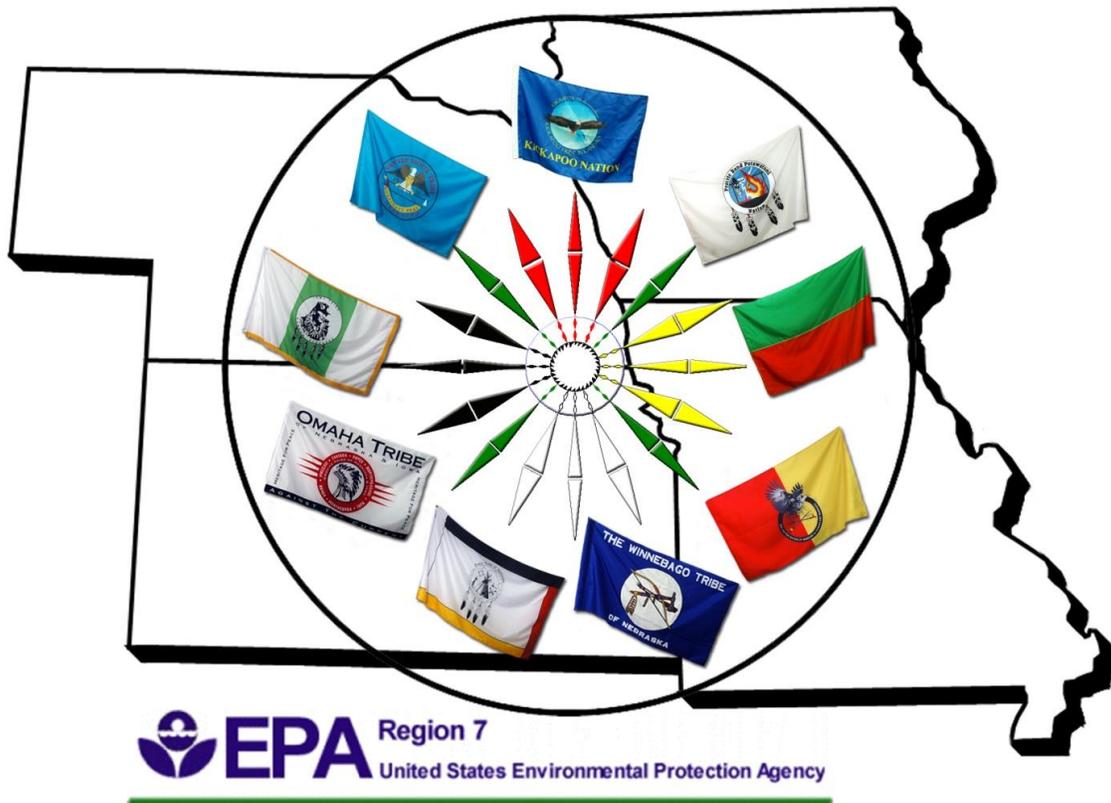


EPA Region 7

Tribal Consultation and Coordination Guidance

June 2017¹



¹ Disclaimers: In June 2017, Region 7 received comments from EPA Headquarters to clarify this Regional Guidance. Thus, the Guidance now specifically provides that consultation will be on matters that “may affect tribal interests,” which is consistent with the EPA Policy on Consultation and Coordination with Tribal Governments (May 2011). This clarification from HQ does not alter this Guidance in any other way. Any and all prior versions of this guidance are hereby superseded and should be discarded including the April 2017 version and the R7 Interim Guidance on Consultation with Tribal Governments (June 2011).

This document provides general information and guidance regarding Region 7’s work in Indian country. It does not address all information, factors, or considerations that may be relevant. This document is not legally binding. The words “will” or “should” and other similar terms used in this document are intended as general recommendations or suggestions that might be generally applicable or appropriate and should not be taken as providing legal, technical, financial, or other advice regarding a specific situation or set of circumstances. This document may be revised at any time without public notice. This document is not a substitute for environmental law provisions, regulations, or policies, nor is it a regulation itself. In the event of a conflict between the discussion in this document and any statute, regulation, or policy, this document would not be controlling and cannot be relied upon to contradict or argue against any EPA position taken administratively or in court. It does not impose legally binding requirements on EPA or the regulated community, and might not apply to a particular situation based upon the specific circumstances. This document does not affect the Agency’s enforcement discretion in any way.

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I. Purpose and Scope

EPA's policy is to consult on a government-to-government basis with federally recognized tribal governments when EPA actions and decisions may affect tribal interests. Federally recognized tribal governments (tribes) include all elected officials, appointed directors or officers, and all tribal staff who represent the government of a tribally-authorized Indian organization. The *EPA Policy on Consultation and Coordination with Indian Tribes* (Consultation Policy) establishes national guidelines and institutional controls for consultation across EPA. This *EPA Region 7 Tribal Consultation and Coordination Guidance* (Guidance) is consistent with the Consultation Policy, but includes more specific guidelines for the consultation process to meet the needs and practices of tribes in EPA Region 7 (Region 7).

