

**U.S. Environmental Protection Agency
Region 2**

**Superfund Program Guidance on
Indian Nation Consultation**

May 22, 2013

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I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) Region 2 (hereinafter, “Region 2”) developed this Superfund program guidance document to establish regional procedures for the Superfund program to facilitate consultation with the eight federally recognized tribes (hereinafter referred to as “Indian Nations” or “Nations”) within Region 2 under the EPA Policy on Consultation and Coordination with Indian Tribes issued on May 4, 2011. These Nations include the Cayuga Nation, the Oneida Indian Nation, the Onondaga Nation, the Seneca Nation of Indians, the Shinnecock Nation, the St. Regis Mohawk Tribe, the Tonawanda Seneca Nation, and the Tuscarora Nation.

II. PURPOSE

The goals of this Superfund program guidance document are to establish clear Region 2 procedures for the superfund tribal consultation process, including defining the “why, what, when, and how” of Indian Nation consultation; identifying the roles and responsibilities of those involved in Indian Nation consultation to promote consistency in, and coordination of, the consultation process; and establishing oversight and reporting processes to strive for regional accountability and transparency.

The EPA Policy on Consultation and Coordination with Indian Tribes (EPA Consultation Policy) was developed in response to a Presidential Memorandum issued on November 5, 2009, directing agencies to develop a plan to implement fully Executive Order 13175: Consultation and Coordination With Indian Tribal Governments, which was issued on November 6, 2000. Executive Order 13175 requires 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. This Superfund program guidance document is intended to implement the EPA Consultation Policy, the applicable provisions of which are incorporated herein by reference. This guidance document is also intended to implement the requirements of Section 126 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), 42 U.S.C. § 9626.

While this document describes the procedures that Region 2 expects to follow in consulting with the Indian Nations, it does not alter or create any legal rights or obligations. Nations are free to suggest or request different procedures if they deem it appropriate, and Region 2 retains its discretion to tailor approaches to consultation on a case-by-case basis.

III. IDENTIFICATION OF ACTIVITIES WARRANTING CONSULTATION

a. Mechanisms for determining which matters are appropriate for consultation:

- The regional Remedial Project Manager (RPM) or regional On-Scene Coordinator (OSC) will make the initial determination of whether a Nation or multiple Nations may be affected by the action. Various resources are available to assist them in making this determination, including maps of federally recognized tribal government locations, Indian Country, maps of Nation lands and historic areas of interest (see Appendix B), and maps of watersheds. The RPM or OSC may also contact Nation environmental staff to gauge Nation interest, and/or confer with the Regional Indian Program office and the Regional Indian Matters Legal Specialist.
- Nation officials may request consultation in addition to Region 2’s determination as to what requires consultation. Region 2 will attempt to honor the Nation government’s request with consideration of the nature of the activity, past consultation efforts, available resources, timing considerations, and all other relevant factors.

b. Included in the categories of activities appropriate for consultation:

- Superfund site remedial or removal response actions; and
- Superfund emergency response actions

c. Identifying tribal interest for consultation: At the beginning of a Superfund response action, the RPM or OSC (See Section VI, Consultation Roles and Responsibilities) should make a determination whether a Nation or multiple Nations might be affected by the action. The following non-exclusive list of factors should be considered in identifying a potentially affected Nation(s):

- Sites on or adjacent to Indian Country, or nearby if the action may affect a Nation's resources, rights, or traditional way of life.
- Actions at sites within the federal historic preservation areas that could potentially affect a Nation's resources, rights, or traditional way of life, including properties of cultural or historical significance to a Nation that may be located beyond the current reservation boundaries. A map of Nation reservations/ areas of interest is included in Appendix B.
- Action(s) that may impact resources, whether on or off current Indian territory, that are protected by treaty to which the Nation is a party.
- Action(s) that may impact the health of members of a Nation.
- Action(s) that may impact the cultural, traditional or subsistence resources of a Nation or a Nation's traditional way of life
- Actions at sites that could affect how the boundaries of a Nation's territories are interpreted

IV. CONSULTATION AS DISTINGUISHED FROM PUBLIC PARTICIPATION

Indian Nation consultation is distinct from Superfund public participation and community involvement processes. Whenever possible, consultation should occur before the public release of a Proposed Plan in order to offer Region 2 the opportunity to incorporate the views of interested Nation governments prior to seeking public comment.

A Nation may benefit from participating in the Region 2 public participation process, separate and apart from any consultation. Additionally, a Nation may choose to submit oral and written comments made during the consultation process into the public record during a public comment period.

