

EPA Policy on Consultation and Coordination with Indian Tribes

I. Policy Statement

<p align="center">EPA Policy on Consultation and Coordination with Indian Tribes <i>May 4, 2011</i></p>	<p align="center">Region 9 Implementation Best Practices <i>Last updated 9/17/2018</i></p>
<p>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. 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. As a process, consultation includes several methods of interaction that may occur at different levels. The appropriate level of interaction is determined by past and current practices, adjustments made through this Policy, the continuing dialogue between EPA and tribal governments, and program and regional office consultation procedures and plans.</p>	
<p>This Policy establishes national guidelines and institutional controls for consultation across EPA. EPA program and regional offices have the primary responsibility for consulting with tribes. All program and regional office consultation plans and practices must be in accord with this Policy. This Policy seeks to strike a balance between providing sufficient guidance for purposes of achieving consistency and predictability and allowing for, and encouraging, the tailoring of consultation approaches to reflect the circumstances of each consultation situation and to accommodate the preferences of tribal governments. The consultation process is further detailed in Section V of this document.</p>	<p>This Region 9 Best Practices document seeks to specify for Region 9 Managers and Staff, as well as tribal partners, how Region 9 approaches implementation of the national policy within the Region. While every consultation is different, Region 9 seeks in this document to create additional clarity for participants without creating additional burden on tribes or EPA programs.</p>

II. Background

<p align="center">EPA Policy on Consultation and Coordination with Indian Tribes <i>May 4, 2011</i></p>	<p align="center">Region 9 Implementation Best Practices <i>Last updated 9/17/2018</i></p>
<p>To put into effect the policy statement above, EPA has developed this proposed <i>EPA Policy on Consultation and Coordination with Indian Tribes</i> (Policy). The Policy complies with the Presidential Memorandum (Memorandum) issued November 5, 2009, directing agencies to develop a plan to implement fully Executive Order 13175 (Executive Order). The Executive Order specifies that each Agency must have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.</p>	<p>EPA, Region 9 previously maintained a Consultation Approach that the Region implemented to bring tribal viewpoints into Regional decision making. That document was superseded by the EPA Agency-wide policy adopted in May of 2011. Region-specific tailoring in that document that remains consistent with the EPA policy is incorporated here.</p>
<p>This Policy reflects the principles expressed in the <i>1984 EPA Policy for the Administration of Environmental Programs on Indian Reservations</i> (1984 Policy) for interacting with tribes. The 1984 Policy remains the cornerstone for EPA’s Indian program and “assure[s] that tribal concerns and interests are considered whenever EPA’s actions and/or decisions may affect” tribes (1984 Policy, p. 3, principle no. 5).</p>	<p>To view the 1984 Indian Policy, a keystone EPA document, see: https://www.epa.gov/tribal/epa-policy-administration-environmental-programs-indian-reservations-1984-indian-policy</p>
<p>One of the primary goals of this Policy is to fully implement both the Executive Order and the 1984 Indian Policy, with the ultimate goal of strengthening the consultation, coordination, and partnership between tribal governments and EPA.</p>	
<p>One of the primary goals of this Policy is to fully implement both the Executive Order and the 1984 Indian Policy, with the ultimate goal of strengthening the consultation, coordination, and partnership between tribal governments and EPA.</p>	
<p>The Policy is intended to be implemented using existing EPA structures to the extent possible. The use of current EPA business processes, such as the Action Development Process, National and Regional Tribal Operations Committees, and tribal partnership groups is purposeful so that consultation with tribal governments becomes a standard EPA practice and not an additional requirement.</p>	

<p align="center">EPA Policy on Consultation and Coordination with Indian Tribes <i>May 4, 2011</i></p>	<p align="center">Region 9 Implementation Best Practices <i>Last updated 9/17/2018</i></p>
<p>The issuance of this Policy supports and guides the development and use of program and regional office consultation plans and practices consistent with this Policy.</p>	

III. Definitions

<p align="center">EPA Policy on Consultation and Coordination with Indian Tribes <i>May 4, 2011</i></p>	<p align="center">Region 9 Implementation Best Practices <i>Last updated 9/17/2018</i></p>
<p>A. “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 1944, 25 U.S.C. 479a.</p>	<p>Federally Recognized Tribes are catalogued in the Federal Register by the Bureau of Indian Affairs, and a contact list of tribal leaders is also maintained by the BIA. EPA has compiled a reference list of tribal grantee key contacts and merged that data with BIA’s records; that reference list comprises the Indian Nations Database, available to EPA staff on the internal R9 SharePoint site.</p>
<p>B. “Tribal official” means an elected, appointed, or designated official or employee of a tribe.</p>	<p>The Region 9 universe of tribal officials changes frequently. EPA staff should always reference the EPA internal Indian Nations Database for most current leadership information. The Land Division, Tribal Section Project Officer may also be a resource in this phase, found here: https://www.epa.gov/tribal/epa-region-9-tribal-section-project-officer-list Offers of consultation should always be sent to the tribal leader and copied to tribal environmental program staff unless otherwise directed by a tribal leader. Tribes may specify</p>

