region should develop and implement the compliance plan in consultation with the affected tribe. In that way, the compliance plan can simultaneously serve as notice to the tribe of the compliance and enforcement issues and an indication of EPA's willingness to work cooperatively to resolve the matter. Therefore, the Region should send a draft compliance plan to the tribal government and the affected facility for review. The Region should provide the tribe with a specific deadline by which to submit comments. If the tribe does not submit comments or otherwise respond to the compliance plan, the Region should notify the tribe that the plan will be implemented as drafted.

12.     **Q:** *Should Regions develop compliance plans in all cases of noncompliance involving tribal facilities?*

**A.** While a compliance plan is generally warranted whenever there is a reasonable expectation of cooperation from the tribe or facility, there are circumstances in which development of a compliance plan would not be effective. For example, a compliance plan may not be appropriate when EPA has consulted with the tribal government and there is a documented history of disinterest in or resistance to EPA's efforts to provide compliance assistance. In addition, a compliance plan may not be appropriate if the Region has previously provided compliance or technical assistance to the facility and EPA believes that additional assistance will not result in a return to compliance (for example, at a drinking water system with the proven ability to perform monitoring and reporting requirements yet repeatedly fails to actually monitor and report, despite EPA assistance). Finally, a compliance plan might not be immediately feasible when exigent circumstances exist and an immediate enforcement action is necessary to address the hazard (see questions 30 - 31, below). If the Region decides not to develop a compliance plan to address a particular tribal facility, they should inform the tribe in writing of that decision and the reasons why a compliance plan may not be an appropriate means to address that noncompliance.

13.     ***Q: What should the compliance plan cover?***

**A:** Compliance plans vary in length and detail based on the specifics of the situation and nature of the noncompliance. At a minimum, the compliance plan should include the following:

- a description of the noncompliance that EPA identified;
- the nature of the assistance to be provided to the facility and the timeline for providing the assistance;
- the specific steps the facility will take to come into compliance based on the types of activities needed and the milestones associated with the activities; and
- the enforcement response anticipated if the facility's compliance does not improve according to the milestones stated in the plan.

The compliance plan could provide that the Region will discuss with the tribal government whether to pursue prompt enforcement action against the tribal facility if key milestones are missed.

14.     ***Q: Can the compliance plan include assistance provided by another agency?***

**A:** Yes, where appropriate, EPA should include other federal agencies in its compliance efforts as early as is reasonable under the circumstances. Federal agencies such as the Bureau of Indian Affairs, the Indian Health Service, and the Rural Utility Service have significant resources to assist tribes in protecting human health and the environment. Where another federal agency has provided technical assistance to a tribal facility and has documented the assistance given, EPA may take into account such assistance in drafting and implementing its compliance plan, providing additional compliance assistance as appropriate. In consultation with the tribe, EPA and a tribe may occasionally want to take advantage of compliance assistance resources of state agencies. EPA should document in the case file its contacts with other agencies. The Regional Indian Coordinator can assist with such interagency coordination.

15.     ***Q: What should Regions do if milestones contained in the compliance plan are missed?***

**A:** The milestones contained in a compliance plan should outline the specific steps the facility will take to come into compliance based on the types of activities needed. Regions should notify the tribe when milestones are missed; if oral notification occurs, the discussion should be memorialized in writing. In addition, Regions should review the missed milestone(s) and decide whether or not it is appropriate to revise the compliance plan and associated milestone(s) or proceed with the outlined enforcement action. Missed milestones are an important indicator of whether or not the facility is able to return to compliance in a timely manner.

16.     ***Q: How do I provide compliance assistance for a violation that is not continuing in nature?***

**A:** For some types of violations, technical assistance can help a facility achieve and maintain compliance. For example, EPA and other entities may provide hands-on assistance in the operation of a public water supply system over a period of months or even years. For other types

of violations, however, such as dredging and filling wetlands without the necessary permit, EPA may not be able to provide compliance assistance after the fact. In such cases, the Region may be able to provide information on avoiding a repeat violation and may provide technical assistance in planning and carrying out mitigation measures. For example, in the dredging and filling context, EPA generally would provide technical assistance to the tribal facility regarding the development and implementation of a restoration plan or mitigation plan, such as providing information concerning the proper qualifications for the consultants for restoration and/or mitigation work and a timeline for the necessary tasks. This would assist the tribal facility in retaining a consultant and developing appropriate plans for EPA review and approval.

## **V. What Is an “Enforcement Action” and When Is it Appropriate?**

Consistent with the Indian Policy, the Enforcement Guidance, and the protection of human health and the environment, enforcement in Indian country may be an appropriate response to noncompliance.

7.     *Q: Does the guidance apply in cases where EPA has authorized a tribe to administer the federal program under which the violations occurred?*

A: The Enforcement Guidance does not apply to enforcement actions taken by tribes under tribal codes, including any tribal action under an EPA-authorized program. However, the Enforcement Guidance does apply to all of EPA’s civil enforcement actions in Indian country. Even if the tribe has an approved program in place, EPA maintains jurisdiction and authority to initiate an independent enforcement action to address violations of the requirements of an approved program. Similarly, if the tribe is authorized for a portion of an EPA program but has left the enforcement authority to EPA, the Enforcement Guidance applies to any EPA enforcement.

18.    *Q: Are actions regarding grants to tribes, such as a cost recovery action under the grant regulations in cases where the tribe did not perform the required grant activities, enforcement actions calling for application of the guidance?*

A: No, the Enforcement Guidance does not apply to either the grant process or any actions taken under the grant regulations.

19.    *Q: When is enforcement action appropriate against a tribal facility?*

A: Under the Indian Policy, EPA may consider taking an enforcement action against a tribal facility when it determines that (1) a significant threat to human health or the environment exists, (2) the action would reasonably be expected to achieve effective results in a timely manner, and (3) the federal government cannot use other alternatives to correct the problem in a timely fashion.

