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EPA Region 10 Tribal Consultation And Coordination Procedures

CONSULTATION

U.S. Environmental Protection Agency
Region 10

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Table of Contents

| | |
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| Purpose and Scope of This Document | 3 |
| I. Why Region 10 Consults | 5 |
| II. What is Consultation | 5 |
| A. Definition of Tribal Consultation | 5 |
| B. Consultation and the Public Participation Process | 6 |
| III. Who in Region 10 is Responsible For Planning, Supporting, and Conducting Tribal Consultation | 6 |
| A. Roles and Responsibilities | 6 |
| B. Region 10 Representation for Tribal Consultation | 8 |
| IV. Identifying Activities Appropriate for Consultation | 8 |
| A. Types of Activities That May Be Appropriate for Consultation | 8 |
| B. Whether Tribal Interests Are Affected | 9 |
| V. Timing of Consultation | 10 |
| VI. How Region 10 Consults | 11 |
| A. Initiation by EPA | 11 |
| B. Initiation by a Tribe | 12 |
| C. Planning the Consultation Process | 12 |
| D. Conducting the Consultation | 14 |
| E. Required Follow-Up and Reporting | 17 |
| VII. Historic or Archaeological Resources | 17 |
| Appendix | |
| EPA Region 10 Emergency Response Tribal Consultation Procedures | 19 |

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Purpose and Scope of This Document

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. The EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011) establishes national guidelines and institutional controls for consultation across EPA. These Region 10 Tribal Consultation Procedures (Procedures) are consistent with the agency-wide consultation policy, but include more specific guidelines for the consultation process to meet the needs and practices of tribes in EPA Region 10 (Region 10).

These Procedures apply to Region 10 interactions with federally recognized tribes (tribes) in Washington, Oregon, Idaho and Alaska.¹ The U.S. Bureau of Indian Affairs maintains and periodically updates and publishes a list of all federally recognized tribes.² Whenever questions arise regarding consultation with other entities, such as Alaska Native Corporations, tribal consortia, or other organizations representing or consisting of tribes or tribal members, the Region 10 Tribal Consultation Specialist should be contacted.

These Procedures supersede the 2001 EPA Region 10 Consultation Framework, as well as all Region 10 individual program, sector, and unit/team consultation procedures, except for the Region 10 Enforcement Procedures in Indian Country. These Procedures do not supersede any EPA agency-wide consultation policies or procedures, or those developed by individual tribes, nor does it replace individual EPA-tribal memoranda of agreement, consultation plans, Tribal Environmental Agreements (TEAs), or other specific agreements between Region 10 and a tribe or tribes.³ Finally, these Procedures do not apply to Region 10 civil enforcement or compliance assurance activities.⁴ Emergency response activities are addressed separately in Appendix A.

A large number of routine administrative and staff-to-staff level interactions and communications occur between EPA and tribal government employees on a regular basis. These Procedures do not apply to these regular, ongoing interactions. These Procedures are not intended to cover the large number of routine interactions between funding recipients and EPA staff. Again, consult with the Region 10 Tribal Consultation Specialist for further guidance.

While this document describes the procedures that Region 10 expects to follow in consulting with federally recognized tribes, it does not alter or create any legal rights or obligations. Also, the possible circumstances where consultation might be appropriate are so varied that these Procedures can not anticipate every scenario; thus there may be situations for which these Procedures do not apply or are not appropriate, and the general ideas contained here will need to be applied flexibly.

1 These Procedures do not apply to consultations initiated by EPA Headquarters' Offices.

2 The most current list is at 77 Fed. Reg. 47868 (August 10, 2012)

3 Other types of agreements could include cooperative agreements and/or an Administrative Order on Consent for Remedial Investigation/Feasibility Study under the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), which may describe tribal consultation procedures for that particular project.

4 Primary guidance on civil enforcement matters involving tribes can be found in EPA's "Guidance on the Enforcement Priorities Outlined in the 1984 Indian Policy," "Questions and Answers on the Tribal Enforcement Process" and the Region 10 Enforcement Procedures in Indian Country.

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I. Why Region 10 Consults

Meaningful tribal consultation is an integral component of the federal government's general trust relationship with federally recognized tribes. The federal government recognizes the right of each tribe to self-government, with sovereign powers over their members and their territory. Executive Order 13175 (November 9, 2000) directs federal agencies to establish and implement processes to ensure meaningful and timely input by tribal officials in the development of policies that have tribal implications.

The EPA has a longstanding policy that supports tribal involvement in decision-making. In EPA's landmark 1984 Indian Policy,⁵ the Agency stated that the keynote of EPA's efforts to protect human health and the environment "will be to give special consideration to tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs" that affect them. That policy has been reaffirmed by each administration's EPA administrator since then, including the present EPA Administrator, Lisa P. Jackson, in 2009.⁶

II. What is Consultation

A. Definition of Tribal Consultation

The EPA Policy on Consultation and Coordination with Indian Tribes provides the following definition:

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 procedures and plans.

In many circumstances, planned and structured meetings between EPA and tribal leaders are an essential part of the consultation process. For purposes of clarity and to avoid miscommunication, this document will refer to those meetings as "leadership meetings." Many tribes in Region 10 use the term "government-to-government consultation" to refer only to leadership meetings.

Consultation includes seeking, discussing, and considering the views of federally recognized tribal governments regarding a Region 10 action or decision. Consultation consists of respectful, meaningful, and effective two-way communication, in an effort to achieve mutual understanding between EPA and the Tribe of their respective interests and perspectives, before EPA makes its decision or moves forward with its action.

