



OFFICE OF CIVIL ENFORCEMENT

WASHINGTON, D.C. 20460

August 2025

MEMORANDUM

SUBJECT: Transmittal of the Updated Questions and Answers on the Tribal Enforcement Process

FROM: Karin Koslow, Acting Director
Office of Civil Enforcement

TO: ECAD Directors, Regions I – X
Regional Counsels, Regions I – X

This memorandum transmits updated “Question and Answers on the Tribal Enforcement Process.” The Office of Civil Enforcement worked with the American Indian Environmental Office, the Office of General Counsel, and the regional offices to develop this update. We also sent the document to federally recognized Indian Tribes and solicited their input, consistent with the Environmental Protection Agency (EPA) “Policy on Consultation with Indian Tribes.” The updated document assists in implementing the “EPA Policy for the Administration of Environmental Programs on Indian Reservations” (November 8, 1984) (Indian Policy) and responds to questions raised by Tribes and EPA regional offices since the issuance of the “Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy” (January 17, 2001) (Enforcement Guidance) and the original “Question and Answers on the Tribal Enforcement Process” (April 17, 2007).

In Indian country, the EPA directly implements federal environmental laws and regulations, as well as conducts oversight of Tribes with authorized, delegated, or approved programs. In both roles, the EPA and Tribes share a commitment to achieving high levels of environmental compliance. This is achieved by monitoring facilities and, when violations are found, taking action to return regulated entities to compliance. The EPA has identified improvements in its approaches to communicating with Tribes about why, how, and when the EPA conducts civil compliance monitoring and takes civil enforcement to address noncompliance at regulated facilities in Indian country, including those owned or operated by Tribal governments. In addition, the EPA has identified updated best practices for how it addresses noncompliance at Tribal facilities. The intent of the updated Questions and Answers document is to update both the EPA’s approach to communicating with Tribes and to enable the EPA to use the full range of approaches—compliance assistance, compliance monitoring, and enforcement—to protect public health and the environment in Indian country.

If your staff have any questions, please have them contact Jonathan Binder or Matt Castelli at binder.jonathan@epa.gov or castelli.matthew@epa.gov. I appreciate your continued efforts to ensure human health and environmental protection in Indian country.

Enclosure

Questions & Answers on the Tribal Enforcement Process

cc: Helen Serassio, Associate General Counsel, Cross-Cutting Issues Law Office
Lisa Berrios, Acting Director, American Indian Environmental Office
Jacqueline Werner, Director, Office of Compliance
Kathryn Caballero, Director, Federal Facilities Enforcement Office
Helena Healy, Deputy Director, Office of Site Remediation Enforcement

Questions and Answers on the Tribal Enforcement Process

Table of Contents

Overview and Background	4
1. Question: What is the purpose of this document?	4
2. Question: What policies apply to civil inspections and enforcement activities in Indian country?	5
3. Question: What are some key terms when working in Indian country or with Tribes?	5
Tribal Facility and Non-Tribal Facility	6
4. Question: What is a Tribal facility?	6
5. Question: What is a non-Tribal facility?	7
6. Question: What is the impact of a facility being a Tribal facility or non-Tribal facility?	7
7. Question: In emergency situations, what is the impact of a facility being labeled a Tribal facility or non-Tribal facility?	8
8. Question: When and how often does the EPA make Tribal facility determinations?	8
9. Question: What types of information can the EPA use to make a Tribal facility determination?	9
10. Question: How can the EPA obtain the information it needs to make a Tribal facility determination?	9
Civil Compliance Monitoring	9
11. Question: Why does the EPA conduct civil compliance monitoring activities in Indian country?	9
12. Question: When does the EPA notify Tribes of announced on-site civil inspections conducted in Indian country?	10
13. Question: When does the EPA notify Tribes of unannounced on-site civil inspections conducted in Indian country?	10
14. Question: Does the EPA consult with Tribes on compliance monitoring activities?	11
Working Cooperatively with Tribal Governments	11
15. Question: How does the EPA “work cooperatively” with Tribes in the civil administrative enforcement context?	11
16. Question: How does the EPA “work cooperatively” with Tribes regarding noncompliance at Tribal facilities?	11

Questions and Answers on the Tribal Enforcement Process

17. Question: How does the EPA “work cooperatively” with Tribes regarding noncompliance at non-Tribal facilities?	11
Escalation to Civil Enforcement at a Tribal Facility	12
18. Question: Why does the EPA use enforcement to address noncompliance at Tribal facilities?	12
19. Question: What are uses and examples of informal enforcement actions and formal enforcement actions?	12
20. Question: What is a compliance plan?	13
21. Question: When is a compliance plan appropriate?	13
22. Question: Are compliance plans legally binding?	13
23. Question: When can the EPA take an informal enforcement action against a Tribal facility?	14
24. Question: When can the EPA take a formal enforcement action against a Tribal facility?	14
25. Question: What does it mean that “a significant threat to human health or the environment exists”?	14
26. Question: Is an imminent and substantial endangerment or other emergency situation a “significant threat to human health and the environment”?	15
27. Question: What does it mean that an enforcement action “would reasonably be expected to achieve effective results in a timely manner”?	15
28. Question: What does “the Federal Government cannot use other alternatives to correct the problem in a timely fashion” mean?	15
29. Question: When should the EPA seek penalties in an enforcement action against a Tribal facility?	16
30. Question: What is the appropriate role of states, local governments, or other countries in enforcement matters that arise in Indian country?	17
Consultation and Coordination with Tribes on Civil Administrative Enforcement	17
31. Question: How does the EPA engage with Tribes?	17
32. Question: Does the <i>EPA Consultation Policy</i> reference civil administrative enforcement?	17
33. Question: How and when should the EPA offer to consult with Tribes on a civil administrative enforcement action when the Tribe could be a party to the action?	18
34. Question: How and when should the EPA offer to consult with Tribes on civil administrative enforcement actions when the Tribe could not be a party to the action?	18

