

CONSULTATION AND COORDINATION WITH FEDERALLY RECOGNIZED INDIAN TRIBES



EPA Region 6 Consultation and Coordination Procedures

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Introduction

Purpose and Scope

EPA's National Tribal Consultation Policy is to consult on a government-to-government basis with federally recognized Tribal governments when EPA actions and decisions may affect a Tribe. The *EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011)* ("EPA Tribal Consultation Policy") establishes national guidelines and institutional controls for consultation across EPA. The Region 6 Tribal Consultation and Coordination Procedures ("Procedures") are consistent with the agency-wide consultation policy, but include more specific guidelines for the consultation process to increase the effectiveness of working with Tribes in Region 6.

These Procedures do not supersede any EPA agency-wide consultation policies or procedures, or those developed by individual Tribes. These Procedures do not replace individual EPA-Tribal memoranda of agreement, consultation plans, Tribal Environmental Agreements (TEAs), or other specific agreements between Region 6 and a Tribe or Tribes. These Procedures do not apply to the Region 6 formal civil enforcement process or consultations initiated by EPA Headquarters. Primary guidance on consultation on civil compliance monitoring and enforcement actions is found in the *Guidance on the Enforcement Priorities Outlined in the 1984 Indian Policy, Questions and Answers on the Tribal Enforcement Process* and the *Region 6 Guidance on Compliance Monitoring, and Compliance Assistance, and Civil Enforcement at Tribal Facilities*.

For Tribal consultation regarding Superfund activities, discuss with the Region 6 Tribal Consultation Advisor as early as possible. Additional information is available in *Consulting with Indian Tribal Governments at Superfund Sites: A Beginner's Booklet* at http://www.epa.gov/superfund/partners/osrti/booklet_text.htm. This supplemental information does not supersede the EPA Tribal Consultation Policy or these Procedures.

Definitions

EPA's National Tribal Consultation Policy provides the following definitions:

Consultation is a process of meaningful communication and coordination between EPA and Tribal officials that begins prior to EPA taking actions or implementing decisions that may affect Tribes. As a process, consultation includes several methods of interaction that may occur at different levels.

Tribal Consultation Advisors (TCAs) are the in-office subject matter experts that assist staff and management in the implementation of the EPA Tribal Consultation Policy. TCAs assist in identifying matters appropriate for consultation and prepare summary information on consultation activities and provide it to AIEO. TCAs receive and provide advice within their respective program offices and regions on what actions may be appropriate for consultation. TCAs also serve as a point-of-contact for EPA staff, Tribal governments, and other parties interested in the consultation process. For Region 6, the TCA is the Office of Environmental Justice and Tribal Affairs Director or Designee.

1. The Consultation Process

Tribal Consultation may commence when Tribal officials request consultation as well as when EPA identifies matters appropriate for consultation. EPA honors the Tribal government's request with consideration of the nature of the activity, past consultation efforts, available resources, timing considerations, and all other relevant factors. The appropriate level of interaction initiated by Region 6 is determined by past and current practices, with adjustments made as needed consistent with the EPA Tribal Consultation Policy.

1.1 Identification Phase

During the identification phase, EPA identifies activities that may be appropriate for consultation. The identification phase should include a determination of the complexity of the activity, its potential implications for Tribes, and any time and/or resource constraints relevant to the consultation process. This phase should also include an initial identification of the potentially affected Tribe(s).

Tribal Consultation at EPA consists of four phases:

- Identification
- Notification
- Input
- Follow-up

A wide range of EPA Region 6 activities are appropriate for consultation under the EPA Tribal Consultation Policy. Regional activities may include the development of regulations, rules, permits, guidance documents, policies, directives, budget and priority planning development, legislative comments, civil enforcement and compliance monitoring actions, response actions and emergency preparedness, state or Tribal authorizations or delegations, and EPA activities in implementation of United States' obligations under an international treaty or agreement. The EPA Tribal Consultation Policy makes clear that certain actions, such as legislative comments and EPA's enforcement authorities, may be subject to policy and time constraints. EPA Region 6 defines "actions" as regulatory or policy decisions, but not necessarily every step taken within a decision-making process.

