

EPA Region 5

Implementation Procedures

for EPA Policy on Consultation and Coordination
with Indian Tribes

U.S. Environmental Protection Agency Region 5

7/26/2011

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1.0 Introduction

1.1 Purpose

The purpose of this document is to set forth procedures to implement the *EPA Policy on Consultation and Coordination with Indian Tribes*, May 4, 2011 (EPA Tribal Consultation Policy). The EPA Tribal Consultation Policy states, “EPA’s policy is to consult on a government-to-government basis with federally recognized tribes when EPA actions and decisions may affect tribal interests.” The implementation procedures set forth in this document will help EPA Region 5 to consult with tribal governments in a manner that is meaningful, respectful of EPA Region 5 tribal preferences, and consistent with the EPA Tribal Consultation Policy. The definitions of acronyms used in this document are provided in Appendix A, Acronyms.

1.2 Coordination, Collaboration and Outreach

The EPA Tribal Consultation Policy states that, “To the fullest extent possible, EPA plans to use existing EPA business operations to put this Policy into effect.” EPA Region 5 staff have ongoing relationships with tribal government programs. Often, EPA Region 5 and tribal staff discuss tribal concerns even before EPA Region 5 has formally extended an invitation to consult. Tribal-EPA Region 5 interactions take the form of information sharing, technical discussion, training and joint planning. These interactions include visits by Regional staff and managers to Indian reservations or communities, regularly scheduled program conference calls, email correspondence, and EPA Region 5 presentations or exhibit booths at tribal meetings, conferences, and gatherings. These routine interactions improve the ability of EPA Region 5 to work in partnership with tribes to protect the environment and human health. EPA Region 5 calls these interactions coordination, collaboration and outreach. These interactions encompass both action-specific communications as well as interactions of a more general nature. In the case of a site or facility cleanup, the interaction may span several years. Consultation may occur at more than one stage in the multi-year span of a project (e.g., a site or facility cleanup). Government-to-government consultation may be interwoven with ongoing collaboration between EPA Region 5 and tribal staff.

1.3 Meaningful Tribal Consultation

EPA Region 5 staff will determine whether the action under consideration may affect tribal interests. To make consultation meaningful, both parties should commit to the consultation process with an open mind. A climate of mutual respect is essential to meaningful consultation. Throughout the consultation, both parties must seek to understand each other’s priorities and constraints. The timing of consultation will be as early as possible, but for each program, timing may be driven by statutory or regulatory limitations.

2.0 Steps in Consultation

The following sequence elaborates on the description of the consultation process in the EPA Tribal Consultation Policy. The descriptions of the roles and responsibilities of staff members involved in EPA Region 5 consultation process are provided in Appendix B, Roles and Responsibilities of EPA Region 5 Tribal and Program Staff. Each EPA Region 5 program may also have a chapter within its Standard Operating Procedures (SOP) to address how consultation will be handled in various program-specific situations. The four phases of consultation are Identification, Notification, Input and Follow-up. National consultation practices may vary from Region 5's consultation practices.

2.1 Identification of a Need for Consultation

2.1.1 Determining When EPA will Invite Tribes to Consult

A wide range of EPA Region 5 activities may affect tribal interests and be appropriate for consultation under the EPA Tribal Consultation Policy. Activities may include the development of 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 authorizations or delegations, and EPA activities in implementation of United States' obligations under an international treaty or agreement. The EPA Tribal Consultation Policy makes clear that certain activities, such as legislative comments, are special cases and that consultation may not always be possible. In addition, consultation in the context of EPA's civil enforcement and compliance monitoring activities are subject to other policies.¹

“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 interest” (EPA Policy on Consultation and Coordination with Indian Tribes, May 4, 2011). EPA Region 5 will use its best efforts to invite a tribe or tribes to consult early enough in the process so that it has not narrowed significantly the possible outcomes. EPA Region 5 defines “actions” as regulatory or policy decisions, but not necessarily every step taken within a decision-making process. For example, if EPA Region 5 offers consultation on EPA Region 5's issuance of a permit, it need not offer consultation on incremental decision-making steps involved in that permit decision.

At the beginning of a proposed project or action, a designated EPA Region 5 program staff member, hereafter referred to as the Project Lead, will make an initial determination on whether a tribe's or multiple tribes' interests might be affected by the action. The Project Lead will

¹ 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.”

coordinate with the Program Tribal Coordinator (PTC). The PTC will work with the Tribal Consultation Advisor (TCA), and the Office of Regional Counsel (ORC) to determine whether an EPA Region 5 action may impact a tribal interest and if consultation is appropriate.