V. 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 of Sites Phase: The RPM or OSC will evaluate the affected sites to determine whether a Nation or multiple Nations might be impacted by remedial, removal and/or emergency response activities. Appendix A includes a color chart identifying the discrete elements of Superfund Remedial and Removal actions. As outlined in Appendix A Superfund Remedial actions include elements such as remedial investigations, feasibility studies, human health and ecological risk assessments, proposed plans, record of decisions, remedial designs, and five-year reviews. As outlined in Section XI and Appendix A, Superfund Removal actions include elements such as site assessments, possible engineering evaluation and cost analysis, action memoranda, progress pollution reports and site closeouts

b. Notification Phase: Region 2 will notify the Nations of activities that may be appropriate for consultation. Notification will typically be accomplished through the issuance of a notification letter to the affected Indian Nation(s), using the model notification letter format provided in Appendix C, sent at the beginning of the Superfund process. For remedial actions at sites already on the National Priorities List (NPL) this is expected to happen early in the development of the Remedial Investigation and Feasibility Study (RI/FS) and, in any case, sufficiently in

advance of the publication of a Proposed Plan to allow for meaningful consultation. (For sites being considered for inclusion on the NPL this is expected to occur by the time of proposal of the site for NPL inclusion; for sites at this stage of the Superfund process, the EPA Region 2 Site Assessment Manager (SAM) will make the initial determination of whether a Nation or multiple Nations may be affected by the action.) For removal actions, this is expected to occur after a removal assessment has indicated the likely need for a removal action to be taken. Notification should occur early in the process and, specifically, early enough to allow Nations the opportunity to provide meaningful input during the course of the remedial or removal action and prior to EPA's decisions with respect to the action.

Region 2 notification will include sufficient information for Nation officials to make an informed decision about the desire to continue with consultation, and sufficient information to understand how to provide informed input. The notification should also include applicable information about time constraints under which Region 2 is operating, such as the need for immediate or emergency response action (see Section XI for further detail on emergency response actions).

c. Input Phase: Nations may provide input to Region 2 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. Region 2 coordinates with Nation 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, Region 2 considers the input regarding the activity in question. Region 2 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: Region 2 will provide feedback to the Nation(s) involved in the consultation to explain how their input was considered in the final action. This feedback should be a formal, written communication and may include communications from EPA staff to Nation representatives as well as formal written communication from a senior Regional EPA official (Regional Administrator or Superfund Division Director), to the most senior Nation official involved in the consultation. In the case of a Record of Decision (ROD), this feedback should be provided by or before the date of the issuance of the document. If the formal feedback is not provided in advance of the issuance of a ROD, then Region 2 will undertake to notify the Nation in advance of the issuance of the document by more informal means such as a phone call or email message.

VI. CONSULTATION ROLES AND RESPONSIBILITIES

Consultations on Region 2 Superfund matters will typically involve representatives from at least three different Region 2 organizational units – the Superfund program office (the Emergency and Remedial Response Division or ERRD), the Regional Indian Program office (located in the Office of Strategic Programs or OSP), and the legal office (the Office of Regional Counsel or ORC). Within ORC two different attorneys will typically be involved – the attorney assigned to the Superfund site in question and an attorney with Indian Law expertise. These several individuals will work together as a team during the consultation process. Their respective supervisors will also be involved, directly and indirectly, to provide appropriate management-level engagement and oversight. The Region 2 supervisory positions involved may include a section chief, branch chief, deputy division director and/or division director. Pursuant to EPA's Consultation Policy, the Regional Administrator oversees the consultation process for Region 2.

a. Regional Program Lead: The regional program lead plays the central role in tribal consultation. The regional program lead is typically the Remedial Project Manager (RPM) for remedial actions and the On-Scene Coordinator (OSC) for removal actions. Once the regional program lead determines, using the criteria discussed and guidance provided in this document, that Nation consultation should be initiated, or once a consultation request is received from a Nation, the regional program lead will notify appropriate personnel in his or her own unit, as well as the regional Tribal Consultation Advisor (TCA). General consultation questions should be directed to Region 2's TCA for the National Indian Program. The regional program lead will enter information about the consultation activity into the American Indian Environmental Office (AIEO) consultation database.

b. Regional Tribal Consultation Advisor (TCA)/Regional Indian Program): The regional TCA/Regional Indian Program inventories all Nation consultations undertaken in Region 2, monitors the effectiveness of Region 2's consultation procedures, and recommends procedural improvements as necessary. The regional TCA also reviews and approves consultation database entries made by program staff as discussed below. The regional TCA will automatically be notified of Indian Nation consultation for database entry. The TCA/Indian Program possesses considerable knowledge about how to work effectively with the Nations and should assist program staff in the consultation process as needed.

c. Office of Regional Counsel: The Office of Regional Counsel (ORC) should be consulted whenever questions arise over application of federal Indian law, jurisdiction, or the potential liability of a Nation government or of EPA. As it is ORC's function and as ORC has the legal expertise to answer questions and concerns raised by a Nation's legal counsel, whenever a Nation's legal counsel attends or participates in consultation meetings or discussions, EPA regional attorney(s) should also participate.