<p align="center">EPA Policy on Consultation and Coordination with Indian Tribes <i>May 4, 2011</i></p>	<p align="center">Region 9 Implementation Best Practices <i>Last updated 9/17/2018</i></p>
	<p>additional tribal contacts for consultation offers.</p>
<p>C. “Indian country” means:</p>	
<p>1. All land within limits of any Indian reservation¹ under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights- of-way running through the reservation;</p>	<p>EPA, Region 9 regularly obtains geo- referenced data from the Bureau of Indian Affairs and data.gov that can inform decisions about whether an action may affect Indian Country, although it is typically not definitive. However, this data should not be considered decisional. The Agency considers jurisdictional assertions on a case-by-case basis in coordination with the potentially affected tribe, the Bureau of Indian Affairs, and other interested stake holders. The Office of Regional Counsel should be consulted in any process attempting to determine the bounds of “Indian Country” through a request for support to the manager of the General Law and Cross-Cutting Issues group,.</p> <p>EPA staff interested in more information about the definition of “Indian Country” may reference the Region 9 internal training on Tribal Jurisdiction, available from the Tribal Section in the Land Division.</p> <p>Note that for this purpose, Indian Country is not limited trust land, but may include fee land, including land not owned by tribal members or a tribe.</p>

EPA Policy on Consultation and Coordination with Indian Tribes <i>May 4, 2011</i>	Region 9 Implementation Best Practices <i>Last updated 9/17/2018</i>
¹ EPA’s definition of “reservation” encompasses both formal reservations and “informal” reservations, i.e., trust lands set aside for Indian tribes. <i>See for example</i> Oklahoma Tax Comm’n v. Sac and Fox Nation, 508 U.S. 114, 123 (1993); 56 Fed. Reg. 64876, 64881 (1991); or 63 Fed. Reg. 7254, 7258 (1998).	
2. 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	
3. All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.	

IV. Guiding Principles

EPA Policy on Consultation and Coordination with Indian Tribes <i>May 4, 2011</i>	Region 9 Implementation Best Practices <i>Last updated 9/17/2018</i>
To understand both the purpose and scope of the Policy as well as the integration of the Policy, Memorandum, and Executive Order, it is helpful to list principles found in EPA’s January 2010 <i>Plan to Develop a Tribal Consultation and Coordination Policy Implementing Executive Order 13175</i> :	
*EPA’s fundamental objective in carrying out its responsibilities in Indian country is to protect human health and the environment.	
*EPA recognizes and works directly with federally recognized tribes as sovereign entities with primary authority and responsibility for each tribe’s land and membership, and not as political subdivisions of states or other governmental units.	
*EPA recognizes the federal government’s trust responsibility, which derives from the historical relationship between the federal government and Indian tribes as expressed in certain treaties and federal Indian law.	EPA acts consistent with the federal trust responsibility when the Agency implements environmental laws in Indian Country.
*EPA ensures the close involvement of tribal governments and gives special consideration to their interests whenever EPA’s actions may affect Indian country or other tribal interests.	

<p align="center">EPA Policy on Consultation and Coordination with Indian Tribes <i>May 4, 2011</i></p>	<p align="center">Region 9 Implementation Best Practices <i>Last updated 9/17/2018</i></p>
<p>*When EPA issues involve other federal agencies, EPA carries out its consultation responsibilities jointly with those other agencies, where appropriate.</p>	
<p>In addition, it is helpful to note the distinction between this Policy, federal environmental laws pertaining to public involvement, and Executive Order 12898, <i>Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations</i>. Under this Policy, EPA consults with federally recognized tribal governments when Agency actions and decisions may affect tribal interests. EPA also recognizes its obligations to involve the public as required by federal environmental laws. Finally, EPA recognizes the need to be responsive to the environmental justice concerns of non-federally recognized tribes, individual tribal members, tribal community-based/grassroots organizations and other indigenous stakeholders.</p>	<p>EPA's policy on tribal consultation concerns government-to-government dialogue between tribal governments and the Agency separate and apart from the general processes whereby EPA seeks public input on agency actions, such as rulemaking or permitting. Of course, EPA may also receive comments from tribes on agency actions as a member of the public, in a similar fashion as individuals, organizations, or non-tribal governments or governmental agencies.</p> <p>While consultation is only between a tribal government and the Agency, individual tribal members, other indigenous people, or members of unrecognized tribes, as well as potential environmental justice communities may provide input to the Agency through these other public processes. EPA has described approaches for working with indigenous people and tribes in an environmental justice context in the "EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples," found at: https://www.epa.gov/sites/production/files/2017-10/documents/ej-indigenous-policy.pdf</p>

V. Consultation

<p style="text-align: center;">EPA Policy on Consultation and Coordination with Indian Tribes <i>May 4, 2011</i></p>	<p style="text-align: center;">Region 9 Implementation Best Practices <i>Last updated 9/17/2018</i></p>
<p>A. The Consultation Process. To the fullest extent possible, EPA plans to use existing EPA business operations to put this Policy into effect.</p>	
<p>Tribal officials may request consultation in addition to EPA’s ability to determine what requires consultation. EPA attempts to honor 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.</p>	<p>Routine administrative and programmatic staff-to-staff level interactions occur between EPA Region 9 and tribal government employees on a regular basis, and may not constitute formal government-to-government consultation, but serve a valuable function. These interactions include, but are not limited to:</p> <ul style="list-style-type: none"> *grantee-project officer discussions, *delegated, approved program oversight, *interactions with tribal inspectors, *requests for publicly available information, and *routine communication. <p>In addition, there are some areas of EPA Region 9's operations that may not be appropriate for consultation. These may include, but are not limited to, internal Agency operations such as 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, and when EPA is not the lead Agency for an action.</p>
<p>Consultation at EPA consists of four phases: Identification, Notification, Input, and Follow- up:</p>	

