

EPA Region 9 Approach to Consultation with Tribal Governments Regarding Non-Enforcement Related Matters

1. Purpose and Introduction

This document is intended as a communication tool for the U.S. Environmental Protection Agency Region 9 (referred to as Region 9 or the Region). It describes how Region 9 generally has approached consultation with tribal governments when addressing matters other than enforcement. For a discussion of consultation in the context of Region 9 enforcement actions in Indian Country, please refer to the *January 2001 Guidance on Enforcement Principles Outlined in the 1984 Indian Policy* issued by the Office of Enforcement and Compliance Assurance ("2001 OECA Guidance") and the *EPA Region 9 Approach for Consultation and Coordination with Tribes Concerning Enforcement Against Non-Tribal Facilities and Inspections in Indian Country* dated December 15, 2004 attached as Exhibits A and B, respectively.

The information in this paper was compiled by a workgroup consisting of representatives from Region 9's Regional Indian Program Steering Committee (RIPSC), who surveyed their respective programs as to their consultation practices. The information they gathered identified certain common practices which are described below. The RIPSC representatives also met with tribal representatives from the Regional Tribal Operations Committee (RTOC) consultation workgroup to discuss Region 9's practices and tribal perspectives regarding consultation. In the course of preparing this paper, representatives for both the RIPSC and the RTOC emphasized the variety of issues affecting consultation and the consequent need for flexibility. These issues include (i) varying legislative, regulatory and other program requirements, (ii) the differences among potentially affected tribal governments, (iii) prior working relationships and arrangements between Region 9 staff and the potentially affected tribal government, (iv) resources available to both the potentially affected tribal government and Region 9, and (v) the extent to which a tribal government may be affected. Given this need for flexibility, this paper describes certain principles and common practices to assist Region 9 staff in consultation planning.

To further assist staff in consultation planning, attached as Exhibit C are summaries of consultation approaches that Region 9 previously has employed in the Air, Water and Superfund divisions. For assistance with developing consultation strategies, EPA staff are encouraged to contact their RIPSC representative or the Tribal Program Office (TPO).

2. Why Consult?

Tribes are sovereign entities that exercise inherent sovereign powers over, among other things, members and territory. The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders and court decisions, and works with tribes on a government-to-government basis. EPA's consultation responsibilities generally arise from this unique legal relationship. Tribal consultation may also be called for in the language of certain statutes that may apply to some EPA actions (e.g., the National Historic Preservation Act, where applicable). For more information regarding this legal relationship and Federal and EPA consultation policy see:

Executive Order 13175, Consultation and Coordination with Tribal Governments dated November 6, 2000 ("Executive Order 13175"),
<http://www.epa.gov/fedrgstr/eo/eo13175.htm>

- EPA's 1984 *Policy for the Administration of Environmental Programs on Indian Reservations*, <http://www.epa.gov/indian/1984.htm>;
- *Government-to-Government Relations with Native American Tribal Governments*, April 29, 1994 Presidential Memorandum;
- The American Indian Environmental Office's *Working Effectively with Tribal Governments Resource Guide*, (see <http://www.epa.gov/aieo>

3. What is Consultation?

Region 9¹ generally views consultation as including a meaningful and timely government-to-government dialogue with elected or duly-appointed officials of tribal governments or authorized intertribal organizations.² To the extent practicable and permitted by law, such an exchange generally includes information sharing,³ full expression of views by the tribal government(s) and Region 9, a commitment by Region

¹As of the date of this document, EPA has not issued national guidance defining tribal consultation.

²As used in this paper, the term "tribe" refers to any Indian tribe, band, nation, pueblo, village, community, rancheria or colony that the Secretary of the Interior acknowledges to exist as an Indian entity, as published annually in the Federal Register, pursuant to 25 U.S.C. Section 479a-a1 and 25 C.F.R. Part 83, and which is located within Region 9.

³Staff are strongly encouraged to seek legal advice from ORC when consultation involves sharing sensitive or confidential information by either EPA or the tribal government(s).

