

****DRAFT ****

MEMORANDUM

SUBJECT: Region 6 Guidance on Compliance Monitoring, Compliance Assistance, and Civil Enforcement at Tribal Facilities

**FROM: Richard Greene
Regional Administrator**

TO: All Region 6 Employees

This memorandum transmits to you the United States Environmental Protection Agency (EPA) Region 6's "Region 6 Guidance on Compliance Monitoring, Compliance Assistance, and Civil Enforcement at Tribal Facilities."¹ The purpose of this memorandum is to elaborate on the guidelines that Region 6 intends to follow when monitoring compliance, providing compliance assistance, and taking civil enforcement actions at "facilities" that are considered "tribal facilities," as those terms are defined in Section II, *infra*.²

These guidelines provide Region 6 with assistance in implementing Part 8 of EPA's November 8, 1984, "EPA Policy for the Administration of Environmental Programs on Indian Reservations" (Indian Policy), and subsequent national EPA guidance, specifically the January 17, 2001, "Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy" (Enforcement Guidance) and the April 17, 2007, "Questions and Answers on the Tribal Enforcement Process" (Questions and Answers Guidance) (Attachments A, B, and C, respectively). These guidelines are intended to be consistent with, and build upon, Region 6's own tribal policies, including the June 11, 2008, "Reaffirmation of Region 6's Relationship with Tribal Governments" and the Region 6 "Tribal Consultation Policy Statement," (Attachments D and E, respectively).

¹ These procedures deal solely with violations of EPA's civil regulatory programs. It does not apply to criminal conduct, criminal investigations, or enforcement pursuant to criminal provisions of laws or regulations which are enforced by EPA.

² This guidance was developed by a workgroup with representatives from the Office of Regional Counsel (ORC), the Office of Environmental Justice & Tribal Affairs (OEJTA), the Compliance Assurance and Enforcement Division (6EN), the Multimedia Planning and Permitting Division (6PD), and the Water Quality Protection Division (6WQ). All Region 6 Divisions and Offices, except for the Management Division and the Office of External Affairs, were invited to participate in the workgroup. In addition, the workgroup circulated for comment a draft of these guidelines to all Region 6 Divisions and Offices. Region 6 also circulated this memorandum to federally recognized Indian tribes (tribes) during the November 2008 Regional Tribal Operations Committee (RTOC) meeting in Tulsa, Oklahoma and solicited their input.

Region 6's primary goal and responsibility in Indian country is to protect human health and the environment. Region 6 achieves this goal by monitoring compliance at tribal facilities, providing compliance assistance to tribal facilities, and, in situations where compliance assistance is not appropriate or does not result in compliance, pursuing civil enforcement actions against tribal facilities. As such, Region 6 remains committed to working cooperatively with tribes to protect human health and the environment. Nonetheless, there may be situations where compliance is not achieved through cooperation and compliance assistance, and in those instances EPA retains its discretion to take such civil judicial and administrative enforcement actions as it deems appropriate and necessary.

This guidance is not intended to change or replace the elevation process previously negotiated with Region 6 tribes.³ In addition, nothing in this guidance should be interpreted as diminishing Region 6's commitment to consult with tribes on a government-to-government basis and follow Region 6's "Tribal Consultation Policy." This guidance is intended, in part, to help EPA employees identify some appropriate times and methods for contacting a tribe, environmental director, or tribal facility operator, and to share with tribes the generally-expected procedures for an EPA response to a potential violation. However, a tribe may also request meetings, conference calls, or formal consultation with Region 6 at times in addition to those identified in this guidance.

This guidance will provide a general framework that Region 6 should apply to all compliance monitoring, compliance assistance, and civil enforcement actions at tribal facilities. The form of Region 6's compliance monitoring, compliance assistance, or civil enforcement action will depend on the circumstances at the particular tribal facility.⁴ The key points that are expanded in this guidance include:

- guidelines for making a tribal facility determination;
- guidelines for compliance monitoring at tribal facilities;
- guidelines for compliance assistance at tribal facilities; and
- guidelines for conducting civil enforcement actions against tribal facilities.

If you have any questions or comments concerning this guidance, or its implementation, please contact Rebekah Reynolds at (214) 665-6605 or Jeannine Hale at (214) 665-2136, both in ORC.

I. ROLES AND RESPONSIBILITIES

³ The elevation process is contained in the June 11, 2008 "Reaffirmation of Region 6's Relationship with Tribal Governments." Attach. D.

⁴ This guidance is not intended to be binding on Region 6 or the public, nor is it intended to create any right, benefit, or responsibility, including any trust responsibility, when applied in particular situations. Region 6 retains the discretion to adopt approaches that differ from this memorandum, where appropriate and depending upon the specific circumstances at issue.

A. Division Enforcement Programs

All Region 6 division enforcement programs, including 6WQ, 6SF, 6PD, and 6EN, are subject to the guidelines outlined in this memorandum. Region 6's division enforcement programs are responsible for, *inter alia*: (i) program enforcement planning; (ii) coordinating with identified contacts, to communicate plans and results; and (iii) deciding upon compliance requirements and taking enforcement actions, after obtaining needed concurrences and approvals from OECA. When investigating a facility, the applicable division enforcement program is responsible for determining whether a tribal facility determination has been made for the facility under investigation. In situations where Region 6 has already determined that a facility is a tribal facility or where Region 6 needs to make a tribal facility determination, the division enforcement program staff is responsible for notifying an ORC tribal law advisor and OEJTA and following the guidelines outlined in this memorandum. Throughout this memorandum the term "division enforcement program" refers only to the particular division enforcement program investigating the facility at issue.

B. Office of Environmental Justice and Tribal Affairs (OEJTA)

OEJTA strives to strengthen EPA's relationship with tribes and should work with the division enforcement program when there is an issue involving a tribal interest. OEJTA is available to assist the division enforcement programs in working with and communicating with tribes. All communication, and contacts, with OEJTA regarding tribal facility determinations or compliance monitoring, compliance assistance, and civil enforcement decisions, at tribal facilities should go through, or be made by, the Associate Director of OEJTA, unless or until the Associate Director of OEJTA, or his or her management, communicates to the division enforcement program that the aforementioned communication should be made to an alternate staff member in OEJTA. In addition, all routing to OEJTA should go through the Associate Director of OEJTA, unless or until the Associate Director of OEJTA, or his or her management, designates an alternate staff member in OEJTA to assume this responsibility.

C. Office of Regional Counsel (ORC)

The guidelines outlined in this memorandum are not intended to change the role of the enforcement attorney. Division enforcement programs should follow existing guidelines to request that an enforcement attorney be assigned to a case. Where an enforcement attorney has been assigned, the enforcement attorney will take the lead in working with the ORC tribal law advisor assigned to the matter.

The enforcement attorney, or, where no enforcement attorney has been assigned, the division enforcement program, should consult with a tribal law advisor when there are questions regarding tribal facility status, the process for, or factors to consider in, making a tribal facility determination, the status of land, the potential liability of a tribal government, the application of federal Indian law and EPA's Indian Policy and Indian guidance, or when an action will require consultation with any office at EPA headquarters.

D. EPA Headquarters Offices

OECA guidance calls for Region 6 to obtain the concurrence of the Assistant Administrator for the Office of Enforcement and Compliance Assurance (OECA) before taking certain civil enforcement actions against a tribal facility.⁵

E. Tribes

Generally, when the terms "tribal government" and the "tribal environmental director" are used in this guidance, Region 6 should contact the person who is listed as the point of contact in the Region 6 tribal contacts database managed by OEJTA. However, tribal contacts used for a particular situation should be based on tribal specific issues, such as who has the responsibility or authority to address an issue.

At any time, a tribal government may notify Region 6 that specific persons are the authorized representative(s) of the tribe to communicate and work with Region 6 regarding a particular situation. At any time, a tribal government may also notify Region 6 that it is represented by legal counsel for a particular situation. Region 6 should encourage a tribe to seek legal counsel, if it has not already done so, once an enforcement action requiring OECA concurrence, as described in Section V, *infra*, appears likely.

II. GUIDELINES FOR MAKING A TRIBAL FACILITY DETERMINATION

When preparing for an inspection, or dealing with any compliance issue, at a facility located within or outside of "Indian country," as that term is defined under 18 U.S.C. § 1151,⁶ the division enforcement program should determine whether the facility

⁵ Enforcement Guidance at 8-9.

⁶ "Indian country" is defined under 18 U.S.C. § 1151 as: (i) 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, (ii) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (iii) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Under this definition, EPA treats as reservations trust lands validly set aside for use by tribes, even if the trust lands have not formally been designated as a reservation. Tribal facilities can be located within or outside Indian

at issue is a tribal facility within the meaning of the Enforcement Guidance and the Questions and Answers Guidance.

The term “facility,” as used in this memorandum, the Indian Policy, the Enforcement Guidance, and the Questions and Answers Guidance includes activities that are subject to EPA’s civil regulatory program, e.g., dredge and fill activities, illegal dumping, improper land disposal or burial of wastes, storm water discharges from construction sites, illegal pesticide use, pipeline leaks, spills or emissions from mobile sources, and drinking water systems.

The term “tribal facility” means (i) a facility owned or managed by tribal governments, and (ii) a non-tribally owned or managed facility in which a tribal government has a substantial interest or over which a tribal government exercises control.⁷ Tribal facilities can include facilities in which the tribal interest is “substantial,” although not “proprietary.”⁸

Where tribal facility status has been established, then the guidelines outlined in the subsequent sections of this memorandum should apply. Where tribal facility status has not already been established or documented, and where it is not obvious that the facility at issue is a tribal facility, the Director of the division enforcement program,⁹ should initiate government-to-government communication and afford the affected tribe an opportunity to provide information regarding its interest in the facility by sending¹⁰ both the tribal government and the tribal environmental director a letter, routed to the ORC tribal law advisor and OEJTA for informational purposes,¹¹ soliciting the affected tribe’s views, and summarizing any information Region 6 already has in regard to the tribal facility status of the facility.¹² This letter should advise the tribe of its opportunity to request a meeting, conference call or consultation. This guidance, and its attachments, should be enclosed with the letter.

country. If there is any question regarding the Indian country status of land an ORC tribal law advisor should be contacted.