<p align="center">EPA Policy on Consultation and Coordination with Indian Tribes <i>May 4, 2011</i></p>	<p align="center">Region 9 Implementation Best Practices <i>Last updated 9/17/2018</i></p>
<p>1. Identification Phase: EPA identifies activities that <i>may be</i> appropriate for consultation, using the mechanisms described in section B.2, below. 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).</p>	<p>There are internal resources intended to assist EPA staff and managers appropriately identify consultative issues and potentially affected tribes available on the R9 SharePoint site.</p> <p>Additional resources may include EPA staff who work with potentially affected tribes or in the subject area, the R9 Consultation Advisor, or tribal staff at potentially affected tribes.</p> <p>EPA should always be judicious in making determinations in the Identification Phase and err on the side of offering consultation if the impacts on tribal interests are uncertain.</p>
<p>2. Notification Phase: EPA notifies the tribes of activities that may be appropriate for consultation.</p>	
<p>Notification can occur in a number of ways depending on the nature of the activity and the number of tribes potentially affected. For example, EPA may send out a mass mailing to all tribes, may contact the tribal governments by telephone, or provide notice through other agreed upon means. EPA normally honors tribal preferences regarding the specific mode of contact.</p>	<p>Some tribes have produced specific consultation guides of their own for Federal agencies to review. While it may not always be possible for EPA to fully honor tribes' requests articulated in these materials, this information may be useful to programs when preparing for consultation. Any tribe-specific guides received by the Region are maintained on the Sharepoint site.</p> <p>Some tribes have opted into email communication from the EPA on official matters. Tribes that have opted in, and their email preferences, are recorded for internal use in the</p>

<p align="center">EPA Policy on Consultation and Coordination with Indian Tribes <i>May 4, 2011</i></p>	<p align="center">Region 9 Implementation Best Practices <i>Last updated 9/17/2018</i></p>
<p>Notification includes sufficient information for tribal officials to make an informed decision about the desire to continue with consultation and sufficient information to understand how to provide informed input.</p>	<p>Indian Nations Database.</p> <p>Information sufficient to make an informed decision should be included in the communication either in the body of the letter or as attachments. Sample letters can be found at the American Indian Environmental Office’s internal-facing resource on consultation. This can be accomplished with a summary early in the body of the letter and details, if they are succinct, can be later in the letter or included in an attachment(s). Whenever possible, Region 9 programs should provide a summary with essential details about the EPA action to aid in the tribe’s decision making early in the main body of the communication, including when a decision is anticipated and how long recipient tribes have to respond.</p> <p><i>For example: “This issue concerns streamlined permitting for future tribal gas stations that might require permits after calendar year 2019.” A statement such as this would help a tribe determine if they are even interested in the topic (if they plan to have a gas station that will need a future permit).</i></p> <p><i>For example: “This issue concerns National Program Manager guidance that specifies grant</i></p>

<p align="center">EPA Policy on Consultation and Coordination with Indian Tribes <i>May 4, 2011</i></p>	<p align="center">Region 9 Implementation Best Practices <i>Last updated 9/17/2018</i></p>
	<p><i>program requirements for the Clean Water Act Wetlands Program, Section 104(b)(3), beginning in Fiscal Year 2019." A statement such as this would help a tribe determine if they are interested in the topic (if they plan to or currently receive 104b3 funding).</i></p>
<p><i>Notification should occur sufficiently early in the process to allow for meaningful input by the tribe(s).</i></p>	<p>Tribal governments will require time to review and respond to an offer of consultation. Appropriate staff will need to review the information provided by the EPA, hold clarifying conversations with EPA if needed, and make recommendations to tribal leadership concerning a proposed response. If the matter must be brought to a tribal council, those bodies might meet weekly, biweekly, monthly, or only as needed.</p> <p>Scheduling a discussion before the tribal council, and additionally scheduling time for tribal leaders to participate in verbal consultation with the EPA requires advance scheduling.</p> <p>Region 9 recommends that programs not offer less than 30 days for an initial response to an offer of consultation (an indication a tribe would like to engage). Additionally, it is recommended to include "If EPA doesn't hear from X tribe by [DATE], EPA will. " For example, EPA could offer to keep tribes apprised of milestones during a</p>

<p align="center">EPA Policy on Consultation and Coordination with Indian Tribes <i>May 4, 2011</i></p>	<p align="center">Region 9 Implementation Best Practices <i>Last updated 9/17/2018</i></p>
	<p>process. Such action would be included in the initial communication. Taking these additional steps would mean not continuing to copy a tribe on an action unless it was negotiated to do otherwise.</p> <p>If EPA does not receive a response from a tribe, it should not necessarily be construed as a declination to consult. EPA programs should follow up on offers of consultation shortly after they are received by tribes (perhaps a week after mailing, or a day after emailing) by communicating by phone with tribal environmental staff or other appropriate key recipients to ensure the communication was received by the correct individuals and that the material is understood. This phone call can also be useful to determine if the tribe intends to accept the offer of consultation.</p> <p>A record of communications, including follow-up phone calls, should be kept.</p> <p>Tribal contacts are listed in an internal directory at the Indian Nations Database.</p> <p><u>For example:</u> <i>The California Air Resources Board (CARB) has requested that the EPA redesignate the Chico</i></p>