Questions and Answers on the Tribal Enforcement Process

35. Question: What type of information should the EPA seek from a Tribe during a consultation about a proposed civil enforcement action against a Tribal or non-Tribal facility?	19
36. Question: Can the EPA share non-public, enforcement-related information with a Tribe that is a party to an enforcement action but is not a respondent or defendant?	19
37. Question: Can the EPA split penalties with a Tribe that is a party to an enforcement action but is not a respondent or defendant?	20
38. Question: Can the EPA consult with Tribes on civil compliance monitoring and enforcement policies or initiatives?	20
39. Question: Should the EPA use the terms “formal consultation,” “informal consultation,” “big C Consultation” or “little c consultation”?	20
40. Question: What should the EPA do if a Tribe has its own consultation statute, ordinance, or policy with different requirements than the EPA’s policies?	20
41. Question: When should the EPA include consultations on policies or enforcement actions in the Agency’s Tribal Consultation Opportunities Tracking System (TCOTS)?	21
42. Question: When may an EPA civil enforcement action outside of Indian country affect a Tribe?	21
43. Question: What happens when a facility outside Indian country may affect a Tribe or Indian country, but it is regulated by a state approved to implement a federal enforcement program?	22
Department of Justice Considerations – Consultation, Coordination, and Consent Decrees ..	22
44. Question: Does the Department of Justice (DOJ) consult with Tribes on civil judicial enforcement actions?	22
45. Question: Can the DOJ coordinate with Tribes during a civil judicial enforcement action, including before lodging a consent decree?	22
46. Question: What is the EPA’s role during coordination with Tribes on civil judicial enforcement matters?	23
47. Question: Does the United States consult with Tribes on the terms of draft civil judicial consent decrees involving non-Tribal facilities?	23
48. Question: Should case teams notify Tribes of consent decrees upon lodging and entering?	23
49. Question: How long should the consent decree comment period last?	24
Disclaimer	24

Questions and Answers on the Tribal Enforcement Process

Overview and Background

In 1984, the U.S. Environmental Protection Agency (EPA or Agency) issued the [EPA Policy for the Administration of Environmental Programs on Indian Reservations](#) (November 8, 1984) (*Indian Policy*). The *Indian Policy* established nine principles to guide the Agency in our dealings with federally recognized Tribes and our actions to protect human health and the environment in Indian country. The *Indian Policy*'s Enforcement Principle states that "the Agency will strive to assure compliance with environmental statutes and regulations on Indian reservations." The EPA implements the Enforcement Principle consistent with the federal trust relationship and the United States' unique government-to-government relationship with Tribes.

In 2001, the Office of Enforcement and Compliance Assurance (OECA) issued the [Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy](#) (January 17, 2001) (*Tribal Enforcement Guidance*) to assist EPA staff in implementing the Enforcement Principle. The *Tribal Enforcement Guidance* reiterated the EPA's resolve to use compliance assistance to help Tribal facilities return to compliance in a timely manner and to consult with Tribes on formal administrative enforcement actions in Indian country. The EPA remains committed to working with Tribes to ensure equal protection of human health and the environment in Indian country as elsewhere in the United States.

This *Questions and Answers* document builds on the *Indian Policy*, the *Tribal Enforcement Guidance*, and experience since the original *Questions and Answers on the Tribal Enforcement Process* (April 17, 2007) was issued, to explain further how the Agency works cooperatively with Tribes to identify and to address noncompliance at facilities in Indian country. This revised document replaces the 2007 *Questions and Answers* document, as further explained below.

1. Question: What is the purpose of this document?

Answer: This document builds on existing OECA civil enforcement guidance and policy focused on federally recognized Indian Tribes, like the *Tribal Enforcement Guidance*, and replaces the original 2007 *Questions and Answers* document. To the extent the information in this document differs from previous guidance, these questions and answers reflect current best practices.

This document applies to the EPA's civil compliance monitoring and enforcement actions in Indian country or affecting Tribes, including EPA actions in an area where a Tribe is implementing an EPA-approved program. This document does not address issues related to OECA Assistant Administrator concurrence on formal enforcement actions or the EPA's criminal enforcement program and related activities. This document does not apply to federal grant regulations or federal grant processes.

Questions and Answers on the Tribal Enforcement Process

2. Question: What policies apply to civil inspections and enforcement activities in Indian country?

Answer: The EPA applies its Tribal and generally applicable policies together to protect public health and the environment in Indian country to the same extent as in other areas.

In addition to this document, civil compliance monitoring and enforcement policies that apply to the EPA's work in Indian country and with Tribes include the *Tribal Enforcement Guidance* and similar region-specific policies and guidance documents. Other policies that may apply include the *Indian Policy*, the [EPA Policy on Consultation with Indian Tribes](#) (December 7, 2023) (*EPA Consultation Policy*), and the [Department of Justice Policy on Consultation](#) (November 30, 2022) (*DOJ Consultation Policy*).

Policies that apply to the EPA's civil compliance monitoring and enforcement activities outside Indian country also apply when the EPA takes similar actions in Indian country or against Tribal facilities located outside Indian country. For example, the EPA's [generally applicable civil compliance monitoring policies](#), media specific enforcement response policies, and penalty assessment policies apply to enforcement activities that may affect Tribes. In addition, the EPA's national enforcement and compliance initiatives, regional enforcement priorities, and national and regional policies and guidance also apply to enforcement activities that may affect Tribes. Foremost among these is the [Restrictions on Communicating with Outside Parties Regarding Enforcement Actions](#) (March 8, 2006) guidance.

Note: See the "Department of Justice Considerations – Consultation, Coordination, and Consent Decrees" section for information on policies and procedures in cases involving the Department of Justice.

3. Question: What are some key terms when working in Indian country or with Tribes?

Answer: The following key terms apply:

- "Consultation" is defined in the *EPA Consultation Policy* and means a two-way, government-to-government exchange of information and dialogue between official representatives of the EPA and federally recognized Tribal governments.
- "Coordination" is defined in the *EPA Consultation Policy* and means communication among EPA and Tribal government officials, Tribal environmental staff, or other Tribal representatives that can support the consultation process. Coordination is used to inform representatives of potentially affected Tribes or Tribal groups prior to an EPA action or decision and can help determine whether government-to-government consultation is appropriate. Coordination does not exclusively occur in support of consultation and may be conducted in other contexts.
- "Indian country" is defined in 18 U.S.C. § 1151 and means:

Questions and Answers on the Tribal Enforcement Process

- All land within limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;
- All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and
- All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.
- *Note: The EPA's definition of "reservation" encompasses both formal reservations and "informal" reservations, i.e., trust lands set aside for Indian Tribes. See 56 Fed. Reg. 64876, 64881 (1991); 63 Fed. Reg. 7254, 7258 (1998).*
- "Indian Tribe" or "Tribe" means an Indian or Alaska Native Tribe, Band, Nation, Pueblo, Village, or Community that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. §§ 5130-5131 (1994).
- "Informal enforcement" and "formal enforcement" are defined in the EPA's [New Definitions for Key Terms and Action Categories for EPA's Enforcement Program Tools](#) (June 13, 2024). The definitions in that document are intended to supplement the EPA's existing program-specific enforcement response policies and related documents as well as supersede any inconsistent definitions they contain.
- "Non-Tribal facility" means a facility or site that is not owned, managed, or operated by a Tribal government, Tribal department, or Tribal corporation. See additional details in Question 5.
- "Party" and "outside party" are terms that relate to an entity's relationship to an enforcement action and impact, among other things, the EPA's information sharing under the [Restrictions on Communicating with Outside Parties Regarding Enforcement Actions](#) (March 8, 2006) guidance and can include Tribes, Tribal departments or agencies, Tribal officials, and Tribal members.
- "Tribal facility" means a facility or site that is owned, managed, or operated by a Tribal government, Tribal department, or Tribal corporation. See additional details in Question 4.
- "Tribal official" means an elected or appointed official of a Tribe, or an official or employee of a Tribe designated by an elected or appointed official of a Tribe.

