

EPA Region 3 Consultation Policy Standard Operating Procedures

Implementing the EPA Policy on Consultation and
Coordination with Indian Tribes

Disclaimer

This document identifies internal Agency policies and procedures for EPA Region 3 employees in coordinating Agency activities related to consultation with federally-recognized Indian tribes. This document is not a rule or regulation and it may not apply to a particular situation based upon the circumstances. This document does not change or substitute for any law, regulation, or any other legally binding requirement and is not legally enforceable. As indicated by the use of non-mandatory language, this Policy does not create any judicially enforceable rights or obligations substantive or procedural in any person.

September 29, 2020

U.S. Environmental Protection Agency Region 3

Table of Contents

Table of Contents	i
Acronym Dictionary	1
Introduction	2
Background	3
The Regional Consultation Process	3
Regional vs. National Consultation Efforts	3
The Pre-Notification Phase – <i>Gauging tribal consultation interests</i>	5
The Notification Phase	6
Regional Meetings and Outreach vs. Consultation	7
Tribal Consultation Delegations	8
Declining to Consult or Failing to Respond to Consultation Notifications	8
The Input Phase	8
The Follow-up Phase	9
Concerns Regarding the Region’s Decision to Consult and/or Adequacy of Consultation	10
State Roles in Consultation	10
Record Retention	11
Impact to Cross-Cutting Programs	11
Semi-annual Projection of Likely Consultations	11
Reporting Completed Consultations	13
Process Feedback and Improvements	13
Appendices	14
Appendix A - Likely Regional Consultation Activities	15
Appendix B - Roles and Responsibilities	18
Appendix C - Example Consultation Letter	21
Appendix D - Example of Pre-notification phase gauge of interest message	23
Appendix E - Consultation Reporting Procedure and Resources	24
Appendix F - Region 3 Tribal Consultation Preferences	25
Appendix G - Division Consultation Advisors	26

Acronym Dictionary

AE	Action Expert
AIEO	American Indian Environmental Office
CA	Consultation Agent
CAA	Clean Air Act
CWA	Clean Water Act
DCA	Division Consultation Advisor
DD	Division Director
DRA	Deputy Regional Administrator
EO13175	Executive Order 13175
EPA	Environmental Protection Agency
OCTEA	Office of Communities, Tribes and Environmental Assessment
ORC	Office of Regional Counsel
OMB	Office of Management and Budget
NAAQS	National Ambient Air Quality Standards
R3	Region 3
RA	Regional Administrator
RCA	Regional Consultation Advisor
RCRA	Resource Conservation and Recovery Act
RTOC	Regional Tribal Operations Committee
SOP	Standard Operating Procedure
TED	Tribal Environmental Director
TCOTS	Tribal Consultation Opportunity Tracking System
UIC	Underground Injection Control

Introduction

The U.S. Environmental Protection Agency's (EPA) policy is to consult on a government-to-government basis with federally recognized tribal governments when EPA actions and decisions may affect tribal interests. The "EPA Policy on Consultation and Coordination with Indian Tribes," issued May 4, 2011 (2011 Consultation Policy), establishes national guidelines for consultation across the Agency.

EPA Region 3 has developed this Standard Operating Procedure (SOP) to outline regional protocols and implementation procedures for consulting with the federally recognized tribes in Region 3. Specifically, the goals of this SOP are to: (1) outline Regional program activities for which tribes may be notified of opportunities to consult; (2) outline the consultation process and roles; and (3) establish a Regional reporting process that will ensure accountability and transparency. This SOP applies only to Region 3 consultations, and not to National consultations or consultations with other EPA regional offices.

This SOP is intended to be a living document and is subject to revision as consultation best practices are learned and feedback for improvement is received. Please check the [R3 Tribal SharePoint site](#) for updates to this SOP, consultation resources, and representational maps of tribal lands in Region 3.

Many routine administrative and staff level interactions and communications occur between the EPA and tribal government employees on a regular basis. This SOP does not apply to these regular, ongoing interactions. In addition to the biannual "Working Effectively with Tribal Governments" training, Region 3 staff who work with tribes are encouraged to participate in regional training opportunities and to work with their Division Consultation Advisor (DCA) and the Regional Consultation Advisor (RCA) to ensure that tribal concerns are appropriately considered.

Who is my Division Consultation Advisor? DCA's for each Division are listed on the R3 Tribal Program SharePoint Site and in Appendix G.

This SOP supplements the 2011 Consultation Policy and two additional overarching documents¹ outlining the EPA's responsibilities with respect to consultation with tribes:

- "EPA Policy for the Administration of Environmental Programs on Indian Reservations" (November 11, 1984) (hereinafter, "1984 Indian Policy"); and
- Executive Order 13175: "Consultation and Coordination with Indian Tribes" (November 6, 2000) (hereinafter "EO 13175").

¹ Documents available at R3 Tribal SharePoint Site or upon request from the RCA or a DCA.

Background

The EPA's 1984 Indian Policy strengthened the EPA/tribal relationship and introduced consultation but predominately focused on recognizing tribal self-government regarding environmental standards and practices. Executive Order 13175 (EO 13175) directed each agency to develop an accountable process to ensure timely and meaningful input by tribal officials in the development of regulatory policies that have tribal implications.

A November 5, 2009 Presidential Memorandum directed federal agencies to develop specific tribal consultation plans and to begin annual reporting of consultation activities to the Office of Management and Budget (OMB). Thereafter, in its 2011 Consultation Policy, the EPA established its national policy of consulting with federally-recognized tribes on a government-to-government basis when EPA actions and decisions may affect tribal interests. This SOP ensures consistency with the 2011 Consultation Policy.

The Regional Consultation Process

The 2011 Consultation Policy defines four (4) phases of the consultation process: Identification; Notification; Input; and Follow-up. It also identifies a list of the EPA activities that may be appropriate for consultation, recommended mechanisms for identifying consultation matters, articulates roles and responsibilities for tribal consultation and engagement, describes how and when consultation should occur, and defines reporting requirements. This SOP defines each of these elements as they apply to EPA Region 3. To the fullest extent possible, Region 3 plans to rely upon existing Agency practices to implement this SOP. However, it may be prudent for a Division to develop their own consultation SOPs that are congruent with the Regional and National policies but add specificity for a Division.

Regional vs. National Consultation Efforts

The EPA's Headquarters offices also engage in consultation and coordination activities, including those related to national regulation and policy development. The EPA's National program offices will have the lead on tribal consultations regarding National actions, while Region 3 will have the lead on tribal consultations for Regional matters. For example, a nationally driven consultation handled by the Office of Water would be the regulatory definition of Waters of the United States under the Navigable Waters Protection Rule, whereas a regionally driven consultation handled by the Regional office would be Region 3's approval of a revised Virginia water quality standard. Region 3 will also strive to ensure that Regional tribes are aware of national consultation efforts and may coordinate with EPA Headquarters as needed to facilitate communication with Region 3 tribes. Region 3 typically will not conduct consultation on behalf of EPA Headquarters.