⁷ Enforcement Guidance at 3; *see also* Questions and Answers Guidance, response to question 2 (describing the factors used to determine whether a facility is owned, managed, or operated by a tribal government, and response to question 3 (describing the type of proprietary interest necessary to make a determination that the tribal government has a sufficient interest in the facility).

⁸ Enforcement Guidance at 3; *see also* Questions and Answers Guidance, response to question 4 (describing when a nonproprietary interest may be a substantial interest).

⁹ In the situation where the division enforcement program has delegated the responsibility to make a tribal facility determination to a different Region 6 program, the director of that program will have the same responsibilities that are outlined in this guidance as the director of the division enforcement program.

¹⁰ Unless otherwise noted, when this memorandum requests that information in writing be sent, mail, email, or facsimile are examples of proper methods of satisfying the request.

¹¹ *See* Questions and Answers Guidance, question 1, page 4 (stating that the EPA regional offices are responsible for determining whether a facility is a tribal facility).

¹² This letter is consistent with the approach for consulting with a tribe as outlined in the Questions and Answers Guidance at 4.

In order to avoid delays in addressing noncompliance at a facility, the aforementioned letter should include a specific date for the tribal government and tribal environmental director to respond by. Generally two to four weeks is an appropriate time period, but the time period may vary from case to case depending on the particulars of the situation. If it does not appear that Region 6 will receive a response from the tribe within the requested time period, or a response had not been received by the end date of the requested time period, the division enforcement program, with ORC and OEJTA assistance, as appropriate, should make reasonable efforts to secure a response from the tribe. For example, the division enforcement program could call the tribal government and remind the tribe of the approaching deadline. It may be that the tribe requires additional time to submit a response or, in some cases, the tribe may prefer not to submit a response.

Upon receiving information from the tribe, or after reasonable efforts to secure information from the tribe indicate that the tribe is not likely to submit information regarding its interest in the facility, and an additional two weeks have elapsed, the division enforcement program should make a decision, in consultation with an ORC tribal law advisor and OEJTA, as appropriate, of tribal facility status and determine whether the guidelines outlined in this memorandum should apply to the facility at issue.

If Region 6 determines that the evidence shows that a facility is a tribal facility, then all guidelines outlined in this memorandum should apply.

If Region 6 determines that the evidence shows that a facility is not a tribal facility, then Region 6 should generally address the noncompliance in the same way as it would address the noncompliance at a private facility located outside of Indian country. Region 6 should, for example, notify and consult with the affected tribal government on a government-to-government basis to the greatest extent practicable and permitted by law.¹³

If Region 6 determines that the evidence as to whether a facility is a tribal facility is inconclusive, Region 6 should treat the facility as if it is a tribal facility and all guidelines outlined in this memorandum should apply unless and until Region 6 makes a tribal facility status determination.

Within two weeks of making a new decision of tribal facility status, where the tribal facility status is not obvious, division enforcement program staff should send, the tribal government, the tribal environmental director, the facility, and, if appropriate, the appropriate state a letter, routed to the ORC tribal law advisor and OEJTA for informational purposes, stating the outcome of the determination of tribal facility status

¹³See Questions and Answers Guidance at 5 (responding to noncompliance with a facility that is not a tribal facility).

and, where appropriate, providing an analysis of what the division enforcement program relied on to reach its determination.¹⁴

III. GUIDELINES FOR COMPLIANCE MONITORING AT TRIBAL FACILITIES

A. Inspections at Tribal Facilities

1. Announced Inspections

Prior to an announced Region 6 inspection of a tribal facility, generally at least seven days before the inspection,¹⁵ the division enforcement program should send the tribal environmental director a letter, routed to the ORC tribal law advisor and OEJTA for informational purposes, providing notice of the announced inspection. A copy of the letter should be sent to the tribal government and the tribal facility. In the letter, Region 6 should invite the tribal government and the tribal environmental director to meet with, or have a conference call with, Region 6 prior to the inspection, to accompany the Region 6 inspector(s) during the inspection where appropriate,¹⁶ to meet with Region 6 after the inspection, or all of the above.¹⁷ This guidance, and its attachments, should be enclosed with the letter, if not previously provided with respect to the tribal facility at issue. Alternatively, the division enforcement program could communicate this same information to the tribal environmental director by calling or emailing the tribal environmental director and providing OEJTA with a record of communication or a copy of said email. If communication occurs in this fashion, OEJTA should take responsibility for contacting the tribal government, as appropriate.

The division enforcement program should follow this letter with a meeting or telephone call to discuss: (i) the facilities targeted for inspection during the visit; (ii) what will be done during the visit and what potential follow-up actions may be needed; (iii) tribal information and concerns regarding the tribal facilities to be inspected; and (iv) verification of appropriate contacts for the tribe and Region 6.¹⁸ Division enforcement

¹⁴ See Questions and Answers Guidance at 4 (stating that the EPA regional offices are responsible for determining whether a facility is a tribal facility).

¹⁵ The term “days” as used in this document refers to calendar days, including weekends and holidays.

¹⁶ In the invitation to the tribal government, the tribal environmental director, or both to participate in an inspection, Region 6 should clearly communicate that all non EPA employees are responsible for their own health and safety training and protective clothing and equipment and that EPA does not take on responsibility for hazards or incidents associated with the inspection.

¹⁷ If, in addition to the letter or telephone call to the tribal environmental director, a program issues a standard inspection notice to the tribal facility, the program will provide a copy of the inspection notice to the tribal government and the tribal environmental director.

¹⁸ Questions and Answers Guidance at 6.

program staff should notify and invite an ORC tribal law advisor and OEJTA to participate in any scheduled meeting or telephone call.

2. Unannounced Inspections

Division enforcement programs may conduct unannounced inspections and investigations in “Indian country.” If a division enforcement program conducts an unannounced inspection at a tribal facility, the division enforcement program should inform the tribal government and the tribal environmental director of the inspection as soon as the inspection begins and invite them to an exit conference. If this method of notification is not possible, the division enforcement program should inform the tribal government and the tribal environmental director of the inspection as soon as reasonably practicable after the inspection and invite the tribal government to meet with Region 6.¹⁹ This guidance, and its attachments, should be sent to the tribal government, if not previously provided. The Division enforcement program should also inform an ORC tribal law advisor and OEJTA in writing,²⁰ that an unannounced inspection is anticipated or, where advance notice is not possible, immediately after the unannounced inspection has occurred and the date of the unannounced inspection.

B. Preparing and Sending Information Requests to Tribal Facilities

If the division enforcement program determines that sending an information request to a tribal facility is appropriate, then the Director for the division enforcement program, or his or her designee, should send the tribal facility the information request, routed to the ORC tribal law advisor and OEJTA for informational purposes. The tribal government and the tribal environmental director should be sent a copy of the information request. This guidance, and its attachments, should be sent to the tribal government, if not previously provided.

IV. GUIDELINES FOR COMPLIANCE ASSISTANCE AT TRIBAL FACILITIES

A. Guidelines for Communicating Within Region 6 after Discovery of Noncompliance at a Tribal Facility

If division enforcement program staff identify areas of concern at a tribal facility, based on information collected during an inspection, an information request, or a separate reliable source, that warrants further contact with the tribal facility, the division enforcement program staff should inform an ORC tribal law advisor and OEJTA of the

¹⁹ Questions and Answers Guidance at 7.

²⁰ Email is an appropriate method of written communication within EPA.

noncompliance as soon as reasonably practicable, generally within one week after the identification.

B. Guidelines to Determine if a Compliance Plan is Appropriate

As soon as reasonably practicable, but generally within one month of the discovery of noncompliance and a determination that the noncompliance is confirmed, continuing in nature, and serious enough for further action, the division enforcement program should provide an ORC tribal law advisor and OEJTA with the noncompliance information and compliance assistance history, if any. The division enforcement program should also provide an ORC tribal law advisor and OEJTA with a recommendation as to whether a written compliance plan²¹ is warranted. A compliance plan is generally warranted and should be developed but there may be circumstances in which development of a compliance plan would not be appropriate.²² If the division enforcement program decides not to develop a written compliance plan, the division enforcement program should justify a decision not to develop a written compliance plan to an ORC tribal law advisor and OEJTA.

C. Guidelines if a Compliance Plan is Not Appropriate

If the division enforcement program determines that a compliance plan is not appropriate, then the Director for the division enforcement program, or his or her designee, should send the tribal facility a letter, routed to the ORC tribal law advisor and OEJTA for informational purposes, letting the tribal facility know that a compliance plan is not appropriate. The tribal government and the tribal environmental director should be sent a copy of this letter. The letter should state the reasons why Region 6 believes a compliance plan is not appropriate and discuss any pending civil enforcement action.

D. Guidelines for Developing the Compliance Plan

Where the division enforcement program determines that a compliance plan is appropriate, and as soon as reasonably practicable, but generally within two months of

²¹ The term “compliance plan” is defined in the Enforcement Guidance and the Questions and Answers Guidance.

²² Questions and Answers Guidance at 7 (Examples of situations in which a compliance plan may not be appropriate include situations where (1) EPA has consulted with the tribal government and there is a documented history of disinterest in or resistance to EPA’s efforts to provide compliance assistance; (2) the Region has previously provided compliance or technical assistance to the facility and EPA believes that additional assistance will not result in a return to compliance; or (3) a compliance plan might not be immediately feasible because exigent circumstances exist and an immediate enforcement action is necessary).

the discovery of noncompliance, the division enforcement program should draft a compliance plan.²³ The draft compliance plan should include, at a minimum:

1. a description of the noncompliance that Region 6 identified;
2. a description of the type and nature of the compliance assistance offered/available;
3. the time(s) and timeframe compliance assistance will be offered/available;
4. a list and schedule of action(s) the tribe and tribal facility need to provide to Region 6;
5. the specific steps the tribal facility will take to come into compliance based on the types of activities needed and the milestones associated with the activities;
6. a date by which Region 6 may again assess the status of the compliance at the tribal facility; and
7. the civil enforcement response anticipated if the compliance at the tribal facility does not improve according to the milestones stated in the plan and a statement that continuing noncompliance could result in the filing of a formal civil enforcement action, including the assessment of civil penalties.