5 EPA Policy for the Administration of Environmental Programs on Indian Reservations (November 8, 1984).

6 Memorandum: EPA Indian Policy (July 22, 2009).

The process of effective tribal consultation may include a wide range of communication over the course of developing an EPA action or decision. This communication can include meetings, telephone conferences, or internet-based communication to exchange technical information at the staff or management level, discussions to establish effective processes for coordination and planning, formal structured meetings between EPA and tribal leaders, or a wide range of other communication in person or by e-mail, telephone or letter.

B. Consultation and the Public Participation Process

Tribal consultation is distinct from the EPA public participation and community involvement processes. Tribal consultation should occur before any EPA public meeting or workshop, to offer EPA the opportunity to consider input from interested tribal governments prior to seeking public comment.

A tribe may benefit from participating in the EPA public participation and community involvement processes, separate and apart from any consultation. A tribe may choose to submit oral and written comments into the public record during the public comment period. This may be necessary for the tribe to preserve its appeal rights, or to preserve a particular issue for appeal. It may be helpful to discuss these specific issues with the tribe when planning the consultation.

Additionally, a tribe may choose to hold its own community or member meetings to discuss EPA's action. The tribe may invite EPA to participate in these meetings or it may choose to meet privately with its tribal community or membership.

III. Who in Region 10 is Responsible For Planning, Supporting, and Conducting Tribal Consultation

A. Roles and Responsibilities

The **Regional Administrator** oversees the consultation process in Region 10. The Regional Administrator and **Deputy Regional Administrator** are the top EPA officials for Region 10. The Region 10 **Office Directors** report directly to the Regional Administrator, and are members of the Executive Team. The Office Directors carry out major EPA program activities. The Office Directors are responsible for ensuring that the appropriate staff are aware of tribal consultation responsibilities and procedures, and that the procedures are carried out for actions, decisions, projects, and similar activities carried out by their office.

The Region 10 **Senior Tribal Policy Advisor (STPA)** reports directly to the Regional Administrator, and is a member of the Executive Team. The STPA works with EPA senior managers and staff to ensure effective government-to-government relations with Tribes, in accordance with EPA's consultation policy and practices. The STPA provides advice on effective communication with Tribes and advises EPA senior management on and/or participates in tribal consultations. Where there are significant tribal issues or a high degree of tribal interest, particularly where the Regional Administrator or Deputy Regional Administrator is or may be engaged personally, the STPA may be involved. The STPA involvement with consultation

is in coordination with the Regional Administrator, Deputy Regional Administrator, or Office Directors. Contact information for the STPA is available at <http://yosemite.epa.gov/R10/tribal.NSF/webpage/tribal+contacts>.

The individual with primary responsibility for the EPA activity or action (“**EPA Project Lead**”), such as a project manager, permit writer, contingency planner, or on-scene coordinator, ordinarily has the primary responsibility for the consultation process. Others within the Region are involved or can support the consultation process; their roles are described here. The first two listed below, the program-specific Tribal Specialist and the Region 10 Tribal Consultation Specialist, are the Project Lead’s initial points of contact for all tribal consultation support or related questions.

Each Region 10 Office has a **Tribal Specialist**, who serves as the main point of contact, and source of information and support, for tribal work within each program office. *The Project Leads should inform the Tribal Specialist of any activities that may affect tribes.* The Tribal Specialist is the first source of information about what steps to take, and what other resources or staff are available to provide support, or should be informed. A list of Tribal Specialists is available at <http://yosemite.epa.gov/R10/tribal.NSF/programs/tribal+specialists>.

The Region 10 **Tribal Consultation Specialist**, located in the Tribal Trust and Assistance Unit (TTAU), Office of Ecosystems, Tribal and Public Affairs, is responsible for supporting tribal consultation across the Region. *Project Leads should inform the Tribal Consultation Specialist of all tribal consultations*, and should seek his or her advice regarding whether, when, and how to consult in a given situation. Contact information for the Tribal Consultation Specialist is available at <http://yosemite.epa.gov/R10/tribal.NSF/webpage/tribal+contacts>.

The Region 10 **Tribal Coordinators**, in TTAU, serve as liaisons between EPA and the tribes, and also as project officers for certain grant programs that involve tribes. There is a Tribal Coordinator assigned to each tribe in Region 10. The Tribal Coordinators are generally familiar with each tribe’s environmental concerns, political structure, and relationship with EPA. The appropriate Tribal Coordinator should be aware of, and often will assist with, the consultation process, and can be an invaluable resource because of his or her familiarity with each tribe. The Tribal Consultation Specialist will involve Tribal Coordinators when appropriate. A list of Tribal Coordinators is available at <http://yosemite.epa.gov/R10/tribal.NSF/webpage/tribal+coordinators>.

The Region 10 **Alaska Resource Extraction Tribal Policy Advisor**, in the Alaska Operations Office, coordinates tribal consultation and community involvement for Alaska resource extraction projects. The Alaska Resource Extraction Tribal Policy Advisor often will work closely with the Project Lead on tribal consultation involving large scale resource extraction projects that involve multiple Alaska tribes. Contact information for the Alaska Resource Extraction Tribal Policy Advisor is available at <http://yosemite.epa.gov/R10/tribal.NSF/webpage/tribal+contacts>.

The Region 10 **Office of Regional Counsel** (ORC) should be consulted when questions arise over application of federal Indian law or EPA policies, potential liability of a tribe under an environmental statute, tribal jurisdiction or authority, Indian country boundaries, or other related legal issues. If a tribal government plans to have an attorney present at any interaction with the Region, ORC should be notified. Contact information for the ORC is available at <http://www.epa.gov/ogc/regional.htm>.