2.1.2 Opportunity to Consult on State Program Issues

EPA Region 5 will make every effort to alert tribes to upcoming public participation/comment periods, for federally approved, delegated, or authorized state programs through the outreach/collaboration activities discussed in Section 1.2, Coordination, Collaboration and Outreach. Tribes have opportunities to participate in these comment periods and ongoing interactions, and to seek further information from the appropriate Regional program. For issues/activities considered major or unique as decided by each program, EPA Region 5 may offer consultation. If the issues/activities are not major or unique, then the Region will have the option to inform the tribe(s) through routine outreach and collaboration activities. Tribes may also request consultation. Consultation by EPA will only be provided on state actions in which EPA has an oversight role.

Certain State and EPA Region 5 actions have specific statutory timelines that must be met, which can impact tribal consultation opportunities. Participation in the public participation process early on can help assure tribal concerns are considered within the regulatory timelines.

2.1.3 Activities Not Subject to Consultation

A large number of routine administrative and staff-to-staff level interactions occur between EPA Region 5 and tribal government employees on a regular basis. The EPA Tribal Consultation Policy does not apply to these regular, ongoing interactions. These include grantee-project officer discussions, requests for publically available information, and other routine communications. In addition, there are some areas of EPA Region 5's operations that by their very nature are not appropriate for consultations. These include strictly internal Agency operations (activities and decisions related to staffing, personnel, and human capital management; oversight of contractor performance under Agency-issued contracts; administration of the Agency's working capital funds, etc.) and when EPA is not the lead Agency for an action. This also includes areas where the Agency lacks discretion (e.g., Congressionally mandated time lines, actions, or other requirements; judicially mandated time lines, actions, court orders, or other requirements; and Agency response to court orders; and Agency activities subject to confidentiality protections). Criminal investigations are subject to other policies.²

² EPA enters into memoranda of agreement with tribes regarding criminal enforcement of the environmental programs that the tribe is authorized to administer. These agreements ensure that federal investigators and tribal law enforcement work cooperatively to enable EPA to discharge its duty to enforce against criminal violations of environmental laws. Authorization of a state or tribal environmental program does not divest EPA of primacy with respect to criminal enforcement.

2.2 Notification to the Tribe(s)

2.2.1 The Invitation to Consult Letter

The EPA Region 5 Project Lead will draft an invitation letter to be circulated for review, comment and approval in accordance with the *Guidelines for Communicating with Tribal Governments*, U.S. EPA Region 5, November 29, 2004 (See web link in Appendix C). Typically, the letter will be reviewed by the Program Tribal Coordinator, the ORC assignee, and the TCA.

The Project Lead will notify a tribe of its offer to consult by sending a letter to the Tribal Environmental Manager. When notification is sent through the U.S. Postal Service, the letter will include a documented receipt mechanism. If email is used, documentation may include a response to the email or a documented follow-up telephone conversation with the recipient of the notification. If the tribe requests to elevate consultation to a higher level, EPA Region 5 will consider all requests on a case-by-case basis.

EPA Region 5's consultation invitation letter generally will:

- Be addressed to the Tribal Environmental Manager with copies to the TCA, Program Tribal Coordinator, if any, and the ORC assignee;
- Be signed by either the Project Lead, or elevated to the Division or Office Director at the request of the tribe;
- Describe the issue and include maps or technical data as appropriate and available;
- Include process timelines and timing considerations which may vary by EPA Region 5 program and issue;
- Identify the EPA Region 5 Project Lead who will work with the tribe to arrange consultation;
- Request the tribe to respond to the Project Lead and clarify whether it wants to consult;
- Include a "respond by" date, 30 calendar days from the receipt of the consultation invitation letter (when possible); this should allow adequate time for a tribal council meeting or other internal deliberations by the tribe;
- Request the tribe to identify an official representative who will serve as the tribal point of contact for planning the consultation and to speak on behalf of the tribe during the consultation; and
- Ask the tribe if it would like other tribal representatives to be copied on correspondence related to the consultation.

2.2.2 Determining the Consultation Approach with One Tribe or a Small Number of Tribes

The EPA Region 5 Project Lead and tribal points of contact, generally, are expected to work together to develop an acceptable consultation approach. The points of contact should work

closely with one another, while at the same time they communicate with their own leadership to ensure they are supportive of the developing approach to consultation. Terms to be negotiated, depending on available resources, may include:

- Whether the consultation will be conducted in a face-to-face meeting or through some other format;
- The location of the face-to-face meeting(s), if this approach is selected;
- The overall goal or desired outcome of the consultation for each party;
- What issues related to the proposed action will be the focus of the consultation;
- Who will represent and participate on behalf of EPA Region 5 and the tribe (e.g., whether attorneys will participate); and
- Timetable for the consultation (including the timing and number of meetings, when EPA Region 5 feedback will occur, and when closure is expected).