VII. INITIATION OF CONSULTATION

a. Consultation initiated by Region 2: The Region 2 Notification Letter will be prepared by the RPM or OSC, who may request review from the Indian Program and ORC prior to finalization of the letter. The letter should be from the Region 2 Superfund Division Director or the appropriate Superfund Branch Chief, and should be addressed to the appropriate delegated tribal official (environmental director, historic preservation officer, etc.). A model consultation notification letter is found in Appendix C.

The Notification Letter should:

- Describe the anticipated Superfund action 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.
- Identify the RPM or OSC who will coordinate with the Nation to arrange all aspects of the consultation.
- Request that the Nation respond to the signatory of the notification letter, with a courtesy copy to the RPM or OSC, indicating whether or not the Nation desires consultation.
- Request a response by a specific date that allows adequate time for a Nation council meeting or other internal deliberations by the Nation where possible (usually at least four weeks from receipt of letter).
- Request that the Nation provide the name of a Nation representative who will serve as their point of contact for planning the consultation, if the nation wishes to go forward with consultation.
- Request any policy that the Nation may have regarding how the Nation wants us to consult.
- Request that the Nation provide any declination in writing for documentation.
- Include a courtesy copy to the regional Indian Program and regional Indian Matters Legal Specialist;

Wherever possible, the RPM or OSC should follow up with a telephone call or email to the appropriate Nation department after the written correspondence has been sent to ensure receipt of the letter and to open dialogue about the consultation.

1. Indian Nation declination procedures: If a Nation declines consultation on a given matter, Region 2's consultation efforts are normally concluded. The regional program lead should document in the program file the Nation's declination, with a courtesy copy to the Indian Program and Indian Matters Legal Specialist. Finally, if at any point during the Superfund action the Nation desires to revisit Nation consultation, the Nation can submit this request to Region 2; however, this request may come at a time when it is too late to influence Region 2's decision or for Region 2 to engage in meaningful consultation. In such situations, Region 2 will initiate such consultation if meaningful consultation is still feasible.

2. Tribal non-response procedures: If a Nation does not respond by the date provided in the consultation notification letter, the RPM or OSC should work with the Indian Program and Indian Matters Legal Specialist to reach out to the Nation to determine the Nation's interests and the level of involvement the Nation 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, Region 2's attempts should be documented and Region 2 can conclude its efforts to initiate consultation. If, at some later date, the Nation indicates its interest in consultation, Region 2 will initiate such consultation if meaningful consultation is still feasible.

b. Consultation initiated by a Nation: Region 2 generally agrees to consult when such a request for consultation is made by a Nation, assuming the proposed action or lack of action may affect that Nation. In some cases, Region 2 may propose to defer the consultation until a later date when more information would be available to support more effective consultation.

When Region 2 receives a written request from a Nation leader, it will be forwarded to the appropriate RPM or OSC who, in turn, should provide a written response to the Nation within two weeks of receipt of the correspondence. The response letter from the Region will designate the point of contact to work with the Nation to arrange the Nation consultation, and request that the Nation identify a Nation point of contact for that purpose. The Indian Program and Indian Matters Legal Specialist should be copied on the correspondence.

c. Region 2 and Nation representation: The designated Regional and Nation points of contact should discuss who will represent each party at each point during the consultation process. Each Nation will determine who will represent its government during various stages of Nation consultation. Written verification from Nation leadership is recommended to ensure that the Nation representative is authorized to represent the Nation for the purposes of consultation with Region 2, to avoid misunderstandings that can arise from dealing with consultants, attorneys, or Nation staff members that may not be authorized by the Nation leadership to represent the Nation as a whole. In the event a Nation authorizes its legal counsel to serve as its representative for consultation discussions with Region 2, Region 2 will involve Region 2's legal counsel.

The main point of contact for Region 2 during the course of the consultation is ordinarily the RPM or OSC. During any leadership meetings, a senior regional official should normally be designated to represent Region 2, usually the Superfund Division Director, Deputy Division Director or Branch Chief. This can depend on the level of representation on the Nation's part. If a Nation leader participates personally, it is generally expected that Region 2 will be represented by the Superfund Division Director, depending on the availability of both leaders and any timing or other constraints under which the consultation process must operate.

VIII. CONSULTATION PLANNING PROCESS

Each Nation 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 nation and that particular action, and designed by both Region 2 and the Nation.

