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EPA Responses to Comments on EPA Policy for Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights

Introduction

In May 2011, the Environmental Protection Agency (EPA) issued the *EPA Policy for Consultation and Coordination with Indian Tribes* (Consultation Policy). This Policy describes how EPA is to consult on a government-to-government basis with federally recognized tribal governments when EPA actions and decisions may affect tribal interests. Consultation by EPA consists of four phases: Identification, Notification, Input, and Follow-up on how tribal input was considered. The attached *EPA Policy for Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights* (Guidance) complements the Consultation Policy and is designed to be used in tribal-treaty-rights discussions for certain EPA actions undergoing consultation. The Guidance does not make any changes to the principles or processes established under the Consultation Policy.

This document contains EPA's consolidated responses to the comments received from federally recognized tribes, tribal consortia, and tribal organizations during the August – November 2015 tribal consultation and outreach period for the draft Guidance. As a result of the comments received, EPA has made substantive changes to the Guidance as described in this document, as well as changes suggested by commenters that go to the overall tone of the Guidance. A copy of the final Guidance can be found at [insert URL]

Throughout the tribal consultation and outreach period, EPA used a variety of mechanisms to exchange ideas and receive suggestions for how to improve the Guidance. These mechanisms included: written input; in-person consultations; national consultation teleconference calls; informational calls with EPA's national and regional tribal operations committees; and meetings with tribal organizations such as the Northwest Indian Fisheries Commission, the Great Lakes Fish and Wildlife Commission, and the National Congress of American Indians.

This document summarizes the common issues raised during the tribal consultation and coordination period and indicates how those issues were addressed in the final Guidance. Similar comments have been consolidated and summarized for clarity and efficiency.

RESPONSE TO COMMENTS

Comment 1 ***The Guidance should apply to more EPA actions than just those that are focused on a specific geographic area.***

Response 1 This Guidance is designed to assist in consultations on EPA actions in specific geographic areas. This approach focuses EPA efforts on consultations related to actions believed to be those most likely to potentially affect treaty rights.

Treaty rights may be important considerations in EPA actions not expressly covered by this Guidance. EPA believes the framework laid out in the Guidance may be helpful and appropriate to use in those situations. EPA has added the following language to the Guidance: “Where tribes raise treaty rights as a basis for consultation on issues that are national in scope or treaty rights otherwise are raised during consultation on national actions, this Guidance can assist in the treaty rights consultation discussion.” Guidance, page 2.

This Guidance does not reflect any legal determination regarding treaty rights and the scope of EPA actions.

Comment 2 ***Guidance Question #2: “What treaty rights does the tribe believe it retains in the specific geographic area?” fails to reflect potential impacts on the environment needed to support protected treaty resources and inappropriately refers to legal obligations as tribal beliefs.***

Response 2 EPA appreciates the number of tribes that provided suggested text for rephrasing this question. EPA believes the concerns raised were well-founded and Question #2 now reads: “What treaty rights exist in, or what treaty-protected resources rely upon, the specific geographic area?” Guidance, page 3. The rephrased question also makes clear that issues related to the environmental conditions supporting treaty resources are within the scope of the Guidance. For example, where tribes have treaty-protected fishing rights, and the fish in question are migratory, the Guidance also pertains to consultations on actions that affect fish habitat in areas where migration occurs.

Comment 3 ***The Guidance should make clear that treaties between tribes and the United States are the supreme law of the land under the U.S. Constitution and that EPA must follow the federal Indian law canons of treaty construction in interpreting treaty rights.***

Response 3 EPA agrees with this comment. The following language was added to the Guidance: “The U.S. Constitution defines treaties as part of the supreme law of the land, with the same legal force as federal statutes. Treaties are to be interpreted in accordance with the federal Indian canons of construction,

a set of long-standing principles developed by courts to guide the interpretation of treaties between the U.S. government and Indian tribes. As the Supreme Court has explained, treaties should be construed liberally in favor of tribes, giving effect to the treaty terms as tribes would have understood them, with ambiguous provisions interpreted for their benefit. Only Congress may abrogate Indian treaty rights, and courts will not find that abrogation has occurred absent clear evidence of congressional intent. We note that this Guidance does not create any new legal obligations for EPA or expand the authorities granted by EPA's underlying statutes nor does it alter or diminish any existing EPA treaty responsibilities." Guidance, page 1.

- Comment 4 ***EPA should use the “Free, Prior and Informed Consent” of tribes standard as found in the United Nations Declaration on the Rights of Indigenous Peoples before taking any EPA action that may affect treaty rights.***
- Response 4 EPA recognizes the importance of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and believes that EPA tribal policies support many of the principles under UNDRIP. The *EPA Policy for Consultation and Coordination with Indian Tribes* and the Guidance support consultation on a government-to-government basis when EPA-proposed actions or decisions may affect a tribe's interest, including treaty rights. The Guidance is consistent with Executive Order 13175: *Consultation and Coordination With Indian Tribal Governments* and reflects the principles expressed in the *EPA Policy for the Administration of Environmental Programs on Indian Reservations*, often referred to as the 1984 EPA Indian Policy, and the Consultation Policy.
- Comment 5 ***The Guidance does not address how EPA will implement its obligation to protect treaty rights when it delegates programs to states or exercises its oversight authority for delegated programs.***
- Response 5 EPA actions with respect to EPA-approved state programs vary by EPA statute and program and include both mandatory and discretionary actions. Under EPA's existing Consultation Policy, tribes may request consultation on any EPA action or decision affecting tribal interests – including actions or decisions relating to authorized or delegated programs. Consultation Policy, page 4. This Guidance would apply to (and assist with) a tribal consultation on an EPA action or decision relating to authorized or delegated programs when that action or decision is focused on a specific geographic area. The Guidance does not, however, create any new legal obligations for EPA or expand existing authorities granted by EPA's underlying statutes, nor does it alter or diminish any existing EPA treaty responsibilities.
- Comment 6 ***The Guidance should include a process to resolve potential conflicts between EPA actions and tribal treaty rights.***

