

# **EPA Tribal Consultation Best Practices for Air and Radiation Division Regulatory Actions**

**August 22, 2021**

**U.S. EPA Region IX**



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## I. Introduction

Consultation is a process of meaningful communication and coordination between EPA and tribal officials prior to EPA taking actions or implementing decisions that may affect tribes. 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.

The purpose of this document is to clearly state several best practices for consultation when Region 9's Air and Radiation Division (ARD) takes a regulatory action required by the Clean Air Act (CAA) or actions guided by EPA policy and/or guidance. ARD developed this document in response to concerns raised by our tribal partners regarding past consultation practices. In response, ARD staff and management convened four listening sessions with tribes in 2019 (September 5, October 8, October 17, and October 23) to specifically solicit feedback on ARD's consultation practices and collect suggestions for improvement. ARD staff and management provided updates on our progress to improve our consultation process and solicited additional feedback from tribes during sessions at the Winter and Summer 2020 Regional Tribal Operations Committee (RTOC) meetings.

EPA Region 9 staff from ARD and the Office of Regional Counsel have consulted with EPA Headquarters' program and legal staff and management, and researched consultation practices within other regional EPA offices to guide changes to ARD's consultation process. Over the past year, ARD has begun to incorporate many of these changes into our consultation process and this document reflects these new best practices.<sup>1</sup>

This document provides background information on EPA's consultation practices and focuses on five key areas for improvement that were identified through the listening sessions, which guided the development of this document. A more detailed account of tribal feedback is included in Appendix A.

The five key areas for improvement include:

- **Communication of impacts:** ARD notifications should identify potential impacts of an action and be written in a manner that is easily understood.
- **Advance notice:** ARD should provide earlier notice of our rulemaking activities to tribes.
- **Communication with EPA Headquarters:** ARD and Region 9, in general, should communicate more effectively with EPA Headquarters on tribal issues.
- **Training:** EPA staff should receive additional training on working with tribes.
- **Best practices:** ARD should develop best practices for consultation and rulemaking and use them consistently.

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<sup>1</sup> This document provides a non-binding description of the Region's approach to consultation to assist as a communication tool to Region 9. It is not a regulation and is not intended to impose legally binding requirements on EPA or the public, nor to create any right, benefit or responsibility, including any trust responsibility, when applied in particular situations. EPA retains the discretion to adopt approaches that differ from this document where appropriate depending upon the specific circumstances at issue. EPA reserves the right to change this approach at any time without public notice, as needed.

This document incorporates many of the practices outlined in the regional document, “Region 9 Best Practices for Tribal Consultation and Treaty Rights” (2011), as well as additional information and best practices specific to the types of Clean Air Act regulatory actions implemented by the Air & Radiation Division. Additional consultation documents that ARD staff utilize for regulatory actions are listed in Appendix B.

Though this document is not subject to consultation, we are seeking feedback from tribes on our proposed best practices to refine or add to ARD’s effort to provide meaningful consultation.

## **II. Background**

### **Why we consult with tribes**

Tribes are sovereign entities that exercise inherent sovereign powers over, among other things, members and trust lands. The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders and court decisions, and works with tribes on a government-to-government basis. EPA’s consultation responsibilities generally arise from this unique legal relationship, as set forth in Executive Order 13175 issued by President Clinton in 2000, and further described in EPA’s 1984 Policy for the Administration of Environmental Programs on Indian Reservations and the 2011 EPA Policy on Consultation and Coordination with Indian Tribes. Tribal consultation may also be called for in the language of certain statutes that may apply to some EPA actions (e.g., the National Historic Preservation Act, where applicable).

### **When does consultation happen?**

EPA consults on a government-to-government basis with federally recognized tribal governments when EPA actions and decisions may affect tribal interests. Tribal officials may also request consultation with EPA. Consultation should occur early enough to allow tribes the opportunity to provide meaningful input that can be considered prior to EPA deciding whether, how, or when to act on the matter under consideration. As proposals and options are developed, consultation and coordination should be continued, to ensure that the overall range of options and decisions is shared and deliberated by all concerned parties, including additions or amendments that occur later in the process. If a tribe requests consultation, even when EPA did not initially determine that it may affect tribal interests, EPA generally provides it.