After a matter is identified as appropriate for consultation, Region 2 will work with the Nation point of contact to develop a mutually acceptable approach to planning, preparing and implementing the consultation process. This effort may include an exchange of information about the expectations of each party regarding the consultation process. The Region 2 and Nation 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.

Scope and number of meetings

The Region 2 and Nation 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 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 proposed action and the appropriate participants. The points of contact should explain to each other any constraints or limitations applicable to the scheduling of the consultation process and the specification of timeframes for its completion. The Indian Nation point of contact is encouraged to share with the

EPA point of contact applicable information about the timing of Nation festivals or ceremonies that may affect the consultation schedule. The EPA point of contact is encouraged to share comparable information. In some cases, external timing constraints or an emerging or urgent environmental or human health matter may place extraordinary demands on the parties' schedules.

Both Region 2 and the Nation 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.

IX. CONDUCTING THE CONSULTATION

a. Communication and Information Exchange: Most Nation-Region 2 communication takes the form of information sharing, technical discussion, and joint planning, and involves staff and management of both the Region and Nation. Region 2 is committed to timely and efficient dissemination of information to Nations, and a reciprocal receipt of information from Nations is needed to ensure timeliness of the consultation process. When the Region and a Nation are effectively communicating and coordinating in a timely, meaningful way, conflict is reduced or avoided, and in some cases a Nation 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 Nation lacks the resources to conduct a technical or legal review. Depending on the degree of Nation 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.

b. Consultation involving multiple nations: When extending a notification of consultation to multiple Nations in Region 2, a letter should be sent to each Nation. Depending on the situation and as resources permit, Region 2 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 Nations, and in locations where Nations have expressed interest, to the extent practical. It is important for the Region to know who the designated Nation representative is for each Nation.

c. Timing and location of consultation: Timing of meetings should involve consideration of the Nation's administrative, subsistence, commercial fishing, and cultural events calendars, and Region 2's schedule, which is often dictated by timing constraints inherent in the decision that is the subject of the consultation. The Indian Nation point of contact is encouraged to share with the Region 2 point of contact applicable information about the Nation's timing constraints. Region 2 will be sensitive to the Nation's concerns about timing and location, and will seek to provide reasonable time periods during which consultation can occur. Region 2 will also undertake to explain any constraints, including time periods that may be established for completion of consultation. If travel money or time constraints make such a visit impossible, the parties may agree to meet via video or telephone conference.

d. Telephone or Video Conferences: Regional participants in telephone or video 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 or video conference can present communication challenges such as determining when someone wishes to speak and inability or difficulty in reading 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.

e. Indian Nation visits: If the consultation will involve a visit by Region 2 to a Nation's reservation, the Region 2 and Nation points of contact should consider including a site visit into the visit. Other options may include working with the Nation to host a public meeting or workshop, visiting the Nation's cultural center/museum or meeting with traditional Nation leaders/elders.

f. Consultation involving other federal agencies: Region 2, as the lead agency, may look to engage in consultation with Nations and other federal agencies that may have an interest or role in a particular Superfund matter.

g. Sensitive Information, Record-keeping and Freedom of Information Act (FOIA) Procedures: The points of contact, in coordination with their respective leadership, should discuss confidentiality and FOIA issues in advance. The Nation may wish to share information with Region 2 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 Nation to carry out traditional and cultural practices. While information shared between Region 2 and a Nation may be beneficial for the consultation process, it is generally not protected from disclosure under FOIA and may have to be released to the public should EPA receive a FOIA request, 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 Nation points of contact should work together to ensure information exchange around sensitive issues is planned and supported. Some cultural information belonging to a Nation cannot be shared with Region 2. To the extent allowed by law, Region 2 should defer to Nation policies on confidentiality and management of cultural resources. Region 2 and Nations 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 Nation may have mapped the general area of a cultural resource without identifying a specific location, allowing Region 2 to take that area into account.

The reverse is also true in that sometimes EPA shares documents with a Nation's leadership that are not ready for public dissemination. A side agreement between Region 2 and the Nation may be necessary before the document(s) can be shared. If such an arrangement is needed, EPA staff should consult their regional attorneys. A confidentiality agreement between EPA and the Nation should be signed prior to the EPA's sharing of documents with the Nation.

h. Outside party involvement in the consultation process: Participation and attendance at consultation meetings is generally limited to the representatives of Region 2 and the Nation. Consultants employed by Region 2 or the Nation, or third parties such as intertribal organizations, tribal consortia, environmental/non-profit organizations, potentially responsible parties, and state or local governments, may be included as long as there is no objection from either side. In some cases, the Region and the Nation 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 Nation issues and priorities. Media are excluded from consultation unless both parties agree prior to the consultation.