<p align="center">EPA Policy on Consultation and Coordination with Indian Tribes <i>May 4, 2011</i></p>	<p align="center">Region 9 Implementation Best Practices <i>Last updated 9/17/2018</i></p>
	<p><i>PM2.5 area to “attainment.” Accompanying the request is a maintenance plan developed by BCAQMD that ensures the area will continue to comply with the air quality standard. We are currently evaluating CARB’s redesignation request and BCAQMD’s maintenance plan, and expect to publish our proposed response in the Federal Register soon. A 30-day public comment period will begin upon publication. We invite the Oak Tree Rancheria to provide comments to the EPA during the public comment period.</i></p> <p><i>I would also like to invite you or your designated representative to consult with the EPA if you have interests or concerns regarding this redesignation request. If you would like to initiate consultation, your staff may contact XXXXXXXX at XXX-XXX- XXXX or last.first@epa.gov. We respectfully request that you notify us by April 30, 2018, if you wish to consult. If you have any questions, please call me at XXX-XXX-XXXX.</i></p>
<p>3. Input Phase: Tribes provide input to EPA 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. EPA coordinates with tribal officials during this phase to be responsive to their needs for information and to provide opportunities to provide, receive, and discuss input. During this phase, EPA considers the input regarding the activity in question. EPA may need to</p>	<p>EPA must maintain careful records during the input phase. If comments are provided verbally, an EPA notetaker should capture key points and request the tribe concur on those notes following the discussion. That concurrence could take place at the close of the consultative event via a review of input captured, or following the event via an email exchange.</p>

<p align="center">EPA Policy on Consultation and Coordination with Indian Tribes <i>May 4, 2011</i></p>	<p align="center">Region 9 Implementation Best Practices <i>Last updated 9/17/2018</i></p>
<p>undertake subsequent rounds of consultation if there are significant changes in the originally-proposed activity or as new issues arise.</p>	<p>The purpose of consultation is to inform the EPA decision-maker regarding tribal perspectives. Input provided by the tribe on a proposed action pursuant to consultation should, as a general rule, be included in the administrative record for the action. If input is provided verbally, the EPA official who will make the final decision on the action should be the person to receive the input. This might mean a senior EPA appointee or official, but it alternately might mean a member of EPA's management team who is tasked with gathering data and recommending a final decision to senior leaders. Where direct engagement with the deciding official is not possible, tribal input provided during consultation will be made available to the decision-maker before the matter is decided. Unless there are countervailing reasons not to do so, verbal input from a tribe on an EPA action should be memorialized in writing in the record.</p>
<p>4. Follow-up Phase: EPA provides feedback to the tribes(s) involved in the consultation to explain how their input was considered in the final action. This feedback should be a formal, written communication from a senior EPA official involved to the most senior tribal official involved in the consultation.</p>	<p>This formal follow-up is required to close a consultation. Note that the intended purpose of consultation is informed decision-making; consensus among parties is not always possible. EPA retains final decision-making authority, but should acknowledge tribal input and reflect on how that input informed the final decision in this phase of consultation. This internal link has</p>

<p align="center">EPA Policy on Consultation and Coordination with Indian Tribes <i>May 4, 2011</i></p>	<p align="center">Region 9 Implementation Best Practices <i>Last updated 9/17/2018</i></p>
	example close out letters.
<p><i>B. What Activities May Involve Consultation?</i></p>	
<p>1. General Categories of Activities Appropriate for Consultation: The broad scope of consultation contemplated by this Policy creates a large number of actions that <i>may</i> be appropriate for consultation.</p>	
<p>The following list of EPA activity categories provides a general framework from which to begin the determination of whether any particular action or decision is appropriate for consultation. The final decision on consultation is normally made after examining the complexity of the activity, its implications for tribes, time and/or resource constraints, an initial identification of the potentially affected tribe(s), application of the mechanisms for identifying matters for consultation, described below, and interaction with tribal partnership groups and tribal governments.</p>	
<p>The following, non-exclusive list of EPA activity categories are normally appropriate for consultation if they may affect a tribe(s):</p>	
<ul style="list-style-type: none"> • Regulations or rules 	
<ul style="list-style-type: none"> • Policies, guidance documents, directives 	
<ul style="list-style-type: none"> • Budget and priority planning development 	
<ul style="list-style-type: none"> • Legislative comments² 	
<p>² Legislative comments are a special case where, due to short legislative timeframes, consultation in advance of comment submission may not always be possible. Nevertheless, EPA will strive to inform tribes when it submits legislative comments on activities that may affect Indian country or other tribal governmental interests.</p>	
<ul style="list-style-type: none"> • Permits 	
<ul style="list-style-type: none"> • Civil enforcement and compliance monitoring actions³ 	<p>Further information on consultations related to enforcement and compliance actions, see Civil and Superfund Enforcement Material at this internal link.</p>
<p>³ Primary guidance on civil enforcement matters involving tribes can be found in "Guidance on the Enforcement Priorities Outlined in the 1984 Indian Policy," and "Questions and</p>	