The draft compliance plan may also include or incorporate an enforcement action that does not require OECA concurrence, i.e. an “informal enforcement action,” as that term is described in further detail in Section V, *infra*.

The Director for the division enforcement program, or his or her designee, should send the tribal facility a cover letter and the draft compliance plan, routed to the ORC tribal law advisor and OEJTA for informational purposes, for the tribal facility to review. The cover letter transmitting the draft compliance plan to the tribal facility should include a specific deadline by which to submit comments on the draft compliance plan, generally two to four weeks is a reasonable time frame.²⁴ The cover letter should also state that if no comments are submitted Region 6 intends to implement the compliance plan as drafted.²⁵ The tribal government and the tribal environmental director should be sent a copy of the cover letter and draft compliance plan along with a notice, where appropriate, inviting the tribal government to meet with Region 6.

If Region 6 receives comments on the draft compliance plan, the division enforcement program should review and consider comments, and, where appropriate, revise the compliance plan. Where appropriate, the division enforcement program should provide the tribal government, tribal environmental director, and tribal facility with a response to any significant comments and an opportunity to comment on any major

²³ In certain instances, it may be appropriate for the division enforcement program to solicit input from the Tribal government, or the tribal environmental director, or both as to the contents of the compliance plan.

²⁴ Questions and Answers Guidance at 11.

²⁵ Questions and Answers Guidance at 11.

revisions that may affect the tribal facility's ability to meet the terms or the deadlines or both contained in the plan.

If comments are received, the Director for the division enforcement program, or his or her designee, should send the tribal facility a cover letter and the final compliance plan, routed to the ORC tribal law advisor and OEJTA for informational purposes. The tribal government and the tribal environmental director should be sent a copy of the cover letter and final compliance plan. Where appropriate, the cover letter transmitting the final compliance plan should explain how any received comments were addressed.

If no comments are received, the Director for the division enforcement program, or his or her designee, should send the tribal facility a letter, routed to the ORC tribal law advisor and OEJTA for informational purposes, to convey that because no comments were received, the draft compliance plan was finalized as is. The tribal government and the tribal environmental director should be sent a copy of this letter.

E. Assessment of the Compliance Plan

1. Compliance Achieved

If compliance is achieved, and as appropriate so as not to interfere with or compromise a subsequent enforcement action, the Director of the division enforcement program, or his or her designee, should send the tribal facility a letter, routed to the ORC tribal law advisor and OEJTA for informational purposes, stating that compliance has been achieved. The tribal government and the tribal environmental director should be sent a copy of the letter.

2. Missed Milestones

If milestones are missed, the Director for the division enforcement program, or his or her designee, should send the tribal facility a letter, routed to the ORC tribal law advisor and OEJTA for informational purposes, providing notification that milestones have been missed.²⁶ The tribal government and the tribal environmental director should be sent a copy of the letter.

If milestones are missed, then the division enforcement program should review the missed milestones and decide whether it is appropriate to revise the compliance plan and associated milestones or proceed with an enforcement action.

If milestones are missed and an enforcement attorney in ORC has not already been assigned, the division enforcement program or the ORC tribal law advisor should request that an enforcement attorney be assigned as soon as practical.

²⁶ See Questions and Answers at 8 (stating that "if oral notification occurs, the discussion should be memorialized in writing").

If the division enforcement program determines that the compliance plan is to be revised, he or she should revise the compliance plan and the Director for the division enforcement program, or his or her designee, will send the tribal facility a cover letter and the revised compliance plan letter, routed to the ORC tribal law advisor and OEJTA for informational purposes. The tribal government and the tribal environmental director should be sent a copy of the cover letter and the revised compliance plan. Where appropriate, the cover letter transmitting the revised compliance plan should explain why the compliance plan has been revised and should provide a brief summary of the revisions to the milestones.

V. GUIDELINES FOR CONDUCTING CIVIL ENFORCEMENT ACTIONS AGAINST TRIBAL FACILITIES

A. Developing an Enforcement Action Where OECA Concurrence is Not Required (“Informal Enforcement”)

The division enforcement program may decide to include an enforcement action that does not require OECA concurrence,²⁷ as part of a tribal facility’s compliance plan. If the division enforcement program determines that this type of “informal enforcement action” is warranted, the division enforcement program should notify an ORC tribal law advisor and OEJTA, of the division enforcement program’s intention to proceed with an “informal enforcement action” against the tribal facility. Before the “informal enforcement action” is filed, the enforcement document should be routed to the ORC tribal law advisor and OEJTA for informational purposes. The ORC tribal law advisor and OEJTA should be provided with a copy of the final enforcement document.

B. Developing an Enforcement Action Where OECA Concurrence is Required (“Formal Enforcement”)

If the division enforcement program determines that (1) a significant threat to human health or the environment exists, (2) the action would reasonably be expected to achieve effective results in a timely manner, and (3) the federal government cannot use other alternatives to correct the problem in a timely fashion,²⁸ the Director of the division enforcement program should notify, in writing, an ORC tribal law advisor, Regional Counsel, and the Director of OEJTA, of the division enforcement program’s intention to

²⁷ The Enforcement Guidance and the Questions and Answers Guidance use the term “informal enforcement action” to describe enforcement actions where OECA concurrence is not required and the term “formal enforcement action” to describe enforcement actions where OECA concurrence is required. Examples of informal enforcement actions, include notice of noncompliance or notice of violation, show cause orders, administrative orders on consent that do not include penalties, and consent agreements filed simultaneously with a complaint and final order where no penalty is sought as provided in the Consolidated Rules of Practice, 40 C.F.R. Part 22. Questions and Answers at 11 Generally, OECA concurrence is not required for informal enforcement actions against tribal facilities. *But see id* (stating that OECA concurrence or consultation may be required for other reasons, such as the existence of issues identified in OECA delegations as nationally significant issues).

²⁸ For purposes of these guidelines, enforcement actions are any actions in which OECA concurrence is called for. *See* Enforcement Guidance at 8-10; *see also* Questions and Answers Guidance at 9.

elevate the issue to OECA in order to obtain Regional unanimity to proceed with a “formal enforcement action.” The writing should include the following information:

- 1 the name and location²⁹ of the tribal facility, and/or other entity against whom the action is proposed, including the tribe or any appropriate division of the tribe, such as the tribal utility department;
- 2 the nature of the alleged violation (including, as appropriate, (i) citation to the statutory or regulatory provision allegedly violated, the place, the time, and date of violation, the names of actors, and a description of the action giving rise to the violation, and (ii) a distinction between (A) any past violations that have been remedied but that Region 6 is proposing be included in the proposed action, and (B) presently continuing violations;
- 3 the type of civil enforcement action proposed;
- 4 a description of how the case meets the conditions generally necessary for a civil enforcement action including: (i) a summary of all relevant communications with the Tribe, (ii) a narrative describing the compliance assistance activities performed by Region 6 including a description corresponding the particular compliance assistance activities with the violation of those activities sought to be addressed, (iii) a narrative describing any violations previously remedied by the facility, and (iv) a detailed description of (A) the significant threat to human health or the environment, the factors creating the threat, and the way such factors create such threat, (B) how the civil enforcement action is expected to achieve effective results in a timely manner; and (C) the alternatives considered and utilized to correct the problem in a timely fashion and the basis for the determination that the Federal government cannot utilize other alternatives to correct the problem in a timely fashion; and
- 5 a description of any nationally significant issues present.³⁰

The division enforcement program should provide ORC and OEJTA with an opportunity to meet to discuss any questions or concerns regarding the proposal to proceed with a “formal enforcement action.”

C. Seeking and Obtaining OECA Concurrence on a Proposal for Formal Civil Enforcement Action

As soon as practical after the division enforcement program has notified ORC and OEJTA, of its proposal to proceed with a formal civil enforcement action, an ORC tribal law advisor will notify OECA that a civil enforcement action is being contemplated by Region 6 and will consult with OECA as necessary.

²⁹ As appropriate, the description of the location of the tribal facility should include a summary of pertinent information and evidence related to land status, i.e. whether the tribal facility is on lands designated as a reservation, tribal trust land, restricted or tribal fee land, or whether the tribal facility is on land known to be under state jurisdiction or where the land status is unknown.

³⁰ This is all the same information required in the concurrence package for OECA. *See* Enforcement Guidance at 11. The concurrence package for OECA includes the additional requirement of a copy of the proposed enforcement document and relevant supporting documents.

As soon as reasonably practicable after the division enforcement program has contacted OECA, generally within two weeks, the division enforcement program should submit the concurrence package to OECA. Guidelines for submitting the concurrence package are described in further detail in the Enforcement Guidance.³¹ The concurrence package to OECA should be routed to the ORC tribal law advisor and OEJTA for informational purposes.

D. Guidelines after OECA Concur

As soon as reasonably practicable after OECA concurs on Region 6's proposal to bring a "formal enforcement action" against a tribal facility, generally within two weeks, the Director for the division enforcement program, or his or her designee, should send a letter to the tribal government, routed to the ORC tribal law advisor and OEJTA for informational purposes, providing notice of the impending civil enforcement action. The tribal environmental director and the tribal facility should be sent a copy of the letter. The letter should advise the tribe that further communications regarding the violations at the tribal facility and the impending civil enforcement action should be directed to the ORC or, in civil enforcement matters involving the Department of Justice (DOJ), the DOJ, attorney. Communication with the affected tribe should continue throughout the enforcement process. In civil enforcement actions involving the DOJ, Region 6 should coordinate carefully with DOJ to define the scope and manner of communication with the tribe.

E. New Information

If significant new information is brought to Region 6's attention after Region 6 has sent the proposal for a formal civil enforcement action to OECA, the new information will be shared among the division enforcement program, ORC, and OEJTA. A meeting will be held if requested by any Office or Division. Region 6 will then decide whether the information: (i) warrants a change or withdrawal of the Regional request for concurrence; (ii) must be forwarded to OECA (and DOJ if the action has been referred); and/or (iii) need not be forwarded.