Region 2 will also be engaging in consultation with the New York State government with respect to Superfund response actions that affect state interests and/or resources. This state consultation will often be taking place contemporaneously with Region 2's Nation consultation. Should all parties agree in advance, one or more joint consultation discussions may be arranged, involving Region 2, the Nation(s) and New York State.

X. 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. Region 2 should aim to understand the priorities and constraints of the affected Nation(s).

Region 2 should make a concerted effort to support solutions that do not negatively impact a Nation's rights, resources and interests. The regional program lead should understand and apply the contents of U.S-Nation agreements (treaties), 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.

Region 2's authority is often subject to specific statutory and regulatory limitations, and the extent to which the Agency can address nation concerns may vary on a case-by-case basis. Region 2 intends to work with a Nation in a

reciprocal manner in addressing issues and matters that might affect it, striving toward consensus. While Region 2 will strive to reach a decision that reconciles the Nation's position, interests, and concerns with the responsibilities of the Agency, consistent with federal law and EPA policy, there may be times when Region 2's decision will not be consistent with the Nation's input or preferred outcome.

XI. REGION 2 SUPERFUND PROGRAM SPECIFIC CONSULTATION CONSIDERATIONS

a. Remedial Phase and Process (See Appendix A): The remedial phase and process should follow all four phases of tribal consultation described above: 1. Identification, 2. Notification, 3. Input, and 4. Follow-up.

b. Region 2 Removal and Emergency Response Actions and Indian Nation Consultation Procedures:

The Region 2 Removal Action Branch within the Emergency & Remedial Response Division is responsible for a range of removal assessment and response actions that vary in their duration, complexity and time-critical nature. The Region 2 Response and Prevention Branch within the same Division is responsible for a range of emergency response actions that likewise vary in duration, complexity and time-critical nature. Removal or emergency response actions may be in response to oil or chemical spills, as well as to natural and man-made disasters. Removal Actions, may be considered non-time critical, time-critical, or emergency response in nature. The urgency and dynamics of a Removal Action may affect EPA's ability to fully implement all four phases of tribal consultation described in Section V., above. However, every effort should be made by EPA to engage in tribal consultation in some form, if feasible.

Non-Time Critical Removal Actions

Non-time critical removal actions, which may be conducted or overseen by either EPA On-Scene Coordinators (OSCs) or EPA's Remedial Cleanup Program, generally allow for at least a 6-month planning period prior to the initiation of cleanup activities on-site. Non-time critical removal actions require an engineering evaluation and cost analysis (EE/CA) to evaluate the cleanup action alternatives being considered. A decision document (Action Memorandum) is subsequently developed to document the selection of the cleanup activity. Given the pace of the non-time-critical cleanup activity, EPA expects to fully implement the tribal consultation process when EPA actions or decisions may affect tribal interests. In particular, EPA will provide opportunities to consult during or before the public comment period and prior to issuing the decision document.

Time Critical Removal Actions

For time critical removal actions, while an EE/CA and public comment period is not required, an Action Memorandum needs to be developed to document the cleanup decision, in most cases prior to a cleanup activity taking place. In the case of time-critical removal actions, the OSC should notify, verbally or in writing, those Nation governments potentially affected by the planned activities. The OSC should consult with potentially affected Nation governments prior to the initiation of a removal action regarding affected Nation 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.

Emergency Removal Actions

During an emergency response, such as an oil spill or hazardous substance release, an Action Memorandum is only written for fund-lead cleanups and even then it is usually written after any/all response and cleanup activities are completed due to the immediate need to protect public health and the environment. There are two ways for a potentially affected Nation to participate in or monitor these emergency response activities. First, if a Unified Command System is established on scene to manage the emergency situation, Region 2 will, at the time of notifying the Nation staff, invite the Nation to send a representative to the scene to join in the Unified Command, serving as either a qualified Nation Incident Commander or as a technical specialist. Secondly, Region 2 produces pollution reports (POLREPs) during emergency actions to document key issues and decisions. Region 2 is committed to adding any potentially affected Nations to the POLREP email distribution, thereby providing current and ongoing cleanup information to the Nation if they are unable to participate directly, on scene.

During an emergency response the EPA OSC, considering the situational exigencies and priorities, should endeavor to, as soon as practicable, notify all potentially affected tribal governments. As noted above, consultation between Nations and Region 2 emergency response personnel can best 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.

Due to the often chaotic and uncontrolled nature of emergency response to spills and releases, the ability to conduct other aspects of consultation with potentially affected Nations will have to be made on a case-by-case, incident-specific basis.

c. Historical or Archaeological Resources: Where a Region 2 Superfund 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. 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 Region 2 Historic Preservation Officer, the Indian Program and ORC to determine whether tribal consultation needs to be coordinated with any additional procedures related to resources.