B. Region 10 Representation for Tribal Consultation

The main point of contact for EPA during the course of the consultation is ordinarily EPA's Project Lead. During any leadership meeting, a senior EPA official, usually the Regional Administrator, Deputy Regional Administrator, an Office Director, or one of their Deputies, should be designated to represent EPA. Where there are significant tribal issues or a high degree of tribal interest, particularly where the Regional Administrator or Deputy Regional Administrator is or may be engaged personally, the STPA may be involved. The appropriate EPA official for a leadership meeting depends on who within Region 10 is delegated the authority to make the decision or take the action in question, and also on the level of representation on the tribe's part. Often if a tribal chair participates personally, the tribe will expect EPA to be represented by the Regional Administrator, but this can depend on a number of factors including available resources, schedules, and the stage of the EPA action (for example, early in a process, tribal officials may be satisfied with, or prefer, meeting with EPA technical or program staff).

IV. Identifying Activities Appropriate for Consultation

The Region should consult with a tribe when making decisions, taking actions, managing projects, or engaging in similar activities, when the tribe's interests might be affected. The Project Lead should seek the advice of the Regional Tribal Consultation Specialist and the Project Lead's Unit Manager and/or Office Director to determine whether a given EPA activity warrants consultation in view of the following considerations.

A. Types of Activities That May Be Appropriate for Consultation

The broad scope of consultation contemplated by the EPA Policy on Consultation and Coordination with Indian Tribes and the Region 10 Procedures creates a large number of actions that may be appropriate for consultation.

The following list of Region 10 activities are normally appropriate for consultation if they may affect tribes:

- Regulations or rules
- Policies, guidance documents, directives
- Permits
- Civil enforcement and compliance monitoring actions⁷
- Response actions and emergency preparedness⁸
- National Priority Listing and deferral decisions
- State or tribal authorizations or delegations
- Designation of disposal sites
- EPA activities in implementation of U.S. obligations under an international or tribal treaty or agreement

⁷ Primary guidance on civil enforcement matters involving tribes can be found in EPA's "Guidance on the Enforcement Priorities Outlined in the 1984 Indian Policy," "Questions and Answers on Tribal Enforcement Process" and the Region 10 Enforcement Procedures in Indian Country.

⁸ The term "response" as defined under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) includes removal and remedial actions. For EPA Region 10 Emergency Response Tribal Consultation Procedures see Appendix A.

State Actions. When requested, Region 10 generally will agree to consult with a tribe on state-led actions where Region 10 has the ability to change or veto the state action and the proposed action has the potential to affect that tribe's interests. EPA's approach will be to work with both the tribe and state to address potential effects on tribal interests. EPA will take tribal concerns and impacts into account in its exercise of any oversight authority.

Other Federal Agency Actions. In some circumstances, EPA has a secondary or oversight role in actions or decisions by other federal agencies. Three examples (out of many more possibilities) are (1) federal actions that require Environmental Impact Statements, which EPA reviews and comments on under Clean Air Act Section 309 and related regulations, (2) permits issued by the U.S. Army Corps of Engineers under Clean Water Act Section 404, which EPA may review, and (3) some cleanup actions by other federal agencies under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). In such circumstances, EPA would encourage a tribe seeking to consult with the United States to work directly with the federal agency with the most direct responsibility for the action or decision in question. However, EPA would consider a tribe's request to consult with EPA based on the specific circumstances, including the extent of EPA's active involvement or influence in the decision or action, whether EPA has a range of options or discretion in connection with its role, and whether EPA involvement would contribute significantly to the tribe's direct consultation with the other federal agency or agencies involved.

B. Whether Tribal Interests Are Affected

At the beginning of a proposed project or action, the Project Lead should make an initial determination whether the interests of one or more tribes may be affected by the action, taking into account the following considerations:

Geographic Considerations

- Action on or adjacent to Indian Country or an Alaska Native Village, or nearby (such as within the same airshed or watershed) if the action may affect a tribe's health, resources, rights, or traditional way of life
- Action within the "usual and accustomed areas"⁹ of a federally recognized tribe that may affect a tribe's resources, rights, or traditional way of life

Tribal Resources

- Action that may affect the treaty-reserved resources of a tribe
- Action that may affect the public health in the tribal community
- Action that may affect the cultural, traditional, or subsistence resources of a tribe or a tribe's traditional way of life

Tribal Ownership

- Action related to a facility owned or managed by a tribal government

⁹ In some cases, tribes not only hold reserved fishing, hunting and gathering rights within reservation areas but also retain rights in ceded territories that were their "usual and accustomed" hunting, fishing or gathering places. Within EPA Region 10, these rights are incorporated into the treaties of most tribes.

The Project Lead may review maps of federally recognized tribal government locations, Indian Country,¹⁰ Alaska Native Village locations, “usual and accustomed” areas, watersheds of interest, and Indian Claims Commission maps¹¹ to assist in the initial determination of whether one or more tribes’ interests might be affected by the action. Some of this data will be available in EPA’s Interactive Tribal Mapping Tool for Region 10 personnel, which will allow Region 10 personnel to see which tribes, or tribal areas of interest, are near to a proposed project or action location. The appropriate Tribal Coordinator can assist with these resources.

The Project Lead should not rely solely on maps to assess whether a tribe’s interests might be affected by an EPA action because most traditional use areas of Region 10 tribes are not mapped. For example, a tribal family’s berry picking, hunting or fishing areas may not be well known to others, especially outside of the tribe. The Tribal Coordinator assigned to that particular tribe or region can help with these issues. The Tribal Coordinator or Project Lead may call tribal environmental staff to gauge tribal interest, but note that this coordination with a tribe does not take the place of an offer to consult.