This Guidance applies to Region 7 interactions with tribes in Kansas, Missouri, Nebraska, and Iowa, including the Sac & Fox Tribe of the Mississippi, the Iowa Tribe of Kansas and Nebraska, the Kickapoo Tribe of Indians of the Kickapoo Reservation, the Prairie Band of Potawatomi Nation, the Sac & Fox Nation of Missouri, the Omaha Tribe of Nebraska, the Ponca Tribe, the Santee Sioux Nation, and the Winnebago Tribe.

The goals of this guidance document are to: 1) identify roles and responsibilities of those involved in tribal consultation to promote consistency in, and coordination of, the consultation process, 2) establish clear Region 7 procedures for the tribal consultation process, and 3) establish oversight and reporting processes to strive for regional accountability and transparency.

II. Fundamental Principles

EPA's fundamental objective in carrying out its responsibilities in Indian country² is to protect human health and the environment.

EPA recognizes and works directly with tribes as sovereign entities with primary authority and responsibility for each tribe's land and membership, and not as political subdivisions of states or other governmental units.

EPA recognizes the federal government's trust responsibility, which derives from the historical relationship between the federal government and tribes, as expressed in certain treaties and federal Indian law.

EPA strives to ensure the close involvement of tribal governments and gives special consideration to their interests whenever EPA's actions may affect Indian country or tribal interests in Region 7.

² "Indian country" is defined in the Consultation Policy and by federal law; it includes reservations, independent Indian communities and allotments. The EPA's definition of "reservation" encompasses both formal reservations and "informal" reservations, i.e., trust lands set aside for Indian tribes. *See for example* Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 123 (1993); 56 Fed. Reg. 64876, 64881 (1991); or 63 Fed. Reg. 7254, 7258 (1998).

When EPA issues involve other federal agencies, EPA carries out its consultation responsibilities jointly with those other agencies, where appropriate. In order to apply these principles, Region 7 is committed to comprehensive consultation with tribal governments before making decisions or changing policy on environmental matters that may affect tribal interests.

III. Why Region 7 Consults

Meaningful tribal consultation is an integral component of the federal government's trust relationship with tribes. The federal government recognizes the right of each tribe to self-government, with sovereign powers over their members and their territory. Presidential Memorandum (Memorandum) issued November 5, 2009, directed agencies to develop a plan to implement fully Executive Order 13175 (Executive Order). The Executive Order specifies that each Agency must have an accountable process to ensure meaningful and timely input by tribal officials prior to making any decisions or taking actions that have tribal implications".³

The EPA has a longstanding policy that supports tribal involvement in decision-making. In EPA's *Policy for the Administration of Environmental Program on Indian Reservations*, the Agency stated that the keynote of EPA's efforts to protect human health and the environment "will be to give special consideration to tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs" that affect them.

IV. What is Consultation

a. Definition of Tribal Consultation

The Consultation Policy defines consultation as:

"a process of meaningful communication and coordination between EPA and tribal officials prior to EPA taking actions or implementing decisions that may affect tribes. As a process, consultation includes several methods of interactions that may occur at different levels. The appropriate level of interaction is determined by past and current practices, adjustments made through this Policy, the continuing dialogue between EPA and tribal governments, and program and regional procedures and plans."

In many circumstances, planned and structured meetings between EPA and tribal leaders are an essential part of the consultation process. For purposes of clarity and to avoid miscommunication, this Guidance will refer to those meetings as "leadership meetings", see Part X.c. below.

³ See EO 13175, Section xxx, "Policies that have tribal implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes."

Consultation includes seeking, discussing, and considering the views of tribes regarding a Region 7 action or decision. Consultation consists of respectful, meaningful, and effective two-way communication between the tribes and EPA, in an effort to achieve mutual understanding of one another's respective interests and perspectives *before* EPA makes its decisions or moves forward with its action.

The process of effective tribal consultation may include a wide range of communication over the course of developing an EPA action or decision. This communication can include meetings, telephone conferences, or internet-based communication to exchange technical information at the staff or management level, discussions to establish effective processes for coordination and planning, formal structured meetings between EPA and tribal leaders, or a wide range of other communication in person or by email, telephone or letter.

b. Application

These Guidelines provide guidance to Region 7 staff for communication with tribes. In the situations listed below, Region 7 staff will consult with the Region 7 Office of Regional Counsel including the Federal Indian Law Attorney, to determine consultation and other procedures specifically designated for these circumstances:

- Emergency environmental situations that require immediate response/notification
- Criminal investigations or enforcement
- Civil investigations or enforcement (including unannounced and announced inspections)
- When treaty rights may exist, that may be affected by or are the focus of a proposed EPA action or decision

c. Consultation as Distinguished from the Public Participation Process

Tribal consultation is distinct from the EPA public participation and community involvement process. Whenever possible, tribal consultations will occur before any EPA public meeting to offer EPA the opportunity to consider input from interested tribes prior to seeking public comment.