XII. TRACKING THE CONSULTATION ACTIVITY

In accordance with the requirements of the Consultation Policy, Region 2 tracks consultation activities for a semiannual report submitted to the Office of International and Tribal Affairs every October and April. The 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>. The program lead is responsible to log a particular consultation activity onto the database, after discussion of the details of the consultation activity with the regional TCA, who is responsible for reviewing and approving the consultation database entry. Once approved by the regional TCA, 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, during the notification phase, the consultation notification letter is issued as a means to gauge nation interest, the program lead should notify the regional TCA, who will withhold approval of the TCOTS database entry until Nation interest is confirmed. If no Nation interest is confirmed, the database entry should be deleted by the program lead.

Reporting Requirements: TCOTS is located in the tribal portal and is accessible through Microsoft Office 365. This database is intended to serve as a tracking system for consultation activities from tribal notification through completion of consultation 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.

XIII. CONCLUSION OF CONSULTATION

When consultation has concluded, a follow-up letter will be issued from a senior Region 2 official (typically the Superfund division director) to the most senior Nation official involved in the consultation, thanking the Nation for its participation in consultation. A summary of Nation concerns and how Nation 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 TCA prior to its being issued to the Nation, constitutes formal follow-up notification and should be entered into the tracking database as the date Nation consultation ended.

XIV. CONSULTATION RECORD-KEEPING

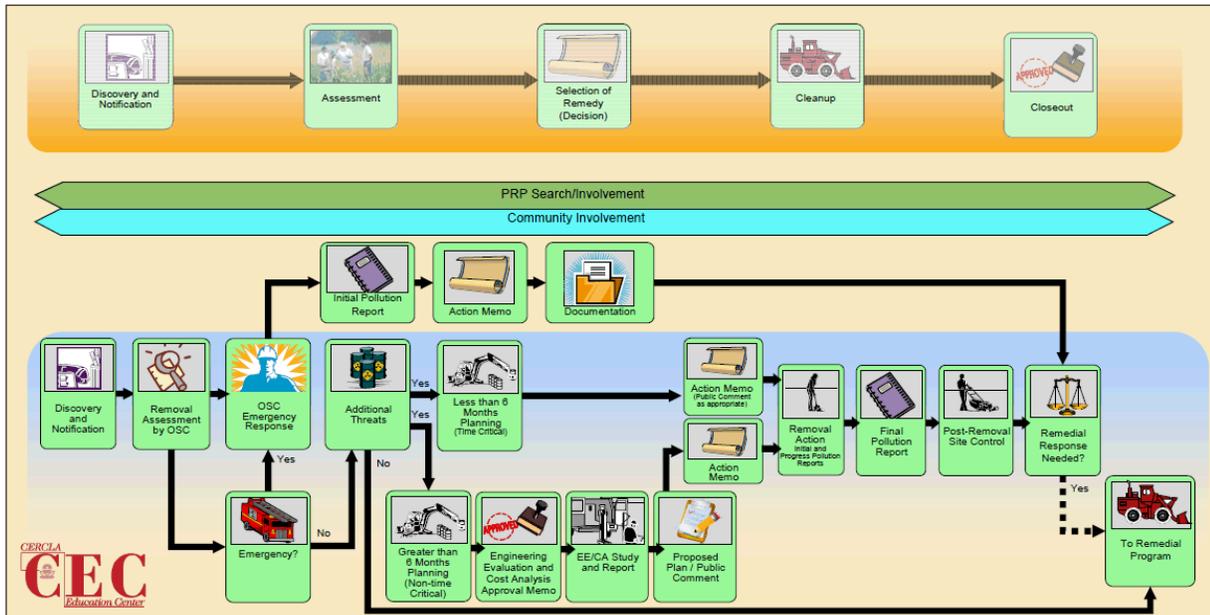
In addition to the tracking of consultation activity on the AIEO Database, Region 2 should keep a record of consultation proceedings, including all letters and pertinent email related to the consultation, in accordance with the Federal Records Act. The record should also include an attendance list of participants in consultation meetings and substantive telephone calls, any documents exchanged and retained, and a brief summary of the discussions. These records would be maintained with the pertinent Superfund site files. Refer to Section IX for additional guidance related to sensitive information, FOIA, and record-keeping procedures.

XV. DISPUTE RESOLUTION

If a dispute arises between one or more Nations and Region 2, the Region 2 RPM or OSC should strive to address the matter informally. In the event that the RPM or OSC 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 matter should be referred to the Emergency and Remedial Response Division Director. The Region's position on a disputed matter will typically be communicated by the ERRD Division Director; however, the Nations are, of course, free to elevate and address their concerns to more senior officials including the Deputy Regional Administrator and the Regional Administrator.