20.     Q: *When does EPA demonstrate that it meets the threshold criteria for taking an enforcement action against a tribal facility?*

A: EPA should determine that the threshold criteria have been met before bringing a formal enforcement action against a tribal facility, unless the exigency of the situation requires otherwise. Regions do not need to determine that the three threshold criteria for bringing an enforcement action have been met prior to pursuing informal enforcement actions, such as Notices of Violation or Notices of Noncompliance, which merely request prompt return to compliance.

21.     Q: *Can a tribe request enforcement action against a tribal facility without full application of the Enforcement Guidance?*

A: Yes, the Enforcement Guidance states that a tribal government “may express the view that EPA should pursue prompt enforcement action against [a tribal] facility as the most appropriate response, without undertaking the cooperative measures and compliance assistance otherwise contemplated by [the] guidance.” In consultation with the tribal government, the Region may determine that it is appropriate to pursue such prompt enforcement. In that case, “the Region should also obtain, and submit to Headquarters as part of the concurrence process, a written statement from the tribal government expressing [the tribal government’s] view that prompt enforcement is appropriate” and conveying the tribal government’s understanding of the nature of the proposed enforcement action, including “the violations that will be alleged, [and] the potential penalty and injunctive relief that will be sought.” The Assistant Administrator for OECA will review and, if appropriate, concur on such requests.

22.     Q: *What is a “significant threat” to human health or the environment?*

A: A significant threat to human health or the environment can include the direct threat posed by the release or potential release of contaminants into the environment and the exposure of humans or the environment to pollutants, as well as an indirect threat to human health or the environment, such as the threat to the regulatory program and the threat posed by failure to monitor or to maintain proper records. The existence of a significant threat is determined on a case-by-case basis.

23.     Q: *How does EPA assess whether the federal government may use other alternatives to enforcement against a tribal facility to correct the problem in a timely fashion?*

A: The Enforcement Guidance suggests three factors for EPA to weigh in determining whether it is appropriate to delay enforcement and, instead, consider other alternatives appropriate to the particular circumstances of a case. EPA should consider: (1) the facility’s good faith efforts to remedy noncompliance in a timely manner, including the resources expended; (2) any relevant history of noncompliance with EPA regulatory requirements, including any requirements stated in administrative or judicial orders previously issued to facilities owned, managed, operated, or controlled by the same tribe; and (3) the degree of willfulness.

## **VI. What is the Process for Obtaining OECA Concurrence for Enforcement Against Tribal Facilities?**

24. **Q:** *When should OECA concurrence be obtained for enforcement against a tribal facility?*

**A:** OECA concurrence should be obtained when:

- EPA is considering a formal enforcement action against a tribal facility, unless exigent circumstances exist;
- an administrative order on consent or other settlement includes penalties;
- an administrative order is issued unilaterally by EPA; and
- an enforcement action or settlement involves issues that OECA has identified as nationally significant.

As set forth in the Enforcement Guidance, OECA will consult with the American Indian Environmental Office and the Office of General Counsel in reviewing regional requests for concurrence. When EPA pursues enforcement action against a tribal facility, it should continue to consult with the tribal government about compliance status as appropriate.

25. **Q:** *When is OECA concurrence NOT needed for enforcement against a tribal facility?*

**A:** Regions need not obtain OECA concurrence for informal enforcement actions. Informal enforcement actions include actions such as a Notice of Noncompliance or Notice of Violation and show cause orders.

In addition, Regions do not need to obtain OECA concurrence before issuing administrative orders on consent that do not include penalties, or before entering consent agreements filed simultaneously with a complaint and final order where no penalty is sought, as provided in the Consolidated Rules of Practice, 40 C.F.R. Part 22. However, there may be other reasons for OECA concurrence or consultation on these types of actions, such as the existence of issues identified in OECA delegations as nationally significant issues. If regional staff have questions about whether their anticipated enforcement response calls for OECA concurrence, they should contact the tribal coordinator for OECA's Office of Civil Enforcement.

26. **Q:** *Is a field citation or another expedited enforcement response an “enforcement action” calling for OECA concurrence when issued to a tribal facility?*

**A:** Yes, the Enforcement Guidance calls for OECA concurrence before EPA issues to a tribal facility a field citation or other expedited enforcement response that seeks to collect a penalty.

27. **Q:** *Should OECA concurrence be obtained if the enforcement action does not seek penalties but does include stipulated penalties for future violations at the tribal facility?*

**A:** No, OECA concurrence need not be obtained for a consent order that includes provisions for stipulated penalties if the order does not seek a civil penalty. However, when stipulated penalties are triggered by failure to comply with the terms of an administrative order on consent, Regions should consult with OECA prior to assessing any penalties.

28. **Q:** *Is OECA concurrence called for with regard to amending an administrative order issued to a tribal facility?*

**A:** If the amendment to the administrative order is on consent, Regions need not obtain OECA concurrence. If the amendment is issued unilaterally, Regions should obtain OECA concurrence if the amendment significantly changes the nature or scope of requirements in the order.

29. **Q:** *When should the Regions begin discussions with OECA concerning noncompliance at a facility in Indian country?*

**A:** When addressing issues of noncompliance at tribal facilities, the Region should contact the tribal coordinator for OECA's Office of Civil Enforcement as soon as the Region discerns that compliance assistance alone may not achieve compliance. Regional enforcement personnel should consult with the regional tribal office and the affected tribe upon identification of non-compliance by a tribal facility. Where appropriate, OECA can assist the Region in developing the appropriate measures to resolve the violations, including both compliance assistance and enforcement. Advance notice to OECA will help to ensure that if the Region decides to proceed with an enforcement action, the concurrence process can be completed as expeditiously as possible. Under the guidance, OECA should issue a response within 20 business days of receipt of the concurrence package.