Tribal Facility and Non-Tribal Facility

4. Question: What is a Tribal facility?

Answer: A regulated facility or site is a "Tribal facility" if it is owned, managed, or operated by a Tribal government, Tribal department, or Tribal corporation. "Owned" often is defined in the applicable federal environmental law or regulation and typically includes having the right to possess, use, or convey the facility or site. "Managed" or "operated" often is defined in the applicable federal environmental law or regulation and typically includes having operational

Questions and Answers on the Tribal Enforcement Process

control and directing, overseeing management, or conducting the day-to-day operation of a facility or site.

This definition aligns with the way federal environmental laws allocate responsibility for noncompliance to those who own, operate, or manage facilities and sites. Additionally, it helps ensure that the enhanced technical, managerial, and financial assistance that the EPA provides Tribal facilities goes to those that are owned, managed, and operated by a Tribe, which is consistent with the government-to-government relationship.

5. Question: What is a non-Tribal facility?

Answer: A regulated facility or site is a “non-Tribal facility” if it is not owned, managed, or operated by a Tribal government, Tribal department, or Tribal corporation. Facilities and sites are not Tribal facilities if they are owned, managed, or operated by a Tribal member without otherwise meeting the definition of a Tribal facility. Facilities and sites are not Tribal facilities if they are owned, managed, or operated by the federal government, state governments, or local governments without otherwise meeting the definition of a Tribal facility.

6. Question: What is the impact of a facility being a Tribal facility or non-Tribal facility?

Answer: Case teams consider whether a facility is a Tribal or non-Tribal facility in determining how to respond to noncompliance.

If a facility in or impacting Indian country is a non-Tribal facility, case teams typically address noncompliance by initiating informal or formal enforcement while keeping the Tribal government informed of the noncompliance and the case’s progress. This approach generally serves to bring facilities into compliance in a timely manner and deter future violations. Recall that the EPA’s [Restrictions on Communicating with Outside Parties Regarding Enforcement Actions](#) (March 8, 2006) guidance limits what information can be shared with any person or entity that is not a party to an enforcement action, including Tribes and members of the public.

If a facility is a Tribal facility, the EPA should inform the Tribal facility of any noncompliance. The EPA’s general policy is to offer compliance assistance to Tribal facilities with noncompliance. Case teams should consider whether offering compliance assistance to the Tribal facility is warranted prior to or at the same time as escalating to enforcement.

Relevant factors to consider when deciding how to address noncompliance at a Tribal facility include the complexity of the statutory or regulatory requirement, applicable statutes of limitations, and the facility’s history of compliance, response to previous assistance, size, and level of experience with the requirement. For example:

Questions and Answers on the Tribal Enforcement Process

- Compliance assistance generally would be appropriate if violations at a small, Tribal government owned or operated drinking water system are the result of a new operator's lack of familiarity with that system's sampling and notice requirements.
- Building off the previous example, initiating compliance assistance and informal enforcement—like a compliance plan, Notice of Violation, or Warning Letter—could be appropriate if there were multiple different sampling requirements and/or deadlines and written documentation would help the operator keep track of action items.
- Initiating compliance assistance and formal enforcement (e.g., an administrative order on consent) concurrently typically would be appropriate for a Tribal facility with repeat construction stormwater noncompliance (e.g., a history of noncompliance) or that previously received compliance assistance for the same or similar issues.
- Significant compliance assistance typically would not be warranted prior to taking a formal enforcement action (e.g., a unilateral order or consent agreement) to address violations at a large Tribal facility like an oil and gas refinery, casino, or substantial commercial operation. This is because these facilities typically have large operational budgets, familiarity with complex regulations, and a team of staff dedicated to maintaining compliance.

Additional information on escalation to enforcement at a Tribal facility is contained in the “Escalation to Civil Enforcement at a Tribal Facility” section.

7. Question: In emergency situations, what is the impact of a facility being labeled a Tribal facility or non-Tribal facility?

Answer: The EPA should take appropriate formal enforcement to address emergency situations, including under the Agency's imminent and substantial endangerment authorities, at both Tribal and non-Tribal facilities. When addressing emergency situations at a Tribal facility, the EPA may provide compliance assistance concurrently with initiating formal enforcement. Additional information is found in the “Escalation to Civil Enforcement at a Tribal Facility” section.

8. Question: When and how often does the EPA make Tribal facility determinations?

Answer: The EPA typically makes Tribal facility determinations before or concurrent with 1) conducting inspections or off-site civil compliance monitoring activities; 2) offering or providing compliance assistance; or 3) escalating to enforcement (i.e., taking informal or formal enforcement). The EPA can revise Tribal facility determinations based on new information or as appropriate under the circumstances. These determinations should be included in the case file and, as appropriate, the EPA database of record.

Questions and Answers on the Tribal Enforcement Process

9. Question: What types of information can the EPA use to make a Tribal facility determination?

Answer: The EPA principally relies on input from the Tribe and the facility owner and operator to determine whether a facility is a Tribal facility. Outside sources such as other federal agencies (e.g., the Bureau of Indian Affairs or the Indian Health Service) and publicly available information may also provide useful information. Depending on the situation, the EPA may want to obtain and review additional information prior to making a Tribal facility determination, including: the Tribe's constitution, other governing documents, and resolutions; documents related to the facility's origins; articles of incorporation, business registration, shareholder information, organizational structure, and tax or other corporate documentation; and lease agreements, deeds, or property records (e.g., operating agreements or title status reports from the Bureau of Indian Affairs).

10. Question: How can the EPA obtain the information it needs to make a Tribal facility determination?

Answer: The EPA can obtain this information through:

- Pre-inspection Tribal notification letters;
- Pre- and post-inspection interviews with representatives from the facility or Tribal government, programs, or departments;
- Letters to Tribal governments (e.g., Tribal facility interest letters);
- Informal staff-level coordination between the EPA and the Tribe;
- Consultation with the Tribe;
- Statutory information request letters; and
- Other federal agencies with potentially relevant information.