VI. EXIGENT CIRCUMSTANCES

EPA has statutory and regulatory authority to respond to emergency situations where there is an immediate threat to human health or the environment. In such exigent circumstances, Region 6 may need to proceed with an emergency civil enforcement action before it can communicate, meet, or engage in or complete consultation with the tribal government, develop a compliance plan, provide compliance assistance, or obtain OECA concurrence for a "formal enforcement action."

³¹ See Enforcement Guidance at 10-13.

If an exigent circumstance arises, Region 6 should, to the greatest extent practicable and as soon as reasonably practicable during or after the emergency, contact the tribal government and the tribal environmental director to alert them to the action(s) being taken and follow these guidelines. After the exigent circumstances that prompted an action are addressed, Region 6 should apply these guidelines to any subsequent civil enforcement response at the tribal facility. Region 6 should also contact OECA to alert them to action(s) being taken and provide appropriate documents.

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ATTACHMENT A

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

11/8/84

EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL
PROGRAMS ON INDIAN RESERVATIONS

INTRODUCTION

The President published a Federal Indian Policy on January 24, 1983, supporting the primary role of Tribal Governments in matters affecting American Indian reservations. That policy stressed two related themes: (1) that the Federal Government will pursue the principle of Indian "self-government" and (2) that it will work directly with Tribal Governments on a "government-to-government" basis.

The Environmental Protection Agency (EPA) has previously issued general statements of policy which recognize the importance of Tribal Governments in regulatory activities that impact reservation environments. It is the purpose of this statement to consolidate and expand on existing EPA Indian Policy statements in a manner consistent with the overall Federal position in support of Tribal "self-government" and "government-to-government" relations between Federal and Tribal Governments. This statement sets forth the principles that will guide the Agency in dealing with Tribal Governments and in responding to the problems of environmental management on American Indian reservations in order to protect human health and the environment. The Policy is intended to provide guidance for EPA program managers in the conduct of the Agency's congressionally mandated responsibilities. As such, it applies to EPA only and does not articulate policy for other Agencies in the conduct of their respective responsibilities.

It is important to emphasize that the implementation of regulatory programs which will realize these principles on Indian Reservations cannot be accomplished immediately. Effective implementation will take careful and conscientious work by EPA, the Tribes and many others. In many cases, it will require changes in applicable statutory authorities and regulations. It will be necessary to proceed in a carefully phased way, to learn from successes and failures, and to gain experience. Nonetheless, by beginning work on the priority problems that exist now and continuing in the direction established under these principles, over time we can significantly enhance environmental quality on reservation lands.

POLICY

In carrying out our responsibilities on Indian reservations, the fundamental objective of the Environmental Protection Agency is to protect human health and the environment. The keynote of this effort 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 affecting reservation lands. To meet this objective, the Agency will pursue the following principles:

1. THE AGENCY STANDS READY TO WORK DIRECTLY WITH INDIAN TRIBAL GOVERNMENTS ON A ONE-TO-ONE BASIS (THE "GOVERNMENT-TO-GOVERNMENT" RELATIONSHIP), RATHER THAN AS SUBDIVISIONS OF OTHER GOVERNMENTS.

EPA recognizes Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace. Accordingly, EPA will work directly with Tribal Governments as the independent authority for reservation affairs, and not as political subdivisions of States or other governmental units.

2. THE AGENCY WILL RECOGNIZE TRIBAL GOVERNMENTS AS THE PRIMARY PARTIES FOR SETTING STANDARDS, MAKING ENVIRONMENTAL POLICY DECISIONS AND MANAGING PROGRAMS FOR RESERVATIONS, CONSISTENT WITH AGENCY STANDARDS AND REGULATIONS.

In keeping with the principle of Indian self-government, the Agency will view Tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as EPA's deliberations and activities have traditionally involved the interests and/or participation of State Governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments.

3. THE AGENCY WILL TAKE AFFIRMATIVE STEPS TO ENCOURAGE AND ASSIST TRIBES IN ASSUMING REGULATORY AND PROGRAM MANAGEMENT RESPONSIBILITIES FOR RESERVATION LANDS.

The Agency will assist interested Tribal Governments in developing programs and in preparing to assume regulatory and program management responsibilities for reservation lands. Within the constraints of EPA's authority and resources, this aid will include providing grants and other assistance to Tribes similar to that we provide State Governments. The Agency will encourage Tribes to assume delegable responsibilities, (i.e. responsibilities which the Agency has traditionally delegated to State Governments for non-reservation lands) under terms similar to those governing delegations to States.

Until Tribal Governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations (unless the State has an express grant of jurisdiction from Congress sufficient to support delegation to the State Government). Where EPA retains such responsibility, the Agency will encourage the Tribe to participate in policy-making and to assume appropriate lesser or partial roles in the management of reservation programs.

4. THE AGENCY WILL TAKE APPROPRIATE STEPS TO REMOVE EXISTING LEGAL AND PROCEDURAL IMPEDIMENTS TO WORKING DIRECTLY AND EFFECTIVELY WITH TRIBAL GOVERNMENTS ON RESERVATION PROGRAMS.

A number of serious constraints and uncertainties in the language of our statutes and regulations have limited our ability to work directly and effectively with Tribal Governments on reservation problems. As impediments in our procedures, regulations or statutes are identified which limit our ability to work effectively with Tribes consistent with this Policy, we will seek to remove those impediments.

5. THE AGENCY, IN KEEPING WITH THE FEDERAL TRUST RESPONSIBILITY, WILL ASSURE THAT TRIBAL CONCERNS AND INTERESTS ARE CONSIDERED WHENEVER EPA'S ACTIONS AND/OR DECISIONS MAY AFFECT RESERVATION ENVIRONMENTS.

EPA recognizes that a trust responsibility derives from the historical relationship between the Federal Government and Indian Tribes as expressed in certain treaties and Federal Indian Law. In keeping with that trust responsibility, the Agency will endeavor to protect the environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations.

6. THE AGENCY WILL ENCOURAGE COOPERATION BETWEEN TRIBAL, STATE AND LOCAL GOVERNMENTS TO RESOLVE ENVIRONMENTAL PROBLEMS OF MUTUAL CONCERN.

Sound environmental planning and management require the cooperation and mutual consideration of neighboring governments, whether those governments be neighboring States, Tribes, or local units of government. Accordingly, EPA will encourage early communication and cooperation among Tribes, States and local governments. This is not intended to lend Federal support to any one party to the jeopardy of the interests of the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals and neighbors often serves the best interests of both.

7. THE AGENCY WILL WORK WITH OTHER FEDERAL AGENCIES WHICH HAVE RELATED RESPONSIBILITIES ON INDIAN RESERVATIONS TO ENLIST THEIR INTEREST AND SUPPORT IN COOPERATIVE EFFORTS TO HELP TRIBES ASSUME ENVIRONMENTAL PROGRAM RESPONSIBILITIES FOR RESERVATIONS.

EPA will seek and promote cooperation between Federal agencies to protect human health and the environment on reservations. We will work with other agencies to clearly identify and delineate the roles, responsibilities and relationships of our respective organizations and to assist Tribes in developing and managing environmental programs for reservation lands.

8. THE AGENCY WILL STRIVE TO ASSURE COMPLIANCE WITH ENVIRONMENTAL STATUTES AND REGULATIONS ON INDIAN RESERVATIONS.

In those cases where facilities owned or managed by Tribal Governments are not in compliance with Federal environmental statutes, EPA will work cooperatively with Tribal leadership to develop means to achieve compliance, providing technical support and consultation as necessary to enable Tribal facilities to comply. Because of the distinct status of Indian Tribes and the complex legal issues involved, direct EPA action through the judicial or administrative process will be considered where the Agency determines, in its judgment, that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion.

In those cases where reservation facilities are clearly owned or managed by private parties and there is no substantial Tribal interest or control involved, the Agency will endeavor to act in cooperation with the affected Tribal Government, but will otherwise respond to noncompliance by private parties on Indian reservations as the Agency would to noncompliance by the private sector elsewhere in the country. Where the Tribe has a substantial proprietary interest in, or control over, the privately owned or managed facility, EPA will respond as described in the first paragraph above.

9. THE AGENCY WILL INCORPORATE THESE INDIAN POLICY GOALS INTO ITS PLANNING AND MANAGEMENT ACTIVITIES, INCLUDING ITS BUDGET, OPERATING GUIDANCE, LEGISLATIVE INITIATIVES, MANAGEMENT ACCOUNTABILITY SYSTEM AND ONGOING POLICY AND REGULATION DEVELOPMENT PROCESSES.

It is a central purpose of this effort to ensure that the principles of this Policy are effectively institutionalized by incorporating them into the Agency's ongoing and long-term planning and management processes. Agency managers will include specific programmatic actions designed to resolve problems on Indian reservations in the Agency's existing fiscal year and long-term planning and management processes.



William D. Ruckelshaus

ATTACHMENT B

**“Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy”
(January 17, 2001)**



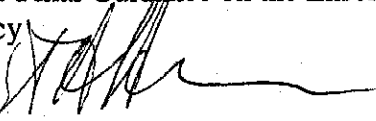
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 17 2001

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Transmittal of the Final Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy

FROM: Steve A. Herman 
Assistant Administrator

TO: Regional Administrators, Regions I - X

This memorandum transmits to you the Final Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy ("guidance"). In developing this guidance, OECA coordinated with, and incorporated the comments of, the American Indian Environmental Office (AIEO), the Office of General Counsel (OGC), the Regions and Tribes.

This document provides guidance on implementation of that portion of the Agency's November 8, 1984, "EPA Policy for the Administration of Environmental Programs on Indian Reservations" ("Indian Policy") that addresses facilities owned or managed by Tribal Governments. On March 14, 1994, Administrator Browner reaffirmed the Agency's commitment to the Indian Policy. The attached guidance regarding the Indian Policy is divided into two parts:

- I. Conditions generally necessary for enforcement actions, and
- II. Coordination within the Agency.