A tribe may benefit from participating in the EPA public participation and community involvement process, separate and apart from any consultation. A tribe may choose to submit oral and written comments into the public record during the public comment period. This may be necessary for the tribe to preserve its appeal rights, or to preserve a particular issue for appeal. It may be helpful to discuss these specific issues with the tribe when planning the consultation.

Additionally, a tribe may choose to hold its own community or member meetings to discuss EPA's action. The tribe may invite EPA to participate in these meetings or it may choose to meet privately with its tribal community or membership.

V. **Who in Region 7 is Responsible for Planning, Supporting, and Conducting Tribal Consultation?**

The Regional Administrator oversees the consultation process in Region 7. The Regional Administrator and Deputy Regional Administrator are the top EPA officials for Region 7. The Region 7 Office/Division Directors report directly to the Regional Administrator. The Office/Division Directors are responsible for ensuring that the appropriate staff are aware of tribal consultation responsibilities and procedures, and that the consultations are carried out for actions, decisions, projects, and similar activities undertaken by their office or division.

The Region 7 Office of Tribal and International Coordination Director (OTIC Director) reports directly to the Regional Administrator and is a member of the EPA/ Regional Tribal Operations Committee (RTOC). The OTIC Director works with EPA senior managers and staff to ensure effective government-to-government relations with Tribes, in accordance with EPA's consultation policy and practices. The OTIC Director involvement with consultation is in coordination with the Regional Administrator, Deputy Regional Administrator, or Office/Division Directors. The OTIC Director also serves as the Tribal Consultation Advisor (TCA) and the Region 7 Indian Coordinator (RIC). The OTIC Director is the main point of contact and is responsible for supporting tribal consultation across the Region.

The individual with primary responsibility for the EPA activity, decision or action is the Project Lead, such as a project manager, permit writer, contingency planner, or on-scene coordinator. Ordinarily, the Project Lead has the primary responsibility for the consultation process unless the RA delegates such responsibility to another person. Others within the Region are involved or can support the consultation process; their roles are described here. The first two listed below, the Regional Indian Coordinator and R7 GAP Project Officers are the Project Lead's initial points of contact for all tribal consultation support or related questions. Project Leads will 1) inform R7 GAP Project Officers of any activities that may affect tribal interests, 2) seek said Project Officers advice regarding whether, when, and how to consult in a given situation, and 3) inform said Project Officers of all tribal consultations.

The Region provides direct field assistance to the Tribes under the GAP grants. The position formerly known as the R7 Tribal Environmental Liaison is now within the responsibilities of the GAP Project Officers in Region 7. As such, GAP Project Officers are generally familiar with each tribe's environmental concerns, political structure, and relationship with EPA. The GAP Project Officers will become aware of consultation(s) on a case-by-case basis and will assist Project Leads' with the consultation process. When acting as liaisons, Region 7 GAP Project Officers are an invaluable resource because of their familiarity with each tribe.⁴

⁴ Current R7 organizational chart can be viewed at: <https://www.epa.gov/aboutepa/organization-chart-epas-region-7-office>

The Region 7 Office of Regional Counsel, Federal Indian Law Attorney will be consulted when questions arise over application of federal Indian law or EPA Indian policies, potential liability of a tribe under an environmental statute, tribal jurisdiction or authority, Indian country boundaries, or other related legal issues. If a tribal government plans to have an attorney present at any interaction with the Region, the Office of Regional Counsel will be notified and invited to participate including the attorney assigned to the matter; and, if no attorney is assigned, the Federal Indian Law Attorney will be notified and invited to participate.

VI. Identifying Activities Appropriate for Consultation

Region 7 will consult with a tribe when making decisions, taking actions, managing projects, or engaging in similar activities, in which the tribe's interests may be affected.

a. **Types of Activities that may be Appropriate for Consultation:** The Consultation Policy contemplates a broad scope of actions for which consultation may be appropriate. The following list of Region 7 activities are normally appropriate for consultation if they may affect tribal interests:

- Regulations or rules
- Policies, guidance documents, directives
- Permits: renewals and new⁵
- Grant matters
- Civil enforcement and compliance monitoring actions⁶
- Response actions and emergency preparedness⁷
- National Priority Listing and deferral decisions
- State or tribal authorizations or delegations
- Designation of disposal sites
- EPA activities in implementation of U.S. obligations under international or tribal treaties or agreements
- State Actions

When a tribe requests or Region 7 is aware of actions affecting tribes, Region 7 generally will agree to consult with a tribe on state-led actions where Region 7 has the ability to change or veto the state action, and the proposed action has the potential to affect that tribe's interests. Region 7's approach will be to work with both the tribe and state as early as possible to consider potential effects on tribal interests in the EPA's exercise of any oversight authority.