<p align="center">EPA Policy on Consultation and Coordination with Indian Tribes <i>May 4, 2011</i></p>	<p align="center">Region 9 Implementation Best Practices <i>Last updated 9/17/2018</i></p>
<p>Answers on the Tribal Enforcement Process." This guidance is intended to work with the Tribal Consultation Policy in a complementary fashion to ensure appropriate consultation with tribes on civil enforcement matters.</p>	
<ul style="list-style-type: none"> • Response actions and emergency preparedness⁴ 	
<p>⁴ The term "response" as defined under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) includes removals and remedial actions.</p>	
<ul style="list-style-type: none"> • State or tribal authorizations or delegations 	<p>Once a program has been delegated to a state or tribe, EPA may continue to consult with tribes on any actions for which EPA retains authority.</p> <p>Where tribes may express interest in consultation on a program area delegated to a state or tribe, EPA may consult on any federal role retained, if any, and will seek to connect the requesting tribe with counterparts in the delegated program and encourage use of an applicable state or tribal consultation process, if available. <i>For example: The State of California has a tribal consultation policy, found here: https://calepa.ca.gov/tribal/</i></p>
<ul style="list-style-type: none"> • EPA activities in implementation of U.S. obligations under an international treaty or agreement. 	
	<p>Where Region 9 is also seeking to conduct consultation under the National Historic Preservation Act (when EPA is the primary agency undertaking a ground-disturbing activity), NHPA and EPA tribal consultation will be combined if appropriate to reduce burden on tribes. For examples of correspondence related to combined efforts, see the R9 Consultation</p>

<p align="center">EPA Policy on Consultation and Coordination with Indian Tribes <i>May 4, 2011</i></p>	<p align="center">Region 9 Implementation Best Practices <i>Last updated 9/17/2018</i></p>
	<p>Advisor.</p>
	<p>There are actions EPA may undertake where the Agency is subject to imposed timeframes or confidentiality clauses that might limit or prohibit consultation, or at least limit the information that can be shared through the consultation process.</p>
<p>2. EPA’s Mechanisms for Identifying Matters for Consultation: The mechanisms EPA uses for identifying matters appropriate for consultation are as follows:</p>	<p>All consultation identified by the Agency, through any means, must be entered into the internal interface of the Tribal Consultation Opportunities Tracking System by the program initiating the action. The TCOTS database serves to track consultations for internal reporting purposes, as well as to feed approved consultation activities to EPA’s external- facing webpage.</p> <p>Training materials related to TCOTS are available on Sharepoint.</p>
<p>a. Tribal Government-Requested Consultation. Tribal officials may request consultation in addition to EPA’s ability to determine what requires consultation. EPA attempts to honor 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.</p>	<p>Note that government-requested consultation must also be entered into TCOTS.</p>
<p>b. Action Development Process (ADP). Early in the process, the lead program office assesses whether consultation is appropriate for the subject action. Its determination is available to tribes in the semiannual Regulatory Agenda as well as in the subset of rules on the Regulatory Gateway accessed through the EPA website.</p>	

<p align="center">EPA Policy on Consultation and Coordination with Indian Tribes <i>May 4, 2011</i></p>	<p align="center">Region 9 Implementation Best Practices <i>Last updated 9/17/2018</i></p>
<p>This Policy is not intended to subject additional Agency actions to the ADP process for the sole purpose of a consultation analysis. Non-ADP actions are subject to consultation analysis through other mechanisms identified within the Policy.</p>	
<p>c. National Program Offices and Regional Offices. For those actions and decisions not in the ADP process, program and regional offices also determine if consultation is appropriate under this Policy. EPA’s Tribal Consultation Advisors, described below, provide assistance with that determination. Such determination includes coordination with national and/or regional tribal partnership groups.</p>	<p>Most consultation activities in Region 9 are initiated at the suggestion of program offices, in coordination with the R9 Consultation Advisor. Region 9 always errs on the side of offering consultation, if the importance or impact of the action is unclear.</p>
<p>d. National and Regional Tribal Partnership Groups. EPA meets regularly with a number of national and regional tribal partnership groups. These groups assist in the identification of matters that may be appropriate for consultation.</p>	<p>Note that while these groups can inform whether an action is appropriate for consultation, the R9 RTOC or meetings of partnership groups should not be relied upon as venues for consultative activities. These meetings can, however, be useful venues to inform tribal staff about an action, so tribes are better equipped to engage on a topic at the leadership level.</p>
<p>C. When Consultation Occurs. 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.</p>	<p>Tribes should be afforded the opportunity to provide "meaningful input" to the Agency. Ideally, this means that tribal input is provided directly to the intended decision-maker at the Agency (via meetings, phone calls, letters, or emails). Where that is not possible, tribal input provided during consultation will be made available to the decision-maker before the matter is decided.</p>
<p>D. How Consultation Occurs. There is no single formula for what constitutes appropriate consultation, and the analysis, planning, and implementation of</p>	<p>The format selected by the EPA for each consultation will vary. Factors that influence the</p>