### **Progress on the key areas identified for improvement**

- ARD management has enhanced the existing review process to ensure that notifications to tribes identify the potential impacts of an action or decision and are written to be easily understood by the recipient.
- The ARD Permits Office has begun sharing draft permits to tribes and permit applicants for their review prior to the public comment period.
- The ARD Planning Office, which reviews submittals associated with the implementation of the National Ambient Air Quality Standards (NAAQS), is offering consultation earlier for specific regulatory actions such as changing an area’s classification.

- To strengthen our communication with EPA Headquarters, ARD's Tribal Air Coordinator communicates regularly with Headquarters staff in order to share information that could potentially affect tribes.
- Regionally, ARD staff are working with the Tribal, Intergovernmental and Policy Division in EPA Region 9 to update training on working with tribes for all Region 9 divisions. The training will include a refresher session on the consultation process. "Working Effectively with Tribal Governments" training is offered periodically; the most recent opportunity for Region 9 personnel to engage in this training was in September of 2020.
- ARD's staff from the Planning and Permits Offices, in consultation with Region 9's Office of Regional Counsel and ARD's Division Director, have developed the best practices outlined in this document.

### **III. Air and Radiation Division's Best Practices for Consultation**

This section provides best practices to be implemented throughout the Air and Radiation Division when undertaking the Clean Air Act regulatory actions that are described in further detail in Section IV and Section V of this document.

- Consultation should occur early in the regulatory process and account for statutory and regulatory deadlines, as well as allowing for a significant length of time for tribes to process the information, inform tribal leaders, and respond to the Agency.
- ARD staff will determine whether the individual tribe has a specific consultation policy by visiting the R9 Consultation Resources SharePoint site. Individual consultation policies will be reviewed to understand the tribe's preferences or constraints that the Region may be able to accommodate.
- All efforts will be made to ensure that contact information for tribes is updated and current.
- All letters notifying tribes of an action that ARD is considering, and/or offering consultation, should be written in a manner that can be easily understood, includes a summary of the action, clearly communicates any regulatory deadline, and describes the impacts of that action. These letters should be addressed to the tribal leader with a copy sent to the tribal Environmental Director.
- Within a week of sending the invitation, ARD staff should follow up on the offer to consult by communicating by phone with the tribal Environmental Director or other appropriate tribal representative to ensure the communication was received by the correct individuals, that the material was understood, and answer any questions.
- In general, EPA will provide at least 30 days from the date that the invitation is mailed/emailed for tribes to respond indicating their interest in engaging. If specific circumstances require a shorter period for a response, ARD staff will call and email the tribe's Environmental Director or designated contact to notify them of the invitation and explain the planned action.

- If a tribe requests consultation, ARD staff will work with the tribal Environmental Director or designated tribal contact to 1) schedule a consultation meeting at a mutually agreeable time and 2) determine the appropriate representation for the tribe and EPA Region 9.
- EPA representation for consultation often depends on the circumstances and/or status of the issue. A consultation meeting is typically conducted by phone, video conference, or sometimes in-person with a Division Director or designee within the management team depending on the issue or level of representation from the tribe.
- If multiple tribes are interested in the same matter, an informational conference call or group meeting may be appropriate, if agreed upon by all interested tribes. Otherwise, consultation will occur with tribes individually.
- In advance of the consultation meeting, staff from EPA and the tribe will develop a draft agenda. The ARD management official and designated tribal representative for the consultation should review and agree on the agenda for the meeting.
- At the close of a consultation meeting, EPA management officials and designated tribal representative should discuss whether the meeting satisfied the tribe's expectations for government-to-government consultation. If additional discussion is needed, those in attendance should discuss plans for a follow-up meeting or other next steps.
- After any consultation meeting, EPA staff will prepare a memo for the public rulemaking docket to document and summarize the meeting. The memo may include the date, names and titles of those in attendance, and a summary of the discussion, including any concerns raised during the meeting.
- Once consultation is complete, ARD management will send a close-out letter to document the discussion and completion of the consultation process.
- All offers of consultation will be entered into the EPA's Tribal Consultation Opportunities Tracking System (TCOTS).
- In addition to engaging in consultation with federally recognized tribes, ARD will strive to be responsive to concerns of non-federally recognized tribes, individual tribal members, tribal community-based/grassroots organizations and other indigenous stakeholders.