⁵ Tribal consultation on EPA-issued permits in Indian country, whether for tribally-owned/operated or non-tribal facilities, will be offered as early as possible in the process.

⁶ Primary guidance on civil enforcement matters involving tribes can be found in "Guidance on the Enforcement Priorities Outlined in the 1984 Indian Policy," and "Questions and Answers on the Tribal Enforcement Process." This guidance is intended to work with the Tribal Consultation Policy in a complementary fashion to ensure appropriate consultation with tribes on civil enforcement matters.

⁷ The term "response" as defined under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) includes removals and remedial actions.

- Environmental Justice Actions
 - Region 7 defines and recognizes “environmental justice” matters in Indian country in accordance with the *EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples*, Region 7 consultations will be available to tribes to promote environmental justice in 1) tribal environmental protection programs, 2) EPA’s engagement with indigenous peoples, and 3) intergovernmental coordination and collaboration.
- Other Federal Agency Actions
 - In some circumstances, EPA has a secondary or oversight role in actions or decisions by other federal agencies. For example, (1) federal actions that require Environmental Impact Statements or other environmental reviews under the National Environmental Policy Act (NEPA), which EPA reviews and comments on under Clean Air Act Section 309 and related regulations, (2) permits issued by the U.S. Army Corps of Engineers under Clean Water Act Section 404, which EPA may review, and (3) some cleanup actions by other federal agencies under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). In such circumstances, Region 7 would encourage a tribe seeking consultation to work directly with the federal agency with the most direct responsibility for the action or decision in question.
 - In specific circumstances, Region 7 would consider a tribe’s request to consult with the Region based on the extent of the agency’s active involvement or influence in the decision or action. For example, the Region has discretion in connection with its role or involvement that would contribute significantly to the action or decision of the other federal agency or agencies.

b. **Whether Tribal Interests are Affected:** At the beginning of a proposed project, action, or decision making, the Project Lead will make an initial determination whether the interests of one or more tribes may be affected by the action, taking into account the following considerations:

i. Geographic Considerations

- Action on or adjacent to Indian Country, or nearby (such as within the same airshed or watershed), if the action may affect a tribe’s health, environment, resources, rights, or traditional way of life, e.g., where a resource-based treaty right (e.g., hunting, fishing, or gathering) is identified, or an environmental condition necessary to support the resource is present in the specific geographic location
- Action within the “usual and accustomed areas” or other treaty-protected locations within or outside Indian country boundaries of a federally recognized tribe, which may affect a tribe’s resources, rights, or traditional way of life, also considering effects on treaty rights

ii. Tribal Resources

- Action that may affect the treaty-reserved resources of a tribe
- Action that may affect the public health in the tribal community

- Action that may affect the cultural, traditional, sustenance, or subsistence resources of a tribe or a tribe's traditional way of life
- iii. Tribal Ownership
- Action related to a facility owned or managed by a tribal government

VII. Phases of Consultation

The Consultation Policy establishes four phases of the consultation process:

a. **Identification:** EPA identifies activities that may be appropriate for consultation. The identification phase will include a determination of the complexity of the activity, its potential implications for tribes, and any time and/or resource constraints relevant to the consultation phase. This phase will also include an initial identification of the potentially affected tribe(s). EPA generally will agree to consult when a tribe initiates consultation. See Part VII.b.ii, below. When a tribe requests, the EPA will endeavor to share information about determinations whether and how to consult and coordinate. In addition, EPA may offer multiple rounds of consultation as appropriate. See Part VII.c., below.

b. **Notification Phase:**

i. Initiation by EPA. Once the Region 7 Project Lead determines that consultation is warranted, EPA will send a letter to the appropriate tribe offering to consult. The 7 Project Lead will draft the letter, and can seek input from the OTIC Director and the Liaison, who can also provide sample letters. The letter will:

- Be addressed to the Tribal Leader (e.g. Tribal Chair), with a copy to the tribe's environmental program staff, Tribal Environmental Director, and the OTIC Director
- Be signed by an Office/Division Director or the Regional Administrator
- Describe the issue at hand clearly, avoiding or clearly defining legal and technical terms and acronyms
- Describe the upcoming EPA project, action, or decision
- Include maps, technical data, and other explanatory or supporting information as appropriate and available
- Relay process timelines and schedule considerations
- Identify the Project Lead, who will work with the tribe to arrange all aspects of the consultation
- Request that the tribe respond to the Project Lead, indicating whether or not the tribe intends on pursuing consultation
- Request response by a date that allows adequate time for a tribal council meeting or other internal deliberations by the tribe (typically four weeks from receipt of letter)
- Request that the tribe provide the name of a tribal representative who will serve as the point of contact for planning the consultation, if the tribe wishes to go forward with consultation

- Request any policy that the tribe may have regarding EPA consultation with them
- Identify or propose timeframes for starting and ending consultation

Whenever possible, the Project Lead will follow up with a phone call or e-mail to the tribal environmental program or other appropriate tribal department to ensure receipt of the letter and to open dialogue about the potential consultation.