V. Timing of Consultation

To make sure that consultation is meaningful and timely requires communication early enough to potentially affect the action or decision, or the data collection associated with it. This will often involve notifying a tribe of an expected action or decision, providing information about the decision to the tribe, discussing major policy and environmental considerations, and exchanging information and viewpoints at a program and technical level.

It will often be important to provide an opportunity for similar communication far enough along in the process that EPA can provide significant detail about the decision or action the Region is considering. In some cases there is a single time period when both of these objectives can be achieved; in other cases, it may be necessary to consult early in the Region’s process, and then consult again at a later point when the EPA action is more developed. The ideal approach is to have active communication throughout the data gathering and decision process about the scope and nature of consultation that the tribe desires.

The timing of tribal elections and fishing, hunting and gathering seasons, etc., is important to consider in timing a consultation. Contact the Tribal Coordinators for more information. The North Slope Protocol is a great resource for this information in Alaska.

10 In 1948 Congress codified the definition of “Indian Country”... as (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) 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 the state, and (c) all Indian allotments, the Indian titles to which have not been extinguished including the rights-of-way running through the same (18 U.S.C § 1151).

11 See USGS Website at <http://rockyweb.cr.usgs.gov/outreach/lewisclark/indianlandsmaps.html>

VI. How Region 10 Consults

A. Initiation by EPA

1. EPA Offer to Consult

Once the Region 10 Project Lead determines that consultation is warranted, EPA should send a letter to the appropriate tribe offering to consult. The Region 10 Project Lead should draft the letter, and can seek input from the Region 10 Tribal Consultation Specialist, and program-specific Tribal Specialist, who can also provide sample letters. The letter should:

- Be addressed to the Tribal Leader (eg. Tribal Chair, Tribal President, or First Chief), with a copy to the tribe's environmental program staff, and the EPA Tribal Coordinator
- Be signed by an Office Director or the Regional Administrator
- Describe the issue at hand clearly, avoiding or clearly defining legal and technical terms and acronyms
- Describe the upcoming EPA action or decision
- Include maps, technical data, and other explanatory or supporting information as appropriate and available
- Relay process timelines and schedule considerations
- Identify the Project Lead, who will work with the tribe to arrange all aspects of the consultation
- Request that the tribe respond to the Project Lead, indicating whether or not the tribe intends on pursuing consultation
- Request response by a date that allows adequate time for a tribal council meeting or other internal deliberations by the tribe (typically four weeks from receipt of letter)
- Request that the tribe provide the name of a tribal representative who will serve as the point of contact for planning the consultation, if the tribe wishes to go forward with consultation
- Request any policy that the tribe may have regarding EPA consultation with them
- Identify or propose timeframes for starting and ending consultation.

Whenever possible and depending on timing and number of tribes involved, the Project Lead should follow up with a phone call, e-mail, or fax to the tribal environmental program or department (or other appropriate tribal department) to ensure receipt of the letter and to open dialogue about the potential consultation.

2. If a Tribe Declines

If a tribe indicates it does not want to consult on a given matter, EPA consultation efforts are normally concluded. The best practice is to document this in the case or project file and inform the Region 10 Tribal Consultation Specialist for tracking purposes. This does not relieve Region 10 of any general trust responsibility it may have to consider the interests of the tribe.

3. If a Tribe Does Not Respond

If a tribe does not respond by the date provided in the consultation invitation letter, when working with one or a small number of tribes, the EPA Project Lead should work with the Tribal Coordinator to reach out to the tribe, usually through e-mails and phone calls to the tribal environmental department. If there is still no response from the tribe, this should be documented in the file and reported to the Regional Tribal Consultation Specialist, and would normally conclude the Region's efforts to initiate consultation. This would not relieve Region 10 of any general trust responsibility to consider the interests of the tribe.

Where EPA offers to consult with a large number of tribes, the Region may, in addition to sending the initial invitation to consult, send e-mails and publicize the consultation opportunity in appropriate publications and at relevant forums. It may be impractical for Region 10 to follow up with individual phone calls or letters to all the tribes.

B. Initiation by a Tribe

Region 10 generally will agree to consult when a tribe requests it, assuming the potential action or decision could affect that tribe's interests. When EPA receives a written request from a tribal leader, the letter should be forwarded to the appropriate program office, which should acknowledge the receipt of the letter or request within two weeks and should respond to the letter in a reasonable time. The Project Lead should notify appropriate personnel in their own office, including their office Tribal Specialist, as well as the Region 10 Tribal Consultation Specialist, who will enter information about leadership meetings in the Region's consultation database.

If it is unclear which program office should take the lead on a consultation request, the request should be forwarded to Regional Administrator's Office for a decision. The response letter from EPA should designate a point of contact to work with the tribe, and request that the tribe identify a tribal point of contact, to arrange the consultation.

C. Planning the Consultation Process

Each tribe has its own governmental structure, and exercises sovereign powers over its members and territories. For that reason, there is no "one size fits all" consultation process template. Consultation is most effective when the approach is individualized to the particular tribe and EPA action. The EPA and tribal points of contact should work together in order to develop a mutually acceptable approach to planning, preparing for, and implementing the consultation process. The points of contact should work closely with one another, while at the same time communicating with their own leadership to ensure support for the developing approach.