A best practice is to memorialize in writing any information gathered orally so that it is part of the administrative record and can be referenced in the future.

Civil Compliance Monitoring

11. Question: Why does the EPA conduct civil compliance monitoring activities in Indian country?

Answer: The EPA conducts civil compliance monitoring activities in Indian country to protect human health and the environment by ensuring compliance with environmental laws and regulations, just like outside of Indian country. These activities can include both on-site inspections and off-site activities (e.g., reviewing self-reported information, sending information request letters, and evaluating tips and complaints). This work is essential to ensuring protection of human health and the environment in Indian country to the same extent as outside of Indian country. This work also supports how the EPA responds to noncompliance,

Questions and Answers on the Tribal Enforcement Process

including by offering compliance assistance and initiating informal and formal enforcement. Information obtained during compliance monitoring activities can also be used to inform other EPA activities including grants, cooperative agreements, and infrastructure funding.

12. Question: When does the EPA notify Tribes of announced on-site civil inspections conducted in Indian country?

Answer: The EPA generally provides Tribal leadership with notice at least seven days prior to EPA staff conducting announced on-site civil inspections in Indian country. This advance notice typically contains basic information on:

- When, where, and why the EPA plans to conduct the inspection;
- The opportunity for entrance and exit interviews involving the inspector(s) and Tribal leadership or other Tribal representative(s);
- When the EPA expects to provide the final inspection report;
- The range of potential responses if violations are identified, including compliance assistance, additional compliance monitoring, an informal enforcement action, or a formal enforcement action; and
- As appropriate, the opportunity to contact the EPA about the inspection.

This notice is also an opportunity for the EPA to assess or confirm the status of the facility as a Tribal facility or non-Tribal facility and request updated information if the status has changed. The notice is often sent via email, mail, or both. *Note: The EPA does not consult on individual compliance monitoring activities. See Question 14 for additional information.*

13. Question: When does the EPA notify Tribes of unannounced on-site civil inspections conducted in Indian country?

Answer: The EPA generally provides Tribal leadership notice of an unannounced on-site civil inspection in Indian country as soon as practicable after conducting the inspection. An unannounced on-site civil inspection may be appropriate where, for example, communication with a Tribe may not be possible prior to a stormwater inspection conducted after a sudden precipitation event, if the inspection relates to an emergency situation, or when the EPA has concerns that providing prior notice of an inspection could compromise the objectives of the inspection. The notice should generally include basic information on:

- When, where, and why the EPA conducted the inspection;
- Why it was unannounced;
- The range of potential responses if violations are identified, including compliance assistance, additional compliance monitoring, an informal enforcement action, or a formal enforcement action; and
- How to contact the EPA with questions about the inspection.

Questions and Answers on the Tribal Enforcement Process

This notice is also an opportunity for the EPA to assess or confirm the status of the facility as a Tribal facility or non-Tribal facility and request updated information if the status has changed. The notice is often sent via email, mail, or both. *Note: The EPA does not consult on individual compliance monitoring activities. See Question 14 for additional information.*

14. Question: Does the EPA consult with Tribes on compliance monitoring activities?

Answer: No. The EPA does not consult with Tribes on compliance monitoring activities, including announced or unannounced inspections. The EPA should refer to notices to Tribes about inspections or other compliance monitoring activities as coordination. Inspection-related notices and inspections should not be recorded in the EPA's [Tribal Consultation Opportunities Tracking System](#) (TCOTS).

Working Cooperatively with Tribal Governments

15. Question: How does the EPA “work cooperatively” with Tribes in the civil administrative enforcement context?

Answer: The EPA “works cooperatively” with Tribal governments by providing notice about inspections; providing notice about identified violations; offering compliance assistance to Tribal facilities when appropriate; providing timely information about, and the opportunity to consult with the EPA on, formal civil administrative enforcement actions; and communicating with the Tribe based on the Tribe’s status as a party or outside party to an enforcement matter.

Additional information on how the EPA works cooperatively with Tribes is addressed in each section below.

16. Question: How does the EPA “work cooperatively” with Tribes regarding noncompliance at Tribal facilities?

Answer: When a Tribe owns or operates a facility, the EPA may treat the Tribe as a party in the context of enforcement. In such cases, the EPA’s communications are less constrained by the [Restrictions on Communicating with Outside Parties Regarding Enforcement Actions](#) (March 8, 2006) guidance. Consultation and coordination with the Tribe can include sharing relevant information that is not privileged or sensitive—like identified violations, the status of an investigation, penalty proposals, and required injunctive relief. As in any enforcement action, there is material the EPA generally does not share with a party, including deliberative internal communications, penalty calculation worksheets, unfiled complaints, etc.

17. Question: How does the EPA “work cooperatively” with Tribes regarding noncompliance at non-Tribal facilities?

Answer: If the Tribal government could not be named as a party to an enforcement action, the EPA works cooperatively with the Tribe by providing public information about the violations

Questions and Answers on the Tribal Enforcement Process

and potential enforcement responses. See the [Restrictions on Communicating with Outside Parties Regarding Enforcement Actions](#) (March 8, 2006) guidance. This can occur when the Tribe has a proprietary or non-proprietary interest in a facility but the Tribe is not responsible for the noncompliance. Importantly, the EPA does not need to offer compliance assistance to this type of facility before moving to formal enforcement.

Escalation to Civil Enforcement at a Tribal Facility

18. Question: Why does the EPA use enforcement to address noncompliance at Tribal facilities?

Answer: The EPA's goal in using enforcement to address noncompliance at Tribal facilities is a timely return to compliance to ensure the same degree of human health and environmental protection inside and outside of Indian country. The EPA seeks to achieve this goal by integrating OECA's *Tribal Enforcement Guidance* and this document with OECA's generally applicable enforcement response policies, national enforcement and compliance initiatives, and regional enforcement priorities to resolve noncompliance using compliance assistance, informal enforcement, and formal enforcement.

19. Question: What are uses and examples of informal enforcement actions and formal enforcement actions?

Answer: Informal enforcement actions are typically used to address less serious violations or potential violations. The EPA can take informal enforcement actions to notify regulated entities of potential violations (e.g., Warning Letter, Notice of Non-Compliance). The EPA may also take informal enforcement actions to advise regulated entities of an impending enforcement action and invite settlement (e.g., Notice of Violation, Show Cause Letter, Pre-Filing Notice Letter, and Notice of Intent to File an Administrative Complaint).

Compliance plans are a type of informal enforcement action the EPA can use to help a Tribal facility return to compliance. They are different from plans and schedules that are required under other EPA actions, like administrative orders. The EPA enforcement or media program divisions can offer compliance assistance separate from, before, or as part of an informal enforcement action, which can be issued with or without a compliance plan.