1. If a Tribe Declines

If a tribe indicates it does not want to consult on a given matter, EPA consultation efforts are normally concluded. The best practice is to document this in a memo to the file (and administrative record, as necessary) and inform the OTIC Director for tracking purposes. This does not relieve Region 7 of any federal trust responsibility it may have to consider the interests of the tribe.

2. If a Tribe Does Not Respond

If a tribe does not respond by the date provided in the consultation invitation letter the EPA Project Lead will work with the OTIC Director to reach out to the tribe, usually through e-mails and phone calls to the tribal environmental department. If there is still no response from the tribe, this will be documented in the file (and administrative record, as necessary), and would conclude the Region's efforts to initiate consultation. This would not relieve Region 7 of any federal trust responsibility to consider the interests of the tribe.

ii. Initiation by a Tribe. Region 7 generally will agree to consult when a tribe requests it, assuming the potential Region 7 action or decision could affect that tribe's interests. When Region 7 receives a written request from a tribal leader, the Project Lead will acknowledge the receipt of the request within one week. The Project Lead will also notify appropriate personnel in their own office, the OTIC, and the Region 7 Federal Indian Law Attorney.

c. **Input Phase:** Tribes provide input to Region 7 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 on the specific circumstances involved. Region 7 coordinates with tribal officials during this phase to be responsive to their needs for information and to provide opportunities to provide, receive, and discuss input. Region 7 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 7 provides feedback to the tribes involved in the consultation to explain how their input was considered in the final action. This feedback will be a formal, written communication from a senior Regional EPA official (Regional Administrator or respective program office manager) to the most senior tribal official involved in the consultation. See Section XV: Conclusion of Consultation, for more details regarding the follow-up.

VIII. Timing of Consultation

To assure that consultation is meaningful and timely requires communication early enough to potentially affect the project, action, decision, or the data collection associated with it.

This will often involve notifying a tribe of an expected action or decision, providing information about the decision to the tribe, discussing major policy and environmental considerations, and exchanging information and viewpoints at a program and technical level.

It will often be important to provide an opportunity for similar communication far enough along in the process that Region 7 can provide significant detail about the decision or action it is considering. In some cases there is a single time period when both of these objectives can be achieved. In other cases, it may be necessary to consult early in the process, and then consult again at a later point when the action is more developed. The ideal approach is to have active communication throughout the data gathering and decision process about the scope and nature of consultation that the tribe desires.

The timing of tribal elections and fishing, hunting and gathering seasons, etc., is important to factor in timing of a consultation. Contact the OTIC Director and the Liaison for more information.

IX. Consultation Planning Process

Each tribe 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 tribe and that particular action, and designed by both Region 7 and the tribe.

After a matter is identified as appropriate for consultation, Region 7 and the tribal points of contact should work together to develop a mutually-acceptable approach to planning, preparing and implementing the consultation process. The 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.

Region 7 and tribal points of contact should summarize key decisions and plans in writing to ensure shared understanding and documentation of decisions reached. In some cases, the points of contact may summarize their mutually developed approach in a written consultation plan or a Memorandum of Understanding (MOU).⁸ When the issue is highly complex, controversial, resource intensive, or involves several phases of consultation over a long period of time,⁹ Region 7 and the tribe's preferred approach may be to develop a signed MOU, taking into consideration time to prepare and negotiate it.

⁸ On case-by-case basis, an MOU may be negotiated with a tribe during the consultation, which may be a continuous process that includes such negotiation. The Federal Indian Law Attorney should be consulted on MOUs.

⁹ For example, EPA response actions may take 5 or 10 years and involve multiple decision making points.

The Region 7 and tribal points of contact should discuss the following elements of the consultation:

a. Goals and Expectations of each Party

Region 7 and tribal points of contact should work with their respective leadership to identify each party's goals and expectations, and to determine how to structure the consultation process to address those goals and expectations.

b. Consultation Policies and Procedures

Region 7 should discuss with the tribe whether it has developed its own consultation policy or procedures. Any tribally-developed consultation policies or procedures will be incorporated into the consultation planning and implementation, where appropriate.

c. Identification of Authorized Tribal Official

The Project Lead will work with the tribe to specify who will represent each party at each point during the consultation process. It is important that the Project Lead verify in writing with the tribe that the specified tribal representative is authorized to represent the tribe for the purposes of consultation. This is necessary to avoid misunderstandings that can arise from dealing with consultants, attorneys, or tribal staff members who may be communicating with EPA without the authority to represent the tribe as a whole.