#### **IV. Air and Radiation Division Planning Office's Best Practices**

##### **Planning Actions that Trigger Consultation**

In accordance with EPA's tribal consultation policies and guidance, the Air Planning Office will offer consultation to tribes in advance of a proposed rulemaking for actions that could affect the designation or classification of an area subject to tribal jurisdiction, or alter the requirements of an implementation plan applicable in an area subject to tribal jurisdiction.

Common actions include:

- Initial designation of an area to attainment/unclassifiable, unclassified or nonattainment;
- Redesignation of an attainment/unclassifiable or unclassifiable area to nonattainment;

- Redesignation of a nonattainment area to attainment and approval of a maintenance plan under Clean Air Act (CAA) 107(d)(3);
- Action on a request from a state for a voluntary reclassification under CAA 181(b)(3);
- Action on a request from a state for reclassification under CAA section 188;
- Reclassification resulting from a determination that an area did not attain by the attainment date, for both multi-jurisdictional nonattainment areas that include tribal lands and nonattainment areas comprised only of tribal lands;
- Development of a Federal Implementation Plan (FIP) that would apply on tribal land or that would apply to facilities on or near tribal land;
- Action on a Tribal Implementation Plan (TIP).

In general, for regulatory actions on State Implementation Plan submittals for nonattainment areas that include tribal land, but do not affect the designation or classification of the area and therefore have no effect on permitting thresholds, ARD will notify the tribes within the area at the time the proposed and final actions are signed, and again when the actions are published in the Federal Register, and will consult with tribes, if requested.

#### **ARD Planning Office's Best Practices**

- For initial designations of an area to attainment/unclassifiable, unclassified or nonattainment of a new national ambient air quality standard (NAAQS), ARD will follow EPA's 2011 guidance on tribal designations that suggests two offers of consultation during the designations process. The first offer after establishment of the NAAQS but before recommendations are due, and the second in a letter to tribes describing our proposed designation ("120-day letter"), which is sent after reviewing tribal recommendations and before making a final designation determination.
- For other rulemaking actions that affect a tribe's designation or classification, consultation will be offered far enough in advance of a proposal that at least one initial consultation meeting or call can be held prior to when the notice of proposed rulemaking is signed, which is prior to publication of the notice in the Federal Register and the start of the public comment period.
- For rulemaking actions that do not affect a tribe's designation or classification, and therefore do not affect permitting thresholds, EPA will notify and/or offer consultation depending on the type of action, at the time a notice of proposed rulemaking is signed, which is prior to publication of the notice in the Federal Register and the start of the public comment period.
- ARD Planning Office staff will respond promptly to any questions raised by the tribal contact about the action under consideration or the consultation process.
- Whenever possible, ARD will provide timelines for next steps and clearly communicate statutory and regulatory deadlines.

## **V. Air and Radiation Permits Office's Best Practices**

### **Permitting Actions that Trigger Consultation**

In accordance with EPA's tribal consultation policies and guidance, the Air Permits Office intends to offer consultation to tribes in advance of proposing permits or actions that could affect a tribe.

Common actions include:

- Air permit applications submitted to EPA for projects on tribal lands (including both tribally owned and privately-owned projects);
- Development of general permits. General permits are developed for a category of sources and are an optional method for obtaining preconstruction permit approval;
- Federal Implementation Plans (FIPs) related to new or revised air permitting programs on tribal land. These are rulemaking actions that typically establish the requirements permit applicants must meet to obtain a permit from EPA on tribal land. A FIP can be developed for a specific project, a category of air pollution sources (e.g., a permit by rule for dry cleaners), or broadly applicable to any owner or operator required to obtain an air permit (e.g., the Tribal Minor New Source Review program);
- Tribal Implementation Plans (TIPs) for air permitting programs. These are rulemaking actions EPA undertakes to approve permitting programs submitted by tribes to implement their own air permitting program in lieu of an EPA air permitting program;
- EPA-issued air permits on state land when EPA is the air permitting authority and the project is near tribal land.