Regions should obtain OECA concurrence before initiating formal civil enforcement action against a tribal facility. However, in exigent circumstances, the Regions may need to act immediately to protect public health or the environment. In exigent situations, the Regions should follow the Enforcement Guidance to the extent practicable and should communicate promptly with the tribal coordinator for OECA's Office of Civil Enforcement and the appropriate tribal government regarding any actions for which prior communication and consultation was not possible. "Exigent circumstances" is discussed further in questions 30 and 31, below.

30. **Q:** *Can EPA conduct emergency actions at tribal facilities?*

**A:** Yes, EPA has statutory and regulatory authorities to respond to emergency situations where there is an immediate threat to human health or the environment. In exigent circumstances, the Region may need to proceed with emergency enforcement action before it can complete consultation with the tribal government, provide compliance assistance, or obtain OECA concurrence.

For instance, an exigent circumstance may exist where contamination is detected in a public water supply and the water is likely to be ingested. In these circumstances, it may be necessary to immediately issue an order requiring public notices of the contamination, boil orders, and/or bottled water, or it may be necessary to require that the system be shut down. These types of enforcement measures would address the exigent circumstance by preventing ingestion of contaminated water.

Even when addressing exigent circumstances, EPA should contact the tribal government to, at a minimum, alert them to the actions being taken. Formal consultation with the tribe should occur as soon as possible. Agency personnel should follow this guidance and all other applicable procedures to the extent practicable. Enforcement staff should also ensure prompt communication with OECA's tribal coordinator and the affected tribal government regarding any actions for which prior consultation was not possible. For example, where an order is issued within one or two weeks of detecting the threat, the Region will likely only be able to provide notice of the proposed action and a draft copy of the order before it is issued. Where an order is issued within a few days of detecting the threat, the Region should provide copies of the order and supporting documentation as soon as possible.

After the circumstances that prompted the action are addressed, the criteria and procedures of the Enforcement Guidance apply to any subsequent enforcement response at the tribal facility.

31      **Q:** *What is the difference between “imminent and substantial endangerment” and “exigent circumstances,” as used in the Enforcement Guidance?*

**A:** “Imminent and substantial endangerment” is the threshold set forth in various statutory provisions authorizing EPA to respond to imminent risk of harm. These statutory authorities include RCRA section 7003, SDWA section 1431, and CAA sections 303 and 112(r)(9). These statutory provisions generally authorize EPA to issue administrative orders or proceed in court to require actions to protect human health and the environment. For example, pollutants or contaminants released into a wetland that have not yet harmed aquatic life may present an imminent and substantial endangerment. Similarly, hazardous constituents in an aquifer that may be used as a future source of drinking water may present an imminent and substantial endangerment.

“Exigent circumstances” is used to describe situations requiring an immediate response to protect human health or the environment. For example, exigent circumstances may exist when EPA has detected contamination in a public water supply and the water is likely to be ingested. In exigent circumstances, the emergency nature of the situation may preclude the full application of the guidance before steps are taken to abate the harm. On the other hand, some situations that EPA can address using its imminent and substantial endangerment authorities do not rise to the level of exigent circumstances; for example, groundwater contamination that is slowly moving toward a drinking water source or an open dump that may present a threat of groundwater contamination, combustion, or spread of disease. In those situations, the Region will likely be able to follow the OECA concurrence process before proceeding with an enforcement action.

32.     **Q:** *Is the immediate expiration of the statute of limitations an exigent circumstance that warrants immediate action without full application of the Enforcement Guidance?*

**A:** Yes, the *immediate* expiration of the statute of limitations may warrant action without full application of the Enforcement Guidance. Ideally, Agency personnel will proceed in such a manner that the expiration of the statute of limitations will not be an issue and the process set forth in the Enforcement Guidance can be fully implemented. However, there may be circumstances where the statute of limitations will expire imminently and EPA believes that it can only assure protection of human health or the environment by preserving its legal claims. In any event, the Enforcement Guidance and all other applicable procedures should be followed to the extent practicable. The Regions should ensure prompt communication with OECA's tribal coordinator and the affected tribal government regarding any actions for which prior consultation was not possible.

If imminent expiration of the statute of limitations results in filing an action against a tribal facility before all of the steps identified in the Enforcement Guidance are carried out, EPA should proceed with compliance assistance and full application of the Enforcement Guidance to the extent feasible given the progress of the litigation.

33.     **Q:** *Who determines whether exigent circumstances exist?*

**A:** Typically, the Region makes the determination based on its judgment that exigent circumstances require immediate action and notifies the tribal coordinator in OECA's Office of Civil Enforcement and the tribal government as soon as possible. Where there is time to confer with OECA (rather than just notify) prior to making the determination that an exigent circumstance exists, the Region should do so.

34.     **Q:** *What happens after OECA concurs?*

**A:** Once EPA has determined that it is appropriate to initiate an enforcement action at a tribal facility, the Region should notify the affected tribe of the impending enforcement action. This notification should include the specific action to be taken, including the amount of any penalty and the nature of injunctive relief sought. EPA should proceed with the enforcement action to ensure that the violations are addressed in a timely manner. Consultation with the tribe should continue throughout the enforcement process to the extent it is appropriate and consistent with the tribe's role at the facility. In enforcement matters involving the Department of Justice (DOJ), EPA should coordinate carefully with DOJ to define the scope and manner of communication and consultation with the tribe.