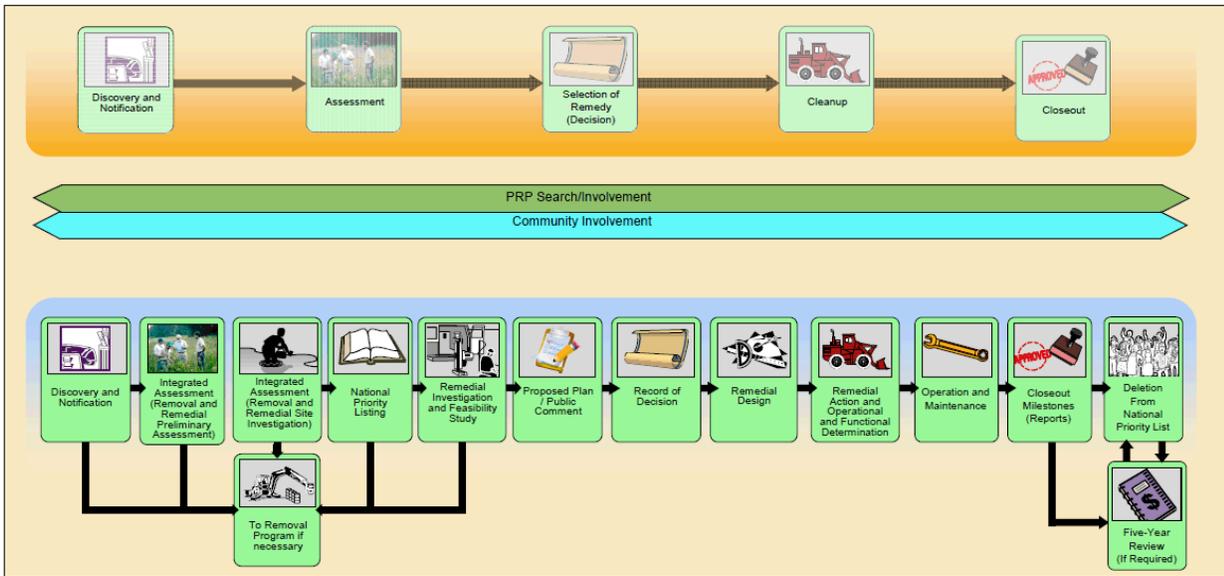
Appendix A – 1: Color Chart of the Removal Process