The EPA and tribal points of contact should address the following issues of the consultation:

1. Goals and Expectations of each Party

The EPA and tribal points of contact should work with their respective leadership to identify each party's goals and expectations, and to determine how to structure the consultation process to address those goals and expectations.

2. Consultation Policies and Procedures

The points of contact should discuss whether the tribe has developed its own consultation policy or procedures. Any tribally developed consultation policies or procedures should be incorporated into the consultation planning and implementation, where appropriate.

In addition to the EPA Policy on Consultation and Coordination with Indian Tribes, there may be program-specific national EPA tribal consultation guidance. (For example, the Office of Air Quality Planning and Standards developed “Consulting with Indian Tribal Governments” in 2009.) Project Leads should contact their respective headquarters offices to determine if such a policy exists, and, if so, should incorporate those procedures into the consultation process.

3. Identification of Authorized Tribal Official

The Project Lead should work with the tribe to specify who will represent each party at each point during the consultation process. It is important to verify that the specified tribal representative is authorized to represent the tribe for the purposes of consultation, to avoid misunderstandings that can arise from dealing with consultants, attorneys, or tribal staff members who may be communicating with EPA without the authority to represent the tribe as a whole.

4. Scope and Number of Meetings

The EPA and tribal points of contact should determine whether the consultation topics can be covered in a single meeting or whether the consultation topics will require a series of meetings, possibly including technical exchange meetings and one or more leadership meetings.

5. Consultation Plan Format

The parties should discuss whether a written consultation plan is needed, or a more formal Memorandum of Understanding (MOU), or whether verbal/email planning will suffice. It may be appropriate to develop a MOU for particularly complex consultations, such as those involving multiple federal agencies, tribes, legal authorities, decision points, and/or regulatory processes. ORC must be involved in the development of any MOU.

6. Setting the Leadership Meeting Date and Location

The points of contact should begin setting the meeting date(s) at the earliest opportunity, as it may take weeks of planning to align calendars of the appropriate participants with the schedule for the EPA action or decision. Timing of meetings will need to take into account EPA’s calendar and a tribe’s administrative, subsistence, commercial fishing, and cultural events calendars. Leadership meetings should be held face-to-face whenever possible, preferably on tribal homelands. If travel money or time constraints make such a visit impossible, the parties may agree to meet via video or telephone conference. See Section D.3 below for more information on leadership meetings.

7. Information Exchange

The points of contact should discuss in detail what information each party will need for effective consultation. Both EPA and the tribe may have technical or factual information relevant to the consultation. This information should be shared between the parties, whenever possible.

8. Consultation Facilitation

The EPA and tribal points of contact should discuss and agree on whether there will be facilitation for any meetings during the course of the consultation. The parties may decide upon someone from their respective staffs, often the EPA Tribal Coordinator, or may choose to hire an independent third party, if resources allow. If the parties elect to forgo a facilitator, it is important to pay particular attention to potentially different communication styles.

D. Conducting the Consultation

1. Information Exchange and Open Communication

Consultation shall be conducted in good faith and in a climate of mutual respect. Region 10 staff should work hard to understand the tribe's priorities, perspective, and constraints, and to explain EPA's. EPA should make a concerted effort to identify solutions that do not negatively impact a tribe's rights, resources and interests. The Project Lead should understand and comply with any U.S.-tribe agreements (treaties, MOA's) when identifying and evaluating decision alternatives. The Project Lead should also apply the policy goals of the 1984 EPA Indian Policy.

Most tribe-EPA communication during the consultation process takes the form of information sharing, technical discussion, and joint planning, and involves staff and management of both EPA and a tribe. EPA should timely and efficiently disseminate relevant information to tribes and should seek a reciprocal timely receipt of information from tribes. This is a critical part of the consultation process in most cases. The tribe and EPA may wish to designate technical points of contact to discuss data and findings in advance of the leadership meeting. When EPA and a tribe are effectively communicating and coordinating in an early, meaningful way, conflict is reduced or avoided, and in some cases a tribe may feel its interests have been met without the need for further consultation at the leadership level. In other cases, this will serve as an important preliminary step to a productive leadership meeting.

There may be situations where a tribe lacks the resources to conduct a technical or legal review. Depending on the degree of tribal interest, and practical considerations such as timing and resources, it may be beneficial to provide an additional technical meeting or workshop where information can be exchanged. The EPA Project Lead should help identify the various decision points and potential topics or issues that may be of particular interest to the tribe. For example, in the development of a permit there may be technical support documents created that assist EPA in making decisions. The tribe may wish to have a workshop about the technical support document so that input can be provided and the parameters of EPA's authority can be best understood.

Sometimes, it is difficult for EPA to meet tribal expectations, especially when EPA lacks the discretion or authority to fully resolve all tribal concerns. EPA's authority is often subject to specific statutory and regulatory limitations, and the extent with which it can address tribal expectations will vary on a case-by-case basis. Clarifying these issues in the consultation process can be very helpful.

2. Sensitive Information, Record-Keeping and Freedom of Information Act

It is important to promote full and frank exchange of views during government-to-government consultation with tribes. These interactions may include discussions relating to issues of unique sensitivity to tribes such as cultural practices, uses of environmental resources,

and locations of cultural resources. There may also be sensitivity regarding tribal relationships with surrounding states and jurisdictional issues. In preparing any records memorializing consultations with tribes, the EPA Project Lead should consider these potential sensitivities in determining the level of detail to include. The EPA Project Lead should also consider and discuss with tribes the fact that written records of consultations, or other documents exchanged between EPA and Tribes during the consultation and coordination, ordinarily will not be privileged or otherwise protected from disclosure under FOIA. For advice on specific situations, please consult the Office of Regional Counsel.