1.1.2 Activities Not Subject to Consultation

Routine administrative and staff-to-staff level interactions occur between EPA Region 6 and Tribal government employees on a regular basis. The EPA Tribal Consultation Policy is not intended to apply to these regular, ongoing interactions. These include grantee-project officer discussions, requests for publicly available information, grant funding decisions, review of progress reports, programmatic evaluations with the Tribe and other routine communications. In addition, there are some areas of EPA Region 6's operations that are not appropriate for consultations. These include strictly internal Agency operations (activities and decisions related to staffing, personnel, and human capital management; oversight of contractor performance under Agency-issued contracts; administration of the Agency's working capital funds, etc.). This also includes areas where the Agency lacks discretion (e.g., congressionally mandated time lines, actions, or other requirements; Agency response to court orders; and privileged or confidential Agency activities).

1.2 Notification Phase

Once the appropriate EPA Region 6 Division and TCA determine that consultation is warranted, EPA Region 6 shall send a letter to the appropriate Tribal government(s) either offering to consult or initiating consultation. The notification phase should precede any public comment period associated with the proposed action by at least 30 days. EPA Region 6 strives to notify a Tribe or Tribes of the opportunity to consult as early as possible to enhance meaningful discussion.

1.2.1 EPA Consultation Outreach

Once the appropriate EPA Region 6 Division and TCA determine that an action may affect a Tribe(s), EPA Region 6 shall send a letter notifying Tribal government(s) of the opportunity to consult with EPA.

Invitations To Consult (Notification): Working with the TCA, the appropriate Division/program staff will draft an invitation letter to the Tribal leader(s) for the Division Director's signature, with the TCA's concurrence.

The letter should:

- Be addressed to the Tribal Leader, with a copy to the Tribe's program staff, and bcc to the appropriate Division and the TCA;
- Be signed by the appropriate Division Director or the Regional Administrator;
- Describe the issue at hand clearly, avoiding or clearly defining legal and technical terms and acronyms;
- Provide maps, technical data, and other explanatory or supporting information as appropriate and available;
- Relay process timelines and schedule considerations;
- Identify the EPA Region 6 point of contact whom the Tribe may contact to seek additional information;
- Request that the Tribe(s) respond in writing to the Division or TCA, within a specified timeframe indicating whether or not the Tribe(s) wants to pursue consultation and indicate that if no response is received, EPA will assume the Tribe has declined consultation;
- If appropriate, request the Tribe(s) identify an official representative who will serve as the Tribal point of contact for planning the consultation and/or coordination activities and authority to speak on behalf of the Tribe during the consultation, if not Tribal leadership;
- Include summary factsheet with brief statement of action to enable Tribal environmental staff to brief Tribal leadership as appropriate.

Response To Request For Consultation: In cases where a Tribe has addressed a letter to the Regional Administrator requesting consultation, the appropriate Division/program staff, in coordination with the TCA, will draft a response letter for the Regional Administrator's signature. The Division should circulate that letter for review, comment and concurrence by the TCA, External Affairs and the appropriate Division Director, and Office of Regional Counsel.

The letter should:

- Be addressed to the Tribal Leader with a copy to the Tribe's program staff (e.g. Environmental Director);
- Have the concurrences of the TCA, OEJTA Director, Division Director, External Affairs and the Regional Counsel;
- Be signed by the Regional Administrator;
- If requested, provide maps, technical data, and other explanatory or supporting information as appropriate and available;
- Relay process timelines and schedule considerations;
- Identify the EPA Region 6 point of contact whom the Tribe may contact to seek additional information;
- If appropriate, request that the Tribe (s) identify an official representative who will serve as the Tribal point of contact for planning the consultation and/or coordination activities and may also be able to speak on behalf of the Tribe during the consultation, if not Tribal leadership

1.2.2 Consultation with Small Number of Tribes

When EPA Region 6 has determined that consultation is appropriate and that more than one Tribe may be affected, the appropriate Division and TCA shall work together to develop an approach to consultation. The same protocol above will be applicable in addition to terms to be negotiated, depending on available resources, which may include:

- Whether the consultation will be conducted in a meeting, conference calls, or other appropriate interactions depending upon specific circumstances involved;
- The timing and location (s) of the interactions;
- The overall goal or desired outcome of the consultation for each party;
- What issues related to the proposed action will be the focus of the consultation;
- Representatives that will participate on behalf of EPA Region 6 and the Tribe; and
- Timetable for the consultation (e.g., start and end dates of the consultation period, anticipated meeting dates, and other dates relevant to the EPA action such as public comment periods).