Section I interprets the specific enforcement provisions of the Indian Policy, and section II clarifies procedures for the concurrence, communication and coordination of case issues within the Agency. Key points of the Guidance include:

- 1) an enhanced discussion of what facilities are subject to the Guidance,
- 2) the development and implementation of a written compliance plan,
- 3) clarification on when OECA concurrence is called for,
- 4) step-wise procedures for obtaining OECA concurrence,
- 5) guidance on how to proceed in cases where OECA concurrence is not called for, and

6) examples of exigent circumstances affecting the applicability of the Indian Policy.

Consistent with the federal trust responsibility to federally-recognized Tribes and the obligation to consult with Tribal Governments on a government-to-government basis, I ask that you consult with representatives of Tribal Governments in your Region regarding the finalization of this guidance. This can be accomplished by working with the relevant Regional Tribal organization (e.g., RTOC) where available or through other means of Regional/Tribal communication.

OECA is in the process of drafting "Questions & Answers" to response to questions raised by EPA offices and Tribes' regarding the guidance. As such, if you, or the Tribes in your Region, have any questions or comments, please contact Carolyn Dick of my staff at (202) 564-4007. I appreciate your continued efforts to ensure human health and environmental protection in Indian country through your work on, and implementation of, this guidance.

ATTACHMENT: Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy

cc: Eric Schaeffer, Director, Office of Regulatory Enforcement
Connie Musgrove, Deputy Director, Office of Regulatory Enforcement
Betsy Devlin, Director, RCRA Enforcement Division
Caroline Ahearn, Branch Chief, RCRA Enforcement Division
Carolyn Dick, Attorney, RCRA Enforcement Division
Kathy Gorospe, Director, American Indian Environmental Office
Anthony Hanson, Attorney, American Indian Environmental Office
Gary Guzy, General Counsel
James Nelson, Associate General Counsel
Tod Siegal, Attorney, Office of General Counsel
Deputy Regional Administrators, Regions I-X
Tribal Contacts, Regions I-X
Regional Counsel, Regions I-X
Enforcement Coordinators, Regions I-X

GUIDANCE ON THE ENFORCEMENT PRINCIPLES OUTLINED IN THE 1984 INDIAN POLICY

On November 8, 1984, the U.S. Environmental Protection Agency (EPA) issued its "EPA Policy for the Administration of Environmental Programs on Indian Reservations" ("Indian Policy"). The Indian Policy establishes, among other things, a policy of graduated response when addressing instances of noncompliance by facilities owned or managed by Tribal Governments or by facilities in which a Tribal Government has a substantial proprietary interest (and in some instances, a substantial interest that is not proprietary) or over which a Tribal Government has control ("Tribal facilities"). In a memorandum dated March 14, 1994, Administrator Browner formally reaffirmed the Indian Policy.¹

In keeping with the United States' policy of operating within a government-to-government relationship² with federally recognized Indian Tribes³ and consistent with its trust responsibility to such Tribes, EPA remains committed to working with Tribal facilities to enhance human health and environmental protection. Additionally, EPA continues to express its resolve, as originally described in the Indian Policy, to use compliance and technical assistance to help Tribal facilities achieve compliance with environmental laws and regulations. Nonetheless, there may be situations when such assistance does not result in compliance. In those situations, consistent with the Indian Policy criteria and this guidance, EPA may consider taking civil judicial and administrative enforcement actions against Tribal facilities in order to protect human health and the environment.

EPA's Office of Enforcement and Compliance Assurance (OECA) has developed this guidance document to implement the enforcement principles outlined in the Indian Policy and to clarify EPA's internal coordination process in such matters. This guidance applies to actions that EPA may take in response to civil violations of EPA's regulatory programs but does not apply to criminal enforcement situations. This document supercedes the "Guidance on the Process for Review of Enforcement Actions Against Tribal Facilities," from Steven A. Herman, Assistant Administrator (OECA) to Deputy Regional Administrators *et al.* (Feb. 16, 1996). Unless the exigencies of the situation require otherwise, this guidance applies to actions that EPA may

¹ See also, Memorandum, "Indian Policy Implementation Guidance," from Alvin L. Alm, Deputy Administrator, to Assistant Administrators *et al.* (November 8, 1984).

² See, e.g., Memorandum, "Government-to-Government Relations with Native American Tribal Governments," from President Clinton to the Heads of Executive Departments and Agencies (April 29, 1994) (59 Fed. Reg. 22951 (May 4, 1994)); Executive Order (No. 13084) on Consultation and Coordination with Indian Tribal Governments (May 14, 1998) (63 Fed. Reg. 27655 (May 19, 1998)).

³ "Indian Tribe" means an Indian Tribe, band, nation, pueblo, community or Alaska Native Village that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479a. Maintained by the Department of the Interior, the list of federally recognized Tribes is updated periodically and published in the Federal Register.

consider taking under statutory "imminent and substantial endangerment" authorities⁴ and other civil remedial authorities. During exigent situations, the Agency should follow this guidance to the extent practicable and follow all other applicable procedures, and the Regions should ensure prompt communication with OECA and the appropriate Tribal Government regarding any actions for which prior communication and consultation was not possible.⁵

I. Conditions Generally Necessary For Enforcement Actions

The Indian Policy sets forth the following conditions for certain relevant enforcement actions:

In those cases where facilities owned or managed by Tribal Governments are not in compliance with Federal environmental statutes, EPA will work cooperatively with Tribal leadership to develop means to achieve compliance, providing technical support and consultation as necessary to enable Tribal facilities to comply. Because of the distinct status of Indian Tribes and the complex legal issues involved, direct EPA action through the judicial or administrative process will be considered where the Agency determines, in its judgment, that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion.

In those cases where reservation facilities are clearly owned or managed by private parties and there is no substantial Tribal interest or control involved, the Agency will endeavor to act in cooperation with the affected Tribal Government, but will otherwise respond to noncompliance by private parties on Indian reservations as the Agency would to noncompliance by the private sector elsewhere in the country. Where the Tribe has a substantial proprietary interest in, or control over, the privately owned or managed facility, EPA will respond as described in the first paragraph above.

⁴ Examples of these authorities are currently found at, 42 U.S.C. § 6973 (§ 7003) of the Resource Conservation and Recovery Act; 42 U.S.C. § 7661c (§ 504) of the Clean Water Act; 42 U.S.C. § 1431 (§ 300i) of the Safe Drinking Water Act; 42 U.S.C. § 9606 (§ 106(a)) of the Comprehensive Environmental Response, Compensation and Liability Act; and 42 U.S.C. §§ 7603 and 7412 (§§ 303 and 112(r)) of the Clean Air Act.

⁵ While exigent circumstances will vary from case to case, they are the types of circumstances requiring an immediate response to protect human health or the environment. For example, an immediate risk of drinking water contamination or ongoing releases of toxins which have an immediate risk of injury to neighboring persons may constitute exigent circumstances.

The following subsections address the key compliance and enforcement elements of the Indian Policy.

A. “... facilities owned or managed by Tribal Governments...” and facilities in which a Tribal Government has a “substantial proprietary interest” or over which a Tribal Government has “control”

1. Tribal facilities

For purposes of this guidance document, the term “Tribal facilities” means (1) facilities owned or managed by Tribal Governments, and (2) non-Tribally-owned or managed facilities in which a Tribal Government has a substantial proprietary interest or over which a Tribal Government has control. Consistent with the Indian Policy, Tribal facilities can also include facilities in which the Tribal interest is “substantial,” although not “proprietary.” Whether the interest a Tribe has in a facility is sufficiently “substantial” (although not proprietary) for the facility to qualify as a Tribal facility will be decided on a case-by-case basis. In making such a determination, the Region is encouraged to consult with the appropriate Headquarter’s contact(s). “Tribal facilities” can include facilities located within or outside Indian country.⁶

2. Non-Tribally owned or managed facilities

In cases of noncompliance by facilities located within Indian country but not owned or managed by a Tribal Government (and in which a Tribal Government does not have a substantial proprietary interest, substantial non-proprietary interest, and over which a Tribal Government does not have control), EPA will generally respond in the same manner as it would toward such facilities outside Indian country. EPA will notify the affected Tribal Government of any anticipated Agency action and consult with that Tribal Government on a government-to-

⁶ “Indian country” is defined under 18 U.S.C. § 1151 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 a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Under this definition, EPA treats as reservations trust lands validly set aside for the use of a Tribe, even if the trust lands have not formally been designated as a reservation. Further, Tribal facilities can be located within or outside Indian country. While the Indian Policy speaks to Agency responsibilities on Indian reservations, this guidance addresses facilities located within or outside Indian country, which is consistent with the policy of operating in a government-to-government relationship with Tribal Governments.

government basis to the greatest extent practicable and to the extent permitted by law.⁷

- B. “... EPA will work cooperatively with Tribal leadership to develop means to achieve compliance, providing technical support and consultation as necessary...”

When addressing issues of noncompliance at Tribal facilities, EPA will establish and maintain cooperative government-to-government relationships with Tribal Governments. Such relationships focus on consultation, compliance assistance, the sharing of information, and EPA's consideration of Tribal views regarding any Agency action that may affect Tribal interests or resources. The Agency's consultation with the Tribal Government should emphasize EPA's expectations for improvements in compliance at the facility and any expected enforcement response by EPA if the facility's compliance status does not improve according to EPA's stated expectations.

To ensure communication between the Agency and the Tribal Government is facilitated, the EPA regional Tribal program office, as well as other interested offices, should be notified of, and offered an opportunity to be included in, all discussions with the Tribe relating to compliance issues at or potential enforcement actions against Tribal facilities.

When EPA becomes aware that a Tribal facility is not in compliance with federal environmental laws, the Agency will notify the affected Tribal Government of the noncompliance and indicate the Agency's willingness to work cooperatively to resolve the matter (for example, by offering compliance assistance). In appropriate circumstances, and where the Tribal Government concurs, EPA may also contact and/or work directly with the facility manager.⁸ Emphasizing compliance assistance activities aimed at returning the facility to compliance will be EPA's first response to violations at Tribal facilities.