3. Leadership Meeting

It will often be appropriate to offer to meet with a tribe at the leadership level when EPA anticipates or proposes an action that may affect a tribe. The Project Lead should seek the Region 10 Tribal Consultation Specialist's advice regarding leadership meetings. The executive leadership of EPA and the tribal government officials may have one or more meetings. The tribal and EPA points of contact should discuss and agree on the arrangements and expectations, including the agenda, for each leadership meeting in advance of the meeting. Generally, the agenda should include:

- Introductions
- Statement of meeting purpose, including identification of EPA action or decision.
- Statements from each party, usually focused on goals and expectations for the consultation
- Presentation of information, both from EPA and the tribe
- Discussion and input
- Identification of next steps

The EPA and tribal points of contact should summarize these arrangements and expectations for the leadership meeting in writing, such as in an e-mail message or a letter, depending on the level of formality appropriate under the circumstances. It is also usually advisable to send a letter to the tribe after the leadership meeting summarizing the key issues discussed and addressing any follow-up tasks.

4. Consulting with Multiple Tribes

When offering to consult with a large group of tribes or all tribes in Region 10, a letter should be sent to each tribe. The most feasible approach may be to carry out the consultations in a hub (centralized) location or through conference calls and webinars, depending on practical considerations such as the number and location of the tribes involved, the facilities, and other resources available. Hub consultations normally are arranged in areas that can accommodate a large meeting and are central to the maximum number of tribes, and where tribes have expressed interest, to the extent practical. In multiple party consultation, it is important for EPA to know who the designated tribal representative is for each tribal government participating. If the consultation involves a large number of tribes or all tribes within the Region, a lead EPA Tribal Coordinator may be appointed to coordinate work with the program. It is important to discuss these issues with each tribe involved, as referenced in Section VI.C, to ensure mutual understanding about the consultation process, particularly if one or more Tribes request individual government-to-government consultation.

5. Telephone Conferences

As described in Section VI.C, if it is determined that the most feasible approach for a consultation is through a telephone conference, participants should take extra care to ensure the consultation retains appropriate protocol. Consultation by telephone can present communication challenges such as determining when someone wishes to speak and inability to read body language. It is important to allow periods of silence to ensure tribal participants have the opportunity to speak. It is also helpful to have the facilitator stop occasionally and ask if anyone has points or questions they would like clarified or addressed.

6. Visit to Tribe

If the consultation will involve a visit by EPA to a tribe, the EPA and tribal points of contact should consider building other activities, in addition to the consultation, into the visit. The tribe may wish to host a tour of environmental sites and projects for EPA representatives. Other options may include working with the tribe to host a public meeting or workshop, visiting the tribe's cultural center or museum, or meeting with traditional tribal leaders and elders. If possible, such activities should be scheduled before the consultation.

7. Coordination with Other Federal Agencies

EPA should actively seek opportunities to conduct tribal consultations jointly with other federal agencies when EPA and one or more other federal agencies have related actions that affect tribal interests. This type of federal partnership could reduce the burden on a tribe and may also result in improved protection of human health and the environment. Discussion with state or local agencies may be appropriate if they have related actions, but they are not part of the federal consultation process; their involvement should be discussed with the tribe in advance of any meeting. Tribes are generally entitled to meet with federal government representatives only, if that is their preference.

8. Including the Public, the Media, or Other Participants in Tribal Consultation

Participation and attendance at EPA-tribe consultation meetings is generally limited to the representatives of EPA and the tribe. Consultants employed by EPA or the tribe, or third parties such as intertribal organizations, tribal consortia, environmental or non-profit organizations, or state or local governments, may be included as long as there is no objection from either side. EPA and the tribe may agree to grant a party "observer status" where that party can listen to the proceedings but not participate, to provide the third party an opportunity to better understand EPA and tribal issues and priorities. Media are excluded from consultation unless both parties agree prior to the consultation.

9. Translation and Recording

There may be instances within Region 10 when a translator may be required for meaningful consultation. It is important to discuss the need for a translator ahead of the meeting. It is also important to discuss in advance whether either party intends to record any meetings (in person or telephonic).

E. Required Follow-Up and Reporting

In accordance to the EPA Policy on Consultation and Coordination with Indian Tribes, Region 10 will provide feedback to the tribe(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. Each individual that participated in the consultation should receive a copy of this communication, as should the Region 10 Tribal Consultation Specialist for purposes of consultation tracking requirements.

Region 10 must develop a semi-annual agenda and submit the Agenda or an update to EPA's American Indian Environmental Office (AIEO) by October 1st and April 1st of each year. The semi-annual agenda consists of a list of pre-identified activities that Region 10 plans to consult upon in the future. Submission of the Agenda is satisfied by entering the relevant information in the Tribal Consultation Opportunities Tracking System (TCOTS, <http://yosemite.epa.gov/oita/TConsultation.nsf/TC?OpenView>). TCOTS requires the entry of a small set of standardized information used to track the consultation including a start and end date and the primary point-of-contact. The information provided is used as the basis for posting consultation information outside EPA for tribes and the public. In addition, Region 10 is responsible for submitting brief summaries of completed consultations to AIEO as soon as practicable once consultation is complete. The Region 10 Tribal Consultation Specialist is responsible for tracking and inputting required consultation information into TCOTS. Please contact the Region 10 Tribal Consultation Specialist for additional information on reporting requirements.