35.     **Q:** *What should EPA document in the file when proceeding with an action under the Enforcement Guidance?*

**A:** Typically, every decision and communication should be documented in the case file. Oral communication with the affected tribal government or facility manager should be memorialized

in writing so EPA has a clear timeline of all steps taken to return the facility to compliance. Correspondence with the facility manager concerning noncompliance should be copied to the affected tribal government.

## VII. Other Questions Concerning Tribal Facilities

36. **Q:** *Does the Enforcement Guidance apply to federal facilities?*

A: The Enforcement Guidance only applies if a federal facility also qualifies as a tribal facility. Where a federal facility is not a tribal facility, EPA will address noncompliance at federal facilities in Indian country in the same manner as with federal facilities not located in Indian country. Where a federal facility is also a tribal facility, such as a school established by the Bureau of Indian Affairs but managed or operated by a tribe, the Enforcement Guidance applies, including consultation with the affected tribe regarding appropriate responses to violations at the facility. Regions may also consult EPA guidance for addressing federal facility noncompliance, including "The Yellow Book: Guide to Environmental Enforcement and Compliance at Federal Facilities," February 1999.

[Http://www.epa.gov/compliance/resources/publications/civil/federal/yellowbk.pdf](http://www.epa.gov/compliance/resources/publications/civil/federal/yellowbk.pdf).

37. **Q:** *With whom should EPA consult when working with a tribe?*

A: In consultations concerning tribal interest in a facility and non-compliance at tribal facilities, EPA should consult with the head of the affected tribal government, such as the tribal chair, or the duly-designated representatives, in a timely manner. If the tribe has delegated the authority to work with EPA on environmental compliance to a tribal agency, committee, or individual, then EPA should document that delegation in the case file and consult with that agency or official as the primary tribal official. Designation of the contact for both EPA and the tribe should occur as early as possible in the process so as to avoid confusion.

38. **Q:** *When consulting with a tribe pursuant to the Enforcement Guidance, how does EPA address concerns about the release of confidential information [i.e., confidential business information, enforcement confidential information, or communications otherwise not releasable under the Freedom of Information Act (FOIA)]?*

A: EPA should protect confidential information during tribal consultation, whether internal Agency communications or communications with a private party involved in the enforcement action. Accordingly, EPA should consult with tribes to the greatest extent practicable without divulging privileged or confidential information. In certain cases, for example, enforcement actions brought jointly by EPA and the tribe, EPA has entered into special arrangements to share information. If such an arrangement is needed, staff should consult their regional attorneys. In addition, tribal inspectors who are authorized to conduct Clean Air Act inspections on behalf of EPA do have access to confidential business information obtained from the facility being inspected. However, internal Agency communications and documents in an enforcement action would still be withheld as enforcement confidential.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

MAR - 8 2006

ASSISTANT ADMINISTRATOR  
FOR ENFORCEMENT AND  
COMPLIANCE ASSURANCE

**MEMORANDUM**

**SUBJECT:** Restrictions on Communicating with Outside Parties Regarding Enforcement Actions

**FROM:** Granta Y. Nakayama *Granta Y. Nakayama*

**TO:** Assistant Administrators  
Deputy Assistant Administrators  
Associate Administrators  
Regional Administrators  
Deputy Regional Administrators  
General Counsel

This memorandum reiterates earlier guidance and memoranda outlining restrictions on communicating with parties external to the Environmental Protection Agency (EPA) about enforcement actions. Continuing to implement these procedures will ensure an open and fair process, and will allow enforcement staff to negotiate and conclude cases successfully. When sensitive enforcement information is released by EPA through either discussions or written communications, it may result in less protection of public health and the environment and jeopardize settlement negotiations. I request that you relay the information in this memorandum to all of your managers and staff and continue to reiterate the importance of this policy.

**Historical EPA Directives on External Communications**

EPA has traditionally directed employees not to disclose information that will interfere with an investigation, settlement negotiation, or litigation. Since 1990, various policy statements and ethics advisories have addressed this issue, including EPA Ethics Advisory 90-2, and, most recently, an October 28, 2003, memorandum from Assistant Administrator J.P. Suarez, entitled, "Restrictions on Communicating with Outside Parties Regarding Enforcement Actions", which is substantially the same as this memorandum. Copies are attached for your reference.

I am hereby endorsing those past directives through this memorandum, and am providing further guidance to ensure that such information is maintained as privileged and confidential to the fullest extent allowed by law. We must also continue to work openly, fairly, and in accordance with all legal requirements while simultaneously protecting enforcement-sensitive and privileged information.



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## **Outline of General Principles**

Central to our enforcement work is the need to keep information that is not already in the public domain confidential while EPA is engaged in an enforcement matter. Although oftentimes the existence of an enforcement action is widely known, specific and sensitive enforcement information should be closely guarded. Therefore, communication with outside parties about enforcement-sensitive information should not occur.

Outside parties include, but are not limited to:

- Members of Congress or Congressional staff;
- Representatives of state or local governments that do not enter into a joint prosecution or confidentiality agreement with EPA or the federal government;
- Representatives of the media;
- Industry, trade associations, environmental groups, public interest groups; and
- Members of the general public, except when they are involved, as necessary, in a settlement involving a Supplemental Environmental Project (SEP).

Information that should not be shared with outside parties includes, but is not limited to:

- Information on the status of an investigation, negotiation, or settlement discussion, including strategy and tactics;
- Non-public information concerning pending litigation;
- Sensitive information that may affect how a case proceeds, even though the information may not be privileged;
- Non-public information that was inadvertently or otherwise disclosed by EPA or other parties;
- Information that is required to be treated as Confidential Business Information (CBI) pursuant to 40 C.F.R. Part 2; and
- Draft press and communications documents, such as press releases.