1.2.3 Consultation with All or Large Number of Tribes

When a larger group of Tribes or all Tribes in EPA Region 6 could potentially be affected by an action, a notification letter engaging those Tribes in consultation is extended to the large group of Tribes or all Tribes in EPA Region 6 in accordance with section 1.2.1 above. EPA Region 6 will work to ensure consultations carried out with all or a large number of Tribes are done in a mutually agreeable and meaningful method, including but not limited to centralized locations in areas close to many of the Tribes.

1.2.5 If a Tribe(s) Declines to Consult

If a Tribe(s) indicates it does not wish to consult on a particular matter, EPA consultation efforts are normally concluded. This does not relieve EPA Region 6 of any trust responsibility it may have or the obligation to reinitiate consultation efforts in the future if changes warrant such action.

The TCA will enter the relevant data into the Tribal Consultation Opportunities Tracking System (TCOTS) for tracking purposes. Enforcement and compliance issues where a Tribe is a respondent will not be entered in TCOTS .

1.3 Input Phase

During the Input Phase, tribes provide input to EPA Region 6 on the consultation matter. This phase may include a range of interactions including written and oral communications including exchanges of information, phone calls, meetings, and other appropriate interactions depending upon the specific circumstances involved.

1.3.1 Coordination

Working in coordination with the TCA, regional and Tribal staff discuss consultation meeting logistics such as location, date, time, agenda items and expected attendees from EPA and the Tribe. Additionally, information needs related to the issue being consulted on should be identified, such as the dissemination of technical documents such as maps or monitoring data, legislative notices, judicial decisions or orders, and other relevant information. Informal outreach like websites, webinars, Tribal organizational meetings and Tribal conferences may be used to further discussions of issues as part of the consultation process to ensure Tribes have adequate information to formulate a position; however, such informal communications do not constitute or substitute for consultation with Tribal governments. There may also be occasions where EPA Region 6 coordinates with other EPA regions on consultations with Tribes that may have concerns across more than one region.

1.3.2 Consultation

Open dialogue between the Region and the Tribe(s) is expected during the input phase. Technical staff from the Region may also be available to answer questions directly from Tribal leadership during the consultation.

Following the initial consultation meeting and to the extent allowed by law, EPA Region 6 will take Tribal comments and concerns under consideration and work to address these issues. This may include the need to undertake subsequent rounds of consultation to address unresolved questions, provide additional technical information, update the Tribe on significant changes in the originally proposed activity, or to address new issues that may arise.

During Consultation EPA Region 6 and the Tribe:

- Discuss how the action originated;
- Discuss how the Tribe may be impacted;
- Identify any technical and/or funding assistance that the Region may be able to provide, if relevant;
- EPA listens to the input from the Tribe and considers effects of the proposed action through a meaningful dialogue with Tribal leadership and

1.4 Follow-Up Phase

During the follow-up phase, EPA Region 6 provides feedback to the Tribe(s) involved in the consultation to explain how their input was considered in the final action.

1.4.1 Considering Tribal Input

The Division Director and staff, in collaboration with the TCA and Office of Regional Counsel, will consider the Tribal input, weighing how program decisions can or should address the concerns raised by a Tribe or Tribes. To the fullest extent allowed by law and policy, EPA Region 6 will incorporate the input of the Tribe(s).

1.4.2 Responding to Tribal Concerns and Closing out the Consultation Process

A written response to the concerns raised by the Tribe(s) during consultation should be drafted by the Division, with concurrence by the TCA and the Office of Regional Counsel (if necessary), and signed by the appropriate Division Director, or the Regional Administrator when appropriate. For consultations requiring subsequent meetings, the written response will identify any follow up action items resulting from the meeting. The response letter will explain how EPA Region 6 considered the input from the Tribe(s) in its final decision.

For issues or concerns that are beyond the scope or subject matter of the consultation, a response acknowledging the issues or concerns should be included. This response letter will be sent to the Tribal leader or the Tribe's designated representative for the consultation, with a copy to the TCA.