The Identification Phase – The EPA identifies activities that may be appropriate for consultation

The EPA’s 2011 Consultation Policy identifies a non-exclusive list of activities normally appropriate for consultation where such activities may affect a tribe(s).² These activities are:

- Regulations or rules;
- Policies, guidance documents, directives;
- Legislative comments;
- Permits;
- Civil enforcement and compliance monitoring actions;³
- Response actions and emergency preparedness;
- State or tribal authorizations or delegations; and,
- EPA activities in implementation of U.S. obligations under an international treaty or agreement.

Region 3 can identify additional, specific Regional activities which may also be appropriate for consultation. These will be listed by Division in Appendix A. Also listed in the Appendix A are those activities typically not appropriate for consultation.

The EPA’s consultation process is typically triggered by activities occurring within Indian country (for informational purposes, approximate Region 3

tribal boundary maps and/or tribal areas of consultation interest are located on the EPA’s R3 Tribal SharePoint site or available upon request from the DCA or RCA). It is important to note, however, that consultation may also be triggered by activities involving areas outside of Indian country. Examples include activities that may affect traditional subsistence hunting, fishing, or gathering locations, water quality standard revisions per 40 CFR 131.10(b), cultural resources and/or sacred sites. In addition, permitting and civil enforcement activities occurring outside, but proximate to, Indian country may also implicate tribal interests and should be evaluated for possible consultation.

The consultation process relies on staff within the Region to identify when their assigned matters

DIVISION CONSULTATION ADVISOR (DCA) ROLES & RESPONSIBILITIES

As the DCA, you should:

- ✓ Make an initial determination of whether an action or decision is appropriate for consultation, consulting the tribe, Division staff, the RCA, and programmatic counsel
- ✓ Coordinate with the RCA and others throughout the consultation process
- ✓ Provide technical information to the tribe(s) and conduct follow-up call(s) and/or send correspondence
- ✓ Lead the development of consultation related documents

² See qualifying notes in the May 2011 Consultation Policy.

³ Primary guidance on civil enforcement matters involving tribes can be found in the “Guidance on the Enforcement Priorities Outlined in the 1984 Indian Policy” and “Questions and Answers on the Tribal Enforcement Process.” In addition, judicial and/or administrative case law, EPA [compliance monitoring policies](#), EPA [enforcement response policies](#), and the [“Restrictions on Communication with Outside Parties Regarding Enforcement Actions”](#) may also apply to inspections and enforcement activities. ORC should be consulted whenever questions arise about consultation with tribes on such matters.

may trigger consultation. Projected consultation opportunities are identified and reported semi-annually, at a minimum, but may be identified at any time. Questions regarding whether a matter is appropriate for consultation should be directed to the DCA and RCA. While the Regional Administrator has ultimate decision-making authority on all Regional consultation matters, most final decisions regarding whether to consult on a Regional action or activity will be made by the relevant Division Director or their designee.⁴ For a specific consultation the regional lead will be the DCA. The DCA will consult with the Action Expert (AE) who is the division staff member working on the action triggering consultation. The DCA may or may not be the AE. There may be multiple AEs for an action who would work as a team on the consultation effort. At any time during consultation the RCA may be brought in for advice and assistance in executing the consultation. The DCA and AE will be supported by the RCA, the Office of Communities, Tribes and Environmental Assessment (OCTEA) including the assigned OCTEA tribal attorney and programmatic attorneys from the Office of Regional Counsel (ORC).

Tribes may also request consultation. Consultation may be requested in writing or verbally to the AE, DCA and/or RCA. The EPA will consider the request in accordance with the Consultation Policy,⁵ and if appropriate, consultation will continue with the Notification Phase.

The Pre-Notification Phase – *Gauging tribal consultation interests*

Consultation is a living process, meaning that over the long-term relationship the Region has with a tribe, tribal interests in various focus areas may shift over time. The Region and specifically the Divisions are to be constantly communicating, learning and establishing trust with tribal partners in understanding which EPA actions would elicit tribal interest and perhaps trigger a consultation opportunity. To the Divisions' (DCA) best ability, they are to work with the tribal consultation agent (CA) to ascertain what the tribal interests are for EPA actions. Examples of assessing tribal interests prior to the notification phase are: sending communication about a possible action and allowing the tribe to opt out of consultation, and providing a list of sites, water bodies, counties, etc. and allowing the tribes to self-declare which ones they have interest in. This communication can happen through telephone conversations, during meetings and written correspondence. Ultimately, the tribal interests should be memorialized in a written account from the tribe to the DCA, RCA or AE.

As the Region is establishing these new relationships with tribes, it is understood that there may be increased communication on consultable actions as the Region is not aware, nor are the tribes, of what actions may carry import and require consultation. The Region will continue to work with tribes to ensure compliance with the National Consultation Policy while also fine-tuning Regional practices to make consultation more collaborative and ultimately beneficial for both parties. Divisional SOPs can specify distinct processes on how to address gauging tribal interests while ensuring compliance with the consultation policy.

⁴ See Appendix B, Roles and Responsibilities.

⁵ Consistent with the 2011 Consultation Policy, the final decision on consultation is normally made after examining the complexity of the activity, its implications for Tribes and time and/or resource constraints.

The Notification Phase – The EPA notifies tribes of a consultation event

The appropriate point at which to initiate consultation is as early as possible as needed for timely and meaningful input by the tribe(s). Consultations are conducted on a government-to-government basis. Where Region 3 initiates the consultation, letters notifying a tribe of an opportunity to consult will be developed by the DCA and the AE with review by the RCA, the programmatic ORC attorney and the OCTEA Tribal Attorney. Notification letters are to be signed by the RA, unless that responsibility has been delegated to the relevant Division Director and must be sent to the tribal leader (Chief/Chairman), unless the tribal leader has designated a CA to act on his or her behalf.⁶

Letters notifying a tribe of an opportunity to consult should include information to aid tribal officials in making an informed decision about whether to participate in the consultation and sufficient information on how to provide informed input. In general, the letters should contain the following elements⁷:

- A description of the activity with appropriate attachments (maps, technical data, etc.);
- A description of the consultation timeline with a clear beginning (the letter itself), a clear end (this may be described by an event as opposed to a date), and any important steps of consultation as appropriate (e.g., webinar to be held on a specific date, conference calls, etc.);
- Questions the EPA would ask when proposing an action that may affect tribal treaty or other reserved rights within a specific geographic area, consistent with the 2016 Tribal Treaty Rights Guidance;⁸
- The identity of the Region 3 DCA and, if warranted, the AE.;
- A request for a response to the consultation notification, and a tribal point of contact or representative with whom the EPA can follow up and who can speak on behalf of the tribe (however, the tribe(s) may also want additional representatives engaged in the consultation opportunity);
- A “please respond by” date, allowing for adequate time for a tribal council meeting or other internal deliberations by the tribe. In most instances, thirty (30) days would be a sufficient response time, however, certain activities may require more or less time depending on the circumstances of the activity at issue. For situations in which the EPA’s time to take an action is constrained, it may be appropriate to include a statement notifying the tribe that a failure to respond by the date specified will be interpreted as a decline of the offer to consult;
- Include “cc” to Tribal Environmental Director (TED)/Tribal CA; and
- Provide a copy of the final letter to the DCA and RCA for tracking and reporting purposes.