Formal enforcement actions are typically used to address more serious violations and may be independently enforceable. Unilateral Administrative Orders, Administrative Orders on Consent, Complaints, Consent Agreements, and Consent Decrees are examples of formal enforcement actions. The EPA can offer compliance assistance before, during, and after formal enforcement actions, but compliance plans are not appropriate when taking formal enforcement actions given the seriousness of the violations.

Questions and Answers on the Tribal Enforcement Process

20. Question: What is a compliance plan?

Answer: A compliance plan is a type of informal enforcement that takes the form of a short, written document that:

- Describes the finding of violations or potential violations;
- Provides information on available, appropriate, and targeted compliance assistance from the EPA and other federal agencies;
- Outlines recommended actions needed to return to compliance;
- Details recommended timelines for completing compliance actions within six months or within the timeframes in the applicable enforcement response policy or guidance, whichever is shorter; and
- Describes the steps the EPA may take if compliance is not achieved within the compliance plan's timeframe, including formal enforcement.

A compliance plan is often offered in a letter to a Tribe notifying Tribal leaders about noncompliance.

21. Question: When is a compliance plan appropriate?

Answer: Although not necessary before the EPA proceeds to formal enforcement action, a compliance plan may be appropriate when:

- The EPA has not previously offered compliance assistance that failed to yield improvements in compliance;
- Returning to compliance can be accomplished within six months or otherwise meets applicable enforcement response policies or guidance timeframes, whichever is shorter;
- There are practicable, available, and standard actions the facility can take to return to compliance;
- Returning to compliance can be accomplished with available Tribal facility staff;
- Returning to compliance does not require special resources and does not require the purchase or installation of parts or equipment that cannot be obtained within the compliance plan's timeframe; and
- The Tribe and Tribal facility are interested in using a compliance plan to guide their efforts to return to compliance.

Note: Compliance plans generally are not appropriate if a Tribe does not respond to the EPA's offer of a compliance plan.

22. Question: Are compliance plans legally binding?

Answer: No. Compliance plans are not signed and do not carry penalties for noncompliance. Like other EPA documents, a compliance plan and any cover letter should not give assurances that the EPA will not pursue enforcement for a violation.

Questions and Answers on the Tribal Enforcement Process

23. Question: When can the EPA take an informal enforcement action against a Tribal facility?

Answer: The EPA can initiate informal enforcement against a Tribal facility any time noncompliance is identified. This should include a notice to the Tribal facility and Tribal officials that identifies the noncompliance and required corrective actions. Informal enforcement can occur concurrently with providing compliance assistance, if it is appropriate.

24. Question: When can the EPA take a formal enforcement action against a Tribal facility?

Answer: The EPA can take a formal enforcement action against a Tribal facility at any time the Agency determines that the three factors from the *Indian Policy* are met. These factors are: “(1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot use other alternatives to correct the problem in a timely fashion.” The factors are explained below.

Formal enforcement can occur even if the EPA has not offered compliance assistance or initiated informal enforcement. Escalation to enforcement should be considered in light of the type of violation(s) and the simultaneous application of the EPA’s Tribal specific guidance (see Question 2); this document; and generally applicable enforcement response policies, national enforcement and compliance initiatives, and regional enforcement priorities. In addition, the EPA can take a formal enforcement against a Tribal facility when requested by a Tribe, as long as the three factors are met.

25. Question: What does it mean that “a significant threat to human health or the environment exists”?

Answer: The EPA’s longstanding position is that a significant threat to human health or the environment can stem from any violation of federal environmental law or regulation and is determined on a case-by-case basis. Such threats can include indirect threats to human health or the environment, such as threats posed by the failure to monitor or maintain proper records. They also can include direct or actual threats posed to humans or the environment by contaminants or pollutants. A return to compliance following noncompliance does not preclude an enforcement action for the earlier noncompliance. For example, the EPA may pursue an enforcement action against a Tribal facility that has discharged a significant amount of raw sewage to a jurisdictional water even if the Tribal facility stops the discharge.

The following types of violations are examples that can satisfy the significant threat to human health and the environment factor:

- Failure to conduct required monitoring or reporting under an applicable program;
- Operating without a permit or failing to submit a notice of intent to obtain a permit;

Questions and Answers on the Tribal Enforcement Process

- Emissions, discharges, or releases into the air, water, or land in violation of an applicable law, regulation, permit, or standard;
- Chronic and repeat violations that are expected to continue or become more serious in the future;
- Violations that threaten the integrity of the applicable environmental program, like falsified records or statements; or
- Violations that are considered a “high priority” under an applicable environment response policy, national enforcement and compliance initiative, or regional enforcement priority.

26. Question: Is an imminent and substantial endangerment or other emergency situation a “significant threat to human health and the environment”?

Answer: Yes. Civil imminent and substantial endangerments or other emergency situations are considered “significant threats to human health and the environment.” Such situations are considered “exigent circumstances” and automatically satisfy all of the *Indian Policy*’s three factors. The EPA should initiate appropriate formal enforcement consistent with the applicable emergency response protocols, including appropriate consultation and coordination with the affected Tribe.

27. Question: What does it mean that an enforcement action “would reasonably be expected to achieve effective results in a timely manner”?

Answer: The EPA’s formal civil enforcement actions address noncompliance and are expected to achieve effective results in a timely manner. EPA enforcement actions may seek an immediate return to compliance or may set forth specified timeframes for corrective action (e.g., based on the applicable enforcement response policy) to ensure a Tribal facility complies with the law. Enforcement actions can also require injunctive relief, such as physical improvements or operational changes to ensure compliance with applicable requirements. Enforcement actions may also achieve effective results by including mitigation that remedies, reduces, or offsets harm caused by past or ongoing violations.

28. Question: What does “the Federal Government cannot use other alternatives to correct the problem in a timely fashion” mean?

Answer: When the EPA considers taking formal civil enforcement against a Tribal facility, the Agency assesses whether there are alternatives that will return a Tribal facility to compliance in a timely fashion. A return to compliance, without initiating formal enforcement, is timely if it is within the timelines provided in an applicable enforcement response policy or a maximum of six months when no enforcement response policy timeline applies. The goal is to achieve the same timely return to compliance both inside and outside of Indian country.

Consideration of the alternatives generally begins as soon as practicable after violations are identified. When evaluating alternatives, the EPA should consider the extent to which the

Questions and Answers on the Tribal Enforcement Process

Agency or other federal agencies previously provided or offered alternatives but those actions did not result in changes that resolved the noncompliance. Finally, the EPA should consider the Tribal facility's prior efforts to remedy the noncompliance and history of noncompliance, including responses to previous informal and formal enforcement actions.