In consultation with the Tribe, the Region should develop and implement a short written plan for providing compliance assistance to the facility.⁹ The plan should specify the nature of

⁷ Notice and consultation are particularly important in cases of noncompliance at non-Tribal facilities that offer goods or services that are vital to a Tribe's economy or welfare (for example, at the sole gasoline station located on a particular reservation).

⁸ This guidance is not intended to, and should not, impede the information-gathering authority of EPA in order to determine compliance or the presence of potential harm to human health or the environment. However, consistent with the Indian Policy and the Presidential Memorandum dated April 29, 1994, EPA will inform the Tribal Government when it issues an information request and consult with the Tribe regarding plans to inspect a Tribal facility.

⁹ This does not include cases of non-compliance identified prior to the issuance of this guidance in circumstances where EPA has already provided substantial compliance assistance.

the assistance to be provided to the facility and the time frame for providing the various assistance activities, and establish EPA's expectations for improvements in compliance at the facility. To address situations in which EPA's initial efforts do not result in compliance, the plan should set forth the additional cooperative measures to be taken to assist the Tribal facility in resolving all violations. Such efforts could include additional offers of compliance assistance, including the development of informal compliance agreements that neither assess penalties nor constitute consent orders. The plan should also describe any expected enforcement response by EPA if the facility's compliance status does not improve according to EPA's stated expectations. Throughout implementation of the plan, the Region should consult with the affected Tribal Government about important developments regarding compliance at the facility.

Consistent with the government-to-government relationship, consultation with the affected Tribal Government will likely include both oral and written communications. When oral communication occurs with the affected Tribal Government or, where appropriate, the facility manager, these discussions should be memorialized in writing. Copies of correspondence and memorialized discussions with the facility manager should be sent to the affected Tribal Government.

C. When EPA will consider taking an enforcement action

EPA will consider taking an enforcement action when it determines that (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion. Each of these factors is discussed below. Although these factors establish threshold criteria for EPA's consideration of enforcement action against Tribal facilities, they are not intended to, and should not, result in a lesser degree of human health and environmental protection in Indian country than elsewhere in the U.S. Instead, consistent with the Indian Policy, EPA should ensure equivalent protections through increased focus on the cooperative measures, including compliance assistance activities, described in Section I.B. above.

If EPA is considering an enforcement action against a Tribal facility, the Agency will continue consultation with the Tribal Government concerning the need for the action and will consider the Tribe's views regarding the effects that such an action, and any resolution thereof, may have on the Tribe's interests, including the possibilities that the action could affect Tribal assets or result in the Tribe being named as a defendant.¹⁰

¹⁰ EPA's consideration of enforcement action should focus on the Tribal facility in the first instance, and any direct action against a Tribal Government should be considered only where the Agency determines such action is necessary to achieve compliance at the facility. Where EPA pursues an enforcement action against a Tribal facility, the Agency should look initially to the facility, and not to the Tribal Government, with respect to the calculation and/or assessment of any penalty or participation in

1. “... a significant threat to human health or the environment exists...”

EPA will consider taking enforcement action against a Tribal facility where EPA determines, among other things, that a significant threat to human health or the environment exists at the time the enforcement decision is being made because of the noncompliance. The existence of such a threat, which may be an actual or potential source of harm, as well as the factors creating the threat and the way such factors create the threat should be described in the appropriate enforcement documents submitted by the Region to Headquarters offices as part of the concurrence process discussed in Section II below. Threats to human health or the environment can include direct threats posed by the release of contaminants into the environment and the exposure of humans or the environment to pollutants, and also indirect threats to human health or the environment such as threats to the regulatory program and threats posed by circumstances such as the failure to monitor or to maintain proper records.

2. “... such action would reasonably be expected to achieve effective results in a timely manner...”

EPA will consider taking an enforcement action against a Tribal facility where EPA determines such action would reasonably be expected to achieve effective results in a timely manner. As a general matter, enforcement proceedings seeking injunctive relief are reasonably expected to achieve effective results in a timely manner if the relief requested is specific and appropriate to the violations and includes a time frame for attaining compliance. EPA should seek penalties for violations at Tribal facilities or include stipulated penalties in administrative orders or consent decrees related to Tribal facilities only when those penalties are necessary to secure effective, timely results and other efforts to achieve timely compliance have failed. In appropriate cases, EPA should be guided by program-specific penalty policies, as well as policies on small business, small communities, or other applicable policies, to determine the penalty for a violation and the weight to be given to such factors as an inability to pay, an economic benefit from noncompliance, the impact to Tribal financial resources, and compliance history. Additionally, EPA should consider supplemental environmental projects in arriving at a settlement. A description of how the enforcement action is expected to achieve effective results in a timely manner should be included in the appropriate enforcement documents submitted by the Region to Headquarters offices as part of the concurrence process discussed in Section II below.

any settlement. Any subsequent proposal to involve the Tribal Government directly in the action or settlement or to consider the Tribe's financial resources should be coordinated with appropriate offices through the Headquarters concurrence process discussed in Section II of this guidance.

3. "... the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion."

Before considering enforcement action, EPA should consider reasonable ways to assist a Tribal facility to come into compliance and should determine that other alternatives cannot be utilized by the Federal government to correct the problem in a timely fashion. Where appropriate, EPA should include other federal agencies in its compliance assistance efforts as early as is reasonable under the circumstances. EPA should involve federal agencies generally charged with American Indian affairs (such as the Bureau of Indian Affairs and the Indian Health Service) or other federal agencies with an interest in the particular matter (such as the Army Corps of Engineers regarding dredge-and-fill permits) whenever EPA reasonably expects such involvement to facilitate a Tribal facility's compliance and cooperation in an acceptable time frame.

Regions should include in the appropriate enforcement documents submitted to Headquarters as part of the concurrence process discussed in Section II below a description of the alternatives considered and utilized by the Federal government to correct the problem in a timely fashion and the basis for the determination that the Federal government cannot utilize other alternatives to correct the problem in a timely fashion.

4. Other factors EPA should consider

EPA retains the enforcement discretion not to proceed with an enforcement action in cases where the above three factors have been satisfied. The following factors should be considered to determine whether it is appropriate to delay enforcement and, instead, consider other alternatives appropriate to the particular circumstances of a case. The additional factors EPA should consider include: (1) the Tribal facility's good faith efforts to remedy noncompliance in a timely manner, including expenditure of resources; (2) resources and time expended by EPA on compliance assistance activities; (3) relevant history of noncompliance with EPA regulatory requirements, including any requirements stated in administrative or judicial orders previously issued to facilities owned or operated by the same Tribal Government; and (4) the degree of willfulness pertaining to the violation.

Additionally, as described in this guidance, in addressing alleged violations at Tribal facilities, EPA will consult with the affected Tribe and consider the Tribe's views regarding appropriate responses including the potential need for enforcement action. In certain cases, the Tribal Government may express the view that EPA should pursue prompt enforcement action against the facility as the most appropriate response, without undertaking the cooperative measures and compliance assistance otherwise contemplated by this guidance. Consistent with the federal trust responsibility to federally-recognized Tribes, the obligation to consult with the Tribal Government on a government-to-government basis, and the Indian Policy, EPA will consider this view and take it into account in developing its response. Where the Region determines that it is appropriate to pursue such prompt enforcement consistent with the Tribal

Government's views, the Region should include in the enforcement documents submitted to Headquarters offices as part of the concurrence process discussed in Section II below a written narrative description memorializing the substance of the consultation with the Tribe and, in particular, the Tribal Government's view that prompt enforcement would be an appropriate response. The Region should also obtain, and submit to Headquarters as part of the concurrence process, a written statement from the Tribal Government expressing that Government's view that prompt enforcement is appropriate as well as that Government's understanding of the nature of the enforcement action that the Region will propose including the a list of the violations that will be alleged, the potential penalty and injunctive relief that will be sought, and the fact that assets of the Tribal Government may be affected by the potential action. Where Headquarters concurs in the proposed action, and EPA pursues enforcement action against the Tribal facility, EPA will continue to consult with the Tribe regarding the action to the greatest extent practicable and permitted by law. In certain cases, the Tribal Government may change its view regarding the need for the prompt enforcement action and may express the view that the cooperative measures and compliance assistance previously omitted should be pursued in lieu of further enforcement. EPA will consider this view and take it into account in determining whether to continue with the enforcement response or pursue such cooperative measures.

II. Coordination Within EPA

The 1984 Indian Policy Implementation Guidance provides that when proposing to initiate direct EPA action through the judicial or administrative process against a Tribal facility, a Regional Administrator should first obtain concurrence from the Assistant Administrator for OECA, who will act in consultation with the American Indian Environmental Office (AIEO) and the General Counsel.¹¹ The following subsections describe types of actions for which OECA concurrence is, or is not, called for, and the procedures for obtaining such concurrence when it is

¹¹The Office of Regulatory Enforcement (ORE), or where appropriate and in coordination with ORE, the Office of Site Remediation Enforcement (OSRE) or the Federal Facilities Enforcement Office (FFEO), will consult on behalf of the Assistant Administrator for OECA with the Office of General Counsel and AIEO to coordinate legal, policy, and management issues of proposed actions against Tribal facilities.

Prior to making enforcement recommendations to the Assistant Administrator of OECA, ORE, OSRE, or FFEO will directly communicate and coordinate with the Office of Criminal Enforcement, Forensics, and Training (OCEFT) and OECA's Senior Indian Program Manager, and consult with the Office of Compliance (OC) and the Office of Environmental Justice (OEJ). ORE, or where appropriate and in coordination with ORE, OSRE or FFEO will then make appropriate recommendations and advise the Assistant Administrator regarding options for civil judicial or administrative actions.

Nothing in this Guidance is intended to infringe upon the delegated authority of OCEFT to determine which alleged environmental violations warrant investigation or referral to the U.S. Department of Justice.

called for.