Consultation letters should always be mailed and e-mailed directly to the tribal leader and a copy emailed to the TED or Tribal CA. It is best practice for the DCA or RCA to call the TED or CA after

⁶ Tribal contact information is available on the Tribal Program SharePoint Site

⁷ Examples letters are available in Appendix C and on the Tribal Program SharePoint Site

⁸ Region 3 recognizes that, although the federally recognized Tribes in the Region may not have any treaties currently in effect, Tribes may have other sources of reserved rights that carry the force of federal law (e.g., congressionally enacted Indian land claim settlements).

the package is sent in the mail and electronically. The purpose of the telephone call is to ensure receipt of the package and answer any initial questions regarding the consultation.

If previously mutually agreed to by EPA Region 3 and a tribe, alternative consultation procedures may be utilized for certain Regional consultations. Such alternative procedures do not extend to National consultation activities. EPA Region 3 anticipates alternate procedures will be added to Appendix F as they are developed and mutually-agreed-upon through written confirmation by the Region (DCA) and the tribes. As noted in the Pre-Notification Phase section, the DCA can employ gauge of interest letters or e-mail messages to ascertain if tribes are or are not interested in a particular action prior to consultation. These letters are not required but can be useful for the tribes and the Region in understanding tribal interest and limiting the amount of communication a tribe may receive regarding consultations. These letters can only inform the Region that a tribe is **NOT** interested in consultation. If the DCA does not receive a response to the gauge of interest letter then the DCA assumes the tribe wants to receive the consultation opportunity letter. An example of a gauge of interest letter can be found in Appendix D.

Region 3 staff work closely with tribal representatives on all manner of environmental and public health work. Be advised that routine programmatic conversations are not consultation until the consultation process, as described herein, has been formally initiated. Once consultation has been initiated, such conversations may become part of the consultation record, where appropriate. Consultation communications may be in the form of emails, conference calls, routine phone calls, and minutes of Regional meetings,⁹ to the extent that any such communications took place pursuant to an initiated consultation. Consultation communications should, however, be documented by the Region 3 DCA and included in the consultation summary at the end of the process.

It is important to promote a full and frank exchange of views during government-to-government consultation with tribes. These interactions may include discussions relating to issues of unique sensitivity to tribes such as cultural practices, uses of environmental resources, locations of cultural resources, tribal relationships, and jurisdictional issues. EPA staff should consider these potential sensitivities in preparing records memorializing consultations with tribes. The Region should also consider and discuss with tribes the fact that memorialization of consultations, including related correspondence, exchanged between the EPA and tribes will generally not be privileged or otherwise protected from disclosure under the Freedom of Information Act. OCTEA and ORC will advise Divisions on how to navigate these sensitive issues.

Regional Meetings and Outreach vs. Consultation

Regional meetings, such as the Regional Tribal Operations Committee (RTOC), involving multiple tribes and/or outside parties are generally not appropriate for consultation unless consultation has been initiated, and the EPA and the affected tribe(s) identified the Regional meeting as part of the intended consultation plan. If a Regional meeting is part of a consultation opportunity, it is important that the tribes are made aware that consultation activities will take place during the meeting. Regional meetings present excellent face-to-face opportunities for discussing issues appropriate for consultation in a group

⁹ See further discussion of Regional meetings below.

situation; however, if consultation has not been initiated and the meeting has not been identified in the consultation plan, discussion of the topic at such a meeting is considered outreach and not consultation. Other tribal meetings, such as trainings and conferences, should also be considered outreach rather than consultation opportunities. Consultation discussions on tribe-specific issues should not occur in group settings unless requested or approved by the consulting tribe(s).

Tribal Consultation Delegations

To the extent possible, Region 3 will honor tribal preferences regarding consultation communications. Those preferences will be incorporated in Appendix F when available. Tribes may choose to delegate routine EPA consultations to the TED (as Tribal CA), or a more accessible designee below the tribal leader (e.g., Chief/Chairman) as they deem appropriate. If the tribe has not designated a CA, all consultation correspondence will be mailed to the tribal leader as described above. If the tribe has designated a CA, that person should be contacted to determine the appropriate tribal recipient of the consultation invitation. If previously agreed to by the tribe, an e-mail consultation invitation may be appropriate as described in the tribe's alternative consultation procedures, but it must still contain the necessary elements described above.

Declining to Consult or Failing to Respond to Consultation Notifications

A tribe's declination of consultation or failure to respond to a notice of an opportunity to consult does not relieve the EPA of its general trust responsibility to consider the interests of the tribe, or mean communication and coordination with the tribe regarding the subject ends. DCAs should continue to keep the tribe informed to the extent of its interest.

If the tribe reconsiders and later requests consultation with Region 3, the request will be reviewed by the DCA to determine the extent to which meaningful consultations can be conducted. Region 3 will inform the tribe of its determination which can ultimately be made by the Division Director. It is Region 3's intent to engage in consultation with tribes if possible, even if they initially decline.

If the EPA's notice of an opportunity to consult included a "please respond by date" and a statement that a failure to respond by such date would be interpreted by the EPA as a decline of the consultation request, then the EPA DCA may conclude the consultation if the tribe fails to respond.

The Input Phase – Tribes provide input to the EPA on the consultation matter

The EPA notes that, consistent with the 2011 Consultation Policy, consultation does not guarantee that Region 3 will make decisions pursuant to the tribes' wishes. Consultation does, however, seek to ensure that tribal interests and concerns are appropriately considered by the Region in the decision-making process. Therefore, the Region 3 DCA and AE provide as much information as possible to the tribe for meaningful consultation. The DCA coordinates with tribal officials during this phase to be responsive to their needs for information and to provide opportunities for discussion. Phone calls, conference calls, and/or face-to-face meetings can constitute consultation. The Region 3 DCA, AE, RCA, Division Directors, Deputy Directors, Regional Administrator, Deputy Regional Administrator, programmatic attorney, OCTEA tribal attorney and other R3 staff, as needed, can participate in consultations meetings. The DCA will document the substance of the consultation including the views and concerns expressed

by the tribe(s), the participants in the consultation and the date(s) and time(s) when consultation occurred.