Alternatives may include new and immediately available compliance assistance, training, infrastructure funding, or informal enforcement likely to return the facility to compliance. In some cases, there may be alternatives available from other federal agencies to facilitate the Tribal facility's return to compliance. The EPA routinely coordinates with agencies like the Indian Health Service, Bureau of Indian Affairs, Bureau of Reclamation, and Rural Utility Service to facilitate a Tribal facility's return to compliance. An example of a timely alternative could be compliance assistance that is immediately available from the Bureau of Indian Affairs to help a Tribal facility understand how to operate wastewater lagoons. However, an alternative is not timely if, for example, it would require months of coordination with the Indian Health Service to identify needed capital improvements and over a year before corrective action is completed at the Tribal facility.

29. Question: When should the EPA seek penalties in an enforcement action against a Tribal facility?

Answer: The EPA should seek penalties for violations at Tribal facilities only when those penalties are necessary to secure effective, timely results and other efforts to achieve timely compliance have failed or would be unsuccessful. In appropriate cases, the EPA should be guided by program-specific penalty policies, as well as policies on small business and small communities, to determine the penalty for a violation. This includes applicable reductions in some penalty policies that apply to governmental facilities, like the national municipal litigation consideration. The EPA should also give weight to factors including inability to pay, the economic benefit from noncompliance, the impact to Tribal financial resources, and compliance history.

Note: The EPA's consideration of an enforcement action should focus on the Tribal facility, Tribal department, or Tribal corporation as the respondent in the first instance, and any direct action against a Tribal government should be considered only where the Agency determines such action is necessary to achieve compliance at the Tribal facility. Similarly, where the EPA pursues a penalty action against a Tribal facility, the Agency should look initially to the facility, Tribal department, or Tribal corporation—and not to the Tribal government—with respect to the calculation and assessment of any penalty.

Questions and Answers on the Tribal Enforcement Process

30. Question: What is the appropriate role of states, local governments, or other countries in enforcement matters that arise in Indian country?

Answer: The EPA works with Tribes and states, as appropriate, to address environmental issues of joint concern. Under general principles of federal Indian law and policy, primary jurisdiction under federal environmental laws in Indian country usually rests with the federal government. Accordingly, the EPA typically implements federal environmental programs in Indian country unless and until the EPA approves a Tribal government to implement a program.

At the same time, the *Indian Policy* encourages cooperation between the EPA, Tribal, state, and local governments to resolve environmental problems of mutual concern. Therefore, it may be appropriate for the EPA, after consulting with the affected Tribe, to notify the state(s) that may be affected by a facility's noncompliance. In consultation with the affected Tribe, the EPA may coordinate with the state and the Tribe to ensure that adequate compliance assistance is provided. Where jurisdictional or tribal, state, or international transboundary issues related to EPA-authorized programs in Indian country arise, the EPA's regional staff should notify the Office of Regional Counsel, the Office of General Counsel, and OECA of the situation, as appropriate; consult with the relevant Tribe(s); and confer with the state(s) for transboundary issue or the Office of International and Tribal Affairs and the Department of State for international issues, as appropriate.

Consultation and Coordination with Tribes on Civil Administrative Enforcement

31. Question: How does the EPA engage with Tribes?

Answer: The EPA engages in consultation and coordination with federally recognized Tribal governments based on their unique political status in the United States and their authority and responsibility for their lands and membership.

32. Question: Does the *EPA Consultation Policy* reference civil administrative enforcement?

Answer: Yes, the *EPA Consultation Policy* includes formal civil administrative enforcement actions in the non-exclusive list of EPA activity categories that may be appropriate for Tribal consultation. While formal civil administrative enforcement actions generally are appropriate for consultation, compliance monitoring activities—like inspections—are not.

Consultations on civil enforcement actions are different than consultations in other contexts (permitting, rulemaking, etc.). The four-phase consultation process is used, but notification is provided directly to the Tribes involved and not more widely announced through TCOTS. Due to the United States' unique government-to-government relationship with Tribes, the EPA endeavors to share as much relevant information as is allowed under our laws, regulations, and policies during consultations with Tribes about noncompliance in Indian country or at Tribal

Questions and Answers on the Tribal Enforcement Process

facilities. However, enforcement consultations have additional restrictions on the type of information the EPA can share depending on whether the Tribal government could be named as a party to the enforcement action. See OECA's [Restrictions on Communicating with Outside Parties Regarding Enforcement Actions](#) (March 8, 2006) guidance for additional information.

33. Question: How and when should the EPA offer to consult with Tribes on a civil administrative enforcement action when the Tribe could be a party to the action?

Answer: When a Tribe could be a party to the enforcement action, the EPA should offer to consult with an affected Tribe prior to taking a formal civil administrative enforcement action to address noncompliance at the Tribal facility. For example, the EPA should offer to consult with a Tribe when the EPA plans to take a formal civil enforcement action after identifying noncompliance at a drinking water system run by the Tribe's utility. Because the Tribe could be a party to the action (e.g., if corrective actions would require funding from the Tribe), the EPA can discuss public information and enforcement sensitive information at the consultation, including the status of an investigation, proposed injunctive relief, or proposed penalties. The EPA can also share information about available compliance assistance, financial assistance (grants and cooperative agreements), and infrastructure funding opportunities. See the "Department of Justice Considerations – Consultation, Coordination, and Consent Decrees" section for information on policies and procedures in cases involving the Department of Justice.

34. Question: How and when should the EPA offer to consult with Tribes on civil administrative enforcement actions when the Tribe could not be a party to the action?

Answer: When a Tribal government could not be a party to an enforcement action, the EPA should offer to consult with an affected Tribe prior to taking a formal civil administrative enforcement action to address noncompliance at the non-Tribal facility. However, the EPA only can share public information with the Tribe during related consultations. This is because the Tribe is considered an outside party. Communication with outside parties is limited, as explained in OECA's [Restrictions on Communicating with Outside Parties Regarding Enforcement Actions](#) (March 8, 2006) guidance, to avoid the release of privileged or otherwise sensitive enforcement information that could inappropriately jeopardize settlement negotiations and enforcement options. For example, a large oil company that owns and operates wells in Indian country is responsible for any noncompliance at the wells, not the Tribe, even though the Tribe may have a royalty interest in the wells. Accordingly, the Tribe could not be a party to the enforcement action and the EPA should offer to consult with the Tribe consistent with the *EPA Consultation Policy* and the [Restrictions on Communicating with Outside Parties Regarding Enforcement Actions](#) (March 8, 2006) guidance.

