



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

May 28, 1998

Reply To
Attn Of: OEC-157

MEMORANDUM

SUBJECT: Region 10 Enforcement Procedures in Indian Country

FROM: Chuck Clarke
Regional Administrator

TO: EPA Region 10

The Region is undertaking enforcement activities on Indian reservations and other areas in Indian Country to directly implement federal environmental laws on lands where EPA has a government-to-government relationship with the tribal government. In some cases, the Region has entered into formal agreements with tribes that provide for coordination of enforcement activities when EPA is the lead agency.

The purpose of this memo is to outline the procedures in Region 10 for enforcement activities on Indian reservations and other areas in Indian Country. Region 10 will carry out enforcement and compliance assurance activities in a timely and effective manner that is consistent with EPA's Indian policies, the Region's agreements with Indian tribes, and EPA enforcement policies. By following these procedures, EPA Region 10 staff and managers will ensure that the Tribes rights to self-government are respected, and that EPA's enforcement discretion and information are safeguarded.

GUIDING PRINCIPLES

EPA follows a long-standing Indian Policy that EPA will operate under a government-to-government relationship with tribal governments, promote tribal self-government, and recognize tribal governments as the primary parties for managing the environment on Reservations ("EPA Policy for the Administration of Environmental Programs on Indian Reservations," November 8, 1984). EPA's policy also is that the Agency will administer environmental programs in Indian



country until a Tribe assumes regulatory responsibility.¹ The Region's enforcement activities in Indian country should be consistent with the President's directive of April 1994 that each federal agency consult with tribal governments to the greatest extent practicable prior to taking actions that affect an Indian tribe and its resources. EPA's Indian Policy also establishes that in those cases where a facility is owned or managed by a tribal government, EPA will work cooperatively with tribal leadership to achieve compliance with federal environmental statutes.

In sum, the Region's enforcement procedures require that when planning and undertaking enforcement actions in Indian country, EPA's approach is to share information about the visit with the tribal government if sharing that information will not jeopardize investigations or enforcement proceedings. EPA generally will notify tribal governments in advance of visits on the reservation, and will inform the tribal government of the results or planned enforcement actions. The EPA enforcement program will generally inform the assigned Tribal Coordinator of planned activities. If advance notice is not made due to circumstances beyond the control of the EPA staff or if the visit involves an unannounced inspection, the tribal government should be contacted as soon as possible.

ROLES AND RESPONSIBILITIES

Program enforcement staff: Responsible for:

- ◆ Program enforcement planning and implementation;
- ◆ Coordinating with identified contacts, including the assigned Tribal Coordinator, to communicate plans and results;
- ◆ Deciding upon compliance requirements and taking enforcement actions, after obtaining needed concurrences and approvals.

EPA Tribal Coordinators: Working either in the Operations Offices or the Regional Office, the Region has assigned Tribal Coordinators to support and facilitate EPA's activities with respect to each Tribe in the Region, and they are responsible for developing and maintaining productive working relationships with Tribal staff. The Tribal Coordinators provide up-to-date information on tribal government contacts and other activities taking place on the reservation, and should be made aware of enforcement activities that take place with their assigned Tribes. Where the assigned Tribal Coordinator works in the state Operations Office, communications with the

¹ The state programs that EPA has approved generally do not extend into Indian country, which means that EPA and the Tribes retain primacy for federal environmental programs. Under federal law, states have limited authority in Indian country, and generally are precluded from enforcing their civil regulatory programs there absent an explicit Congressional authorization and EPA approval.

Tribal Coordinator will also provide for notifying the Ops. Office. The Tribal Coordinator will also be responsible for informing the Tribal Office of enforcement matters involving a tribal government.

Tribal Office: Assists the Region to consider Tribal interests and concerns, to operate with a government-to-government relationship, and to follow EPA policies and procedures regarding Indian tribes. The Director serves as the Regional Lead for developing and maintaining productive working relationships with all Tribal governments. Must be consulted when Region's actions involve tribal interests or concerns.

Operations Offices: Responsible for relating to tribal governments in their specific states, working with the Tribal Office Director, and with much of the EPA staff assigned with responsibility for inspections, providing technical assistance, and supporting enforcement actions. The Tribal Coordinator working in the Operations Office is generally the point of contact for the Operations Office and specified Tribes, while the enforcement program operates under separate authorities.