The DCA will look to the 2016 Tribal Treaty Rights Guidance, where applicable and employ three questions regarding tribal treaty rights. The questions are: (1) “do treaties exist within a specific geographic area?;” (2) “what treaty rights exist in, or what treaty-protected resources rely upon, the specific geographic area?;” and (3) “how are treaty rights potentially affected by the proposed action?” Other sources of reserved rights that carry the force of federal law (e.g., congressionally-enacted Indian land claim settlements) should also be considered in consultation.

As a general matter, the Region intends to conduct tribal consultations prior to any corresponding federal public comment period for the consulted-upon action; however, the Region acknowledges that, in some cases, public comment periods may run concurrent with tribal consultations (e.g., State-lead scenarios, or non-time critical removal situations).

Tribes are encouraged to submit comments in writing at any time during consultation, as well as during any public comment period. Although tribal consultation is distinct from the EPA or state public participation and community involvement process, the DCA and or RCA should alert tribes that it may be advisable for tribes to provide comments during a public comment period even in situations where consultation has occurred as such comment may preserve any administrative appeal rights under the operative statute.

The Follow-up Phase – The EPA provides feedback to the tribe(s) to explain how its input was considered in the final action/decision

Consultation is closed when the Agency action or decision is complete or at a specified date that is clearly communicated to the tribe which may be prior to EPA announcing an action decision. It is Region 3’s general practice that, whether or not the tribe(s) submits written comments, input from the tribe(s) should be summarized after the end date or end event proposed in the notice of an opportunity to consult letter. The DCA should share this summary with the tribe(s) prior to the close of consultation to ensure that the summary captures their comments. The DCA, in coordination with his or her management, the AE, ORC (if appropriate), and the Region 3 decision maker (Branch Chief, Associate Director, Division Director or Regional Administrator), will consider the tribal input prior to final action being taken on the matter. A written response to the comments raised by the tribes will be developed by the DCA and AE, reviewed by the assigned ORC Attorney,¹⁰ and signed by the RA or the relevant Division Director or their designee. The written response may include collective Tribal comments when appropriate, and should contain the following points¹¹:

- Consultation timeframe;
- History of consultation events;

¹⁰ If an ORC attorney is assigned to the matter, then that attorney should review the response to comments. If no attorney has been assigned, then the ORC Tribal Attorney will review the response to comments.

¹¹ Example summary and follow-up letter available at R3 Tribal SharePoint Site or available upon request from the DCA or RCA.

- Brief summary of consultation comments (or attaching summary already shared with tribe(s)) including a discussion of any tribal treaty or otherwise reserved rights;
- A description of how the tribe's input during consultation was/will be considered in the final action;
- Region 3's final decision or intended actions resulting from the consultation effort;
- A clarifying statement that this letter closes out consultation on this matter; and
- A copy to all parties from the original notice of an opportunity to consult.

Following the closure of consultation, the RCA will write a paragraph summary of the consultation event and submit it to TCOTS. The TCOTS record should be updated and archived within 30 days of the close of consultation.

Concerns Regarding the Region's Decision to Consult and/or Adequacy of Consultation

If a tribe(s) disagrees with Region 3 regarding the appropriateness of an Agency action for consultation and/or the adequacy of such consultation, tribes may raise a dispute. The parties will first attempt to resolve a dispute matter informally at the staff level. If resolution of the matter is not successful at the staff level, the issue will be presented to immediate supervisors and Division management, who will attempt to resolve the matter. If the dispute is still not resolved, it will be raised to the Regional Administrator for decision. The Regional Administrator will work with the tribe(s) and with the Region 3 program representatives to understand the issues resulting in the dispute. The Regional Administrator will then make a decision and communicate it to all tribal and regional parties. Tribes or the Regional Administrator may also elevate disputes regarding the EPA's definition of actions appropriate for consultation and/or the adequacy of consultation to the Assistant Administrator for the Office of International and Tribal Affairs as the Designated Consultation Official.

State Roles in Consultation

EPA consultations concern EPA decisions and actions that may affect tribal interests. DCAs and AEs should **NOT** share tribal concerns raised during consultation with the affected state(s). This has the potential to undermine the government-to-government relationship between the EPA and a tribe. Consultation may also have the potential to enhance state/tribal relations by bringing tribes into non-EPA driven processes. Division Consultation Advisors and Action Experts should work with the tribe(s) to determine the appropriate extent, if any, to engage the state. This tribal coordination should occur prior to the EPA involving any state in tribal consultation activities.

Many environmental programs are delegated to the states. As such, certain state actions or decisions may affect tribal interests even though such state programs are not implemented within Indian country. As a general matter, Region 3 will, to the extent practicable, encourage states to consult with tribes on state actions that may affect tribal interests. Region 3 will coordinate and facilitate such discussions when possible. Region 3 encourages tribes to contact the DCA when such facilitation is desired.

The EPA's Role with Other Federal Agency Programs

There may be times when Region 3 coordinates with other federal agencies on environmental programs (e.g., Environmental Impact Statement reviews). If the EPA is the lead agency, the EPA will initiate consultation consistent with its policies. If another agency is the lead, the EPA will recommend and

facilitate tribal consultation where practicable, but it remains the responsibility of the lead federal agency to initiate consultation pursuant to its internal practices.

Record Retention

Tribal consultation records will be kept in the project files by the program staff in accordance with any underlying statutory or regulatory requirement, including, but not limited to, the Federal Records Act, the Freedom of Information Act, and EPA's record retention policies.

Impact to Cross-Cutting Programs

Some federal statutes and regulations contain specific requirements to consult with tribal governments. Where possible, Region 3 will seek to use this SOP when undertaking consultation activities pursuant to such federal statute or regulations.

Examples where federal actions might include separate requirements for tribal consultation include:

- 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.

Semi-annual Projection of Likely Consultations

EPA's American Indian Environmental Office (AIEO) manages the Tribal Consultation Opportunity Tracking System (TCOTS) database. Twice a year, on April 1 and October 1, AIEO will establish a list of prospective consultation opportunities that have been identified for the next six months. In Region 3, prospective consultation opportunities will be identified at the Divisional level. In February and August, the OCTEA Division Director will send an e-mail message to all Region 3 Division Directors and Deputies requesting their Division's consultation projections for the next six months. The DCAs and RCA will be cc'd to that message. The DCAs will work within their Division to compile the projected consultation opportunities and submit them to the consultation tracking document on the Region 3 Tribal SharePoint Site. DCAs will be responsible for submitting consultation projections via the [consultation tracker spreadsheet](#) on the Tribal SharePoint Site no later than March 15 and September 15 of each year. The DCA should coordinate with staff and include management in identification of potential consultation opportunities. If no consultation opportunities are identified, the DCA will communicate that through e-mail to the RCA by the same deadlines. This process is outlined in Appendix E. Figure 1 summarizes the four (4) phases of consultation.

