

EPA REGION 9 APPROACH FOR CONSULTATION AND COORDINATION WITH  
TRIBES CONCERNING ENFORCEMENT AGAINST NON-TRIBAL FACILITIES  
AND INSPECTIONS IN INDIAN COUNTRY

I. Background and Introduction

In response to requests from EPA Region 9 staff and a number of tribes<sup>1</sup> in Region 9, the Region has prepared this document to describe the Region's general approach to several aspects of its civil inspection and enforcement processes in Indian country.<sup>2</sup> This approach does not address criminal matters such as EPA criminal investigations or prosecutions. The EPA Office of Enforcement and Compliance Assurance (OECA) *January 2001 Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy* (2001 OECA Guidance) focuses in detail on EPA's procedures for addressing noncompliance by tribal facilities; thus, this Regional approach does not address those issues.

This document has three parts:

(1) The first part of this document describes the Region's general approach for analyzing whether a facility is a "tribal facility" or "non-tribal facility" within the meaning of the 2001 OECA Guidance.<sup>3</sup>

(2) The second part of this document describes the Region's approach to coordinating with tribes concerning EPA inspections in Indian country.

(3) The third part describes the Region's framework for consulting and coordinating with tribes on enforcement against non-tribal facilities in Indian country.

Given the need for flexibility associated with the complexities of inspection and enforcement activities, the varied facts and interested parties in each investigation and enforcement case, and the need for inspections and enforcement cases to move forward in a

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<sup>1</sup> The term "tribe," where used in this document, refers to Federally recognized Indian tribes and their governments.

<sup>2</sup> "Indian country" is defined under 18 U.S.C. § 1151 as: (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Under this definition, EPA treats as reservations trust lands validly set aside for the use of a Tribe, even if the trust lands have not formally been designated as a reservation.

<sup>3</sup> The 2001 OECA Guidance is attached to this document as Attachment A.

timely manner, this document provides a general framework for the Region to follow but is not intended to be binding on the Region or the public or to impose procedural requirements.<sup>4</sup> Questions concerning the implementation of this approach should be directed to Region 9's Office of Regional Counsel (ORC).

In implementing the approach described below, as in all cases involving interaction with tribal governments, Region 9 inspectors and enforcement staff should demonstrate appropriate respect to tribal elected officials and their designated representatives. While tribes are subject to Federal law, they are also sovereign entities that have a unique "government-to-government" relationship with the United States government. Pursuant to the Memorandum dated September 5, 2000 regarding training for staff doing work in Indian country, all Region 9 employees who conduct work with tribal governments undertake training in working effectively with tribal governments, offered annually by Region 9's Tribal Program Office (TPO). The TPO can provide additional information on conducting respectful interactions with tribal officials.

## II. EPA Region 9 Approach for Analyzing Whether a Facility Is a "Tribal Facility" Within the Meaning of the 2001 OECA Guidance

Prior to proceeding with a formal enforcement action<sup>5</sup> in Indian country, Region 9 analyzes whether a facility is a "tribal facility" or "non-tribal facility" within the meaning of the 2001 OECA Guidance. Under the 2001 OECA Guidance, if a facility is a tribal facility, EPA generally may undertake formal enforcement action with the concurrence of OECA, and usually only after working cooperatively with the facility to provide compliance assistance. The 2001 OECA Guidance does not call for OECA concurrence where the allegedly noncompliant facility in Indian country is not a tribal facility; in such cases, EPA generally proceeds with enforcement in the same manner as it would toward such facilities located outside Indian country, and EPA consults and coordinates with the tribe concerning the enforcement action, as discussed in Section III below.

Regional enforcement staff may complete the analysis of whether a facility is a tribal facility at any time prior to proceeding with formal enforcement action against a facility in Indian country, and some offices in the Region may choose to complete the process prior to conducting an inspection of a facility.<sup>6</sup> The Region may request a tribe's views on a number of facilities at

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<sup>4</sup> For example, during exigent situations, the Region should follow this approach to the extent practicable and appropriate, and the Region should ensure prompt communication with the appropriate tribal government regarding any action for which prior communication was not possible.

<sup>5</sup> This document follows the definition of "formal enforcement action" in Section II of the 2001 OECA Guidance. Section II generally defines "formal enforcement action" to include administrative complaints, orders, citations and referrals for judicial enforcement to the Department of Justice.