### **Initial Outreach and Coordination**

- Permit applicants are not required to work with EPA prior to submitting their permit applications, but it is strongly encouraged. We will provide as much information as we can to tribes during the pre-application process.
- Outreach should start early. For most actions, ARD staff will hold regularly scheduled calls with the tribal Environmental Director or designated tribal contact at an agreed upon frequency in order to optimize a tribe's ability to provide updates to the Tribal Council. ARD staff will invite the designated tribal contact to conference calls with a permit applicant whenever necessary to keep the tribe informed of developments regarding planned permitted activities.
- ARD staff will update the designated tribal contact when EPA receives a permit application and will let the tribal contact know when to expect a consultation invitation.
- For actions that may affect multiple tribes (e.g., general permits and FIPs), ARD will seek feedback on the best methods for outreach and seek input from tribes on the issues related to the FIP/general permit that are of concern.
  - EPA will provide updates during ARD sessions at RTOC to solicit the level of interest.
  - Additional outreach through National Tribal Air Association (NTAA) or tribal conferences may also be appropriate.

- Whenever possible, ARD will provide timelines for next steps and clearly communicate statutory and regulatory deadlines.

### **Notification and Consultation Offers**

- For permit applications or permitting Tribal Implementation Plans (TIPs), ARD staff will send a letter notifying the tribal Environmental Director or designated tribal contact of the project and include an offer of consultation within 15 business days of receipt of the application.
- In general, for development of new general permits and permitting Federal Implementation Plans (FIPs) we will offer consultation at least 90 days prior to the commencement of the public comment period.

### **Draft Permit Development**

- ARD staff will ensure that the tribal Environmental Director or designated tribal contact is informed of the process, even when consultation is not requested.
- ARD staff will continue regularly scheduled calls and will share a timeline for draft permit development with the tribe.
- ARD will ensure that the tribal Environmental Director or designated tribal contact is copied on communications with the permit applicant and invited to conference calls with the permit applicant.
- ARD will share appropriate materials with the tribe prior to public notice. A best practice is to provide the draft permit to the tribal Environmental Director or designated tribal contact for review. Depending on the action, we will typically provide 5-10 business days for review of the draft permit. The tribal contact will be alerted to the approximate timing for receiving the draft permit in advance.

## **VI. Air and Radiation Division Actions to Promote & Sustain Effective Consultation**

- As appropriate, ARD staff and management will meet with staff and management from the relevant programs within the Office of Air & Radiation to ensure that Headquarters' offices understand the concerns of Region 9 tribes and regional staff are aware of national efforts. These meetings will facilitate better communication between offices so that ARD staff can help inform tribes in Region 9 of Headquarters' activities and national rulemaking actions, when appropriate.
- ARD's Tribal Air Coordinator will meet monthly with staff from EPA Headquarters and other Region's Air programs to promote better communication with tribes on a national and regional level.
- ARD will continue to work with Region 9's Tribal, Intergovernmental and Policy Division to update training for Region 9 staff on working with tribes. The training will include a refresher on the consultation process.

- ARD management will encourage all division staff to participate in regional and national trainings that provide information on consultation, EPA's tribal policy, and how to work effectively with tribes. These trainings will be required for ARD staff that work directly with tribes.
- All ARD staff that work with tribes will participate in RTOC meetings and/or sessions. ARD managers and staff that do not work directly with tribes will be encouraged to participate in RTOC sessions, as appropriate, to raise divisional awareness of tribal issues, concerns and activities.
- Separate from our consultation with tribes on specific regulatory actions, ARD will notify tribes of upcoming regional CAA rulemakings and permit reviews at least quarterly through RTOC meetings and through the Region 9 Tribal Newsletter.
- ARD staff and management will periodically review these best practices to ensure the practices are being implemented appropriately, determine if changes are necessary, or if there are additional improvements that can be incorporated into the process.