Office of Enforcement and Compliance (OEC): Responsible for coordinating enforcement activities in the Region and with EPA headquarters programs and OECA, including management of the Region's Enforcement Forum to coordinate enforcement activities in Indian country between the Program Enforcement Staff, the Tribal Office, the Operations Office and Tribal Coordinators.

Office of Regional Counsel (ORC): ORC must be consulted whenever questions arise over the potential liability of a tribal government, application of federal Indian law and EPA policies, or when the action will require consultation with EPA headquarters offices.

EPA Headquarters Offices: Delegations require the Region to consult with the Office of Enforcement and Compliance Assurance (OECA) and the Office of General Counsel (OGC) when certain activities will involve facilities owned or managed by Tribal governments, or may set precedence nationally.

Other Federal Agencies: When EPA staff work with other federal agencies, or with state and local personnel, it is important that those agencies recognize EPA's policies and procedures that apply in specific situations.

OPERATING PROCEDURES [Complete checklist Attachment A for each visit]

1. **Notification.** EPA program enforcement staff will use best efforts to coordinate with tribal government officials prior to entering a Reservation for the purposes of conducting enforcement activities and providing compliance and technical assistance, by taking the following steps:
 - a. Prior to proceeding, EPA program enforcement staff will attempt to determine whether planned activities will occur on an Indian reservation or otherwise within Indian Country, by seeking assistance from the Tribal Coordinator assigned to the particular tribe.²
 - b. If the action will take place in Indian Country, EPA will notify the tribal government in advance of the planned visit, and offer tribal government officials or their designee an opportunity to accompany EPA officials. Where the initial notification occurs more than 2 weeks before the actual visit, EPA will call the tribal government's contact as a reminder several days before the visit.
 - c. EPA program enforcement staff will notify the Region's assigned Tribal Coordinator to coordinate notification of and communication with the particular tribal government. It may also be appropriate to contact the tribal coordinator for the particular program office, if one is assigned, and to inform the OEC tribal liason.
 - d. If a formal order or warrant is required to obtain access, EPA program enforcement staff, in consultation with ORC, and after consulting with the tribal government, will determine whether to include tribal government officials. For warrants, program enforcement staff and ORC will make recommendations to the appropriate U.S. Attorney.
 - e. In cases where the visit occurs prior to recognizing that the site is on a Reservation or in environmental emergency situations, the EPA staff will endeavor to notify the tribal government of the visit as soon as possible, and to communicate the results of the visit.
2. **Determining facility ownership.** As part of inspecting facilities on a Reservation or preparing for an inspection, EPA program enforcement staff will determine whether the facility is owned or managed by the tribal government. Generally, a facility in which a tribal government (not simply a tribal member) has a controlling interest should be treated as if owned or managed by that government. The views of the Tribal government on its ownership or management should be sought before a final decision is made. EPA program enforcement staff must consult with the Office of Regional Counsel (ORC) when a question arises as to the role of the tribal

² Advance notification may not be possible when EPA program enforcement staff are accompanying another federal agency which is the lead enforcement agency.

government as an owner or manager.

3. **Privately owned or managed facilities.** In cases where facilities located within Indian country are not owned or managed by a tribal government, EPA may respond to noncompliance in the same manner in which it does to the noncompliance of non-tribal facilities located outside Indian country. In addition:

- a. EPA program enforcement staff will notify the tribal government and the EPA Tribal Coordinator assigned to the particular tribe if a federal enforcement action is planned for a non-compliance situation involving a private party, and coordinate with the tribe on a government-to-government basis except in specific instances where the enforcement program believes that sharing the information may jeopardize the enforcement investigation.
- b. Prior to making a final decision on an enforcement response, EPA program enforcement staff will solicit and consider the opinion of the tribal government on the matter.
- c. The enforcement program will consider whether the tribal government plans to address the non-compliance using tribal authorities.
- d. Copies of letters and copies of inspection results that are transmitted to regulated entities will be provided to the tribal government.
- e. Program enforcement staff will update the tribal government contact and the EPA Tribal Coordinator assigned to the particular tribe on the results of enforcement activities involving noncompliance situations.

4. **Facilities owned or managed by Tribal Governments.** For facilities owned or managed by the tribal government, EPA will work cooperatively with the tribal government to assist the facility to come into compliance before considering an enforcement action. EPA staff working on enforcement activities in Indian country must be familiar with procedures established by the Region, OECA and American Indian Environmental Office (AIEO).