<sup>6</sup> In programs such as the Underground Storage Tank program that typically use field citations issued at the time of an inspection, it is particularly useful to complete this assessment in advance of the inspection so that any field citation may be issued at the time of the inspection.

one time where appropriate. Once the Region has completed the process for a particular facility, the outcome of its analysis should apply for all future inspections and enforcement actions for that facility, unless the Region has reason to believe that the tribe's interests in the facility have changed, or a significant period of time has elapsed since the analysis was first undertaken. In such case, the Region should confirm the information underlying the original inquiry and solicit input from the tribe as described below.

For purposes of the 2001 OECA Guidance, the term "tribal facilities" means (1) facilities owned or managed by tribal governments, and (2) non-tribally-owned or managed facilities in which a tribal government has a substantial proprietary interest or over which a tribal government has control. Tribal facilities can also include facilities in which the tribal interest is "substantial," although not "proprietary."<sup>7</sup>

The approach taken by Region 9 in assessing whether a facility is a "tribal facility" within the meaning of the 2001 OECA Guidance generally consists of three components: information gathering, seeking the views of the tribe, and assessing whether the facility is a tribal facility.<sup>8</sup> The process for completion of these components may vary, depending on the facts of each situation. Additional discussion with a particular tribe beyond that described here may be appropriate in some cases. Region 9 enforcement staff should notify the TPO<sup>9</sup> and ORC prior to initiating the process, and should confer with ORC regarding the outcome. In some cases, the Region may also confer with OECA regarding the outcome.

In a typical case, Regional enforcement staff will have some information relevant to a tribal facility assessment as a result of the Region's inspection and investigation. The Region may, for example, have information indicating whether or not the facility is owned or operated by the tribe, and whether the tribe derives income from the facility (or even how much). However, prior to discussions with the tribe, the Region typically does not have the tribe's views regarding its interests in a facility, including whether or not certain relevant interests are substantial.

Prior to finalizing the assessment of whether a facility located in Indian country is a tribal facility, EPA solicits the tribe's views on such subjects, and any other information which may be useful in analyzing the facility's status. In communicating with the tribe, the Region should request that the tribe keep any sensitive enforcement or investigation information confidential.

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<sup>7</sup> Tribal facilities may be located outside of Indian country. Regional enforcement staff should follow this tribal facility analysis approach for facilities located outside of Indian country if questions arise regarding tribal interests in those facilities.

<sup>8</sup> Completion of this tribal facility assessment approach may not be called for in situations where it is obvious that a facility is, in fact, a tribal facility.

<sup>9</sup> Where this approach recommends TPO involvement, Regional enforcement staff should contact the director of the TPO or the TPO's enforcement liaison, who then assigns a TPO staff person to assist with the particular matter.

Formal communications with the tribe concerning these issues should be sent to the tribal government -- typically the tribal chairperson or equivalent<sup>10</sup> -- with a copy to other appropriate tribal personnel such as the tribal environmental department.

In order to obtain the tribe's views, and to obtain any other information which may be useful in assessing the facility's status, the Region typically sends the tribal government a letter outlining the 2001 OECA Guidance and soliciting the tribe's views. Informal discussions with tribal government staff such as the tribal environmental department prior to and after sending the letter may also be useful. If the Region already has relevant information, the letter should generally summarize such information so that the tribe does not need to duplicate the effort. An example of such a letter is attached to this memorandum as Attachment C. A written response is not essential and the tribe may elect to provide its views or any other relevant information orally. Where enforcement staff and ORC believe the Region has already gathered much of the information through informal contacts with the tribe or otherwise, the Region may include a tentative assessment in this letter.

After soliciting the tribe's views, Regional enforcement staff and ORC should consider any input from the tribe and either pursue the matter further with the tribe or conclude that the facility either is, or is not, a tribal facility, as appropriate. Where pursuing the matter further with the tribe, the Region may choose to make a tentative assessment (if it has not done so already) to be sent to the tribe for input. Letters to the tribe which include tentative assessments or the ultimate outcome of the Region's analysis should summarize the information relied upon in conducting such analysis so that the tribe will have an opportunity to evaluate the basis for the Regional assessment. Examples of letters containing tentative assessments or ultimate outcomes of the Region's analysis are attached as Attachments D and E to this memorandum.