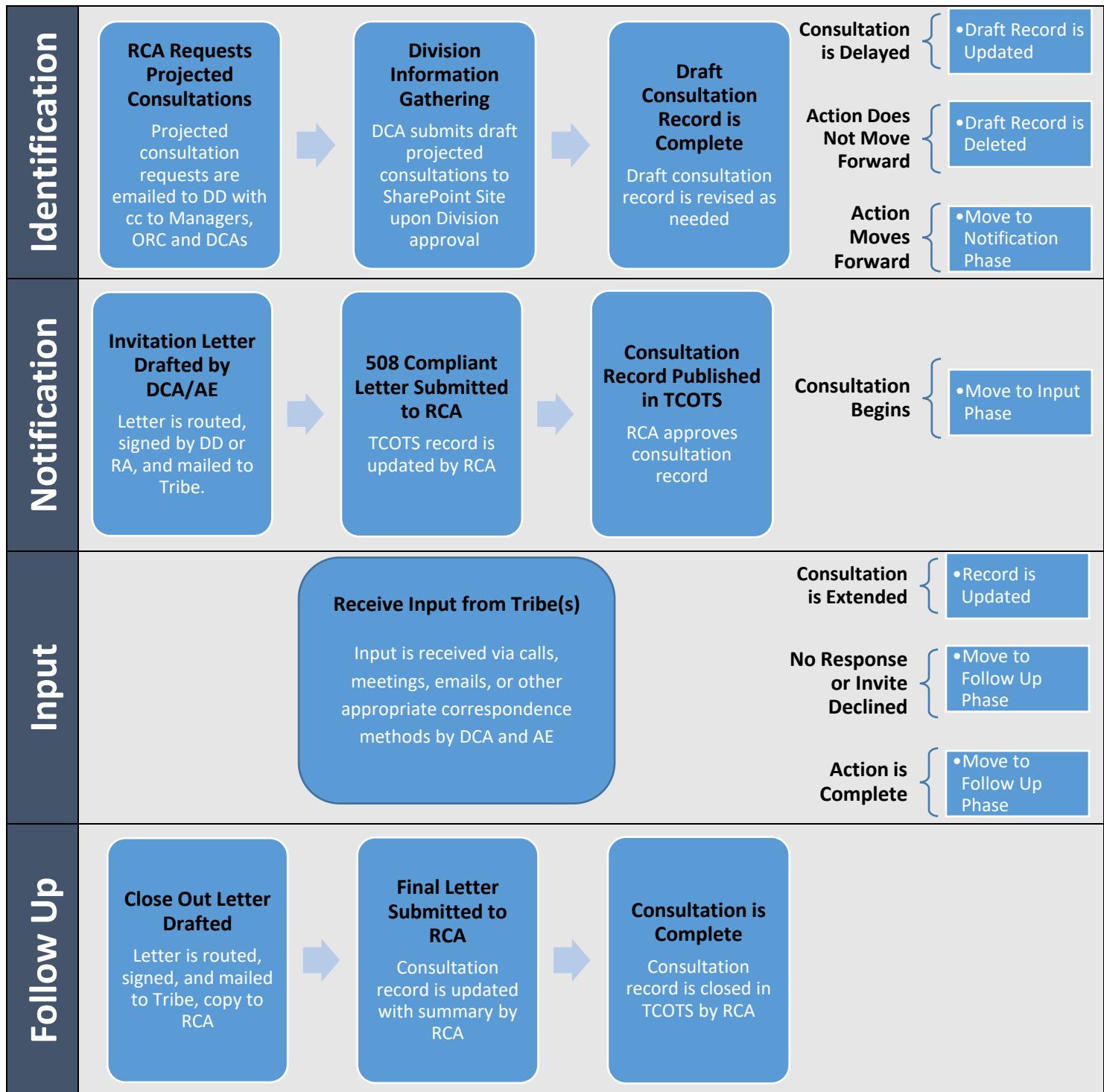


Figure 1: Consultation Process Overview

Region 3 also recognizes that not all activities appropriate for consultation will or can be identified by these reporting dates. When EPA staff recognizes consultation-appropriate activity, or a tribe requests consultation on an otherwise unreported matter, the DCA and Division management should be notified promptly, and the consultation opportunity should be entered into TCOTS by the RCA.

Reporting Completed Consultations

The TCOTS database will serve as the basis for reporting completed consultations and outcomes annually to Office of Management and Budget in June of each year. The RCA holds the responsibility of ensuring TCOTS stays updated and is reflective of proposed, ongoing and completed consultations.

Process Feedback and Improvements

Region 3 views this SOP as a living document and expects that procedures and practices may be identified in the future that would improve the Region's consultation efforts. As such, the Region expects that this SOP will be periodically evaluated by Region 3 and the tribes during future Regional Tribal Operations Committee (RTOC) meetings and other meetings. Should the EPA and the tribes determine that revisions to this policy are necessary and appropriate, the EPA will work in coordination with the tribes to make any such changes to this SOP.

Appendices

Further resources can be found on the Region 3 Tribal Program SharePoint Site.

https://usepa.sharepoint.com/sites/R3_Community/tribal/SitePages/Home.aspx

Appendix A - Likely Regional Consultation Activities

The general types of activities for which consultation may be appropriate are noted in the text of the SOP and are described again below. This attachment supplements the nationally provided general list by adding likely Region-specific circumstances for which consultation may also be appropriate. Many, but not all, activities listed here result from undelegated program elements, or from other Regional activities. Also provided is a list of circumstances for which consultation generally may not be appropriate. These lists are provided by way of example only and consistent with the 2011 Consultation Policy.

Circumstances for which consultation is generally appropriate across all programs (as specifically included in the 2011 Consultation Policy):

- Policies, guidance documents, directives;
- Budget and priority planning development;
- Legislative comments;
- Permits;
- Civil enforcement and compliance monitoring actions;¹²
- Response actions and emergency preparedness;
- State or Tribal authorizations or delegations; and
- EPA activities in implementation of U.S. obligations under an international treaty or agreement.
- Federal decisions

Division Specific Matters for which Consultation may be Appropriate:

Air & Radiation Division:

- NAAQS Designations
- State Implementation Plans (SIPs),
- Permit Modification, Prevention of Significant Deterioration (PSD), New Source Review (NSR)
- Regional Haze
- Actions on State Air Programs (approvals, etc.)