<p align="center">EPA Policy on Consultation and Coordination with Indian Tribes <i>May 4, 2011</i></p>	<p align="center">Region 9 Implementation Best Practices <i>Last updated 9/17/2018</i></p>
<p>consultation should consider all aspects of the action under consideration. In the case of national rulemaking, a series of meetings in geographically diverse areas may be appropriate. For more routine operational matters, a less formal process may be sufficient.</p>	<p>decision may include legal constraints, time constraints, the number of tribes who may want to provide input, the availability of senior decision-makers to participate in a kind of discussion, and travel constraints. Regional programs are encouraged to consider tribal preferences, both those communicated formally by tribes to the EPA and those expressed on an action-by-action basis in coordinating discussions with tribal program staff and management.</p>

VI. Managing the Consultation Process

<p align="center">EPA Policy on Consultation and Coordination with Indian Tribes <i>May 4, 2011</i></p>	<p align="center">Region 9 Implementation Best Practices <i>Last updated 9/17/2018</i></p>
<p><i>A. Roles and Responsibilities</i></p>	
<p>The following roles and responsibilities have been defined to allow EPA to effectively implement this Policy. These roles and responsibilities reflect the fact that, while oversight and coordination of consultation occurs at EPA headquarters, as a practical matter, much of the actual consultation activity occurs in EPA’s program and regional offices. The responsibility for initially analyzing the need for consultation and then subsequently carrying it out, resides with these offices.</p>	
<p>. Designated Consultation Official: In addition to being the EPA’s National Program Manager for the EPA Tribal Program, EPA’s Assistant Administrator for the Office of International and Tribal Affairs (OITA) is the EPA-Designated Consultation Official under the Executive Order. These responsibilities include coordination and implementation of tribal consultation in</p>	

<p align="center">EPA Policy on Consultation and Coordination with Indian Tribes <i>May 4, 2011</i></p>	<p align="center">Region 9 Implementation Best Practices <i>Last updated 9/17/2018</i></p>
<p>accordance with this Policy and Agency compliance with the 1984 Indian Policy.</p>	
<p>The Designated Consultation Official has the authority for: (1) defining EPA actions appropriate for consultation, (2) evaluating the adequacy of that consultation, and (3) ensuring that EPA program and regional office consultation practices are consistent with this Policy.</p>	
<p>Per the Memorandum, the Designated Consultation Official reports annually to OMB on the implementation of the Executive Order.⁵ Further, the Designated Consultation Official certifies compliance with the Executive Order for applicable EPA activities. The American Indian Environmental Office (AIEO) is located within OITA and coordinates the operational details of the Policy and compiles consultation-related information for the Designated Consultation Official.</p>	
<p>⁵ Report is filed annually by August 3rd.</p>	
<p>2. Assistant Administrators: Assistant Administrators oversee the consultation process in their respective offices including analysis for potential consultation and the consultation process. Each program office is directed to prepare a semi-annual agenda of matters appropriate for consultation and a brief summary of consultation that has occurred. The program offices provide this information to AIEO for reporting to OMB. Each office is directed to designate a Tribal Consultation Advisor.</p>	
<p>3. Regional Administrators: Regional Administrators oversee the consultation process in their respective offices including analysis for potential consultation and the consultation process. Each region is directed to prepare a semi- annual agenda of matters appropriate for consultation and a brief summary of consultation that has occurred. The regions provide this information to AIEO for reporting to OMB. Each region is directed to designate a Tribal Consultation Advisor.</p>	

<p align="center">EPA Policy on Consultation and Coordination with Indian Tribes <i>May 4, 2011</i></p>	<p align="center">Region 9 Implementation Best Practices <i>Last updated 9/17/2018</i></p>
<p>4. Tribal Consultation Advisors: Tribal Consultation Advisors (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. TCAs are the in- office subject matter experts to assist staff and management in the implementation of the Policy.</p>	<p>More information about Region 9's TCA and other resources internal to EPA can be found on the SharePoint site.</p>
<p><i>B. National Consultation Meeting</i></p>	
<p>OITA/AIEO may convene a periodic National Consultation Meeting to be chaired by the Designated Consultation Official to review the consultation process across the Agency.</p>	
<p><i>C. Reporting</i></p>	
<p>Pursuant to the Memorandum, EPA submits annual progress reports to OMB on the status of the consultation process and actions and provides any updates to this Policy.</p>	
<p><i>D. EPA Senior Management Review</i></p>	
<p>The Designated Consultation Official communicates regularly with the Assistant and Regional Administrators to review the consultation system, to consider any matters requiring senior management attention, and to make adjustments necessary to improve the Policy or its implementation.</p>	
<p>EPA plans to receive ongoing feedback on the Policy from all parties to assess its effectiveness and implement improvements.</p>	