d. Scope and Number of Meetings

Region 7 and tribal points of contact will determine whether the consultation topics can be covered in a single meeting or whether the consultation topics will require a series of meetings, possibly including technical exchange meetings and one or more leadership meetings.

e. Consultation Plan Format

The parties will discuss whether they need a written consultation plan, a more formal MOU, or whether verbal/email planning will suffice. It may be appropriate to develop a MOU for particularly complex consultations, such as those involving multiple federal agencies, tribes, legal authorities, decision points, and/or regulatory processes. The Office of Regional Counsel for Region 7 must be involved in the development of any MOU.

f. Setting the Leadership Meeting Date and Location

The points of contact will begin setting the meeting date(s) at the earliest opportunity, as it may take weeks of planning to align calendars of the appropriate participants with the schedule for the EPA action or decision. Timing of meetings will need to take into account EPA's calendar and a tribe's administrative, subsistence, commercial fishing, and cultural events calendars. Leadership meetings will be held face-to-face whenever possible, preferably on tribal homelands. If travel money or time constraints make such a visit impossible, the parties may agree to meet via video or telephone conference.

g. Information Exchange

The points of contact will discuss in detail what information each party will need for effective consultation. Both Region 7 and the tribe may have technical or factual information relevant to the consultation. This information will be shared between the parties, whenever possible.

h. Consultation Facilitation

The EPA and tribal points of contact will discuss and agree on whether there will be facilitation for any meetings during the course of the consultation. The parties may decide upon someone from their respective staffs, such as the Liaison, or may choose to hire an independent third party, if resources allow. If the parties elect to forgo a facilitator, it is important to pay particular attention to potentially different communication styles.

X. Conducting the Consultation

a. Communication and Information Exchange

Consultation will be conducted in good faith and in a climate of mutual respect. Region 7 staff will work hard to understand the tribe's priorities, perspectives and constraints. Also, R7 will explain EPA's priorities, perspectives and constraints to the tribal representative(s). When identifying and evaluating decision alternatives, the Project Lead will seek to understand, observe and conform actions or decisions to applicable federal laws, Executive Orders, Treaties and federal agreements with the tribe(s). The Project Lead will also apply the policy goals of the 1984 EPA Indian Policy. See Appendix A for copy of the Policy. The Project Lead is responsible for coordinating the consultation with the tribe. See Part V above for details.

Most communication between Region 7 and the tribes during the consultation process takes the form of information sharing, technical discussion, and joint planning, and involves staff and management of both Region 7 and a tribe. The tribe and Region 7 may wish to designate technical points of contact to discuss data and findings in advance of the leadership meeting. This will enable Region 7 to timely and efficiently disseminate relevant information to tribes. Region 7 should seek a reciprocal timely receipt of information from tribes. This is a critical part of the consultation process in most cases. When EPA and a tribe are effectively communicating and coordinating in an early, meaningful way, conflict is reduced or avoided, and in some cases a tribe 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 a tribe lacks the resources to conduct a technical or legal review, including a review of relevant environmental laws, regulations and EPA policy and guidance documents. Depending on the degree of tribal interest, and practical considerations such as timing and resources, it may be beneficial to provide an additional technical/legal meeting during which Region 7 and the tribe can exchange information. The EPA Project Lead should help identify the various decision points and potential topics or issues that may be of particular interest to the tribe. For example, in the development of a permit there may be technical support documents, regulations, guidance and policy that assist EPA in making decisions. The tribe may wish to have a meeting about the technical/legal support documents so that input can be provided and the parameters of EPA's authority can be best understood.

Sometimes, it is difficult for EPA to meet tribal expectations, especially when EPA lacks the discretion or authority to fully resolve all tribal concerns. EPA's authority is often subject to

specific statutory and regulatory limitations, and the extent with which it can address tribal expectations will vary on a case-by-case basis. Clarifying these issues in the consultation process can be very helpful.

b. Sensitive Information, Record-Keeping and Freedom of Information Act

It is important to promote 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. In preparing any records memorializing consultations with tribes, the EPA Project Lead should consider these potential sensitivities in determining the level of detail to include. The EPA Project Lead should also consider and discuss with tribes the fact that written records of consultations, or other documents exchanged between EPA and Tribes during the consultation and coordination, ordinarily will not be privileged or otherwise protected from disclosure under FOIA. For advice on specific situations, please consult the Office of Regional Counsel and the Federal Indian Law Attorney.

c. Leadership Meetings

When a consultation matter involves tribal sovereignty, such as a boundary dispute, a leadership meeting between the Regional Administrator and the tribal leader(s) is generally appropriate. Leadership meetings will be held face-to-face whenever possible, preferably on tribal homelands. The executive leadership of Region 7 and the tribal government officials may conduct one or more meetings. The meeting agenda for each leadership meeting will be discussed and agreed upon between the tribal and Regional points of contact in advance of the meeting. Generally, the agenda will include:

