Consulting with Indian Tribal Governments at Superfund sites

(a beginner's booklet)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Notice

This document is intended solely for the guidance of Federal Government personnel. Officials may decide to follow the guidance provided in this document or to act at variance with the guidance based on an analysis of site circumstances. The guidance is not a regulation and does not create any legal obligations or any right or trust responsibility.

EPA generally seeks to consult with tribes on Agency actions that may affect tribes, including Superfund sites of tribal interest, consistent with: EPA's Policy for the Administration of Environmental Programs on Indian Reservations (EPA's Indian Policy); the April 29, 1994, Presidential Memorandum on Government-to-Government Relations with Native American Tribal Governments; and the Federal Government's trust responsibility to federally recognized Indian tribes.

This document does not specifically address consultation requirements under Executive Order 13175, 65 Fed. Reg. 67249 (November 9, 2000). EPA's approach to consultation under that Executive Order is described in *Review of Environmental Protection Agency Draft Guidance for Implementing Executive Order 13175, Consultation and Coordination with Indian Tribal Governments*, 71 Fed. Reg. 20314-20329 (April 19, 2006). This Superfund document refers to the consultation EPA undertakes generally, as a matter of policy.

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INTRODUCTION

Early and meaningful tribal involvement at Superfund sites of tribal interest is consistent with the federal trust responsibility to tribes and furthers EPA's overall goal of protecting human health and the environment.

This booklet is intended to introduce EPA staff and managers to the basics of government-to-government consultation with Indian tribal governments within the context of Superfund. It provides a beginner's background to a subject matter that involves many important, nuanced, historical, complex, and challenging issues. This booklet, then, is not exhaustive in scope; rather, it is a starting point.

A list of resources provided at the end of the booklet will help you further explore the concepts and issues introduced here.

STATUTORY BACKGROUND

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) provides broad federal authority to respond to releases of hazardous substances, as well as pollutants or contaminants.

Pursuant to CERCLA section 126, the governing body of a tribe is afforded substantially the same treatment as states for many response-related purposes, which include:

- notification of releases,
- consultation on remedial actions,
- access to information, and
- roles and responsibilities under the National Contingency Plan (NCP).

CERCLA section 104 also allows EPA to enter into cooperative agreements with eligible tribes to perform or participate in Superfund-eligible site response activities. (EPA retains final oversight authority.)

KEY TERMS AND CONCEPTS

Consultation

Consultation generally consists of meaningful and timely communication between EPA officials and tribal government officials in developing Agency actions that affect tribes. Consultation means open sharing of information, the full expression of tribal and EPA views, a commitment to consider tribal views in decision-making, and respect for tribal self-government and sovereignty.

Providing complete, timely, accurate, and understandable information to a tribal government about a site typically is a key component of consultation—but consultation means more than simply providing information about actions EPA plans to undertake and then allowing comment. The consultation process includes seeking, discussing, and considering the views of affected federally recognized tribal governments at the earliest practical time. Consultation works toward the goal of consensus and mutually-acceptable resolutions, while recognizing that goal might not be achieved.

And, as with all aspects of the Superfund response process, the consultation process should be well-documented at each step of the way to reflect the concerns of the affected tribe. This approach also should help protect the interests of the affected tribe and to show the scope and extent of tribal involvement and EPA's consideration for tribal interests.

Government-to-government relationship

The relationship between federally recognized Indian tribal governments and the federal government is a unique one. Indian tribes possess an inherent sovereignty and are sometimes described as domestic dependent nations. Because each Indian tribe is a distinct sovereign government, EPA officials (and those from other federal agencies) are expected to interact with tribal officials as representatives of their government.

Consultation vs. Community Involvement

It is important to distinguish between government-to-government consultation and community involvement activities. EPA carries out community involvement activities pursuant to CERCLA and the National Contingency Plan (NCP), but efforts typically involve the members of the tribal community directly and are normally separate from consultation or discussions with the tribal government. Consultation occurs in addition to the public participation process.

Where appropriate, a Community Involvement Plan should be developed in consultation with the tribal government since the tribe may be able to help EPA design the communication approach that best reflects the tribal community's practices. The Community Involvement Plan can then be tailored more directly to the community's needs.

Federal Indian Trust Responsibility

The federal government has a "trust responsibility" to federally recognized Indian tribes that arises from treaties, statutes, executive orders, and the historical relations between the United States and Indian tribes. Like other federal agencies, EPA must act in accordance with the trust responsibility—which generally includes consulting with and considering the interests of tribes—when taking actions that may affect tribes or their resources. The trust responsibility also includes protecting tribal sovereignty.

Indian / American Indian / Native American / Alaska Native

The terms "Native American," "American Indian," "Indian," and "Alaska Native" can be used in a very broad sense to describe members of ethnically distinct groups of United States citizens who are indigenous to North America. All of these terms are generally accepted, but it is preferable to use individual tribal affiliation whenever possible.