While there are many details within enforcement matters that are confidential and may not be shared with outside parties, public documents that can be shared with outside parties may include:

- Information requests to initiate investigations;
- Judicial complaints;
- Notices of violations;
- Administrative orders;
- Final settlement agreements;
- Motions and other documents filed with courts or filed in administrative proceedings; and
- Court decisions.

These types of public information can be shared with outside parties, although when communicating with outside parties about information that is already in the public domain, staff must be mindful of avoiding the release of confidential, non-public, and/or enforcement-sensitive information.

### **Protecting Settlement Communications**

It is common practice that once settlement negotiations begin in any given enforcement matter, that the parties agree, in writing, that such communications will be held confidential between the parties to the fullest extent allowed by law. These agreements are not only for the protection of the party subject to the enforcement proceeding, but also to protect EPA if the matter is not settled and proceeds to adjudication. In addition to upsetting the unique balance of offers and counteroffers presented in negotiations, a violation of a confidentiality agreement may constitute a violation of ethical standards. Certain legal privileges, such as attorney-work-product and attorney-client communications, may also be waived inadvertently if privileged information is made public. Enforcement staff should not discuss settlement negotiations with outside parties whether or not a confidentiality agreement exists.

During the negotiation process with a specific party or within the EPA internal case development phase, it is not uncommon that legal claims are discussed and litigation risks analyzed, as they are present in any case. Such communications are highly sensitive and must be protected from disclosure. The fact that EPA and a party are in settlement negotiations may not be confidential, but should not be disclosed with respect to a case that has been referred to the Department of Justice (DOJ) without prior consultation with DOJ. The details of exchange of offers, counteroffers, and other settlement dynamics are confidential and must not be disclosed to outside parties. In particular, discussions on the remedy being sought in settlement should be confined to the settlement room where only EPA and other government personnel involved in the enforcement matter and the opposing party are present. Discussions with outside parties relating to the remedy necessary to settle a given case are inappropriate and should not occur.

### **Communications with Congress**

As to Congressional inquiries on pending enforcement matters, Members of Congress and Congressional staff should be handled in the same way as any other outside party when enforcement information is requested. This has consistently been EPA's policy for many years, and I reiterate it again today. While outside parties may contact Congress on legislative, policy, and statutory implementation issues, it is inappropriate for Congress to mediate, participate, or in any way influence the enforcement process against a specific individual or company. Congress is not a party in enforcement actions and should not be privy to settlement exchanges on the appropriate remedy required to settle an enforcement matter, penalty demands, and other case-specific matters. The details of exchange of offers, counteroffers, and other settlement dynamics are confidential and must not be disclosed to outside parties.

If you receive a request from a Member of Congress or Congressional staff, please refer that person to EPA's Office of Congressional and Intergovernmental Relations or the regional Congressional Liaisons. DOJ should be notified and consulted with respect to any communications with Congress regarding an ongoing judicial action or a referred case, and may be present at any meetings with Congressional representatives concerning any such case. Please keep in mind that it is never appropriate to have a Member of Congress or Congressional staff present during settlement negotiations, and any such request must be denied.

### **Conclusion**

Enforcement of the nation's environmental laws is an important component of EPA's mission to protect public health and the environment. Development and the progression of an enforcement case is highly sensitive, and all EPA employees involved in or with knowledge of an enforcement matter are responsible for ensuring that the process is protected and professionally maintained. Failure to adhere to the restrictions outlined in this memorandum may result in disciplinary action. If you have any questions relating to communicating enforcement matters to outside parties, including Congress, please contact my office. If you or anyone on your staff is uncertain about what information should or should not be disclosed in a specific situation, please contact my office or your Deputy Ethics Official (DEO) so that we can evaluate the situation.

Thank you for your attention to this important policy. I look forward to continuing to work together to make sure we are doing all we can to protect our land, air, and water.

cc: Stephen L. Johnson, Administrator  
Marcus C. Peacock, Deputy Administrator  
Charles Ingebretson, Chief of Staff  
Roger R. Martella, Jr., Designated Agency Ethics Official  
Regional Counsels  
Regional Enforcement Managers  
Regional Enforcement Coordinators  
OECA Office Directors and Deputy Office Directors

#### **Attachments:**

EPA Ethics Advisory 90-2, "Outside Communications Regarding Matters Under Investigation, in Pre-Litigation Stages, or in Litigation"  
Memorandum from Assistant Administrator J.P. Suarez, dated October 28, 2003, "Restrictions on Communicating with Outside Parties Regarding Enforcement Actions"



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

MAR 16 2012

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

**MEMORANDUM**

**SUBJECT:** Report on Formal Enforcement Actions on Which Tribal Consultation Has Occurred, Due to the American Indian Environmental Office by April 1, 2012

**FROM:** Lisa Lund, Director  
Office of Compliance *Lisa Lund*

Pamela Mazakas, Acting Director *Pamela J. Mazakas*  
Office of Civil Enforcement

**TO:** Regional Enforcement Coordinators  
Regional Enforcement Division Directors  
Regional Counsel  
OECA Office Directors

As you know, the *EPA Policy on Consultation and Coordination with Tribal Governments* (Policy) states that consultation with tribal governments should occur when EPA actions “may affect tribal interests.” These actions may include regulations, policies, compliance monitoring, and civil enforcement and response actions. The Policy requires that, beginning October 1, 2011, and every six months thereafter, EPA offices, including OECA, shall report to the American Indian Environmental Office (AIEO) on matters about which tribal consultation has taken place, is ongoing, or is expected to be undertaken in the upcoming six-month period. The next report is due on April 1, 2012.