- Introductions
- Statement of meeting purpose and desired outcomes, including acknowledgement of government-to-government consultation
- Statements from each party, usually focused on goals and expectations for the consultation
- Presentation of information from both Region 7 and the Tribe
- Discussion and input
- Identification of next steps, including follow-up meetings

d. Consulting with Multiple Tribes

When offering to consult with multiples of tribes or all tribes in Region 7, the Project Lead will send a letter to each tribe. The most feasible approach may be to carry out the consultations is through conference calls or other electronic media depending on practical considerations, such as the number and location of the tribes involved, the facilities, and other resources available. It is important to discuss these issues with each tribe involved to ensure mutual understanding about the consultation process, particularly if one or more Tribes request individual government-to-government consultation.

e. Telephone Conferences

Regional participants in telephone 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 can present communication challenges such as determining when someone wishes to speak and inability to read 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.

f. Tribal Reservation Visits

If the consultation will involve Region 7 personnel visiting a Tribe's reservation, the Region 7 and tribal points of contact should consider building other activities, aside from the consultation, into the visit. The tribe may wish to host a tour of environmental sites and projects for Regional representatives. Other options may include working with the tribe to host a public meeting, visiting the tribe's cultural center/museum, or meeting with traditional tribal leaders/elders to learn more about the tribe's worldview and culture. If possible, such activities should be scheduled before the consultation, so that Regional personnel can acquire a richer understanding of the tribe and its environmental issues. When attending the consultation meetings with tribal leaders and tribal staff, the Region 7 personnel should exhibit cultural sensitivities and appropriate etiquette. As such, the Region 7 personnel should refrain from interrupting during discussions, turn off all mobile phones, refrain from side conversation at the table or in the room, and refrain from glancing at watches or concerning oneself with strict adherence to the agenda times.

g. Consultation involving other federal agencies

Region 7 should actively seek opportunities to conduct joint or multi-party federal consultation(s) with tribes on multi-faceted or related government actions. In such an instance, EPA Region 7 and other agencies should consult as one federal government party. This type of federal partnership could reduce the burden on a tribe and may also result in improved ability to address potential impacts on tribal rights, resources, and lands. The federal agencies should identify the lead federal agency and execute a memorandum of agreement or a communication and coordination plan. The agreement or plan should identify the roles and responsibilities of each party, including the lead federal agency. Assignment of a partner federal agency as the lead agency, however, does not remove Region 7 from the responsibility of consultation with the Tribe(s) when EPA has an independent reason to consult within the context of a larger activity, consistent with the Consultation Policy.

h. Including the Public, the Media, or Other Participants in Tribal Consultation

Participation and attendance at EPA-Tribe consultation meetings is generally limited to the representatives of EPA and the tribe. Consultants employed by EPA or the tribe, or third parties such as intertribal organizations, tribal consortia, environmental or non-profit

organizations, or state or local governments, may be included as long as neither side objects. Region 7 and the tribe may agree to grant a party “observer status” where that party can listen to the proceedings but not participate, to provide the third party an opportunity to better understand EPA and tribal issues and priorities. Media is excluded from consultation unless both parties agree prior to the consultation.

g. Dispute Resolution

If a dispute arises during the consultation process between one or more tribes and the Region, the Region will strive to address the matter informally within the respective program office(s). In the event that the program representative is unable to resolve the dispute, the issue will be presented to immediate supervisor(s), who will attempt to resolve the dispute. If the dispute is not resolved, the staff will present the matter to progressively higher levels of management in an effort to reach consensus. In the parties do not reach a consensus, the Regional Administrator, after consulting with the elected leader(s) of the tribe(s), will make the final decision for matters delegated to the Region.

XI. Specific R7 Program Consultation Considerations

a. Civil Compliance Monitoring and Enforcement Actions

At Region 7, the relevant program office and the assigned attorney will identify whether consultation is appropriate. The Project Lead and assigned attorney will consult with the OTIC and the Federal Indian Law Attorney when identifying compliance and enforcement matters for consultation. If and when consultation is appropriate, the relevant Project Lead and the assigned attorney will maintain the lead for the notification, input, and follow-up phases and follow this guideline for consultation planning, conducting, concluding, etc.

EPA Region 7 consultations should not divulge privileged, enforcement sensitive or confidential information. EPA Region 7 may enter into memoranda of agreement with tribes regarding criminal enforcement of the environmental programs that the tribe is authorized to administer. These agreements are meant to ensure that federal and tribal law enforcement personnel work cooperatively to identify criminal conduct.

For reporting enforcement consultation on the TCOTS database, EPA Region 7 defers to the current interim guidance established by the EPA Office of Enforcement and Compliance Assistance (OECA) via memo dated March 16, 2012.¹⁰ In summary, civil administrative enforcement is defined as the filing of an administrative complaint, issuance of a unilateral order, or the filing of an administrative order on consent or consent agreement and final order. OECA has indicated that regions will not report on civil enforcement actions in negotiation, under development, or those that have been referred to the Department of Justice, or ongoing, anticipated, or past criminal enforcement actions.