- Response 6 The Guidance outlines the process for consulting on how best to consider treaty rights when they may be affected by a particular EPA action or decision. As noted in the Guidance, following consultation, EPA’s next step will typically involve conducting legal and policy analyses in order to determine how to proceed so that the proposed action or decision does not conflict with treaty rights, and so that EPA may appropriately consider the treaty rights in the course of its decision-making process.
- Tribal governments may communicate any concerns about a specific consultation or the consultation process in general to a Tribal Consultation Advisor, the head of the program or regional office conducting the consultation (i.e., the Assistant Administrator or Regional Administrator), or to the Agency’s Designated Tribal Consultation Official, Assistant Administrator for International and Tribal Affairs.
- Comment 7 ***The Guidance should recognize that consultation on treaty rights should occur with particular tribal officials as designated by each individual tribe, so that the tribe can establish the appropriate team for evaluating the treaty right impacts.***
- Response 7 Participation by particular tribal officials during EPA consultations with tribes is at the discretion of the involved tribes. To ensure clarity, EPA added the following language to the Guidance: “For any treaty rights discussion raised during consultation, the tribe may identify particular tribal officials to consult with EPA about treaty rights. It is important that EPA work to ensure that consultation occurs with the appropriate tribally identified officials.” Guidance, page 3.
- Comment 8 ***Treaty rights protections should be incorporated into a consolidated national policy document that includes the EPA Policy for Consultation and Coordination with Indian Tribes and other related EPA policy documents.***
- Response 8 EPA’s work with tribes is broad and ongoing. As a result, EPA has issued a number of policy documents and guidances over the years to assist in its work with tribes. EPA reads and interprets these documents harmoniously. More-recent documents inform the work under prior documents. In other words, statements regarding treaty rights found in the Guidance are incorporated into EPA’s ongoing work with tribes.
- Comment 9 ***The Guidance should be revised to include details on how the various components outlined will be implemented.***
- Response 9 The purpose of the Guidance is to begin the conversation and consultation with appropriate tribal officials on EPA actions that may affect treaty rights. At the request of commenters, the Guidance clarifies that the treaty rights discussions may entail a series of consultation activities and that

consultation may extend beyond the initial consultation(s) into the time when EPA is conducting its legal and policy analyses. The Guidance now reads: “Although the details of how to conduct such legal and policy analyses are not addressed by this Guidance, the EPA process may warrant continued or additional consultation with tribes.” Guidance, page 4.

Comment 10 ***The Guidance should address the training needs for EPA staff. EPA staff need to learn about treaties or court decisions and have these materials readily available.***

Response 10 EPA agrees with this comment. EPA has developed, and is continuing to identify, additional tools and information to assist its staff in understanding tribal treaties and EPA’s treaty rights obligations. To emphasize the importance placed on training, EPA added the following language to the Guidance: “As part of its commitment, EPA will emphasize staff training and knowledge-sharing on the importance of respecting tribal treaty rights in order to better implement this Guidance.” Guidance, page 4.

Comment 11 ***The Guidance should address EPA’s role in helping tribes understand the technical aspects of any proposed EPA action.***

Response 11 EPA agrees with this comment. For any consultation, it is important that the technical aspects of the EPA action are clearly explained. To address this comment, EPA added the following language regarding technical information to the Guidance: “EPA should explain the proposed action, provide any appropriate technical information that is available, and solicit input about any resource-based treaty rights.” Guidance, page 3.

Comment 12 ***The Guidance should clarify that tribes may initiate a consultation request to discuss the effects of an EPA action on treaty rights.***

Response 12 Under the EPA Consultation Policy, tribes may request consultation on any issue affecting their interests. Consultation Policy, page 4. The Guidance does not change this, or any other, aspect of the Consultation Policy. The Guidance states: “These questions may also be employed when treaty rights arise in other contexts.” Guidance, page 2. The phrase “in other contexts” includes instances when treaty rights are raised by tribes in any consultation that they requested.

Comment 13 ***The Guidance should discuss EPA’s duty to identify other federal agencies potentially involved in the proposed EPA action or the treaty rights issue.***

Response 13 EPA agrees with this comment. If a treaty right issue involving the EPA action involves other federal agencies, EPA will coordinate with the relevant agencies. This is EPA’s current practice. The Guidance acknowledges that this may occur and states: “Issues that may arise often

involve precedent-setting questions or warrant coordination with other federal agencies.” Guidance, page 4.

Comment 14 ***The Guidance should address the issue of confidentiality of the information tribes provide during any consultation on treaty rights.***

Response 14 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. Under federal law, information exchanged between EPA and tribes ordinarily will not be privileged or otherwise protected from disclosure under the Freedom of Information Act.

Reference Documents

1. EPA Policy for Consultation and Coordination with Indian Tribes
<http://www.epa.gov/tribal/epa-policy-consultation-and-coordination-indian-tribes#policy>
2. EPA Policy for Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights : <http://www.epa.gov/tribal/epa-policy-consultation-and-coordination-indian-tribes-guidance-discussing-tribal-treaty>
3. EPA’s Tribal Consultation At-A-Glance <http://www.epa.gov/tribal/tribal-consultation-glance-infographic>