For this reporting period, OECA intends to report in the following manner, and to the extent possible, we ask you to adopt a similar approach. With regard to civil enforcement, OECA intends to report only past consultation related to formal civil administrative enforcement actions that have been taken on or after October 1, 2011 through March 31, 2012. In this regard, formal enforcement shall mean the filing of an administrative complaint, issuance of a unilateral order, or the filing of an administrative order on consent or consent agreement and final order. OECA does not plan to report on enforcement actions in negotiation, under development, or those that have been referred to the Department of Justice. OECA is not submitting information regarding ongoing, anticipated, or past criminal enforcement actions. Decisions regarding reporting regulations, policies, guidance and other OECA activites will be made on a case-by-case basis in consultation with OECA’s Tribal Consultation Advisor, Jonathan Binder.

After the April 1 reporting deadline, the next reporting deadline is October 1, 2012. In advance of that deadline, we will work with you to develop permanent guidance regarding the type of information OECA and the Regions should provide AIEO. If you have any questions about what to report to AIEO or the development of permanent guidance, please contact either of us or Jonathan Binder at 202-564-2516.

cc: Division Directors, Office of Enforcement and Compliance Assurance  
JoAnn Chase, American Indian Environmental Office  
Karin Koslow, American Indian Environmental Office  
Regional Tribal Consultation Advisors

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# Protocols for Interactions with Tribal Leaders

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## *Consultation Cultural*

- Individuals may have preferences between the terms American Indian, Alaska Native, or Native American, but it is generally preferable to refer to an individual as a member of his or her particular tribe.
- Federal jargon, acronyms, and standard operating procedures that are commonplace for the federal employees may not be familiar to tribal members. Therefore, adjust your presentation accordingly. Educate, but don't patronize.
- Listen and observe more than you speak. Learn to be comfortable with silences, or long pauses in conversation. In tribal communities, any interruption is considered highly disrespectful, and may undermine your credibility.
- When you are working with Indian tribes, it is critical to be sensitive to each tribe's history and culture. While some tribes are related culturally or linguistically to others, each of the 560 federally recognized tribes is unique.
- To maintain the parity between the federal and tribal participants, consultations should provide both a federal and tribal co-moderator and should avoid using raised stages, which would give the impression of giving a speech or presentation to Tribal leaders as opposed to the more appropriate dialogue between equals.
- Problems in cross-cultural communication occur primarily because people assume that the elements of their own culture are clearly understood by everyone, thereby misunderstanding the distinctions between their culture and that of others. Being sensitive to such possibilities and seeking clarification in a patient and respectful manner can go a long way in bridging any gaps that may exist in cross-cultural communication
- While the federal government may choose to consult on a specific policy matter, it is not uncommon for a tribal leader to raise other matters that are not related to the discussion.
- Tribal leaders may ask for their statements to be submitted for the record, and they will expect a response to the issues raised.

## *Dialogue*

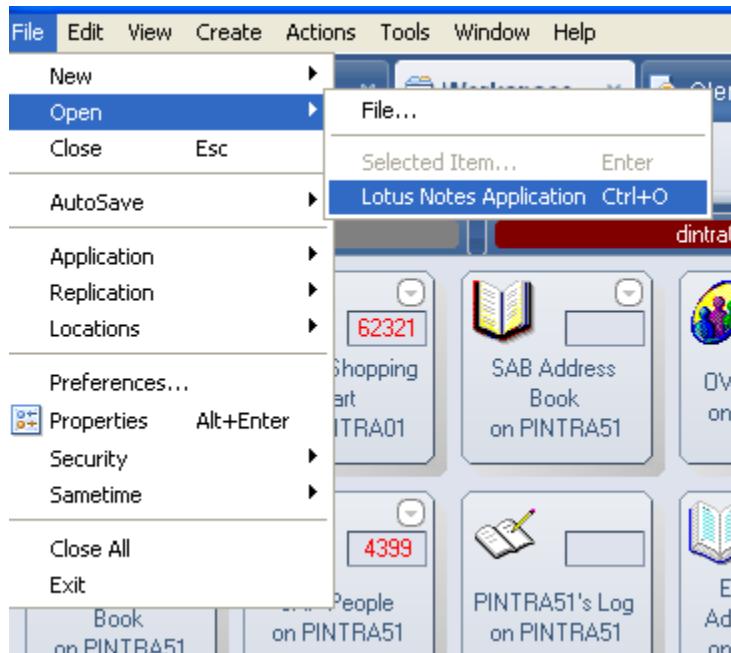
- Federal officials should silence and put away all Blackberries, cell phones, and other electronic devices.
- Do not engage in side conversation at the table or in the room; take your meetings outside.
- Do not glance at watches or concern yourself with strict adherence to the agenda times.
- Do not congregate in hallways or constantly step in/out of the meeting room.

- Do not raise complaints about other federal agencies; remember you are a representative of the US federal government.
- Take careful notes and show genuine interest in the Tribal leader statements.