VII. Historic or Archaeological Resources

Where a federal action might affect historical or archaeological resources, there are a number of laws and procedural requirements that might be triggered, including the American Antiquities Act of 1906, the Historic Sites, Buildings, Objects, and Antiquities Act of 1935, the National Historic Preservation Act of 1966, and the Native American Graves Protection and Repatriation Act of 1990. These laws contain a number of requirements, some of which are very detailed, and may overlap with these tribal consultation procedures and/or the National Environmental Policy Act (NEPA). Often the NEPA process will involve an initial screening as to whether any historical or archaeological resources might be impacted. When working on a project that might involve any resources of this nature, it is very important to consult with ORC to determine whether tribal consultation needs to be coordinated with any additional procedures related to resources protected by law.

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Appendix A

EPA Region 10 Emergency Response Tribal Consultation Procedures

The EPA Region 10 Emergency Management Program (EMP) within the Office of Environmental Cleanup (ECL) is responsible for a range of assessment and cleanup actions that vary in their duration, complexity and time-critical nature. These actions may be in response to oil or chemical spills, as well as to natural and man-made disasters. Cleanups, such as Removal Actions, may be considered non-time critical, time-critical, or emergency response in nature. The urgency and dynamics of a Removal Action may affect EPA's ability to fully implement all four phases of tribal consultation described in EPA policy (identification, notification, input, and follow-up).

Non-Time Critical Removal Actions

Non-time critical removal actions, which may be conducted or overseen by either Federal On-Scene Coordinators or EPA Region 10's Remedial Cleanup Program, generally allow for at least a 6-month planning period prior to the initiation of cleanup activities on scene. Non-time critical removal actions require an engineering evaluation and cost analysis (EE/CA) to evaluate the cleanup action alternatives being considered. A decision document (Action Memorandum) is subsequently developed to document the selection of the cleanup activity. Given the pace of the non-time critical cleanup activity, Region 10 generally should fully implement the EPA Region 10 Tribal Consultation Procedures when EPA actions or decisions may affect tribal interests. In particular, EPA should provide opportunities to consult during or before the public comment period and prior to issuing the Action Memorandum.

Time-Critical Removal Actions

For time-critical removal actions, an EE/CA and public comment period is not required but an Action Memorandum is still developed to document the cleanup decision, in most cases prior to a cleanup activity taking place. For time-critical removal actions, EPA staff should coordinate closely with Tribal environmental staff. To ensure that Tribal leadership are also informed of these cleanup activities, EPA should offer formal consultation directly to Tribal leadership prior to approval of the Action Memorandum, whenever time allows. In some cases, EPA may need to approve of the Action Memorandum and commence cleanup activities without delay and in those cases, formal consultation should be offered as soon as possible during preparations and/or commencement of cleanup activities on scene.

Emergency Removal Actions

During emergency actions, out of necessity, the Federal On-scene Coordinator or the Unified Command will make dozens of critical decisions on a real time basis throughout the day and night. In order to provide meaningful input during the emergency decision-making process, parties typically must be on scene and participating in the response action. Consistent with the National Contingency Plan, when EPA is notified of a spill or release that could potentially impact Tribal interests, EPA's Duty Officer should provide verbal notification to any affected tribe. This verbal notification ordinarily should be coordinated through the U.S. Department of Interior or the Bureau of Indian Affairs.

There are two ways potentially affected tribes may participate in or monitor these emergency response activities. First, if a Unified Command System is established on scene to manage the emergency situation, EPA should, at the time of notifying the Tribal staff, invite the Tribe(s) to send a representative to the scene to join in the Unified Command, serving as either a qualified Tribal Incident Commander or as a technical specialist. Second, EPA produces pollution reports (POLREPS) during emergency actions to document key issues and decisions. EPA should add any potentially affected Tribes to the POLREP email distribution, thereby providing current and ongoing cleanup information to the Tribe if it is unable to participate directly, on scene. During emergency response actions, an Action Memorandum is only written for fund-lead cleanups, and even then it is usually written after any/all response and cleanup activities are completed due to the immediate need to protect public health and the environment.

Due to the often chaotic and uncontrolled nature of emergency response to spills and releases, the ability to conduct other aspects of consultation with potentially affected Tribes must be made on a case by case, incident-specific basis, with the goal of keeping the Tribe fully informed, and providing meaningful opportunity for tribal input.

Summary

1. EPA Region 10 will follow the full tribal consultation process for all non-time critical removal actions.
2. For time-critical removal actions that have less than a 6 month planning period, EPA Region 10 will make all attempts to follow the full tribal consultation process. In some cases, due to the urgency and dynamics of the removal activity, the tribal consultation process may take place concurrently to the cleanup activity.
3. During Emergency Response activities, EPA Region 10 will continue to notify all affected tribes regarding oil and chemical spills and releases that potentially affect Tribal interests. Further, Tribes will be invited to send a representative to participate on scene in the Unified Command. EPA will also add affected Tribes to the email distribution of all POLREPs. During emergencies, decisions regarding other aspects of Tribal consultation will be made on a case-by-case basis.