9 to consider the views of the tribal government(s) during decision making, and respect for tribal self-government and tribal sovereignty. Region 9 generally seeks mutually acceptable resolutions to the extent feasible. In the event, however, that Region 9 and the tribal government(s) are unable to reach a consensus, Region 9 retains its authority to make a final decision, subject to applicable federal laws, regulations, policies and guidance, including any limitations contained therein.

4. Region 9's Approach to Consultation

A. General Considerations.

Obtaining Tribal Input Regarding Consultation.

Tribal governments may prefer different approaches to consultation depending on such factors as degree of interest in the proposed action, available tribal government resources, concerns about sharing sensitive tribal information, and internal tribal government requirements and priorities. Therefore, Region 9 staff are encouraged to solicit input from affected tribal governments regarding their interest in, and preference among, available consultation options.⁴ While the Region generally makes every reasonable effort to accommodate all expressions of interest, after considering such views, the Region selects the appropriate method of consultation, subject to time, resource and legal constraints.

Time for Meaningful Consideration of Tribal Views.

Regional staff should strive to initiate consultation as early in the decision process as is reasonably practicable. While the appropriate time to initiate consultation may vary depending upon the nature and the circumstances of the proposed action, Regional staff should plan sufficient time to allow for meaningful discussion and consideration of tribal views. When allotting time for consultation, Regional staff should consider that for some tribes, some consultation methods, or issues raised with respect to other applicable laws or agreements to which the tribes may be subject, may require the involvement of, or action from, their tribal governing bodies or other tribal governmental entities which may have their own scheduling requirements (e.g. predetermined meeting dates or agendas). Where time-critical actions limit the time available for consultation, Regional staff are encouraged to communicate by telephone and/or email, in addition to sending written correspondence.

⁴To ensure compliance with the Paperwork Reduction Act, Region 9 staff are strongly encouraged to seek the advice of ORC when drafting initial consultation letters which go to ten or more tribal governments.

Region 9 Retains Final Decision Making Authority.

While consensus is a desirable outcome, in the event that the exchange and consideration of views between Region 9 and a tribal government does not result in consensus, the Region makes the final decision regarding the proposed action, subject to applicable federal laws, regulations, policies and guidance, including any limitations contained therein.

B. Consulting with Multiple Tribal Governments Regarding a Proposed Action.

At times, Region 9 staff may consult with a large number of tribal governments regarding the development of a proposed action.⁵ This typically arises when the Region proposes⁶ a general action (such as a Regional rule-making or guidance) that addresses tribal issues (e.g., creating program standards for tribes) and therefore, potentially affects all or many of the tribes in the Region. The Region also may propose a general action (such as a Regional rule-making or guidance) that addresses a general issue (e.g., setting program standards throughout the Region) that is not specific to tribes. Under the latter scenario, the Region should consider on a case-by-case basis whether the proposed action potentially affects tribes in the Region. When assessing whether a general action may have potential impacts on tribes, Region 9 staff are encouraged to seek the advice of the TPO, the Office of Regional Counsel (ORC) and knowledgeable peers working for tribal environmental agencies. Staff are also encouraged to consult maps maintained by the Region which show the location of tribes in the Region to assist with this assessment. When consulting with a large number of tribal governments, Region 9 staff may find it helpful to develop a written consultation plan.

The Region's general approach to initiating consultation with multiple tribes, where reasonably practicable, is as follows:

⁵ Although the Region often uses communication strategies similar to those described in this paper when disseminating information about existing programs (e.g., grant solicitations, training notices) to a large number of tribes, this differs from consultation, which generally consists of a communication exchange regarding a proposed action.

⁶ This paper only describes the consultation approach for Region 9 actions and does not described the approach for national actions developed by EPA headquarters. Where EPA headquarters requests that the Region assist in consulting with Tribal governments regarding a national action, the Region generally would follow the principles and approach set forth in this paper, and may wish to contact EPA headquarters for additional suggestions when appropriate (for example, if there were national guidance relevant to the consultation).