2. Documentation and Reporting

2.1 Division

The Division Lead maintains digital and paper project or site files for each consultation, which may include:

- Letters or emails inviting Tribe(s) to consult and responses from Tribe(s) or follow-up actions by EPA Region 6;
- Consultation schedule, fact sheets, issues list, agenda for consultation meeting(s);
- Notes from any meetings, conference calls, webinars, or video conferences, including names of all participants for the Tribe(s) and EPA Region 6;
- EPA Region 6's written responses to concerns raised by the Tribe(s) throughout the consultation process; and
- Close out letter(s) explaining EPA Region 6's final decision on consultation.

Digital copies of all consultation correspondence shall also be stored in the EPA Region 6 Tribal Consultation folder located on the regional share drive.

2.2 Required Reporting

As outlined in the EPA Tribal Consultation Policy, EPA American Indian Environmental Office (AIEO) submits annual progress reports to the Office of Management and Budget in June of each year on the status of the consultation process and actions on which consultation occurred, as well as plans for consultation on Agency actions in the coming year.

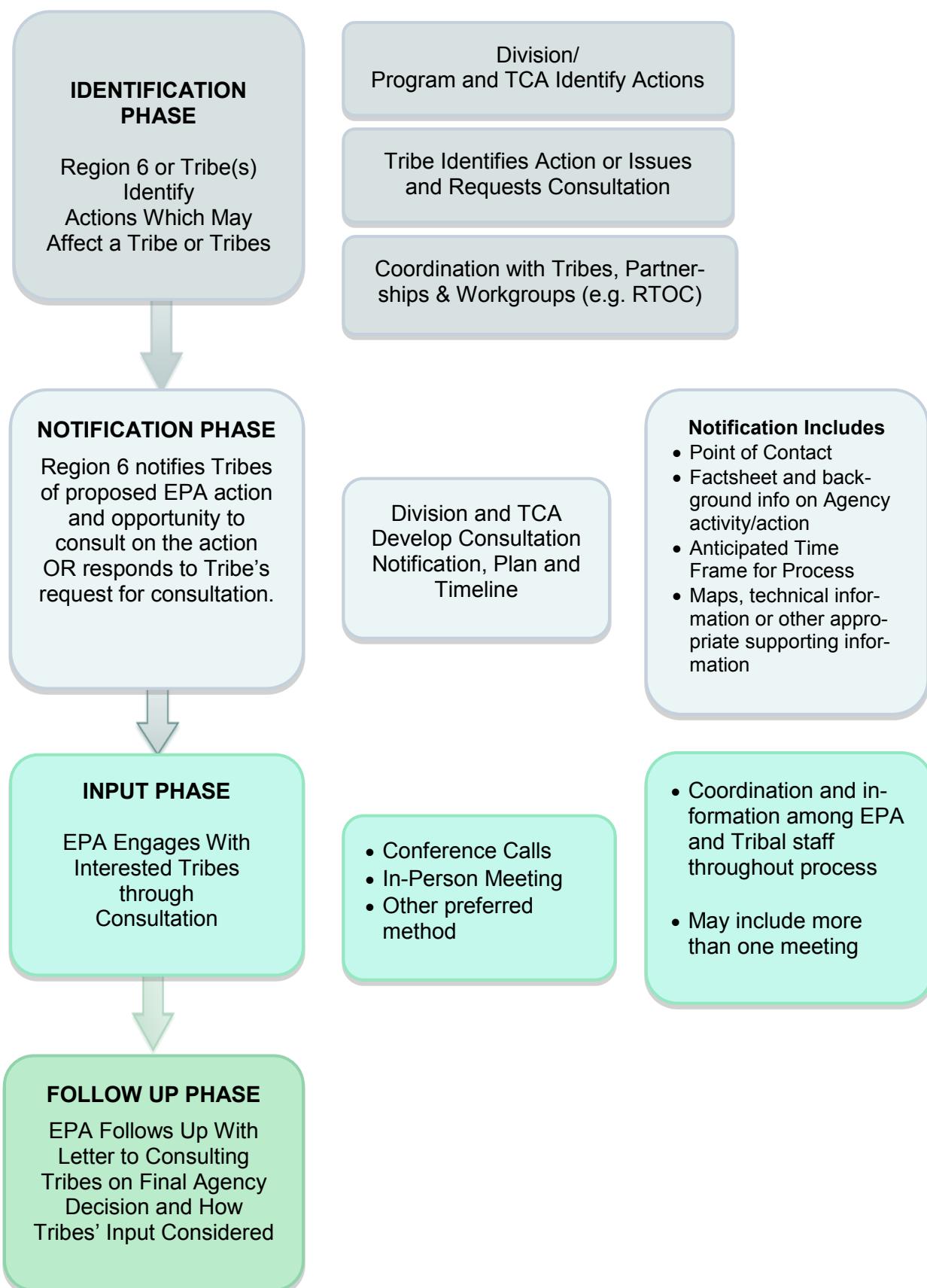
To facilitate submission of the annual progress reports, EPA Region 6 is required to provide a report of anticipated consultations by October 1 and April 1 of each year using the Tribal Consultation Opportunities Tracking System. This requirement is pursuant to the November 5, 2009 Presidential Memorandum directing all executive departments and agencies to develop a detailed plan of action to implement Executive Order 13175, Consultation and Coordination with Indian Tribes. Tribal consultations will be entered in the Tribal Consultation Opportunities Tracking System (TCOTS) by the TCA and tracked accordingly until conclusion of the consultation¹. The TCA will also maintain internal records for consultation invitations not accepted by the Tribe(s) but that were offered. Each EPA Region 6 Division that participates in consultation activities must provide (in a form to be agreed upon by the Division Director and TCA) a list of potential or projected consultations to the TCA by September 1 and March 1 of each year. After management review and approval, the TCA submits the semi-annual consultation plans to AIEO.