- a. Regional program enforcement staff will notify the Tribal Office, the Tribal Coordinator assigned to the particular tribe, OEC, and ORC of non-compliance by a tribal facility as soon as the noncompliance issue is identified.
- b. The program enforcement staff, in consultation with ORC and the Tribal Office, will notify leaders of the tribal government in writing as soon as possible of the specific compliance issues and attempt to cooperatively develop a means to achieve compliance. Correspondence will be addressed separately to the Tribal government and to the regulated facility.

c. The Region also should involve other federal agencies (e.g., BIA, the Indian Health Service, the U.S. Army Corps of Engineers, or BLM) whenever such involvement is expected to facilitate tribal compliance and cooperation in an acceptable time frame.

d. This section describes Region 10's policy on the application of its enforcement discretion to facilities owned or managed by tribal governments which may be in violation of federal environmental laws. These procedures are not legally required, are not legally enforceable, and create no legal rights.

5. **Enforcement at Facilities owned or managed by Tribal Governments.** Should the cooperative efforts of paragraph 4 fail to achieve compliance, the Region enforcement program may proceed with an enforcement action similar to one it would take for a non-tribal facility, but in accordance with EPA national guidance. The assigned Tribal Coordinator or the Operations Office, the Tribal Office, ORC, and specified EPA headquarters offices must be consulted prior to making a final decision to initiate a formal enforcement action, including issuing a written notice of violation.

a. If EPA determines that cooperative efforts have been unsuccessful, the Region may issue a notice of violation to the tribal government followed, if necessary, by a proposed order or an administrative order. The Regional enforcement program must obtain the concurrence of the Office of Regional Counsel before taking any enforcement action, including a notice of violation or an administrative order on consent.

b. Factors to consider in deciding on the nature of an enforcement response include the potential for harm to human health, the environment or the regulatory program, relevant history of noncompliance with EPA programs, and the degree of willfulness pertaining to the violation.

c. Generally, EPA will seek penalties or include stipulated penalties in administrative orders only when necessary to secure effective, timely results.

d. The Regional enforcement program must consult with and obtain the concurrence of the Assistant Administrator for Enforcement and Compliance Assurance before taking any enforcement action other than a notice of violation or an administrative order on consent.

last be for
Nov 10 510
L
SP

6. **Unannounced Inspections.**

EPA enforcement programs have the discretion to conduct unannounced inspections and investigations in Indian country. As operating principles:

For a facility owned or managed by the tribal government, EPA should inform the tribal government that EPA will be visiting identified facilities owned or managed by the tribal government on a regular, periodic basis. While EPA will not provide advance information when that visit will occur, EPA will inform the tribal government of the results.

For privately-owned facilities, EPA will work with the Tribe to ensure that it recognizes and concurs with the need to keep enforcement information confidential. In general, EPA will provide the tribe with advance notice of visits to privately-owned facilities and the results of inspections except in specific instances where the enforcement program believes that sharing the information may jeopardize the enforcement investigation.

CONCLUSION

Region 10 staff will follow the procedures outlined in this memo, including completion of the checklist that is Attachment A to this guidance, whenever visiting Indian country for enforcement and compliance activities. By coordinating notification of Tribes with the Region's Tribal Office and the assigned Tribal Coordinators, the Region's enforcement programs will assist EPA to operate on a government-to-government basis with the Indian tribes in this Region while enforcing federal environmental laws in Indian country.

cc: Executive Team
Region 10 Indian Tribes

ATTACHMENT A

Indian Country Inspection/Compliance Assistance Check List

(Page ____ of ____)

Box 1 - EPA Program Contact Responsibilities:

____ Name of Program planning/requesting inspection or assistance visit

____ Program Contact (*Name and phone number*)

Check one:

____ Announced Inspection

____ Unannounced Inspection

____ Name of facility/site to be visited.

____ Is the facility owned or managed by a Tribal Government? (Y/N)

____ Name of the reservation on which the facility/site is located.

____ Is the facility located on Tribal land, trust land, fee land or

unknown?

(Indicate which.)

____ Date agreed for inspection/visit (*between Program Office and inspector*).

____ If inspection is "unannounced", how was this communicated to the

Tribe,

e.g., annual list, generic letter, phone call?