A. Actions For Which OECA Concurrence Is Called For

Subject to the three exceptions described in Section II.B., below, the Regions should first obtain OECA concurrence before initiating any formal enforcement action against a Tribal facility, including, but not limited to, issuing an administrative enforcement complaint, order, or citation (including field citations), or referring any enforcement matter to the Department of Justice.

B. Actions For Which OECA Concurrence Is Not Called For

Unless the enforcement action involves a nationally significant issue or assesses a penalty, OECA concurrence is not called for with respect to the following actions when undertaken against Tribal facilities: (1) an informal enforcement action as defined below, (2) the issuance of an administrative consent order, and (3) the issuance of a consent agreement with final order or filing of an administrative complaint in one situation described below. Although OECA concurrence is not called for in these cases, the cooperative measures described in Section I.B. of this guidance continue to apply prior to pursuing these types of actions. However, Regions do not need to demonstrate that the three threshold criteria for bringing an enforcement action (described in Sections I.C.(1), (2), and (3)) have been met prior to pursuing these types of actions.

In cases where OECA concurrence is not called for, all communications relating to the relevant action with the affected Tribal Government, facility, or other parties external to EPA, should be made through the appropriate Regional Office and, in all cases where the Tribal Government is involved, should include representatives from the EPA regional Tribal program office.

Informal Enforcement Action. Informal enforcement actions for which OECA concurrence is not called for include letters or notices that contain only a recitation of the violation(s), a schedule for returning the facility to full compliance with all substantive and procedural requirements of applicable statutes, regulations, and permits, and an indication that failure to correct the violation(s) may result in a formal enforcement action. Examples of informal enforcement actions include notices of violation (NOVs), notices of warning and notices of noncompliance. However, if such letter or notice is a statutorily required step for formal enforcement action, or is otherwise an integral part of an enforcement action (such as the case with violations of an implementation plan under the Clean Air Act), OECA concurrence is called for.

Issuing Administrative Consent Order. OECA concurrence is not called for with respect to the issuance of an administrative consent order involving a Tribal facility. An administrative consent order may follow the filing of an administrative complaint (in which case the filing of

the complaint would have called for OECA concurrence under section II.A. above) or memorialize an agreement between EPA and a non-compliant Tribal facility resulting from informal communication, compliance assistance offered by EPA and consultation, including, where the Tribe is not a party, consultation with the Tribal Government to the greatest extent practicable and permitted by law. Any subsequent EPA action to enforce such an administrative consent order would call for OECA concurrence under Section II.A. as well as satisfaction of the procedures and criteria of Section I.

Issuing Consent Agreement with Final Order or Filing Administrative Complaint Simultaneously with Administrative Consent Order.¹² OECA concurrence is not called for with respect to an administrative complaint filed against a Tribal facility if that complaint is filed simultaneously with an administrative consent order. In order for this exception to apply, all parties must be aware that the order and an administrative complaint will be filed with the Regional Hearing Clerk, and the administrative consent order must result from informal communication and consultation between the parties including, where the Tribe is not a party, consultation with the Tribal Government to the greatest extent practicable and permitted by law. Any subsequent EPA action to enforce such an administrative consent order would call for OECA concurrence under Section II.A. as well as satisfaction of the procedures and criteria of Section I.

C. Procedures for Obtaining OECA Concurrence

Whenever the concurrence of the Assistant Administrator for OECA is called for with respect to an enforcement action against a Tribal facility, the following procedures should be followed:

- (1) Concurrence Package. The Office of Regional Counsel (or, as appropriate, the designated Regional enforcement office) should submit one paper copy to the Assistant Administrator for OECA, and electronic copies (unless unavailable, in which case hard copies should be sent) to the Director of the appropriate division at ORE, OSRE, or FFEQ, of the following:

¹² See 40 C.F.R. § 22.13 (Consolidated Rules of Practice; commencement of a proceeding), which revised the procedure to allow the filing of a single document in cases where the parties have agreed to settle the case prior to the filing of a complaint. This rule states, "(a) Any proceeding subject to these Consolidated Rules of Practice is commenced by filing with the Regional Hearing Clerk a complaint conforming to Sec. 22.14....(b) Notwithstanding paragraph (a) of this section, where the parties agree to settlement of one or more causes of action before the filing of a complaint, *a proceeding may be simultaneously commenced and concluded by the issuance of a consent agreement and final order pursuant to Sec. 22.18(b)(2) and (3) (quick resolution; settlement; alternative dispute resolution) (emphasis added).*

- (a) the name and location of the facility, person, and/or other entity against whom the action is proposed;
- (b) the nature of the alleged violation (including, as appropriate, (i) a citation to the statutory or regulatory provision allegedly violated, the place, time, and date of violation, the names of actors, and a description of the action giving rise to the violation, and (ii) a distinction between (A) any past violations that have been remedied but that the Region is proposing be included in the proposed action, and (B) presently continuing violations);
- (c) the type of enforcement action proposed;
- (d) a description of how the case meets the conditions generally necessary for enforcement action set forth in this guidance including (i) a summary of all relevant communications with the Tribe, (ii) a narrative describing the compliance assistance activities performed by the Region including a description corresponding the particular compliance assistance activities with the violation those activities sought to address, (iii) a narrative describing any violations previously remedied by the facility, and (iv) a detailed description of (A) the significant threat to human health or the environment, the factors creating the threat, and the way such factors create such threat, (B) how the enforcement action is expected to achieve effective results in a timely manner; and (C) the alternatives considered and utilized to correct the problem in a timely fashion and the basis for the determination that the Federal government cannot utilize other alternatives to correct the problem in a timely fashion;
- (e) a description of any nationally significant issues present; and
- (f) copies of the proposed enforcement document and relevant supporting documents.

- (2) Informing the Division Director. In addition to submitting the documents described above, the Regional Office should also contact (by telephone or e-mail) the Director of the appropriate division of ORE to inform that division of the potential action and that the Region has requested concurrence of the Assistant Administrator for OECA. Following such notification and where appropriate, ORE will coordinate with OSRE or FFEO.
- (3) Notice to and Consultation with the Tribal Government. The Regional Office should notify the Tribal Government of, and consult with the Tribe about, the potential enforcement action. The notification should include, as appropriate: (i) a list of the alleged violations; (ii) the potential penalty and injunctive relief to be sought; (iii) a reminder that assets of the Tribal Government may be affected by the potential action; (iv) a statement that OECA has been notified of the potential action; (v) a statement that the alleged violations have not been remedied in a timely fashion; (vi) a statement describing (A) how the alleged violations pose a significant threat to human health or the environment, (B) how the enforcement action is expected to achieve effective results in a timely manner; and (C) the alternatives considered and utilized to correct the problem in a timely fashion and the basis for the determination that the Federal government cannot utilize other alternatives to correct the problem in a timely fashion; and; (vii) a description of the compliance assistance already provided to the facility and any progress the facility has made toward achieving compliance.
- (4) OECA Response in 20 Days. Unless an expedited review is requested and granted, the Region should expect a response from OECA within twenty business days from the date of OECA's receipt of the copies of information described above.
- (5) Internal Communications. OECA review, discussion with the Region, and consultation with OGC and AIEO should proceed in a timely fashion. It is strongly encouraged that all internal EPA communications between Headquarters and the Region or other offices be coordinated with the designated ORE, OSRE or FFEO enforcement contact, and that such enforcement contact be notified of and given an opportunity to participate in, all discussions between Headquarters and the Region, or other EPA offices.
- (6) External Communications. In cases referred to Headquarters for concurrence, communications related to the case with the affected Tribal Government, facility, or other parties external to EPA

should be made through the appropriate Regional Office and, in cases where the Tribal Government is involved, should include representatives of the EPA regional Tribal program office. Additionally, the internal EPA contacts (Regional and Headquarters) should confer with each other prior to communicating with the Tribal Government, facility or other external parties. Lastly, it is strongly encouraged that the OECA enforcement contact be given an opportunity to participate in, communications with the affected Tribal Government, facility, or other parties external to EPA.

- (7) Written Concurrence Memorandum. OECA should provide a written concurrence memorandum, or its reasons for non-concurrence, in a timely fashion. The memorandum should state the names of the EPA offices that were consulted during the Headquarters review process and indicate the concurrence of ORE, OSRE, or FFEO, as well as that consultation with OCEFT and the OECA Senior Indian Program Manager has occurred. Prior to concurring with a proposed action, OECA should forward a draft of the concurrence memorandum to AIEO and OGC for their review and timely response indicating the fulfillment of their consultation role.

NOTICE: This document is intended to provide internal EPA guidance regarding civil judicial and administrative enforcement actions against Tribal facilities. This guidance is designed to implement President Clinton's 1994 directive to federal departments and agencies and EPA's Indian Policy for working with federally recognized Tribal Governments on a government-to-government basis. The document does not, however, substitute for requirements in federal statutes or regulations, nor is it a requirement itself. This guidance is not intended to create any right or trust responsibility enforceable in any cause of action by any party against the United States, its agencies, offices or any other person. Thus, it cannot impose legally binding requirements on EPA, and may not apply to a particular situation based upon the circumstances. EPA may change this guidance in the future, as needed, without public notice. Additionally, terms and interpretations used in this guidance are unique to and consistent with the federal trust responsibility to federally-recognized Tribes, the obligation to consult with Tribal Governments on a government-to-government basis, and the Indian Policy. These terms and interpretations do not apply to situations where Tribal Governments are not involved and, therefore, cannot impose legally binding requirements on EPA in such situations. EPA welcomes public comment on this document at any time and will consider those comments in any future revisions of this guidance document.

ATTACHMENT C

“Questions and Answers on the Tribal Enforcement Process”
(April 17, 2007)



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 17 2007

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Transmittal of the Questions and Answers on the Tribal Enforcement Process

FROM: Walker B. Smith, Director *WBS*
Office of Civil Enforcement

TO: Senior Enforcement Managers, Regions I - X
Regional Counsel, Regions II - VII, IX, X
Senior Legal Enforcement Managers Region I, VIII

This memorandum transmits the final “Questions and Answers on the Tribal Enforcement Process.” The Office of Enforcement and Compliance Assurance (OECA) worked with the American Indian Environmental Office, the Office of General Counsel, and the regional offices in developing this guidance. We also circulated the document to federally recognized Indian tribes and solicited their input.