Indian tribe

For the purposes of CERCLA, an "Indian tribe" is an entity that appears on the list of federally recognized tribes published annually by the Bureau of Indian Affairs (BIA) of the Department of the Interior (DOI).

A member of an Indian tribe is a person who meets membership requirements under the laws of that tribe. Each tribe has its own laws and methods of determining membership, but typically membership eligibility is based on a person's ancestry. Some tribes have additional membership criteria, such maternal or paternal descent. Therefore, ultimately, Indian tribal governments determine who is considered an Indian.

EPA can consult—on a government-to-government basis—only with federally recognized tribes. However, keep in mind it is always important to include all interested parties in the process in an appropriate manner.

Indian Country

This legal term is defined by federal statute to include all land within federal Indian reservations, dependent Indian communities, and certain other lands owned by Indians. Tribal land issues can be quite complicated, so talk to your regional Indian Program representative, Regional Counsel, or the Office of General Counsel for more in-depth information.

Multiple tribes

More than one tribe could have interest in a site. In such a situation, EPA should offer to consult with all the interested tribes. In some cases, tribes may form a group to speak with one unified voice. But if this does not happen, EPA should continue to consult with all interested tribes. (Note: This booklet uses the singular "tribe," but it is assumed to include the plural if applicable.)

GETTING THE BALL ROLLING

When arriving on-scene, identifying a new site, or inheriting a site as it reaches your stage of the Superfund process, keep the possibility of tribal interest in mind and try to actively determine whether there is tribal interest.

Get the ball rolling...

- *From the start:* Involve your regional Indian Program representative, Superfund tribal program staff, and Regional Counsel or Office of General Counsel early.
- *Do your homework:* As part of your site background research, determine whether the site is potentially of tribal interest.
- *Contact the tribe:* The golden rule of tribal consultation is: the sooner, the better!
- *Consult with the tribe about the consultation process:* Attempt to reach agreement about the process to use.

From the start

Involve your regional Indian Program representative, Superfund tribal program staff, and Regional Counsel or Office of General Counsel early. They can provide invaluable information and assistance throughout the process.

Did you know...

A site potentially could be of tribal interest even if it is not located in Indian country or if it is on a tribe's land where tribal members no longer live. For example, a tribe might have a legally recognized interest in a site where the tribe historically resided. A tribe might have a treaty right to engage in certain uses, such as to take water or to hunt, fish, or gather. A tribe also might have rights regarding areas of cultural or religious significance. Such interests might not be readily apparent, so be sure to confer with your regional Indian Program representative, EPA Regional Counsel, or Superfund program tribal staff for advice.

Do your homework

Potential tribal interest should be part of your background research for the site, but it might not be obvious. This is where your Superfund tribal coordinator can help.

A tribe is most likely to have an interest in a site actually located in or near Indian country or directly bordering tribally held land. Land status, tribal ownership issues, and treaty rights can be very complicated, and a tribe may have an interest that makes consultation appropriate even for a site outside a reservation (see "Did you know..." above). So, again, be sure to confer with your regional tribal program staff, EPA Regional Counsel, or the Office of General Counsel.

If there is an indication of potential tribal interest, go a step further and do some background research on the tribe. Some information could be beneficial in the long run regarding, for example, past site involvement, customs and traditions, and tribal government structure.

Even if there is no initial indication of tribal interest, keep in mind the possibility of tribal interest throughout the process.

Contact the tribe

Once you have determined that a site is of potential tribal interest, you should contact the tribe and inquire whether and how the tribe is interested in entering into consultation with EPA. The golden rule of tribal consultation is: the sooner, the better!

First and foremost, you should coordinate closely with your EPA regional Superfund tribal program staff when approaching a tribe, but here are general tips to get you started:

- Initiate official contact with the tribal government via letter from the regional EPA Division Director level or higher.
- Address the letter to the tribal Chairperson (or official designee) with a copy going to the tribe's environmental director.
- Propose specific consultation options, perhaps offering to develop a consultation plan.

Keep in mind...

Always maintain the appropriate staff/management level of participation at meetings: EPA staff can meet with tribal staff, but the Division Director (or higher) meets with the tribal Chairperson or designated representative.

Keep in mind that tribal governments sometimes have restricted resources or other limiting circumstances—for example, tribal councils in Alaska typically meet monthly except during hunting or fishing seasons, during which time they don't meet. If a tribe does not respond within a requested or generally reasonable amount of time, you could:

- Follow up with the tribe at staff level by phone calls or e-mail to informally inquire about the tribe's decision.
- Send the tribe another letter—if calls and e-mails don't yield useful information—documenting EPA's efforts to establish consultation while reaffirming EPA's continued interest in consulting with the tribe regarding the site.