____ Is site designated in CERTS as an "Indian Country" facility? (Y/N)

____ Date a confirmed contact with Tribal Coordinator/Operations Office or

Tribal Office was made and name of contact. (*Note: If the Tribal Coordinator is located in an Ops Office, contact with him/her satisfies notification of Ops Off.*)

Box 2 - EPA Tribal Coordinator Responsibilities:

____ Tribal Coordinator (*Name, phone, location, e.g., WOO, IOO, Tribal Office, etc.*)

____ Name and title of most current contact at the tribe. (*Note: This could be the environmental contact, tribal attorney, tribal leader, etc.*)

____ Phone number of Tribal contact.

____ Date contact was made and form of contact. (*Note: If initial contact is more than one week prior to visit, a final contact should be made a few days before visit.*)

Box 3 - EPA Inspector Responsibilities:

____ Inspectors Office (*e.g., OEA, Air, Water, etc.*)

____ Name of Inspector

____ List date(s) of follow-up call(s) to Tribal representative.

____ Date of actual inspection/visit.

____ Date inspection report was sent to Program Office

Box 4 - EPA Program Contact Responsibilities:

_____ List dates possible compliance problems were reported to Tribal Office
 _____ and Tribal Coordinator.

_____ List date & method used to communicate inspection results back to Tribe
 _____ (Oral/Written). *(Note: Tribes need results of all inspections, whether there are
 _____ violations or not.)*

_____ List name(s) of Tribal contact(s) who received inspection
 results.

PLEASE FORWARD A COPY OF COMPLETED FORM TO:
 Tribal Office Director - TO-149
 Tribal Coordinator (listed above)
 OEC Tribal Liaison - OEC-157

**Instruction for
 "Attachment A - Indian Country Compliance/Enforcement Check List"**

(If more space is needed, add separate sheets. If filling in electronic form, use "typeover"; boxes will automatically roll to following pages if additional space is used.)

Background: "Attachment A" to Chuck Clarke's May 28, 1998 memo outlining enforcement procedures in Indian Country was developed to keep Tribes informed of EPA's compliance/enforcement activities taking place within the boundaries of their lands. The revised **Attachment A** form guides staff in communicating with the Tribes and EPA Tribal Coordinators. It also documents communications that have occurred. The form can be filled out and forwarded electronically, but the Tribal Coordinator should be alerted by phone that it is coming and should provide assistance in planning the visit and communication process. If the Tribal Coordinator or alternate is not available, coordination and planning should be done with the Tribal Office. *(Instructions for accessing the list of Tribal Coordinators from EPA's Home Page are included below.)*

For every proposed inspection on a reservation an **Attachment A** form is to be completed. Maps are available via Region 10's Home Page to assist in that determination. If you find that a particular facility is in fact on reservation land but was not indicated as such, please notify the Quality Assurance and Data Unit in OEA so EPA's information can be updated.

Maps: From the Home Page click on <Index>. From the top of the Index Page click on <M to advance to listings under "M". Click on <Map Library> . On the Map Library page advance to the "Tribal Lands Maps" listing. From there you can view either an Alaska map or one of the other three states.

Box 1 - Program Contact: Once the Program Contact determines, directly or through discussion with a Tribal coordinator, that a facility is (or may be) on Native Land, he/she must start an **Attachment A** form. Complete as much of the information in this box as possible. *Note: If firm date of inspection or visit has not been set, give an estimate and note it as such.* Then forward the form to the appropriate Tribal Coordinator. Update the form when a firm date for the visit is set.

Finding Tribal Coordinators: From the Home Page click on <Region 10 Website>. On new page, click on <267 Indian Tribes>. Click on <contacts>. On the Tribal Office page click on <Tribal Office Contacts>. This will give the current list of Tribal Coordinators and the Tribes they work with.

Box 2 - Tribal Coordinator: The Tribal Coordinator (or other Tribal Office representative) will work with the Program Contact and/or inspector (if designated) to complete items in the first box for which the Program Contact did not have information. The Tribal Coordinator will also complete as much of the Box 2 as possible. *Note: Once the Tribal Coordinator makes initial contact with the Tribe, he/she may arrange that future communications between the Tribe and inspector only involve the Tribal Coordinator on an as needed basis.* The form is now to be forwarded to the inspector with a copy back to the Program Contact.

Box 3 - Inspector: After the inspection or visit, the inspector completes Box 3 and returns the form to the Program Contact with a copy to the Tribal Office.

Box 4 - Program Contact: The Program contact (or other program staff) completes Box 4 and forwards it to the Tribal Office with a copy to the Tribal Coordinator and the OEC Tribal Liaison. **A copy should be kept in the inspection file.**

Note: If there are time constraints during any phase(s) of this process these must be noted clearly on the form and highlighted, to avoid unnecessary delays which may jeopardize the desired outcome.