3. Historical or Archaeological Resources

These procedures do not govern or necessarily relate to consultations that may occur with a Tribe pursuant to other statutes regarding historical or archaeological resources. For example, consultations pursuant to Section 106 of the National Historic Preservation Act of 1966 (NHPA) will be conducted in accordance with the requirements of that statute and implementing regulations. EPA understands that consultations under NHPA or other laws such as the Native American Graves Protection and Repatriation Act of 1990 or the National Environmental Policy Act (NEPA) may have requirements that overlap with a consultation under the EPA Tribal Consultation Policy. In these instances, EPA program staff should also work with the Region 6 Tribal law advisor/cross-cutting law attorney to ensure that Tribal consultations are conducted in a way that ensures compliance with any additional federal statutory requirements for protected resources.

¹ Certain compliance monitoring and enforcement activities are not included in TCOTS.

Region 6 Consultation and Coordination Process



Federally Recognized Indian Tribes of EPA Region 6

Louisiana

Chitimacha Tribe of Louisiana
Coushatta Tribe of Louisiana

Jena Band of Choctaw Indians
Tunica-Biloxi Indians of Louisiana

Texas

Alabama-Coushatta Tribe of Texas
Ysleta del Sur Pueblo of Texas

Kickapoo Traditional Tribe of Texas

New Mexico

Pueblo of Acoma
Pueblo of Isleta
Jicarilla Apache Nation
Pueblo of Laguna
Pueblo of Nambe
Pueblo of Pojoaque
Pueblo of Santa Ana
Pueblo of San Ildefonso
Pueblo of Santa Clara
Pueblo of Tesuque
Zuni Tribe

Pueblo of Cochiti
Pueblo of Jemez
Pueblo of Santo Domingo
Mescalero Apache Tribe
Pueblo of Picuris
Pueblo of Sandia
Pueblo of San Felipe
Ohkay Owingeh
Pueblo of Taos
Pueblo of Zia

Oklahoma

Absentee-Shawnee Tribe
Apache Tribe
Cherokee Nation
Chickasaw Nation
Citizen Potawatomi Nation
Delaware Nation
Eastern Shawnee Tribe
Iowa Tribe
Kialegee Tribal Town
Kiowa Indian Tribe
Modoc Tribe
Osage Nation
Ottawa Tribe
Peoria Tribe of Indians
Quapaw Tribe
Seminole Nation
Shawnee Tribe
Tonkawa Tribe of Indians
Wichita and Affiliated Tribes

Alabama-Quassarte Tribal Town
Caddo Nation
Cheyenne and Arapaho Tribes
Choctaw Nation
Comanche Nation
Delaware Tribe of Indians
Fort Sill Apache Tribe
Kaw Nation
Kickapoo Tribe
Miami Tribe
Muscogee (Creek) Nation
Otoe-Missouria Nation
Pawnee Nation
Ponca Tribe of Indians
Sac & Fox Nation
Seneca-Cayuga Tribe
Thlophlocco Tribal Town
United Keetoowah Band of Cherokee
Wyandotte Nation