Removal Process

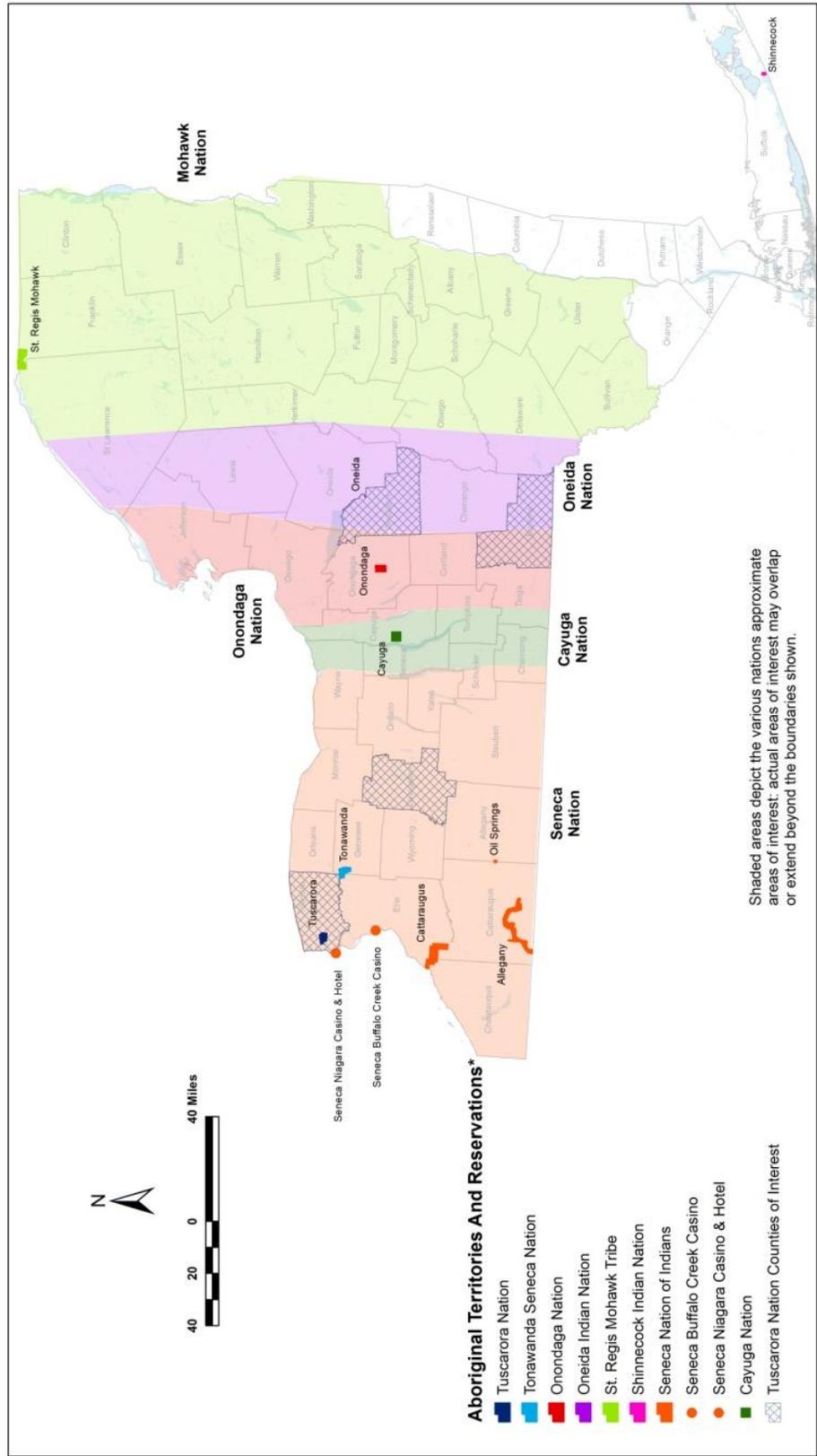


Appendix A – 2: Color Chart of the Remedial Process

Remedial Process



Appendix B Indian Nations' Lands and Approximate Areas of Interest



* Indian Nation Boundary layer downloaded (4/15/13) from U.S. Census location: <http://www.census.gov/geo/partnerships/pvs/bas/436.ny.html>

Appendix C: Model Notification Letter

HEADER:

Name
Title
Nation
Address

Re: Notification of Consultation and Coordination on [name of site and title of action; e.g., *Proposed NPL Listing or Proposed Plan*]

Dear [use contact list for proper title]:

The U.S. Environmental Protection Agency (EPA) Region 2 is seeking to initiate consultation and coordination with the [use contact list for proper Nation name] government concerning [insert name of site and action].

[Insert one paragraph summary of the site and the action.]

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) and the Region 2 Superfund program Indian Consultation guidance (copy enclosed). EPA values the observations, insights, and recommendations of [Nation name] leaders and members regarding [insert name of site and action]. In accordance with our government-to-government relations with you, we are seeking early input and discussion.

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 until [closure date]. The enclosed Region 2 Superfund program guidance document describes the process EPA proposes to follow for this consultation. Also enclosed is additional background information about the [name of site and action], including a proposed timeline for the consultation and coordination period.

(Use the following paragraph if the action under consultation is issuance of a Proposed Plan:) The [Nation name] and other stakeholders will also have an opportunity to comment on the Proposed Plan during the public comment period anticipated to begin [date]. Following the public comment period, EPA anticipates that issuance of a Record of Decision will occur by [date].

The official EPA contact person for this consultation and coordination process is [name, title, email address and phone number], whom you should not hesitate to contact with any questions about the [name of site]. If you have any questions about this consultation process, please contact [name, title], Region 2 Tribal Consultation Advisor, at [insert email address and phone number].

Sincerely,

Senior Consultation Official
Title, Branch, Division

cc: (use contact list for required "cc"s):

Attachments:

1. Copy of EPA Region 2 Superfund Program Indian Nation Consultation Guidance
2. Background information about site, including proposed timeline for consultation

Appendix D: Website Resources

The EPA Headquarters Consultation Database is accessible to all Region 2 staff to upload all Indian Nation consultations that will be reported by Region 2.

The EPA Headquarters contact for the TCOTs database is Dona Harris of the American Indian Environmental Office, in the Office of International and Tribal Affairs (OITA). She can be reached at (202) 564- 6633, harris.dona@epa.gov .

Staff is encouraged to input information about their consultations on a rolling basis; the TCA is available to assist. Once staff inputs data and determines it is complete, data is automatically submitted to the Tribal Consultation Advisor as a “final” which indicates all divisional concurrences have been obtained. The TCA then reviews, edits as appropriate, coordinates with ORA, approves and transmits to the HQ American Indian Environmental Office. After review, AIEO compiles all regional reports into one national report for the Assistant Administrator, Office of International and Tribal Affairs, to transmit to the Office of Management and Budget.