The EPA Region 5 and tribal points of contact can communicate verbally for these negotiations. The EPA Region 5 and tribal representatives may also choose to provide a written summary of key proposals or decisions. In some cases, points of contact may find it appropriate to summarize their agreements in a written consultation plan or a Memorandum of Understanding (MOU). A consultation plan may be appropriate in limited instances, such as where EPA Region 5 is engaged in complex or long-term decision making (e.g., a Superfund cleanup). A Consultation Plan or an MOU will generally include the same information as outlined in the list above.

2.2.3 Consulting with a Large Group of Tribes or with All Tribes in Region 5

When the interests of a larger group of tribes or all tribes in EPA Region 5 could potentially be affected by an action, an invitation for consultation will be extended to the large group of tribes, or all tribes in EPA Region 5, by sending a letter as outlined in the Section 2.2.1, The Invitation to Consult Letter. Before selecting the mode for consultation, EPA Region 5 may choose to ask the potentially affected tribes to express a preference for the mode of consultation. Taking into consideration the availability of resources and the importance of the issue, EPA Region 5 may also choose to carry out the consultations in a centralized (hub) location or through conference calls, webinars or video conferences. EPA Region 5 typically arranges hub consultations in areas that are close to many of the tribes and can accommodate a large group.

EPA Region 5 may ask the Region 5 Tribal Operations Committee for its advice on broad-based potential regional consultation actions. Other avenues available for informal outreach include EPA Region 5 websites, tribal organizational meetings, and tribal conferences. Please note that communications in these forums do not constitute or substitute for consultation with tribal governments.

There may be occasions where EPA Region 5 coordinates with other EPA regions on consultation with tribes. For example, the Great Lakes National Program Office (GLNPO) may want to invite consultation with all tribes with an interest in the Great Lakes. In this case, GLNPO should coordinate the consultation with EPA Region 2.

2.2.4 If a Tribe Declines to Consult

If a tribe states that it does not want to consult on a matter, EPA Region 5 may conclude its consultation efforts. The Project Lead should ask the tribe to provide written notice that it does not want to consult. If the tribe does not provide the requested notice, the Project Lead and ORC assignee will draft a letter for signature by an appropriate EPA Region 5 manager that confirms that the tribe does not want to consult. The letter should be addressed to the tribal leader. A copy of the letter will be sent to the TCA. If the tribe reconsiders and elects to consult in a timely manner, EPA Region 5 will request that the tribe send a written request to consult to EPA Region 5. EPA Region 5 will review the request to consult and determine the degree to which the tribe can still engage in meaningful consultation.

2.2.5 If a Tribe Does Not Respond to a Consultation Invitation

If a tribe does not respond to a consultation invitation, the Project Lead, a designee or other appropriate person will contact the tribe to determine the tribe's intention. If the tribe does not respond, the Project Lead and ORC assignee will draft a letter for signature by an appropriate EPA Region 5 manager that summarizes EPA Region 5's efforts to contact the tribe and sets forth EPA Region 5's understanding that the tribe does not want to consult. This letter should conform to the *Guidelines for Communicating with Tribal Governments*, U.S. EPA Region 5, November 29, 2004. The letter will be addressed to the tribal leader. A copy of the letter will be sent to the TCA. If EPA Region 5 has sent written invitations to consult with a large number of tribes, or all tribes in Region 5, and has not received responses from all invited tribes, the Region may send emails to the tribes or publicize the consultation opportunity verbally at relevant forums or in writing in appropriate publications.

2.3 Input Phase

2.3.1 Providing Information About the EPA Action

The Project Lead will provide information about the proposed action to the tribe at a staff level (if this information has not already been provided prior to the invitation to consult) and answer questions from tribal staff well before any scheduled consultation meeting. This can occur by email or regular mail, conference calls, and/or in face-to-face meetings at a staff level.

2.3.2 The Consultation Itself

Consultation may involve the following: meetings, conference calls, webinars, video conferencing, letters or emails. EPA Region 5 will document all consultation sessions. The tribe may submit comments in written form before, during or after a consultation session.

2.4 Follow-up Phase

2.4.1 Considering Tribal Input and Then Taking Action

The Project Lead, in collaboration with EPA Region 5 management, will consider the tribal input, weighing how program decisions can or should address the concerns raised by a tribe or tribes. The program or office taking the action will work with its Program Tribal Coordinator, the TCA and ORC.