Public information that the EPA can share includes final inspection reports, public violation information, public court filings, notices of violation, discharge monitoring reports, or other

Questions and Answers on the Tribal Enforcement Process

reports submitted to the Agency for compliance purposes, like audits. The EPA should not share nonpublic information—like the status of an investigation, penalty proposals, injunctive relief proposals, etc.—during a consultation with the Tribe, and the Tribe may not participate in settlement discussions.

When a Tribe is an outside party, the EPA can seek a Tribe’s input on whether additional violations exist, how violations may affect Tribal members, whether to initiate enforcement, and whether to cease enforcement. While the EPA can solicit information on how proposed enforcement actions could impact a Tribe, the decision whether to initiate enforcement and what enforcement actions to take rest exclusively with the EPA.

See the “Department of Justice Considerations – Consultation, Coordination, and Consent Decrees” section for information on policies and procedures in cases involving the Department of Justice.

35. Question: What type of information should the EPA seek from a Tribe during a consultation about a proposed civil enforcement action against a Tribal or non-Tribal facility?

Answer: The EPA can seek information about potential impacts of the proposed formal civil administrative enforcement action on the Tribe, the impacts of the violations on the community, whether additional violations exist, and community engagement considerations. The EPA also should ask whether treaty rights or other reserved rights are impacted by the alleged violations if the enforcement action impacts areas where Tribal treaty rights or treaty-protected resources exist. See the [EPA Policy on Consultation with Indian Tribes: Guidance for Discussing Tribal Treaty or Similar Rights](#) (December 7, 2023). If a Tribe is the respondent or defendant in an action, the EPA also should seek information on the Tribe’s efforts to return to compliance, and if raised by the Tribe, the Tribe’s ability to pay any proposed penalty.

36. Question: Can the EPA share non-public, enforcement-related information with a Tribe that is a party to an enforcement action but is not a respondent or defendant?

Answer: In limited circumstances, yes. When a Tribe has an independent claim related to the basis for the EPA’s civil judicial action and asserts that claim, the EPA can notify the Tribe of the action and consider whether to enter into a joint prosecution agreement with the Tribe. The independent claim can be based on a Tribe’s implementation of a program via treatment in a similar manner as a state or based on a claim under Tribal law. If a joint prosecution agreement is executed, then the EPA can share non-public, enforcement-related information with the Tribe as a co-plaintiff. However, the EPA cannot share non-public, enforcement-related information with a Tribe in any other situations where it is considered an outside party because it could not be a respondent or defendant in the action. See the [Restrictions on Communicating with Outside Parties Regarding Enforcement Actions](#) (March 8, 2006) guidance.

Questions and Answers on the Tribal Enforcement Process

37. Question: Can the EPA split penalties with a Tribe that is a party to an enforcement action but is not a respondent or defendant?

Answer: In limited circumstances, yes. The requirements from the [*Joint Collection of Penalties with State and Local Governments and Federally Recognized Indian Tribes*](#) (March 11, 2005) memorandum must be met for the EPA to split penalties. These requirements ensure against violations of the Miscellaneous Receipts Act, 31 U.S.C. § 3302. When a Tribe has an independent claim related to the basis for the EPA's action and asserts that claim, the EPA can notify the Tribe of the action and consider whether to enter into a joint prosecution agreement with the Tribe. The independent claim can be based on a Tribe's implementation of a program via treatment in a similar manner as a state or based on a claim under Tribal law. Further, a Tribe must have the authority to seek the full amount of penalties received and must have participated in developing or prosecuting the case. The EPA can only split penalties in civil judicial enforcement cases, and the penalties in a judicial case should be collected based on the level of participation and the penalty assessment authority of the Tribal government.

38. Question: Can the EPA consult with Tribes on civil compliance monitoring and enforcement policies or initiatives?

Answer: Yes, the EPA can consult with Tribes on civil compliance monitoring and enforcement policies and initiatives consistent with the *EPA Consultation Policy* and the [*EPA Policy on Consultation with Indian Tribes: Guidance for Discussing Tribal Treaty or Similar Rights*](#) (December 7, 2023).

39. Question: Should the EPA use the terms "formal consultation," "informal consultation," "big C Consultation" or "little c consultation"?

Answer: The EPA should use the term "consultation" without modifiers to avoid confusion and conflicting expectations between the EPA and Tribes. Coordination is an appropriate term for communication or interaction among EPA and Tribal officials, Tribal environmental staff, or other Tribal representatives that supports the consultation process and helps determine whether government-to-government consultation is appropriate. Coordination is also the appropriate term for communication conducted outside of consultation.

40. Question: What should the EPA do if a Tribe has its own consultation statute, ordinance, or policy with different requirements than the EPA's policies?

Answer: The *EPA Consultation Policy* states that the "EPA acknowledges that individual Tribes may adopt their own consultation procedures and EPA may, to the extent practicable and consistent with this Policy, seek to accommodate the consultation preferences of the Tribal government engaging in government-to-government consultation." For example, if a Tribe's consultation policy requests that consultation be held on the Tribe's reservation, the EPA may travel to the reservation for consultations if resources allow. However, the EPA may not be able

Questions and Answers on the Tribal Enforcement Process

to accommodate the Tribe's consultation preferences when it is not practicable to do so or if it is inconsistent with the *EPA Consultation Policy*.

41. Question: When should the EPA include consultations on policies or enforcement actions in the Agency's Tribal Consultation Opportunities Tracking System (TCOTS)?

Answer: The EPA should use TCOTS—the EPA's public-facing system to publicize upcoming and current consultation opportunities—when conducting consultations on civil compliance monitoring and enforcement policies and initiatives. The EPA should not use TCOTS when consulting on formal civil administrative enforcement actions. While the EPA may consult on formal civil administrative enforcement actions, notice is provided directly to the affected Tribe(s) via email or letter. Notice of a consultation opportunity on an enforcement action should not be provided in TCOTS, as the notice has already been provided via direct communication with the affected Tribe(s).

42. Question: When may an EPA civil enforcement action outside of Indian country affect a Tribe?

Answer: EPA civil administrative enforcement actions outside Indian country may affect Tribes when the actions involve Tribal facilities or non-Tribal facilities that may have impacts on Tribal resources or rights reserved in treaties or other federal laws.

Tribal facilities can include facilities located within or outside of Indian country. When an EPA formal administrative enforcement action involves a Tribal facility outside Indian country, that action "may affect" the relevant Tribe and the EPA should offer to consult with the Tribe, as described above.