Superfund and Emergency Management Division:

- Site/facility listing;
- Assessments & Decision Documents (see multi-year project consultations note below); and
- Emergency and Removal Actions.

Water Division:

- Water Quality Standards Revisions (state-wide);
- Site-Specific Water Quality Criteria;
- 303(d) Impaired Waters List;

¹² The May 2011 Consultation Policy states in a footnote that "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." EPA consultation on these matters must also be undertaken consistent with the EPA's "Restrictions on Communicating with Outside Parties Regarding Enforcement Actions" (Mar. 8, 2006).

- Total Maximum Daily Loads (TMDLs);
- Establishment of Regulatory Roles for a Public Drinking Water System (where multiple jurisdictions control drinking water supply, the EPA must mediate selection of the appropriate oversight organization);
- Approval of Class 6 Underground Injection Control (UIC) Permits (*e.g.*, fracking permits); and
- Clean Water Act § 402 Permits issued by Region 3.

Office of Regional Counsel:

ORC should be consulted whenever questions arise about the application of federal Indian law, jurisdictional issues, or EPA policies pertaining to Indian country.

In addition, as previously discussed, civil compliance monitoring and enforcement actions are generally appropriate for consultation, to the extent practicable and as permitted by law and EPA policy. However, there may also be additional, relevant documents and sources of law governing such actions, including judicial and/or administrative case law, EPA [compliance monitoring policies](#), EPA [enforcement response policies](#), and the “[Restrictions on Communication with Outside Parties Regarding Enforcement Actions](#).” ORC should be consulted whenever questions arise about consultation with tribes on such matters.

Multi-year project consultation considerations:

Multi-year projects, such as Superfund or RCRA Corrective Action assessment and cleanup, could necessitate several consultation periods throughout the project. In these circumstances, the EPA makes decisions throughout the process. Consultation should be initiated at the earliest possible point, including site identification, and continue through cleanup. A consultation plan should be developed in which critical points in the process are identified for specific tribal input to that phase of the project. Check with the DCA for updated recommendations for developing such consultation plans.

Activities for Which EPA Consultation Generally Is Not Appropriate:

- When the EPA is engaged in a multi-agency project for which it is not the lead agency.
 - EPA Staff, however, are encouraged to raise consultation needs to the lead agency.
- For internal EPA operations, such as activities and decisions relating to staffing, personnel, and human capital management; oversight of contractor performance under Agency-issued contracts; administration of EPA’s working capital funds; and EPA funding allocation decisions.
- When the EPA lacks discretion (*e.g.*, Congressionally mandated actions, schedules or other requirements; EPA response to court orders; any activities subject to confidentiality protections).
- When actions or decisions are completed for state program reviews.
 - The process for state program reviews varies across the Region, and it may involve reviewing site/facility specific information such as individual facility permits. To the extent that specific information evaluated during a state program review pertains to a site or facility that may affect tribal interests (*e.g.*, due to its location near to Indian country), the EPA will generally not consult on such reviews. The EPA’s objective during state reviews is to evaluate the state’s overall program and not to review individual outcomes under the state program. However, if the EPA should identify an actionable deficiency with a specific site or facility permit, for example, and the EPA intends to take action to address that concern, the Agency would consult on the revised decision or action

consistent with its consultation obligations. As a general matter, the Region will encourage states to consult with tribes on state actions that may affect tribal interests.

- The EPA response to tribally-requested input or reviews.
 - In certain circumstances where the tribe has requested EPA review or input, such circumstances may not warrant consultation depending on the nature of the requested action or decision. Program staff should work with their DCA before such decisions or action is made to determine whether consultation is needed.

Appendix B - Roles and Responsibilities

Designated Consultation Official

The Assistant Administrator for the Office of International and Tribal Affairs, as the Designated Consultation Official, has the authority for: (1) defining EPA actions appropriate for consultation, (2) evaluating the adequacy of that consultation, and (3) ensuring that EPA program and regional office consultation practices are consistent with this Policy.

Regional Administrator (RA)

The RA oversees the consultation process in the region, including appointment of a RCA, analysis for potential consultation and the consultation process, and submission of semi-annual consultation projections.

Division Director (DD)

The DD is responsible for overseeing the implementation of the May 2011 Consultation Policy and this SOP in their relevant divisions. DDs are the primary decision-maker on consultation decisions within their Division and are the primary signatories on all formal correspondence with tribal leaders. DDs are also responsible for concurring on their Divisions' TCOTS submissions.

Regional Consultation Advisor (RCA)

The Tribal Program Coordinator in the Office of the Communities, Tribes and Environmental Assessment is the appointed Regional Consultation Advisor for Region 3 unless otherwise designated by the OCTEA Division Director. The RCA is responsible for meeting all AIEO reporting obligations for consultations conducted by the Region and ensures the accuracy of reporting to OMB. The RCA coordinates consultation activities with the DCAs and submits TCOTS entries with the assistance from the DCA and AE. The RCA monitors the effectiveness of the Region's consultation procedures, makes recommendations for improvements, and elevates consultation matters to the RA as needed. The RCA is available to assist the DCAs and the AEs in all aspects of consultation.

Division Consultation Advisor (DCA)/Alternate

A DCA is appointed by each Division Director. The DCA will serve as the first point of contact for Division staff in answering questions and advising about consultation practices and requirements. The DCA will ensure that the Division staff and management maintain a level of awareness regarding consultation obligations and will assist in identifying consultation opportunities. The DCA will assist the Division Director in developing the semi-annual list of consultation opportunities (March 15 and September 15), assists the RCA in providing information for TCOTS records entry, and ensures that Action Experts prepare a short summary of consultation outcomes following the conclusion of each consultation.

Action Expert and/or DCA

The Action Expert (which may or may not be the DCA) is the staff-level technical lead assigned to a consultation action. Specifically, they are responsible for:

- Making initial determination whether a Tribe(s) interest may be affected by an EPA action or decision;
- Notifying the DCA when a Region 3 action/decision is likely to trigger consultation, or when the Tribe requests a consultation;
- Coordinating with management, the DCA, RCA, and the ORC and/or Tribal attorney as needed throughout the consultation process;
- Providing the technical information needed by the tribe for informed consultation. Conducts follow-up call(s) and/or sends letters or emails to the tribal environmental staff to ensure that appropriate levels of tribal program management are aware of the consultation efforts underway.
- Leading the development of any necessary documentations, including: (1) the letter initiating consultation, (2) a summation of all tribal input, (3) assuring tribal review of the summary of tribal input, (4) developing the consultation conclusion letter to the tribe, and (5) documenting close out of consultation by writing a short summary of the consultation effort for inclusion in the TCOTS tracking system.