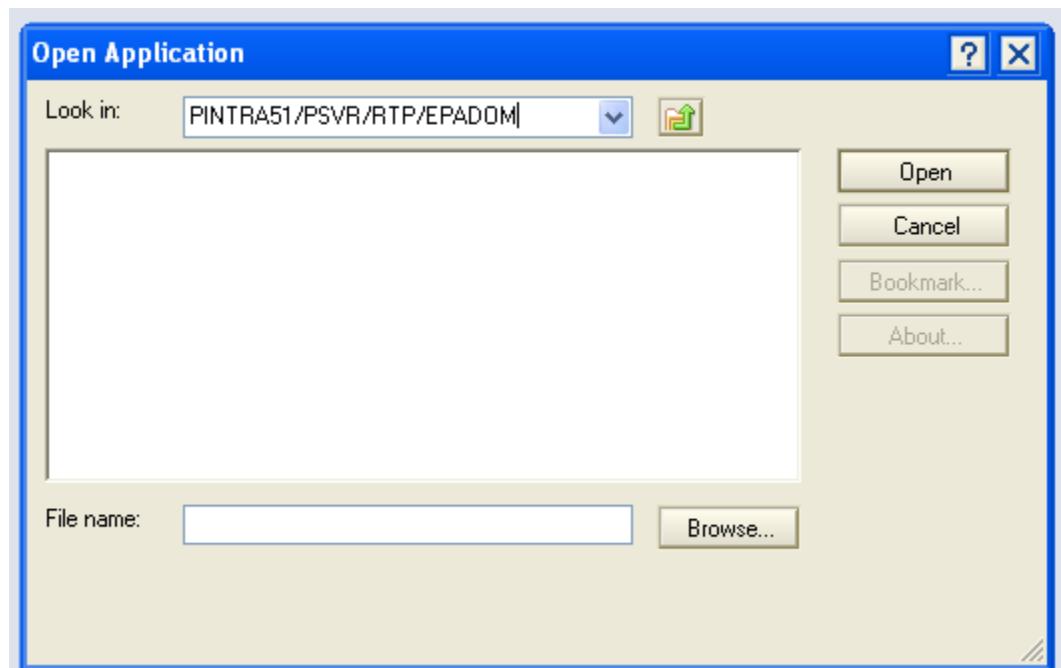
## **Appendix K:**

Tribal Tracking System Help and Accessing  
the Tribal Consultation Tracking System Database  
through Lotus Notes

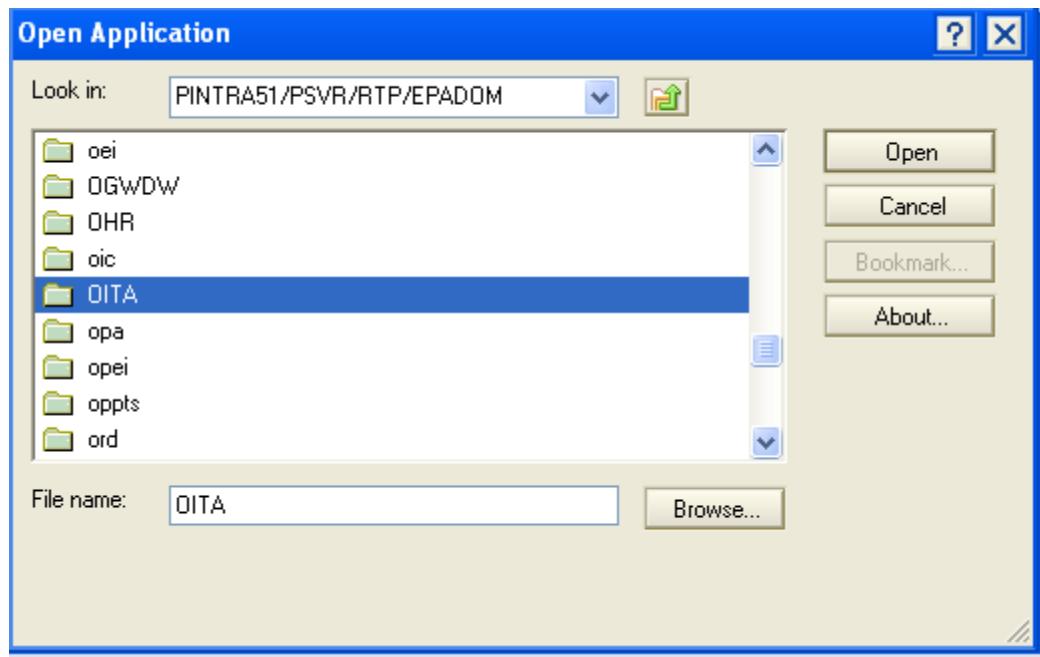
## Accessing Tribal Consultation Tracking System Manually



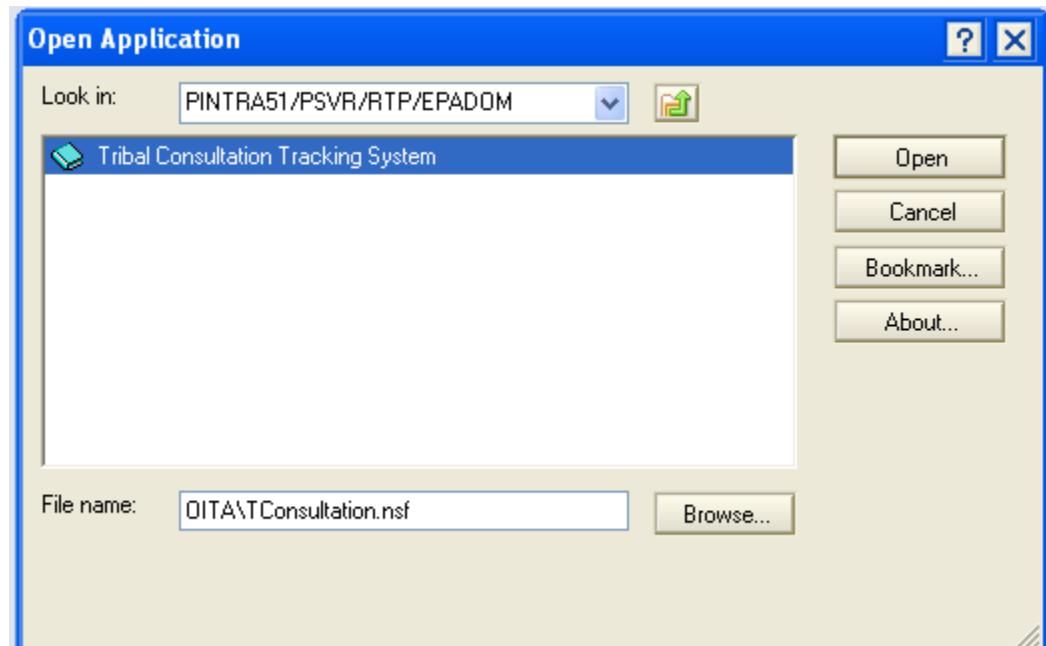
Type in PINTRA51/PSVR/RTP/EPADOM in “Look in” if it doesn’t appear in the dropdown list:



Click “Open” on OITA directory:



Click “Open” on Tribal Consultation Tracking System database:





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

AUG 23 2011

Office of  
International and  
Tribal Affairs

**MEMORANDUM**

**SUBJECT:** Tribal Consultation Opportunities Tracking System

**FROM:** Michelle DePass, Assistant Administrator *MDP*

**TO:** Assistant Administrators, Regional Administrators

I am very pleased to announce the launch of EPA's new Tribal Consultation Opportunities Tracking System (TCOTS), an important step in the implementation of the new *EPA Policy on Consultation and Coordination with Indian Tribes* (Policy), released May 4, 2011.

As you know, the Policy requires each national and regional office to prepare, by October 1<sup>st</sup> and April 1<sup>st</sup> of each year, a list outlining activities that may be appropriate for tribal consultation over the coming 6 month period. We understand that there are some remaining questions about how to apply the policy in particular situations, the Tribal Consultation Advisors workgroup continues to work through questions using the general categories cited in the Policy as a starting point. Until we gain more experience in this process, we encourage you to use a broad standard to identify activities appropriate for consultation, and to use your Tribal Consultation Advisor as a resource for any questions that might arise in the semi-annual review process.

TCOTS was developed by the American Indian Environmental Office with the input of the Tribal Consultation Advisors workgroup. The system has been created in Lotus Notes to facilitate easy entry of key information and documents related to your office's tribal consultation activities that are planned or in-progress. While the policy outlines a semi-annual reporting structure, the system has been set up to ensure that information can also be entered at any time.

Thank you in advance for providing this data which will allow the Agency's Tribal Portal website to link directly to this database to provide internet access to tribes on these consultation opportunities. This new system will assist EPA in achieving our goal of implementing a national tribal consultation system that is transparent and user-friendly for EPA and our tribal government partners.

Internet Address (URL) • <http://www.epa.gov>

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Please contact JoAnn Chase, Director, American Indian Environmental Office at 202 564-0878 or chase.joann@epa.gov should you have any questions about this effort. For specific questions about TCOTS contact AIEO's Dona Harris at 202 564-6633 or your Tribal Consultation Advisor.

Attachment

cc:      Tribal Consultation Advisors

**U.S. Environmental Protection Agency**  
***Tribal Consultation Advisors***

<u>Organization</u>	<u>Name</u>
Office of Administration and Resources Management	Raul Soto
Office of Air & Radiation	C. Darrel Harmon
Office of Chemical Safety and Pollution Prevention	Caren Robinson
Office of Enforcement and Compliance Assurance	Jonathan Binder
Office of Environmental Information	Beth Jackson
Office of Research & Development	Monica Rodia
Office of Solid Waste & Emergency Response	Andrew Baca
Office of Water	Felicia Wright
Office of General Counsel	Jessica Scott
Office of the Chief Financial Officer	Mary Jo Blumenfeld
Office of Policy	Ken Munis
Region I	Mike Stover
Region II	Janice Whitney
Region III	Terry Gallagher
Region IV	Cindy J. Nolan
Region V	Willie Harris
Region VI	Jeannine Hale
Region VII	Wolfgang Brandner
Region VIII	Alfreda Mitre
Region IX	Nate Lau
Region X	Sally Thomas

# Tribal Consultation Tracking System Help

## I. Database Field Definitions /Descriptions



1. Topic – 80 character length title of the consultation. TIP- Provide a concise title statement. The use of the word consultation is not needed. All events listed in this system are consultation. Don't repeat office or region designation. That will appear as separate entry field.
2. Lead Organization – EPA Region or Program Office that is leading this consultation activity.
3. EPA Point of Contact – EPA staff person that is the primary contact for this consultation activity.
4. Tribal Consultation Advisor (TCA)- EPA's designated headquarters and regional staff that are responsible for consultation in their respective program or regional office (see list on second page for your TCA).
5. Start of Tribal Consultation- The date of the Notification letter.
6. Scope – The geographical coverage of the consultation activity (National, Regional, or Multi-Regional)
7. Consultation Activity – Non-exclusive list of EPA activity categories normally appropriate for consultation if they may affect a tribe(s)<sup>1</sup>.
8. Consultation Methodology – The form of interaction(s) taken to solicit views of tribal governments during the consultation period. For each interaction selected you will be prompted to provide a date.
9. Notification Letter- A formal written letter to tribal governments that initiates the consultation process. This letter identifies the reason for this consultation activity, scope, point of contact, start and end of the comment period, the method to be used to consult and all appropriate logistics. The letter may also include supporting documents. This field is limited to only a URL address for this document.
10. Supporting Documents - Documents that provide additional information relating to this consultation activity. These documents may be a part of the Notification letter link or as separate URL addresses.
11. End of Comment Period - Date of when tribal comments/input on this consultation activity must be provided to EPA to be considered.
12. Submit a comment – URL address for tribes to provide electronic comments on this consultation activity. Or the email address the comments should be sent (the email address should match what is in the notification letter).
13. Summary of Consultation: PART 1 –Series of responses to four (4) yes or no questions and the entering of the actual number of tribal governments that participated in this consultation activity.
14. Summary of Consultation: PART2- Final written summary description of this consultation activity. Format is a memo signed by the senior EPA Official who conducted this consultation. This field is limited to only a URL address for this document.

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<sup>1</sup> EPA's Policy on Consultation and Coordination with Indian Tribes (May 4, 2011)