2.4.2 Responding to Tribal Concerns in Writing

A written response to the concerns raised by the tribe(s) during consultation will be drafted by the Project Lead and signed by the Division or Office Director. The response letter will explain how EPA Region 5 considered the input from the tribe(s) in EPA Region 5's final decision. This response letter should be sent to the most senior tribal official involved in the consultation and, if appropriate, others may be copied.

2.4.3 Closing out the Consultation Process

The Division or Office Director will make a decision about the action and convey the decision in writing to the tribal elected leader (with copies to tribal environmental staff or others identified by the tribal representative for the consultation). This communication generally will be combined with the step above. The outcome of the consultation will be relayed to the TCA.

2.4.4 When Consultation Does Not Result in Agreement

Ultimately, EPA Region 5 makes the final decision regarding the proposed action, subject to applicable federal laws, regulations, policies, and guidance. Some of the federal environmental statutes, and implementing regulations, under which EPA Region 5 takes action, provide an appeal process from an EPA final action. That may take the form of an administrative appeal process, such as for grant matters, or a legal process in federal district or appellate court.

3.0 Statutory Consultation Requirements

Federal statutes and regulations may include requirements to consult with Indian tribal governments. These obligations are distinct from those created by the EPA Tribal Consultation Policy. A federal action that might impact historical or archaeological resources may trigger consultation requirements under several laws: 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).

When working on a project that might involve statutory or regulatory obligations to consult, the Project Lead should confer with ORC to make certain EPA Region 5 is complying with the requirements of all pertinent federal statutes as well as with the EPA Tribal Consultation Policy.

EPA Region 5 may choose to combine consultation on multiple topics and for different purposes. EPA Region 5 may also choose to combine its consultation functions with those of other federal agencies, for example where multiple agencies are involved in decision making.

4.0 Documentation and Reporting

4.1 Documentation of Consultation

The Project Lead will maintain the project or site files, which may include:

- Letters or emails inviting tribe(s) to consult and responses from tribe(s) or follow-up actions by EPA Region 5;
- Consultation plan, MOU, issues list, agenda for consultation meeting(s);
- Notes from any meetings, conference calls, webinars, or video conferences, including names of all participants for the tribe(s) and EPA Region 5;
- EPA Region 5's written responses to concerns raised by the tribe(s) throughout the consultation process; and
- Close out letter(s) explaining EPA Region 5's final decision on consultation.

Documentation will be retained by the program in conformance with federal records retention schedules for the applicable program or at least 10 years, as required by Schedule 203 for records relating to State and Other Entity Relations and Oversight Files.

4.2 Required Reporting

As outlined in the EPA Tribal Consultation Policy, EPA American Indian Environmental Office (AIEO) submits annual progress reports to the Office of Management and Budget, in June of each year, on the status of the consultation process and actions on which consultation occurred, as well as plans for consultation on Agency actions in the coming year. EPA Region 5 is required to develop a semi-annual agenda of activities appropriate for consultation by October 1st and April 1st of each year. Tribes will work collaboratively with tribes to develop the semi-annual agenda. After TCA and management review and approval, the semi-annual consultation plans will be submitted to AIEO.

Each regional program that participates in consultation activities must input data on a timely basis into the national consultation tracking matrix. The TCA will compile and prepare an annual evaluation of the consultation process in the Region for the Regional Administrator (RA), Deputy Regional Administrator (DRA) and senior staff. Tribes that participated in consultations referenced in the annual report are encouraged to provide input about the tribes' experience to the Division(s) and/or TCA so that EPA Region 5 can better evaluate its consultation process.

Appendix A: Acronyms

AIEO: American Indian Environmental Office

BIA: Bureau of Indian Affairs, U.S. Department of Interior

CERCLA: Comprehensive Environmental Response, Compensation and Liability Act

DRA: Deputy Regional Administrator

EPA: U.S. Environmental Protection Agency

IEO: Indian Environmental Office

GLNPO: Great Lakes National Program Office

MOU: Memorandum of Understanding

NAGPRA: Native American Graves Protection and Repatriation Act of 1990

NEPA: National Environmental Policy Act

NHPA: National Historic Preservation Act

ORC: Office of Regional Counsel

RA: Regional Administrator

RTOC: Regional Tribal Operations Committee

SOP: Standard Operating Procedures

TCA: Tribal Consultation Advisor

Appendix B: Roles and Responsibilities of EPA Region 5 Tribal and Program Staff

EPA Region 5 has many employees who work with tribes, and on issues that may affect their interests. Below are descriptions of the roles and responsibilities of staff members mentioned in the *Draft EPA Region 5 Implementation Procedures for the EPA Policy on Consultation and Coordination with Indian Tribes*.