Office of Regional Counsel (ORC) Tribal and Staff Attorneys

The ORC Tribal Attorney should be consulted whenever questions arise about the application of federal Indian law, jurisdictional issues, or EPA policies pertaining to federally recognized tribes and Indian country. The ORC Tribal Attorney will advise on questions about whether an EPA Region 3 action or decision is appropriate for consultation, and the effect of other generally-applicable EPA policies and guidance on such consultations.

If a matter has an ORC staff attorney assigned to it, then the ORC Staff Attorney should be consulted on all non-Indian-law aspects of the matter (i.e., media/environmental subject matter questions), and should also be included in any Indian law discussions of the matter with the ORC Tribal Attorney.

Concurrence by the ORC Tribal Attorney and ORC Staff Attorney (if applicable) is necessary for all notices of opportunities to consult, as well as all letters to a tribe pertaining to consultation, including written responses to comments communicated during consultation. An ORC assignee should attend consultation discussions if an attorney for the tribal government is expected to participate.

The ORC Tribal Attorney is responsible for reviewing the semi-annual list of consultation opportunity projections prepared by the DCAs.

Consultation Agent for the Tribe (CA)

Tribal leaders may designate a CA to act on their behalf. CA designations will be recognized by Region 3 only to the extent they include a defined set of circumstances/actions for which the CA authorized to consult with Region 3 on behalf of the tribe. If a CA is designated, the CA will be the first point of

contact for Region 3 Technical Program Leads on matters for which CA consultation is appropriate. For all other matters, consultation communications will be directed to tribal leaders.

It is expected that each tribe will decide how Regional consultation should be conducted for that tribe. Those preferences will become an attachment to this Regional SOP.

Appendix C - Example Consultation Letter

The Honorable Chief Gerald A. Stewart
Chief of the Chickahominy Indians Eastern Division
2895 Mt. Pleasant Road
Providence Forge, VA 23140

Dear Chief Stewart:

The U.S. Environmental Protection Agency (EPA) is seeking to initiate consultation and coordination with the Chickahominy Indians Eastern Division concerning EPA's upcoming action to approve or disapprove Virginia's amendment to its chlorophyll-a criteria for the tidal James River.

This process will be conducted in accordance with the *EPA Policy on Consultation and Coordination with Indian Tribes* (<http://www.epa.gov/tribal/pdf/cons-and-coord-with-indian-tribes-policy.pdf>). We expect EPA's period for consultation and coordination will extend from the date of this letter until 45 days after EPA's receipt of the submission from Virginia Department of Environmental Quality's (VADEQ) amending its chlorophyll-a criteria for the tidal James River.

Enclosed is a consultation and coordination plan for this action which includes a description of the action and the process EPA intends to follow. Also included is a timeline for the consultation and coordination period and information on how you can provide input on this action. This information will also be available on EPA's Tribal Portal <https://tcots.epa.gov>). Additional information on VADEQ's water quality standards program can be found at:

<https://www.deq.virginia.gov/Programs/Water/WaterQualityInformationTMDLs/WaterQualityStandards/NutrientCriteriaDevelopment.aspx>

The EPA contact person for this consultation and coordination process is **INSERT DCA NAME, PHONE and E-MAIL**. The Division may accept this offer to consult by contacting **DCA NAME** as soon as possible, but preferably no later than December 6, 2019, to allow enough time for EPA to conduct consultation prior to the approval or disapproval deadline. If we have not received a response from the Chickahominy Indians Eastern Division by December 6, 2019, EPA will infer that the Division does not wish to consult on EPA's review of Virginia's amendment to its chlorophyll-a criteria for the tidal James River.

Please feel free to contact **DCA NAME** should you have any questions on this action or would like to request alternative arrangements to the process outlined in the consultation plan.

We look forward to hearing from you on this important matter.

Sincerely,

Cosmo Servidio
Regional Administrator

Enclosure

Enclosure: Tribal Consultation and Coordination Process and Timeline

Date	Event	Point of Contact
December 6, 2019	Notify EPA of the acceptance or disapproval to consult	Cheryl Atkinson, ¹
45 days after EPA receipt of VADEQ submittal	Consultation period ends	Cheryl Atkinson
60 days upon EPA's receipt	EPA approval of Virginia's amendment to its chlorophyll-a criteria for the tidal James River	Cheryl Atkinson
90 days upon EPA's receipt	EPA disapproval of Virginia's amendment to its chlorophyll-a criteria for the tidal James River	Cheryl Atkinson

¹Cheryl Atkinson is in the EPA Region III Water Division Virginia Water Quality Standards Coordinator.

EPA's action is contingent upon the receipt of VADEQ submission of its amendment to chlorophyll-a criteria for the tidal James River. That submission has not occurred and although we are highly confident the submission will not differ from the draft amendments we have seen, we cannot be certain no changes will occur. To ensure consultation is conducted on the final submitted amendments, upon receipt of the final package EPA will discern if any discrepancies are reflected and if so, will continue with consultation to update the Division on the changes.

Virginia's amendment to its chlorophyll-a criteria for the tidal James River

A common symptom of degraded water quality is an increase in algae growth. Algal biomass can be measured in an aquatic system by measuring the concentration of chlorophyll-a. High concentrations of chlorophyll-a in a waterbody may be indicative of excessive algal growth, which can negatively impact aquatic life. Excessive algal growth is often a result of increased levels of nitrogen and phosphorous. These nutrients enter aquatic systems from fertilizers, septic systems, sewage treatment plants, air deposition and urban runoff.

Chlorophyll-a criteria enables better watershed management of nitrogen and phosphorus, which drive algal blooms in the tidal James River. The proposed amendments are the result of a comprehensive scientific study overseen by VADEQ that focused on chlorophyll-a dynamics and linkages to aquatic life effects in the James River. Among the most notable changes to the regulation are modified seasonal mean criteria and new short-duration criteria that protect aquatic life from the effects of harmful algae.

The implicit basis of the current criteria was protection of "fish food" not protection against lethal harmful algae blooms (HABs) or physicochemical impacts. Some key points on Virginia new and revised James River chlorophyll-a criteria (JRCC) include revised JRCC based on empirical relationships between chlorophyll-a and response variables such as water clarity, pH, HAB species abundance/toxicity, and dissolved oxygen. These responses (effects) make for more defensible endpoints than reference phytoplankton community metrics (diversity, evenness, richness). In addition, in segments where harmful algal blooms have been documented, the revised seasonal mean criteria would work in tandem with the new short-duration criteria. Compliance with the latter would place a constraint on the upper limit of summer mean concentrations, since these criteria are designed to minimize the frequency of the very high chlorophyll-a concentrations one would expect to see during harmful algal blooms.