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Affiliated Tribes of Northwest Indians • Native Village of Afognak • Agdaagux Tribe of King Cove • Akiachak Native Community • Akiak Native Community • Native Village of Akutan • Village of Alakanuk • Alaska Inter-Tribal Council • Alatna Village • Native Village of Aleknagik • Aleut Community of St. Paul Island • Aleutian Pribilof Island Association • Algaaciq Native Village • Allakaket Village • Native Village of Ambler • Aniak Traditional Council • Village of Anaktuvuk Pass • Aniak Traditional Council • Anvik Village • Asa'carsarmiut Tribe • Association of Village Council Presidents • Council of Athabaskan Tribal Governments • Native Village of Atka • Atmautluak Traditional Council • Native Village of Atkasuk • Beaver Village Council • Native Village of Belkofski • Native Village of Bill Moore's Slough • Native Village of Brevig Mission • Bristol Bay Area Health Corporation • Bristol Bay Native Association • Native Village of Buckland • Burns-Paiute Tribe • Native Village of Cantwell • Chalkyitsik Village Council • Cheesh-Na Tribal Council • Village of Chefornak • Native Village of Chenega • Chevak Native Village • Chickaloon Native Village • Chignik Bay Tribal Council • Native Village of Chignik Lagoon • Chignik Lake Village-Traditional Council • Chilkat Indian Village of Klukwan • Chilkoot Indian Association • Chinik Eskimo Community • Native Village of Chuathbaluk • Chugach Regional Resources Commission • Chuloonawick Native Village • Clarks Point Village Council • Coeur d'Alene Tribe • Columbia River Inter-Tribal Fish Commission • Colville Confederated Tribes • Confederated Tribes of Coos, Lower Umpqua & Siuslaw • Coquille Indian Tribe • Cow Creek Band of Umpqua Indians • Cowlitz Indian Tribe • Craig Community Association • Village of Crooked Creek • Curyung Tribal Council • Native Village of Deering • Village of Dot Lake • Douglas Indian Association • Native Village of Eagle • Eek Traditional Council • Native Village of Eklutna • Native Village of Ekuk • Ekwok Village Council • Evansville Village • Native Village of Eyak • Fort Yukon Native Village • Native Village of Gakona • Galena Village • Native Village of Georgetown • Native Village of Goodnews Bay • Confederated Tribes of Grand Ronde • Gulkana Village • Hoh Indian Tribe • Holy Cross Village • Native Village of Hooper Bay • Hughes Village • Huslia Tribal Council • Hydaburg Cooperative Association • Igiugig Village Council • Inupiat Community of the Arctic Slope • Iqurmit Traditional Council • Ivanof Bay Village • Jamestown S'Klallam Tribe • Organized Village of Kake • Kalispel Indian Community • Village of Kalskag • Kaltag Tribal Council • Organized Village of Kasaan • Kasigluk Traditional Elders Council • Kenaitze Indian Tribe • Ketchikan Indian Community • Native Village of Kiana • King Salmon Village Council • Native Village of Kivalina • Klamath Tribes • Klawock Cooperative Association • Knik Tribe • Kobuk Traditional Council • Kokhanok Village • Native Village of Kongiganak • Kootenai Tribe • Kotlik Traditional Council • Kotzebue Native Village • Native Village of Koyuk • Koyukuk Native Village • Kuskokwim Native Association • Native Village of Kwigillingok • Native Village of Kwinhagak • Native Village of Larsen Bay • Leisnoi Village • Levelock Village Council • Lower Elwha Klallam Tribe • Village of Lower Kalskag • Lummi Indian Nation • Makah Indian Tribe • Maniilaq Association Inc. • Manokotak Village Council • Native Village of Marshall • McGrath Native Village • Native Village of Mekoryuk • Native Village of Minto • Mount Sanford Tribal Consortium • Muckleshoot Tribe • Naknek Native Village • Native Village of Nanwalek • Native Village of Napaimute • Native Village of Napakiak • Native Village of Napaskiak • New Koliganek Village Council • New Stuyahok Village • Newhalen Village • Newtok Traditional Council • Nez Perce Tribe • Nightmute Traditional Council • Native Village of Nikolski • Ninilchik Traditional Council • Nisqually Indian Tribe • Noatak Native Village • Nome Eskimo Community • Nondalton Village • Nooksack Indian Tribe • Noorvik Native Community • Northwest Indian Fisheries Commission • Norton Sound Health Corporation • Nulato Village • Native Village of Nikolski • Noatak Native Village • Nulato Village • Nunakuyarmiut Tribe • Native Village of Nunapitchuk • Village of Ohogamiut • Village of Old Harbor • Orutsararmiut Native Village • Native Village of Ouzinkie • Native Village of Paimiut • Pauloff Harbor Tribe • Pedro Bay Village • Native Village of Perryville • Petersburg Indian Association • Pilot Point Tribal Council • Pilot Station Traditional Council • Native Village of Point Hope • Native Village of Point Lay • Port Gamble Indian Community • Port Graham Village Council • Native Village of Port Heiden • Native Village of Port Lions • Portage Creek Village Council • Puyallup Tribe • Oagan Tayagungin Tribe of Sand Point • Quileute Indian Tribe • Quinault Indian Nation • Ruby Tribal Council • Saint George Island • Native Village of Saint Michael • Samish Indian Nation • Sauk-Suiate Indian Tribe • Native Village of Sealaska Bay • Native Village of Selawik • Seldovia Village Tribe • Native Village of Shiktoolik • Native Village of Shishmaref • Shoalwater Bay Tribe • Shoshone-Bannock Tribes • Native Village of Shumshak • Confederated Tribes • Siletz Indians • Sitka Tribe • Skagway Village • Siskonish Indian Tribe • Village of Sledmuit • Snowalmie Tribe • South Naknek Village Council • South Puget Sound Inter-Tribal Fishing Authority • Spokane Tribe • Staxin Island Tribe • Stebbins Community Association • Tillamook Tribe • Sits'aq Tribe of Koonak • Suquamish Tribe • Swinomish Indian Tribal Community • Takona Village • Native Village of Tanacross • Tanana Tribal Council • Native Village of Tatitok • Native Village of Tetlin • Tonda Native

CONSULTATION