EPA Guidance for Discussing Tribal Treaty Rights

Introduction

<p align="center">EPA Guidance for Discussing Tribal Treaty Rights <i>February 2016</i></p>	<p align="center">Region 9 Implementation Best Practices</p>
<p>EPA recognizes the importance of respecting tribal treaty rights and its obligation to do so. The purpose of this Guidance is to enhance EPA’s consultations under the EPA Policy on Consultation and Coordination with Indian Tribes in situations where tribal treaty rights may be affected by a proposed EPA action. Specifically, this Guidance provides assistance on consultation with respect to EPA decisions focused on specific geographic areas when tribal treaty rights relating to natural resources may exist in, or treaty-protected resources may rely upon, those areas.¹ In these instances, during consultation with federally recognized tribes (tribes), EPA will seek information and recommendations on tribal treaty rights in accordance with this Guidance. EPA will subsequently consider all relevant information obtained to help ensure that EPA’s actions do not conflict with treaty rights, and to help ensure that EPA is fully informed when it seeks to implement its programs and to further protect treaty rights and resources when it has discretion to do so.²</p>	<p>The Treaty Rights guidance should be considered as a supplement to the Consultation Policy. When we engage in consultation, we should also ask questions about potentially impacted reserved rights for the subject tribe.</p>
<p>¹ This Guidance focuses on consultation in the context of treaties. EPA recognizes, however, that there are similar tribal rights in other sources of law such as federal statutes (e.g., congressionally enacted Indian land claim settlements).</p>	<p>Region 9 is in the process of cataloguing available information regarding treaties, statutes, executive orders, and other documents pertaining to tribes in the Region. Once completed, the information will be available to internal customers at the SharePoint Site. This material should not be considered exhaustive, and EPA should always look to tribes as a primary source of relevant</p>

<p align="center">EPA Guidance for Discussing Tribal Treaty Rights <i>February 2016</i></p>	<p align="center">Region 9 Implementation Best Practices</p>
	<p>information following this guide.</p>
<p>² EPA Administrator, December 1, 2014 Memorandum, Commemorating the 30th Anniversary of the EPA Indian Policy.</p> <p>The U.S. Constitution defines treaties as part of the supreme law of the land, with the same legal force as federal statutes. Treaties are to be interpreted in accordance with the federal Indian canons of construction, a set of long-standing principles developed by courts to guide the interpretation of treaties between the U.S. government and Indian tribes.³ As the Supreme Court has explained, treaties should be construed liberally in favor of tribes, giving effect to the treaty terms as tribes would have understood them, with ambiguous provisions interpreted for their benefit. Only Congress may abrogate Indian treaty rights, and courts will not find that abrogation has occurred absent clear evidence of congressional intent. We note that this Guidance does not create any new legal obligations for EPA or expand the authorities granted by EPA's underlying statutes, nor does it alter or diminish any existing EPA treaty responsibilities.</p>	
<p>³ Minnesota v. Mille Lacs Band of Chippewa, 526 U.S. 172 (1999).</p>	

Determining When to Ask About Treaty Rights During Tribal Consultation

<p align="center">EPA Guidance for Discussing Tribal Treaty Rights <i>February 2016</i></p>	<p align="center">Region 9 Implementation Best Practices</p>
<p>EPA consultation with tribes provides the opportunity to ask whether a proposed EPA action that is focused on a specific geographic location may affect treaty-protected rights. Because treaty rights analyses are complex, staff are expected to inquire early about treaty rights.</p>	<p>EPA should always ask: we cannot assume the information we have available is accurate or complete; tribes are the primary source of this information.</p>

<p align="center">EPA Guidance for Discussing Tribal Treaty Rights <i>February 2016</i></p>	<p align="center">Region 9 Implementation Best Practices</p>
<p>Certain types of EPA actions, namely those that are focused on a specific geographic area, are more likely than others to have potential implications for treaty-protected natural resources. For example, EPA review of tribal or state water quality standards as a basis for National Pollutant Discharge Elimination System permits typically focuses on a specific water body. If a treaty reserves to tribes a right to fish in the water body, then EPA should consult with tribes on treaty rights, since protecting fish may involve protection of water quality in the watershed.</p>	<p>Note that reserved rights can extend far beyond the current geopolitical boundaries of a tribal reservation.</p>
<p>Another example of an action in a specific geographic area is a site-specific decision made under the Comprehensive Environmental Response, Compensation, and Liability Act, such as a Record of Decision for a site, or the potential use of Applicable or Relevant and Appropriate Requirements for a cleanup. Other examples include a site-specific landfill exemption determination under the Resource Conservation and Recovery Act or other similar types of regulatory exemptions for specific geographic areas. In each case, employing the following questions in this Guidance during consultation may inform EPA of when treaty rights are present in the defined area and may be affected by the proposed decision.</p>	
<p>For purposes of this Guidance, the treaty rights most likely to be relevant to an EPA action are rights related to the protection or use of natural resources, or related to an environmental condition necessary to support the natural resource, that are found in treaties that are in effect. Other treaty provisions, for example those concerning tribal jurisdiction or reservation boundaries, are outside the scope of this Guidance.</p>	
<p>EPA actions that are national in scope, and thus not within a focused geographic area, fall outside the scope of this Guidance, because EPA actions focused on specific geographic areas are the ones we believe are most likely to potentially affect specific treaty rights.</p>	

<p align="center">EPA Guidance for Discussing Tribal Treaty Rights <i>February 2016</i></p>	<p align="center">Region 9 Implementation Best Practices</p>
<p>Examples of such activities outside the scope of this Guidance include the development of National Ambient Air Quality Standards under the Clean Air Act or the national registration of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act.</p>	
<p>Where tribes raise treaty rights as a basis for consultation on issues that are national in scope, or treaty rights otherwise are raised during consultation on national actions, this Guidance can assist in the treaty rights consultation discussion.</p>	
<p>In addition, EPA staff should be aware that treaty rights issues in the context of compliance monitoring and enforcement actions should be considered when consulting with tribes pursuant to the Guidance on the Enforcement Principles of the 1984 Indian Policy and the Restrictions on Communications with Outside Parties Regarding Enforcement Actions. EPA should also act consistent with the EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples.</p>	