Virginia's amendment provides modified and new site-specific JRCC for the tidal portions of the James River only. These criteria do not apply to freshwater portions of the James River or any tributaries. Please reference the map below but essentially the tidal portion of the James River extends from the inlet to the Chesapeake Bay to just before Richmond.

Appendix D - Example of Pre-notification Phase Gauge of Interest Message

(sent via e-mail from Brian Hamilton to Chief Anne Richardson, Chief of the Rappahannock Tribe, cc'ed OCTEA DD and WD DCA who was the AE as well)

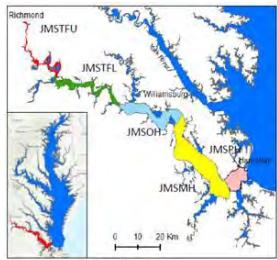
Chief Anne,

I am gauging the interest the Tribe has in receiving a consultation opportunity letter regarding an upcoming EPA action. The action EPA will be taking is the approval or disapproval of Virginia's amendment to its chlorophyll-a criteria for the tidal James River.

One of the symptoms of degraded water quality condition is the increase of algal biomass as measured by the concentration of chlorophyll-a. Bodies of water with higher concentrations of chlorophyll-a may be indicative of levels of algae that are excessive and can negatively impact aquatic life and aquatic ecosystems. Waters with high levels of the plant nutrients nitrogen and phosphorus from fertilizers, septic systems, sewage treatment plants and urban runoff may have excessive levels of algae.

Chlorophyll-a criteria enable watershed management of nitrogen and phosphorus, which drive algal blooms in the tidal James River. The proposed amendments are the result of a comprehensive scientific study overseen by VADEQ that focused on chlorophyll-a dynamics and linkages to aquatic life effects in the James River. Among the most notable changes to the regulation are modified seasonal mean criteria (eight proposed criteria are lower than the existing criteria and two proposed criteria are higher) and new short-duration criteria that protect aquatic life from the effects of harmful algae.

Virginia's amendment provides modified and new site-specific JRCC (excluding tributaries). **And only pertain to tidal sections of the James River.** Please reference the map below but essentially the tidal portion of the James River extends from the inlet to the Chesapeake Bay to just before Richmond.



We want to ensure Tribes are given the opportunity to consult but also want to understand more fully what geographic areas the Tribe has an interest in. Please let me know if you would like to receive a consultation opportunity letter. If we receive no response from the Tribe, we will send a consultation opportunity letter. I'd be more than happy to arrange a conference call with EPA Water Division staff so we can review these proposed changes in more depth so you can make an informed decision to consult or not. I have also included a link to DEQ's website that contains information about these revisions.

https://www.deq.virginia.gov/Portals/0/DEQ/Water/WaterQualityStandards/James%20River%20Chl%20A%20STD/Rulemaking_materials/James_R_Chlorophyll_TSD_DEC2018.pdf?ver=2019-06-04-152144-793

Thank you for your consideration on this matter.

Brian Hamilton

Appendix E - Consultation Reporting Procedure and Resources

The Region must report to AIEO twice a year on projected consultations for the next six (6) months. This must be completed by October 1 and April 1 of each year. The OCTEA Division Director and the RCA will coordinate the solicitation of consultation opportunities and the facilitation of logging those opportunities into TCOTS. Below is the process for complying with the semi-annual consultation opportunity projections.

Soliciting for Consultation Opportunities

- The last week of August and February, the Division Director of OCTEA will send the below message to all R3 Division Directors and Deputies and carbon copy each Division's DCA. The message will direct DCAs to populate the [consultation tracker spreadsheet](#) hosted on R3 Tribal Program SharePoint site by September 15 or March 15.
- The RCA will review the tracker spreadsheet and triage which opportunities warrant consultation and which do not.
- Prior to April 1 or October 1, the DCA will upload the projected consultation opportunities to TCOTS and confirm with the DCA which consultations were uploaded.
- If the DCA determines their Division has no consultation opportunities projected, the DCA will send a message to the RCA confirming that.
- If the Region determines there are no consultations projected in the next six months OCTEA Division Director will send an e-mail message to the DRA confirming no likely consultation opportunities projected in the next six months.
- The DRA then sends an e-mail message confirming no consultations to the AIEO Director.

Draft Message sent to Division Directors and Deputies from OCTEA Director; cc DCAs and RCA

Directors and Deputies –

Twice a year, we are required to identify tribal consultation opportunities that we anticipate for the next six (6) months. Region 3 needs to report to the Office of International and Tribal Affairs -American Indian Environmental Office consultation opportunities that we anticipate through **the end of the fiscal year**.

Please work with your Division Consultation Advisor on determining which actions may trigger tribal consultation. If you need further explanation on what constitutes a consultable activity do not hesitate to contact Brian Hamilton, the Region 3 Consultation Advisor or reference the Regional Consultation Policy on the [Region 3 Tribal Program SharePoint Site](#).

Request:

By September 15 (March 15), please have your DCA submit your Divisions consultation opportunities on the consultation tracker document that is housed on the [Region 3 Tribal Program SharePoint Site](#). If your Division does not have any consultations to project, please have your DCA send Brian Hamilton a message stating so.

Although we are encouraged to project actions anticipated over the next six (6) months, we may also identify consultation opportunities at any time. The key is to identify these opportunities early enough to gain meaningful input from the tribe. If you have any questions, please feel free to contact me.

Thank you -
Samantha Beers

Appendix F - Region 3 Tribal Consultation Preferences

Chickahominy Indian Tribe

Consultation Agent: Dana Adkins

Preferences:

Chickahominy Indians Eastern Division

Consultation Agent: Reme Holmes

Preferences:

Monacan Indian Nation

Consultation Agent: Kaleigh Pollack

Preferences:

Nansemond Indian Nation

Consultation Agent: Keith Anders

Preferences:

Pamunkey Indian Tribe

Consultation Agent: Brenda “Lo” Adkins

Preferences:

Rappahannock Tribe

Consultation Agent: Woodie Walker

Preferences:

Upper Mattaponi Indian Tribe

Consultation Agent: Reggie Tuppance

Preferences:

Appendix G - Division Consultation Advisors

Division	DCA
Office of Communities, Tribes and Environmental Assessment	Brian Hamilton (also serves as RCA)
Air and Radiation Division	Janice Bolden
Land, Chemicals and Redevelopment Division	Donna Weiss
Laboratory Science and Applied Science Division	Norman Rodriguez
Mission Support Division	Matt Creedon
Office of Regional Counsel	Daniel Isales
Superfund and Emergency Management Division	Lisa Denmark
Water Division	Pat Gleason
Chesapeake Bay Program Office	Lucinda Power
Enforcement and Compliance Assurance Division	Makeba Morris