Tribal Consultation Advisor (TCA)

The Director of the EPA Region 5 Indian Environmental Office serves as the TCA. The TCA develops a plan, with input from the programs, for anticipated Region 5 actions requiring consultation, monitors the effectiveness of the Region's tribal consultation procedures, and recommends procedural improvements. The TCA is available to assist the Project Lead, Program Tribal Coordinators, and program staff and managers with all aspects of tribal consultation including EPA policies pertaining to Indian country.

Project Lead

The Project Lead is the person (usually at the program staff level) assigned to coordinate all activities regarding a specific project. If more than one program is involved in a project, the project lead may be shared or management may select one person as the overall lead.

The duties of the Project Lead with regard to consultation with Indian tribes may include, but are not limited to, the following:

- Makes initial determination whether a tribe or multiple tribes might be affected by an action;
- Notifies the Program Tribal Coordinator (PTC) when an EPA Region 5 action is identified which triggers tribal consultation or when the Region receives a consultation request from a tribe;
- Coordinates with Program Management, PTC, TCA, Tribal Liaison(s), and the ORC to determine the need for consultation;
- Coordinates with the PTC to compile and review maps and other information, as appropriate, to determine geographical definition of Indian country and ceded territory in relation to the project;
- Coordinates, with the PTC to determine the appropriate tribal contacts (environmental staff and/or tribal leader);
- Coordinates with Program Management, PTC, TCA, and ORC to develop the consultation invitation;

- Ensures that correspondence with the tribe conforms with the EPA Tribal Consultation Policy and the *Guidelines for Communicating with Tribal Governments*, U.S. EPA Region 5, November 29, 2004;
- Conducts follow-up call(s) and/or sends letter(s) to the tribal environmental staff after the consultation letter is sent;
- Develops, along with tribal counterpart, an acceptable approach to the consultation for a specific EPA proposed action;
- Provides information about the proposed action to the tribal environmental staff and serves as the EPA Region 5 point of contact for technical and consultation issues for the project;
- Considers tribal input in collaboration with Program Management, TCA, ORC, and others, as appropriate; and
- Prepares a draft written response to tribal comments.

Program Tribal Coordinator (PTC)

EPA Region 5 environmental programs have a coordinator who serves as a single point of contact for issues and technical assistance requests. The Program Tribal Coordinator advises staff and managers regarding consultation and provides to the TCA the program-specific information for the annual reports and semi-annual consultation plans described in Section 4.2, Required Reporting, in the *EPA Region 5 Implementation Procedures for the EPA Policy on Consultation and Coordination with Indian Tribes*. EPA Region 5 has Program Tribal Coordinators for Air and Radiation Division, Water Division, Superfund Division, Land and Chemical Division, the Great Lakes National Program Office.

Tribal Liaisons

EPA Region 5 Indian Environmental Office has three Tribal Liaisons stationed among the tribes in Minnesota, Wisconsin, and Michigan. Tribal Liaisons have knowledge and insight about how to work effectively with individual tribes. The role of a Tribal Liaison in the tribal consultation process is to provide input, as appropriate, to the Project Lead and the consultation team.

Office of Regional Counsel (ORC)

The ORC should be consulted whenever questions arise about the application of federal Indian law, jurisdictional issues, or EPA policies pertaining to Indian country. The ORC will advise on questions about whether an EPA Region 5 action or decision gives rise to a duty to consult and to determine whether a tribe or a tribally affiliated entity is a liable party. ORC should review all letters to a tribe pertaining to consultation. An ORC assignee should attend a tribal consultation if an attorney for the tribal government is expected to attend.

Appendix C: List of Tribal Consultation Related Web Links

EPA Policy on Consultation and Coordination with Indian Tribes, U.S. EPA, May 4, 2011
www.epa.gov/indian/pdf/cons-and-coord-with-indian-tribes-policy.pdf

Frequently Asked Questions (FAQs)

(Web link will be provided when AIEO completes this document)

Case Studies on Successful EPA Region 5 Consultations

(Web link will be provided when successful consultations are compiled)

Civil Enforcement and Compliance Assistance in Region 5 Indian Country: Questions and Answers

(Web link will be provided when document is placed on the EPA Region 5 web site)

Guidelines for Communicating with Tribal Governments, U.S. EPA Region 5, November 29, 2004

(Web link will be provided when document is placed on the EPA Region 5 web site)

EPA Region 5 Model Notification Letter

(Web link will be provided when this sample is completed)