## **Appendix A: Listening Sessions with Tribes**

### **Background:**

The following notes were taken by ARD staff during the four consultation-specific listening sessions offered to tribes on September 5, October 8, October 17, and October 23. In addition, three RTOC sessions were held to discuss ARD's progress on developing best practices for consultation and solicit input. These sessions were conducted to gather suggestions that could be implemented to improve ARD's consultation process. Information and concerns gathered during these meetings informed the development of ARD's best practices for consultation outlined in this document. The notes included below were created during conference calls and in-person meetings and may not be comprehensive but were intended to capture the themes and concerns we heard during the sessions.

### **Themes from Listening Sessions**

Listed below are concerns/ideas offered by tribal representatives who attended the listening sessions.

#### **Before Consultation/Offering Consultation**

- An effort needs to be made on the part of EPA to investigate individual tribe's concerns. Acknowledgement of tribal concerns should be included in the letter offering consultation.
- "Request for Consultation Letters" need to be readable, easily understood, and identify potential individual tribe's issues.
- Some tribes have their own consultation policies. EPA should read these before offering consultation.
- Consultation should occur prior to actions.
- Consultation needs to involve the Region even when it is on a national rulemaking. The Region can help identify individual tribal issues.
- Actions shouldn't be a surprise to tribes. They shouldn't hear about the action from a consultation letter.
- EPA Headquarters needs to understand that not including tribes (for example, excluding California tribes) can still affect them, and therefore they should offer consultation (example: gas station permit).
- There needs to be more internal training on working with tribes.
- Some tribes may not be receiving letters (example: tribe not receiving a 2015 ozone designation letter).
- Consultation should be initiated from leader to leader—head of R9 to head of tribe.

## During the Consultation Process

- Meaningful dialogue needs to be back and forth. Rulemaking should be more iterative. This means that sometimes EPA should plan for more than one consultation. Often there is only one meeting, then consultation is closed.
- RTOC meetings aren't an appropriate place to have consultation (HQ sometimes tries to do this).
- Trust responsibility shouldn't be about surprises.
- Consult first—then rule can go out for public comment.
- Consultation should be a tool used to help make a decision; tribes shouldn't be handed a decision to react to.
- Tribes are currently treated like a member of the public during the consultation process. Usually EPA proposes, then tribes consult during the public comment process.

## Additional Information

- There is not implicit trust with the federal government. Tribes are not going to “take our word for it,” they need to see the document and language. Then language needs to be discussed with tribal leadership.
- Tribes have limited resources and may need to prioritize and pick what they respond to because there are too many EPA actions and not enough resources.
- Going through a Tribal Council to get a decision or input can take a long time. The period during which EPA offers consultation often needs to be longer.

## **Appendix B: Consultation Documents**

### Federal:

- [1994 Presidential Memorandum](#)
- [1998 Executive Order 13084 on Consultation and Coordination with Indian Tribal Governments](#)
- [2000 Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments](#)
- [2009 Presidential Memorandum on Tribal Consultation](#)
- [2016 MOU Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights](#)

### EPA:

- [1984 EPA Indian Policy \(reaffirmed July 2009\)](#)
- [1998 Tribal Authority Rule](#)
- [2005 EPA Region 9 Approach to Consultation](#)
- [2009 OAQPS Consulting with Indian Tribal Governments guidance](#)
- [2011 EPA Policy on Consultation and Coordination with Indian Tribes](#)
- [Policy on Environmental Justice of Working with Federally Recognized Tribes and Indigenous Peoples](#)
- [Tribal Treaty Rights Guidance \(2016\)](#)
- Tribal Consultation Opportunities Tracking System- [External TCOTs website](#)
- Guidance to Regions for Working with Tribes during the National Ambient Air Quality Standards Designations Process (December 20, 2011) found at:  
[https://www.epa.gov/sites/production/files/2017-02/documents/12-20-11\\_guidance\\_to\\_regions\\_for\\_working\\_with\\_tribes\\_naaqs\\_designations.pdf](https://www.epa.gov/sites/production/files/2017-02/documents/12-20-11_guidance_to_regions_for_working_with_tribes_naaqs_designations.pdf)