¹⁰ OECA Memo, Report on Formal Enforcement Actions on Which Tribal Consultation Has Occurred, March 16, 2012

b. Emergency Response Actions

During an emergency response, such as an oil spill or hazardous substance release, the EPA Regional On-Scene Coordinator (OSC), considering the situational urgencies and priorities, will endeavor to, as soon as practicable, notify all potentially affected tribal governments. Consultation between tribes and EPA Region 7 emergency response will 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 consultation on his/her behalf. The OSC could 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. In the case of time-critical removal actions, the OSC will notify, verbally or in writing, those tribal governments potentially affected by the planned activities. The OSC will consult with potentially affected tribal governments prior to the initiation of a removal action regarding affected tribal 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.

XII. Required Follow-Up and Tracking the Consultation Activity

In accordance with the Consultation Policy, Region 7 will provide feedback to the tribe(s) involved in the consultation to explain how their input was considered in the final action. Region 7 tracks consultation activities for a semiannual report submitted to the Office of International and Tribal Affairs every October and April. The American Indian Environmental Office (AIEO) maintains a national database on the tribal portal section of the EPA website wherein all consultation activities are 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> and can also be accessed through the AIEO tribal consultation site at <http://www.epa.gov/indian/consultation/index.htm>.

The Project Lead will contact OTIC and request a particular consultation activity be logged into and tracked by the database. The OTIC will assume responsibility for entry and tracking consultation activities into TCOTS. If a letter gauging tribal interest is issued before formal notification, the Project Lead will notify and provide a copy of such letter to the OTIC Director, who will make the decision whether or not such letter will be entered into TCOTs database.

With respect to tribal consultation under Section 106 of the National Historic Preservation Act (NHPA) or in cases of joint undertakings in accordance with the National Environmental Policy Act (NEPA), many programs (Brownfields, Superfund, and others) follow the protocols established under the NHPA and NEPA, which require EPA to invite tribal consultation when and where a federal undertaking might affect cultural resources. In these

cases, Region 7 does not endorse duplication of effort by requiring a formal notification letter per the EPA Policy. However, any letter inviting consultation under the NHPA Section 106 review process will include language that references the Agency's Tribal Consultation Policy and Executive Order 13175. Requests for consultation under NHPA will be entered into the database and submitted to the OTIC Director as drafts and only if the tribes respond affirmatively to the request for consultation will the consultation record be sent to AIEO for publishing. In these cases, only the NHPA letter shall be linked to the TCOTS database.

XIII. Considerations for Effective Consultation

To make consultation meaningful, Region 7 will enter consultation with a commitment to collaboration and mutual respect. Consultation will be conducted in good faith throughout the decision-making process. The Region will aim to understand the priorities and constraints of the affected Tribe(s). Region 7 will make a concerted effort to support solutions that do not negatively impact a tribe's rights, resources and interests. Region 7 will follow and apply the policy goals of the 1984 EPA Indian Policy.

Region 7's authority is subject to specific statutory and regulatory limitations. The extent to which the Agency can address tribal concerns may vary on a case-by-case basis. The Region intends to work with a tribe in a reciprocal manner in addressing issues and matters that might affect them, striving toward consensus. There may be times when the Region's decision will not agree with the tribe's input or preferred outcome. Where differences exist, the Region will strive to reach a decision that reconciles the tribe's position, interests, and concerns with the responsibilities of the Agency, in accordance with federal law and consistent with the Agency's Consultation Policy.

XIV. Historic or Archaeological Resources

Where a federal action might 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, 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 overlap with these tribal consultation procedures and/or the National Environmental Policy Act (NEPA). Often the NEPA process will involve an initial screening as to whether any historical or archaeological resources might be impacted. When working on a project, action, or decision making that might involve any resources of this nature, it is very important to consult with Region 7's Federal Indian Law Attorney to determine whether tribal consultation needs to be coordinated with any additional procedures related to resources protected by law.

XV. Conclusion of Consultation

Within ten business-days of when consultation has concluded, OTIC ensures that a senior EPA Region 7 official will issue a follow-up letter to the most senior tribal official involved in the consultation to thank the tribe for its participation in consultation. The official will include in

the letter or as an attachment a summary of tribal concerns and how Region 7 considered tribal input in the final action. The letter, which the Indian Program Manager will review prior to issuing to the tribe, constitutes a formal follow-up notification and will should be entered into the tracking database as the date tribal consultation ended.

XVI. Consultation Record-Keeping

In addition to tracking consultation activity on the AIEO Database, the Region 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 phone calls, any documents exchanged and retained, and a brief summary of the discussions. The regional program office that initiated or responded to the initial consultation request should maintain the record in accordance with federal record-keeping procedures and laws.