In order to avoid delays in addressing alleged violations at the noncompliant facility, the Region should include a specific date for the tribe's response in letters soliciting information and requests for the tribe's views on tentative assessments; typically two to four weeks is appropriate, but the time frame may vary from case to case depending on the particulars of the situation. If a response from the tribe has not been received as the end of the time frame for a response approaches, Regional enforcement staff, with TPO assistance, should make reasonable efforts to secure a response through phone calls to the tribe or other means recommended by the TPO. It may be that the tribe requires additional time to submit its views, or, in some cases, the tribe may prefer not to provide a response. If those reasonable efforts fail to secure a response to a letter soliciting information or a tentative assessment, the Region should complete and document its

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<sup>10</sup> The elected tribal government officials may formally delegate responsibility for consulting and coordinating with EPA in connection with activities outlined in the 2001 OECA Guidance to another tribal official (e.g., the head of the tribal environmental department), in which case this correspondence would be sent to the delegee. The Region should confirm that the delegation is in writing. At the time of this memorandum, in Region 9 only the Navajo Nation had formally delegated these responsibilities. A copy of that delegation is attached as Attachment B.

analysis, and provide a copy of that document to the tribe.

### III. EPA Region 9 Approach for Coordinating with Tribes Concerning EPA Inspections in Indian Country

Region 9 inspectors should use best efforts to coordinate with tribes prior to entering Indian country for the purpose of conducting inspections.<sup>11</sup> In cases where the inspection occurs prior to recognizing that a facility is located in Indian country or in exigent circumstances, Regional inspectors should endeavor to notify the TPO and the tribal government of the visit as soon as possible, and to communicate the results of the visit.

More specifically, prior to proceeding with an inspection, Region 9 inspection staff should use best efforts to determine whether planned activities will occur on an Indian reservation or otherwise within Indian country, coordinating with the TPO if any questions arise regarding the land status. If the inspection will take place in Indian country, Region 9 inspectors should make every effort to notify the tribal government and to confirm through a conversation with the tribe's designated tribal environmental staff or otherwise that notification has been received in advance of the planned visit. Inspectors should offer tribal government officials or their designees an opportunity to accompany the Region on the inspection. Inspectors should also notify the TPO prior to the inspection, and seek TPO assistance if they experience difficulty in reaching tribal representatives.

If a formal order or warrant is required to obtain access, Region 9 inspection staff and ORC should consider, after soliciting and considering the views of the tribe, if practicable, whether to include tribal government officials on the inspection. For warrants, inspection staff and ORC should also confer with the appropriate U.S. Attorney's Office.

EPA enforcement programs have the discretion to conduct unannounced inspections, and that discretion extends to Indian country. For unannounced inspections of non-tribal facilities, Region 9 inspection staff should decide on a case-by-case basis, with input from ORC and the TPO, whether to notify tribes in advance of the inspection, in light of policy, confidentiality, and legal concerns. Where the Region does provide advance notice, it should work with the tribe to ensure that it recognizes and concurs with the need to keep enforcement and investigation information confidential. Region 9 should inform the tribal government of the results of inspections in Indian country against non-tribal facilities, and provide copies of final inspection reports, except in specific instances where the enforcement program has reason to believe that sharing the information may interfere with the enforcement investigation or proceedings, or where information is confidential and not appropriate for release. (See Section III below for more information on EPA policy and procedures concerning enforcement confidentiality).

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<sup>11</sup> Advance notification may not be possible when Region 9 enforcement staff are accompanying another Federal agency which is the lead enforcement agency.

In the event that Regional enforcement staff intend to conduct an unannounced inspection of a tribal facility, the Region generally should not provide advance information to the tribal government regarding the inspection, but should inform the tribal government of the results as soon as reasonably practicable.