If a tribe does not immediately get involved, send site updates to the tribal officials throughout the process so that they are aware of progress at the site and know that the invitation for consultation is still open.

Consult with the tribe about the consultation process

Once a tribal government officially has confirmed an interest in establishing consultation with EPA, it's good to get everyone together to sit down and develop a game plan with the tribe—consult with the tribe about the consultation process! Each tribal government will have its own preferences for a consultation process with EPA. It is important for EPA to reach a shared understanding of the appropriate approach with the tribe at the beginning of the process.

OTHER FACTORS AND SUGGESTIONS FOR WORKING WITH TRIBES

Be aware of your perceptions and be open-minded

It is natural for us to apply our own experiences, based on our own way of life, to new situations—such as a new hazardous waste site. However, we need to be aware that certain aspects—or the entire lifestyle—of a tribe can differ greatly from mainstream U.S. culture. When working with a tribe, developing an awareness of these differences can facilitate communication with tribal members and help you better understand unique issues and dynamics at play.

Tribe-Specific and Site-Specific Factors

Get to know the tribe. Find out how the tribal government is set up. Don't assume you know everything about a particular tribe because you consulted with a different tribe at a different site. Each tribe is unique—with its own traditions, politics, and lifestyle.

Being aware of a tribe's unique lifestyle or concerns also can help in identifying culturally specific environmental factors to consider when dealing with a site.

Review Historical Documents

Ask the tribe whether it has any historical documents (such as a treaty) that are relevant to the site. Allow the tribe to explain why the document is important and how it relates to the site or the tribe's issues of concern. The document could have information that is integral to the response activity at the site.

Privileged or Confidential Cultural Information

Although it is important to take into consideration cultural factors at a site, sometimes tribal governments do not want to disclose specific information regarding location, ritual, method, or quantity of something. A tribe's reasons for not wanting to disclose information could include concern about artifact thieves or a desire to protect culturally or religiously restricted knowledge. So before preparing records memorializing consultation activities or other information from tribes, it is good practice to discuss with each tribe whether there are issues of unique sensitivity to the tribe that might affect the level of detail the records should contain.

Make sure to provide the tribe with enough information so that it can make an informed decision regarding disclosure. Explain how the information will be used and identify statutory and regulatory requirements that may require public disclosure. Explain also the effect nondisclosure has on the Superfund process, which by law includes some requirements concerning documentation of decisions and public participation.

Finally, if the tribe makes an informed decision not to provide specific data about cultural factors, try to find other ways to document the tribe's general concerns.

National Historic Preservation Act

Any CERCLA site could include properties that qualify as "historic properties"—which could include properties of historic significance to tribes—under the National Historic Preservation Act (NHPA). You should, as appropriate, work with the relevant tribal historic preservation officer or designated tribal representative (which may be a tribal cultural resources office) to consider impacts on historic properties. It also may be appropriate to work with the relevant state historic preservation officer. You should consult your region's historic preservation officer and Regional Counsel for assistance.

Tribes and PRP-lead sites

Generally, a tribe should be involved at a PRP-lead (potentially responsible party) site at least to the extent it would be involved at a Fund-lead site. You may want to explore whether there are legal and practical options that would enable EPA or the PRP to fund tribal involvement.

KEEP IT GOING...

EPA is better able to fulfill its responsibility to "protect human health and the environment" if the Agency utilizes the tribal consultation process by taking advantage of the insight and knowledge tribal governments can provide. Incorporating the views and concerns of Indian tribal governments throughout the Superfund response process may help to bring about more effective implementation and collaboration on actions that are beneficial to public health and the environment in Indian country and elsewhere.

This booklet is intended to give you a brief introduction to a complex and nuanced subject. In the back of this booklet you will find a list of resources for further exploration. And remember: your first and foremost resource is your EPA regional Superfund tribal program staff.

FURTHER READING AND REFERENCE

EPA Indian Program Resource Guide
[http://www.epa.gov/indian/resource/resource.htm]

Working Effectively with Tribal Governments (online training; EPA intranet)
[http://intranet.epa.gov/opptsval/training/tribal/EPA/mainmenu/launchPage.htm]

Federal Laws, Regulation and Guidance
[http://www.epa.gov/indian/laws3.htm]

Executive Orders, Policies and Initiatives
[http://www.epa.gov/indian/policyintitvs.htm]

For more info on the National Historic Preservation Act: CERCLA Compliance with Other Laws Manual: Part II. Clean Air Act and other Environmental Statutes and State Requirements
[http://www.epa.gov/superfund/resources/remedy/pdf/540g-89009-s.pdf]

FAQs Concerning American Indians and Alaska Natives (from Department of Health and Human Services)
[http://aspe.hhs.gov/SelfGovernance/faqs.htm]

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