EPA enforcement actions involving non-Tribal facilities outside Indian country may affect a Tribe for a variety of reasons. For example, such facilities may emit pollution to airsheds, watersheds, or groundwater sources that affect a reservation or other Indian country lands. Pollution from these facilities may also affect off-reservation treaty rights, like hunting and fishing rights in usual and accustomed locations. When preparing enforcement cases near Indian country, enforcement staff should coordinate with the Office of Regional Counsel about potential effects on Indian country and the location of off-reservation rights, as regional attorneys are often aware of which Tribes in a region have off-reservation rights. Mapping tools also can assist regions in identifying the proximity of Indian country to non-Tribal facilities being considered for an enforcement action. The EPA should offer to consult when a formal civil administrative enforcement action against a non-Tribal facility outside Indian country may affect a Tribe's lands or off-reservation treaty rights, and share relevant public information, as the action "may affect" the Tribe.

Questions and Answers on the Tribal Enforcement Process

43. Question: What happens when a facility outside Indian country may affect a Tribe or Indian country, but it is regulated by a state approved to implement a federal enforcement program?

In these situations, a Tribe can express concerns it has to the state as the primary implementing agency or to the EPA as the agency with oversight authority. State agencies and the EPA evaluate potential violations on a case-by-case basis to determine whether enforcement is warranted. If the EPA decides to take a civil administrative enforcement action that “may affect” a Tribe, then the EPA should offer to consult with the Tribe prior to taking such action, as described above. If neither the state nor the EPA take an enforcement action, the Tribe can decide whether a citizen suit is warranted under relevant federal environmental laws.

Department of Justice Considerations – Consultation, Coordination, and Consent Decrees

44. Question: Does the Department of Justice (DOJ) consult with Tribes on civil judicial enforcement actions?

Answer: No. The *DOJ Consultation Policy* and other applicable DOJ policies and guidance apply to the EPA’s enforcement actions when the EPA refers a matter to the DOJ Environment and Natural Resources Division (ENRD). The *DOJ Consultation Policy* contemplates consultation with federally recognized Indian Tribes “before formulating or implementing policies that have Tribal implications.” The *DOJ Consultation Policy* states that “the term ‘policies’ does not include matters that are the subject of investigation, anticipated or active litigation, or settlement negotiations.” As a general rule, neither the DOJ nor the EPA should use the word “consultation” in communicating with Tribes about a civil judicial matter. However, DOJ and EPA case teams can consider the implications of civil judicial actions on Tribes and can coordinate with Tribes to achieve this goal, as described in Questions 45 - 49.

45. Question: Can the DOJ coordinate with Tribes during a civil judicial enforcement action, including before lodging a consent decree?

Answer: Yes. The DOJ can coordinate with Tribes during a civil judicial enforcement action. The coordination, including the information shared, depends on whether the Tribe is a co-plaintiff, defendant, or an outside party. If the Tribe is an outside party, the information that can be shared during coordination may be limited to the United States informing the affected Tribe(s) of public information and listening to any issues of concern expressed, given the confidentiality of settlement discussions and privileged nature of litigation. The case team should discuss and strategize about what information can be shared with Tribes that are not parties. See OECA’s [*Restrictions on Communicating with Outside Parties Regarding Enforcement Actions*](#) (March 8, 2006) guidance as a general reference for additional information. Early engagement is encouraged to allow for Tribal concerns to help shape the case teams goals.

Questions and Answers on the Tribal Enforcement Process

46. Question: What is the EPA's role during coordination with Tribes on civil judicial enforcement matters?

Answer: The DOJ is the EPA's legal counsel on a referred enforcement matter and ultimately is responsible for communication related decisions external to the federal government. That said, ENRD/EPA case teams typically discuss and reach agreement on the timing, substance, and point(s) of contact related to external communications. In some cases, the EPA takes the "lead" in communicating the United States' position on the case to the Tribe(s). In such cases, the EPA's role often reflects both the Agency's pre-referral coordination on the enforcement action and general familiarity and ongoing relationship with the Tribe(s).

Prior to referring a matter to ENRD, the EPA can notify a Tribe about the potential for civil judicial enforcement actions. The decision on whether to notify a Tribe may depend on multiple factors, including the timing of a referral, whether the Agency believes the DOJ would accept the case, and whether a Tribe could be a party to the enforcement action based on an independent claim from the Tribe or its implementation of an EPA-approved program.

47. Question: Does the United States consult with Tribes on the terms of draft civil judicial consent decrees involving non-Tribal facilities?

Answer: No. The United States does not consult with Tribes regarding the specific terms of a draft consent decree (i.e., prior to lodging). See Question 44 for additional information on the *DOJ Consultation Policy*.

In certain limited cases, the United States has coordinated with Tribes on specific elements of a proposed settlement (i.e., the Volkswagen Clean Air Act settlement [2016 and 2017] contemplated a direct Tribal role in implementing one aspect of the settlement and the agencies coordinated with Tribes on specific implementation issues, such as the method of allocating annual funding to the Tribal Allocation subaccount). The fact that the United States coordinated with Tribes on a discrete issue in certain consent decrees does not create an obligation to do so for all settlements. Coordination with Tribes related to a referred case should not be included in TCOTS.

48. Question: Should case teams notify Tribes of consent decrees upon lodging and entering?

Answer: Yes. The EPA and the DOJ should work to identify Tribes that may be affected by a consent decree. Typically, this information is contained in the EPA's referral documentation. At lodging and entry, notification should be sent to the affected Tribes. When appropriate, the notice of lodging can offer the Tribe(s) an opportunity to raise questions about the proposed consent decree with the EPA and the DOJ on a government-to-government basis. While the DOJ is the EPA's legal counsel, case teams typically determine whether ENRD or the EPA is best situated to provide the notice and participate in any coordination opportunities. If a consent

Questions and Answers on the Tribal Enforcement Process

decree will be going through a public comment period, the case team should recommend any comments from the Tribe be memorialized in writing and submitted via the public comment process. These notices and opportunities to confer are not consultations and should not be included in TCOTS.

49. Question: How long should the consent decree comment period last?

Answer: The typical comment period is thirty days. Case teams may decide that an additional fifteen to thirty days is appropriate to encourage and enable affected Tribes to review a lodged consent decree, accept a coordination opportunity, and provide written comments.

Disclaimer

This document identifies internal EPA policies and procedures on civil compliance monitoring and enforcement matters involving or related to federally recognized Indian Tribes. It is intended to improve the Agency's internal management and provide transparency on Agency processes. This document does not change or substitute for any law, regulation, or any other legally binding requirement and is not legally enforceable. It is not binding and does not create a right or benefit, substantive or procedural, enforceable at law or in equity, against the Agency, its officers or employees, or any other person.