IV. EPA Region 9 Approach for Consulting and Coordinating with Tribes on Enforcement Against Non-Tribal Facilities in Indian Country

The 2001 OECA Guidance states that in cases of noncompliance by a non-tribal facility in Indian country, EPA generally responds in the same manner as it would toward such facilities outside Indian country, but notifies the affected tribal government of any anticipated Agency action and consults with that tribal government<sup>12</sup> on a government-to-government basis to the greatest extent practicable and to the extent permitted by law.<sup>13</sup>

If a Region 9 enforcement action is planned involving a non-tribal facility in Indian country, Region 9 enforcement staff should notify the TPO and the tribal government and make reasonable efforts to solicit and consider the views of the tribal government regarding its plan, except in specific instances where the enforcement program believes that sharing the information may interfere with the enforcement investigation or proceeding or otherwise be inconsistent with Agency enforcement and confidentiality policies. Where practicable, prior to making a final decision on an enforcement response, Regional enforcement staff should solicit and consider the views of the tribal government on the matter, including consideration of whether the tribal government plans to use tribal authorities to conduct an enforcement action to address the non-compliance that is timely and commensurate with federal law or suitable for a joint enforcement action.

Region 9 enforcement staff should notify the elected tribal government officials or the designated tribal contact<sup>14</sup> and the TPO of the results of enforcement activities against non-tribal facilities in Indian country. Where the tribe expresses a significant interest in a particular enforcement matter against a non-tribal facility in Indian country, Region 9 should endeavor to provide to the tribal government or designated tribal contact periodic updates concerning the progress of the case, and to consider tribal input, subject to legal and policy restrictions that limit the Agency to sharing only non-sensitive, non-privileged information that does not interfere with the investigation, settlement negotiation, or litigation. Region 9 should also seek to facilitate

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<sup>12</sup> The 2001 OECA Guidance notes that notice and consultation are particularly important in cases of noncompliance at non-tribal facilities that offer goods or services that are vital to a tribe's economy or welfare (for example, at the sole gasoline station located on a particular reservation).

<sup>13</sup> Where a tribe has primary enforcement authority for an approved or authorized Federal program, additional communication protocols may apply.

<sup>14</sup> To facilitate communications, the tribal government may wish to designate an individual such as a member of the tribal environmental department as the tribe's contact for a particular matter.

involvement of the tribal government and community in the development of supplemental environmental projects (also known as “SEPs”) as appropriate.<sup>15</sup> Region 9 notes that when an enforcement matter is before a court, the Agency should consult the appropriate attorneys at the Department of Justice or the U.S. Attorney’s Office before discussing the matter with a tribal government that is not a party to a joint prosecution agreement. See *EPA Ethics Advisory 90-2*.

Agency employees are precluded from disclosing to third parties<sup>16</sup> enforcement confidential information or otherwise sensitive or privileged information that may affect how a case proceeds by legal, ethical or other restrictions summarized most recently in an OECA memorandum dated October 28, 2003. See *Memorandum from John P. Suarez Re: Restrictions on Communicating With Outside Parties Regarding Enforcement Actions*, October 28, 2003 (2003 OECA Memorandum).<sup>17</sup> Such information may include “[i]nformation on the status of an investigation, negotiation, litigation, or settlement discussion, including strategy and tactics,” and “[s]ensitive information that may affect how a case proceeds, even though the information may not be privileged.” 2003 OECA Memorandum. Federal legal requirements also preclude Agency employees from releasing confidential business information, information subject to the Privacy Act, or other information subject to Federal statutory protections against the release of confidential data.<sup>18</sup> If Region 9 and a tribe decide to pursue a joint enforcement action, the parties should enter into a joint prosecution agreement to protect the confidentiality of communications.

This document provides non-binding guidance for Regional staff. It is not a regulation and is not intended to impose legally binding requirements on EPA or the public, nor to create any right, benefit or responsibility, including any trust responsibility, when applied in particular situations. EPA retains the discretion to adopt approaches that differ from this document where appropriate depending upon the specific circumstances at issue. EPA reserves the right to change this approach at any time without public notice, as needed.

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<sup>15</sup> See EPA’s *Interim Guidance for Community Involvement in Supplemental Environmental Projects* for additional information concerning community involvement in SEPs. 68 Fed. Reg. 35884 (June 17, 2003).

<sup>16</sup> External third parties have been defined as including members of Congress, governments that have not entered into a joint prosecution agreement with the Federal government, media representatives, lobbying groups and the general public.

<sup>17</sup> This memorandum is attached to this document as Attachment F.

<sup>18</sup> Public documents that can be shared with outside parties include information requests to initiate investigations, judicial complaints, notices of violations, administrative orders, final settlement agreements and motions, and other documents filed with courts or in administrative proceedings. In addition, non-confidential technical documents may be made available to tribes for their input in the context of remedial responses and other environmental cleanup actions in Indian country.

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