Questions to Raise During Consultation

<p align="center">EPA Guidance for Discussing Tribal Treaty Rights <i>February 2016</i></p>	<p align="center">Region 9 Implementation Best Practices</p>
<p>EPA should employ the following three questions during consultations when proposing an action that may affect tribal treaty rights within a specific geographic area. These questions may also be employed when treaty rights arise in other contexts. Collaboration between program and legal staff before and during consultation is an important aspect of ensuring both that these questions are asked and the answers are understood. For any treaty rights discussion raised during consultation, the tribe may identify particular tribal officials to consult with EPA about treaty rights. It is important that</p>	<p>The questions below should be used during consultation.</p>

<p align="center">EPA Guidance for Discussing Tribal Treaty Rights <i>February 2016</i></p>	<p align="center">Region 9 Implementation Best Practices</p>
<p>EPA work to ensure that consultation occurs with the appropriate tribally identified officials.</p>	
<p><i>(1) Do treaties exist within a specific geographic area?</i></p>	<p>Relatively few treaties in our Region were ratified by Congress. Therefore, generally, Region 9 considers "reserved rights" in a similar fashion as "treaty rights" in Region 9. Such "reserved rights" may be set forth in other legally binding edicts, such as statutes, executive orders, and land claim agreements.</p>
<p>This question is designed to help EPA determine when a treaty and its related resources exist within the specific geographic area of the proposed action. This question is important because tribes may possess treaty rights both inside and outside the boundaries of reservations. In some cases, EPA may already be aware of existing, relevant resource-based treaty rights in a specific geographic area; for example, when a tribe has treaty rights within the boundaries of its reservation or near its reservation. In other cases, EPA may not be aware of the full effects of the treaty rights, or EPA may find it difficult to determine when a specific geographic area has an associated treaty right. For example, some tribes in the Great Lakes area retain hunting, fishing, and gathering rights both in areas within their reservations and in areas outside their reservation boundaries, commonly referred to as ceded territories. Similarly, some tribes in the Pacific Northwest retain the right to fish in their "usual and accustomed" fishing grounds and stations both within and outside their reservation boundaries, and retained the right to hunt and gather throughout their traditional territories.</p>	
<p><i>(2) What treaty rights exist in, or what treaty-protected resources rely upon, the specific geographic area?</i></p>	<p>See above.</p>
<p>This question is designed to help EPA understand the type of treaty rights that a tribe may retain. By asking this question, EPA can better understand</p>	

<p align="center">EPA Guidance for Discussing Tribal Treaty Rights <i>February 2016</i></p>	<p align="center">Region 9 Implementation Best Practices</p>
<p>the complexities that are often involved in treaty rights and better understand whether the proposed EPA action could affect those rights. Some treaties explicitly state the protected rights and resources. For example, a treaty may reserve or protect the right to “hunt,” “fish,” or “gather” a particular animal or plant in specific areas. Treaties also may contain necessarily implied rights. For example, an explicit treaty right to fish in a specific area may include an implied right to sufficient water quantity or water quality to ensure that fishing is possible. Similarly, an explicit treaty right to hunt, fish, or gather may include an implied right to a certain level of environmental quality to maintain the activity or a guarantee of access to the activity site.</p>	
<p><i>(3) How are treaty rights potentially affected by the proposed action?</i></p>	<p>Once a “reserved right” is identified, it must be interpreted as to what it means as a practical effect. For instance, is it a reserved right to fish, to collect animals, to use areas for grazing, etc. The tribe should be asked, through the consultation process, as to the significance of the right. BIA or the solicitor’s office can also be consulted, as well as Office of Regional Counsel.</p>

EPA Actions That May Affect Treaty Rights

<p align="center">EPA Guidance for Discussing Tribal Treaty Rights <i>February 2016</i></p>	<p align="center">Region 9 Implementation Best Practices</p>
<p>EPA’s next steps typically will involve conducting legal and policy analyses in order to determine how to protect the rights. These analyses are often complex and depend upon the context and circumstances of the particular situation. Issues that may arise often involve precedent-setting questions or warrant coordination with other federal agencies. It is expected that the EPA</p>	<p>If a tribe raises concern about potentially impacted reserved rights, please engage immediately with the Office of Regional Counsel.</p>

<p align="center">EPA Guidance for Discussing Tribal Treaty Rights <i>February 2016</i></p>	<p align="center">Region 9 Implementation Best Practices</p>
<p>lead office or region that engaged in the tribal consultation about the potentially affected treaty rights will coordinate with the Office of International and Tribal Affairs, the Office of General Counsel, and appropriate Offices of Regional Counsel to conduct these analyses. Although the details of how to conduct such legal and policy analyses are not addressed by this Guidance, the EPA process may warrant continued or additional consultation with tribes.</p>	

Conclusion

<p align="center">EPA Guidance for Discussing Tribal Treaty Rights <i>February 2016</i></p>	<p align="center">Region 9 Implementation Best Practices</p>
<p>EPA is committed to both protecting treaty rights and improving our consultations with tribes on treaty rights. As part of its commitment, EPA will emphasize staff training and knowledge-sharing on the importance of respecting tribal treaty rights in order to better implement this Guidance. As EPA gains experience on tribal treaty rights and builds upon its prior knowledge, the Agency may modify this Guidance to meet this commitment.</p>	