- A senior Region 9 official, such as a Division Director or his or her designee, generally sends a letter to the elected leader of each tribe in the Region (generally, with a copy to each tribe's environmental director) (i) describing the proposed action, (ii) requesting comments on the proposed action and (iii) extending an opportunity to further consult should the tribe wish to do so. The letter should include Region 9 contact information.
- The Region's letter may propose specific consultation options. Depending upon the circumstances, these options may include public meetings, face-to-face meetings in Region 9's offices, regional tribal government meetings, conference calls, tribal summits, workshops and/or advisory committee meetings.
- The letter may also request that, if the tribal government wishes to participate in further consultation, the tribal leader or his or her designee contact Region 9 by a date certain to discuss consultation options.
- While the Region generally makes every reasonable effort to accommodate all expressions of interest, after considering such views, the Region selects the appropriate method of consultation, subject to time, resource and legal constraints.
- The Region generally notifies tribal governments of final decisions by sending a letter from a senior EPA official, such as a Division Director or his or her designee, to the elected leaders and environmental directors for each Region 9 tribe, as well as to the Regional Tribal Operations Committee (RTOC).

Regional staff is encouraged to obtain early input from the RTOC regarding consultation and/or proposed actions. In addition, Regional staff is encouraged to raise awareness by submitting a summary of the proposed action and a request for comments in the Tribal Program Newsletter, which the TPO circulates to all tribal governments in the Region.

C. Consulting With a Directly Affected Tribe.

Much consultation in the Region concerns proposed actions that directly affect a specific tribe (e.g. permitting a facility located in Indian country, listing a site of tribal concern on the National Priorities List, or remediation or cleanup of a facility in Indian Country).⁷ Often, such actions are complex and may entail multiple decisions over an

⁷EPA programs may have requirements regarding public participation (e.g., publication in the Federal Register to give notice and solicit public comment) that arise independently of the consultation process, but which, in certain appropriate cases, may be used as a component of the consultation process. As submittal of information after close of a comment period may reopen such comment period under some programs,

extended period of time which may result in more frequent interaction between the Region and the affected tribe. As a result, Region 9 and the affected tribe sometimes agree to establish more informal channels of communication (e.g., between Region 9 staff and the tribe's environmental office) to address the majority of these decisions. Where the nature of the action or the issues it presents are particularly complex, Region 9 staff may find it helpful to develop a written consultation plan.

The Region's general approach to initiating consultation with a directly affected Tribe at the outset of the proposed action, where reasonably practicable, is as follows:

- A senior EPA official, such as a Division Director or his or her designee, generally sends a letter to the elected leader of the affected tribe(s) (generally with a copy to the tribe's environmental director) (i) describing the proposed action, (ii) requesting comments on the proposed action if appropriate at that time, and (iii) extending an opportunity to consult further should the tribe wish to do so. The letter should include Region 9 contact information.
- The letter may also request that, if the tribal government wishes to consult further, the tribal leader or his designee contact Region 9 by a date certain.
- Region 9 staff may wish to telephone the tribal leader or tribal environmental director to confirm that the tribe received the letter and to inquire as to whether the tribe plans to respond. If the tribe cannot be reached by telephone, Region 9 program staff may wish to ask the TPO for assistance.
- Depending on the nature of the action, the Region may meet with the tribal leader and/or tribal environmental director in Region 9's offices or at a location proposed by the tribe. Meetings attended by *elected* tribal officials generally should include participation by an appropriate senior management official at EPA, such as a Division Director, unless EPA Region 9 staff and the affected tribe have previously established more informal channels of communication that include meetings with elected tribal officials.
- Where appropriate, the Region may advise the tribal government of a final decision by sending a letter from a senior EPA Region 9 official, such as a Division Director or his or her designee, to the tribal leader and/or environmental director. As some actions may involve multiple decisions over time (e.g., permitting, cleanups), Region 9 and the tribal government may wish to establish more informal communication channels with regard to some or all decisions.

Region 9 staff are strongly encouraged to seek the advice of ORC when developing a consultation plan for an action subject to notice and comment requirements.

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