This document provides assistance in implementing the “EPA Policy for the Administration of Environmental Programs on Indian Reservations” (November 8, 1984) (Indian Policy) and responds to questions raised by tribes and EPA regional offices since OECA issued the “Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy” (Enforcement Guidance) in January 2001. It covers case-specific issues surrounding compliance assistance, inspections, and enforcement. It also emphasizes points in the enforcement response process when it is particularly important to keep the affected tribe apprised of developments and to consult and coordinate with the tribal government. Key points that are expanded in this guidance include:

- what is considered a “tribal facility” for purposes of the Enforcement Guidance,
- the development and implementation of a written compliance plan,
- when enforcement action may be appropriate, and
- examples of exigent circumstances affecting the applicability of the processes set forth in the Enforcement Guidance.

We hope this document assists EPA’s regional offices in their efforts to ensure that the process of compliance assurance in Indian country, from inspection planning to formal

settlement, is as straightforward and transparent as possible. Our goal is to give Regions and tribes the tools they need to ensure protection of human health and the environment in Indian country to the same extent it is assured outside of Indian country. We reiterate our resolve to use compliance and technical assistance to help tribal facilities achieve compliance with environmental laws and regulations. However, where such compliance assistance does not achieve a timely return to compliance, we also want to ensure that the Regions carefully consider their enforcement options in a time frame that ensures that human health and the environment in Indian country are not compromised.

If you have any questions, please contact me or have your staff contact Mary Andrews of my staff at (202) 564-4011. I appreciate your continued efforts to ensure human health and environmental protection in Indian country through your work on, and implementation of, this document.

Attachment

cc: Enforcement Coordinators, Regions I-X
Pat Hirsch, Acting Principal Deputy General Counsel
Carol Ann Siciliano, Acting Associate General Counsel, Cross-Cutting Issues Law Office
Carol Jorgensen, Director, American Indian Environmental Office
Lisa Lund, Deputy Director, Office of Compliance
Randy Hill, Deputy Director, Office of Civil Enforcement
Rosemarie Kelley, Director, Waste and Chemical Enforcement Division
Tod Siegal, Office of General Counsel
Jonathan Binder, Office of Compliance

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Questions and Answers on the Tribal Enforcement Process

In 1984, the U.S. Environmental Protection Agency (EPA or Agency) issued the “EPA Policy for the Administration of Environmental Programs on Indian Reservations” (Nov. 8, 1984) (Indian Policy), which sets forth principles to guide the Agency in dealing with federally recognized tribal governments and in its actions to protect human health and the environment in Indian country.¹ The Indian Policy established a policy of graduated response to noncompliance for facilities owned or operated by tribes, in which a tribal government has a substantial interest, or over which a tribal government has control (tribal facilities). In 2001, the Office of Enforcement and Compliance Assurance (OECA) issued a “Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy” (January 17, 2001) (Enforcement Guidance), which sets forth procedures for EPA to follow when conducting compliance evaluations in Indian country.

The Enforcement Guidance established a process whereby EPA will consult with tribal governments and allow tribal facilities an opportunity to return to compliance with EPA assistance, and if this is insufficient, to allow EPA to proceed with enforcement action so as to protect human health and the environment. This document responds to questions about compliance assistance, compliance monitoring, and enforcement at facilities in Indian country that have been raised since the Enforcement Guidance was issued.

The questions and answers in this document apply only to violations of EPA’s civil regulatory programs. They do not apply to criminal conduct, criminal investigations, or enforcement pursuant to criminal provisions of laws or regulations that are enforced by EPA.

This document is intended solely as guidance for employees of EPA. It is not a regulation and does not impose any legally-binding requirements on EPA or the regulated community. It may not be relied upon to create a right or benefit. EPA retains the discretion to adopt approaches on a case-by-case basis that differ from this guidance.

I. Is the Facility a Tribal Facility?

If a facility is owned, managed, or operated by a tribal government, or a tribal government has a substantial interest in, or exercises control over, the facility, then the facility is a tribal facility and EPA should follow the process set forth in the Enforcement Guidance in proceeding with compliance assistance and enforcement. Tribal facilities can include facilities located within or outside Indian country.

¹ Indian country is defined in 18 U.S.C. § 1151 to include Indian reservations, dependent Indian communities, and Indian allotments.

1 **Q:** *Who is responsible for determining whether a facility is a tribal facility? How do I coordinate with the affected tribe in determining whether the facility is a tribal facility?*

A: The EPA regional offices are responsible for making this determination. However, unless the tribal interest is already known, EPA Regions should give the affected tribe an opportunity to provide information regarding its interest in the facility and to consult with EPA regarding the tribe's interest. In order to obtain the tribe's views, and to obtain any other information which may be useful in assessing the facility's status, the Region may send the tribal government a letter outlining the Enforcement Guidance and soliciting the tribe's views, summarizing any information the Region already has in this regard. Informal discussions with tribal government staff, such as the tribal environmental department, prior to or after sending the letter, may also be useful and may help to obtain a prompt response. In cases where it is obvious that a non-compliant facility is a tribal facility, discussion with the tribe on this issue would be unnecessary. For example, if the facility is a tribally-operated public water supply system, such discussions would be unnecessary. EPA's analysis of this information and its determination should be sent to the tribe and documented in the case file.

2. **Q:** *Is the facility owned, managed, or operated by a tribal government?*

A: A facility in which a tribe holds a substantial ownership, management, or operational interest is a tribal facility. For example, a facility operated by a tribally-owned utility service is a "tribal facility." A facility owned, managed, or operated by tribal members is not a tribal facility unless a tribal government has a substantial interest in, or exercises control over, the facility, as described further below.

3. **Q:** *Does a tribal government have a substantial proprietary interest in or control over the facility?*

A: The Region should consider the nature and extent of the tribal government's ownership interest, and the tribe's input concerning its interest, when determining whether the tribe has a "substantial proprietary interest" in the facility. Depending on the circumstances of a particular facility, a significant ownership interest, corporate relationship, or other factors may give the tribe control over operations such that it is a tribal facility. For example, a manufacturing facility or agricultural operation owned and operated by a tribal development corporation would typically be a "tribal facility."

4. **Q:** *Can a tribal government have a substantial interest in a facility that is not "proprietary"?*

A: The Enforcement Guidance recognizes that a tribal government may have a substantial interest in a facility that is not a proprietary interest. For example, if a facility provides a significant source of employment for the tribe, the Region may consider this interest before proceeding to address the noncompliance. The existence of a lease between a tribe and the operator of a facility does not, in itself, establish a substantial non-proprietary interest. However, the terms of a particular lease may give the tribe control over operations such that it is a tribal

facility. In addition, the income generated by the lease may in some cases give the tribe a significant financial interest in the facility such that it is appropriate for EPA to treat the facility as a tribal facility.

In these circumstances it may be appropriate to ask the tribe about the nature of its lease revenue to determine whether it constitutes a substantial interest within the meaning of the Enforcement Guidance. An inquiry into non-proprietary interests is intended to capture situations where a tribe has a sufficient interest in a facility that it is appropriate for EPA to work cooperatively with the tribal government to help the facility achieve compliance. However, since an enforcement action does not typically influence ongoing facility operations, lease payments and employment numbers are unlikely to be affected by an enforcement action against the facility. For example, in one instance, a tribe indicated that it had a substantial non-proprietary interest in an oil production facility operated by a private oil company due to the lease payments to the tribe and the number of tribal members employed at the facility. Based on this information, EPA determined that the facility should be treated as a tribal facility. However, the tribe asked EPA to proceed with enforcement action against the facility without applying its process for enforcement at tribal facilities.

5. **Q:** *How do I respond if the facility is not a “tribal facility”?*

A: Once EPA has determined that a facility is not a tribal facility, EPA generally responds to noncompliance in the same manner as with a facility outside Indian country. EPA should notify and consult with the affected tribal government on a government-to-government basis to the greatest extent practicable and to the extent permitted by law. However, EPA communications with the tribal government may be constrained by the need to preserve the confidentiality of enforcement sensitive or confidential business information.

II. What Do I Do When Planning Information Requests and Inspections of Facilities in Indian country?

6. **Q:** *Should OECA concurrence be obtained before issuing information requests?*

A: No, the OECA concurrence process does not apply to requests for information. However, the Region should inform the relevant tribal government when issuing information requests to tribal facilities, and where appropriate, may inform tribal governments of information requests issued to non-tribal facilities located in Indian country.

7. **Q:** *Should OECA concurrence be obtained before conducting inspections?*

A: No, OECA concurrence is not called for before conducting inspections. Consistent with the Indian Policy and the “Presidential Memorandum on Government to Government Relations with Native American Tribal Governments” (April 29, 1994), the Region should generally notify the tribal government in advance of visiting a facility in the tribe’s Indian country, and offer the tribe an opportunity to coordinate further with EPA regarding the inspection where practicable. If advance notice is not possible or if the visit involves an unannounced inspection, EPA should

contact the tribal government as soon as possible after the inspection.

8. **Q:** *Should I meet with the tribe before the inspection?*

A: Before an inspection the Region should contact the tribe to discuss the planned activities for your visit, including:

- facilities targeted for inspection during your visit;
- what you will do during your visit and what potential follow-up actions may be needed;
- tribal information and concerns regarding the facilities to be inspected; and
- verification of appropriate contacts for the tribe and EPA.

Where appropriate, the Region should also offer the tribe an opportunity to meet with EPA before the inspection. This is particularly important when the Region has not recently visited this tribe or has not established a routine working relationship with the affected tribe.

III. What Do I Do If I Identify Noncompliance?

EPA should inform the tribal government of the results of each inspection in a timely manner. If EPA identifies potential non-compliance at a tribal facility, EPA should follow the procedures in the Enforcement Guidance as clarified below.

9. **Q:** *What is the role of the state in which the facility is located when EPA is addressing noncompliance at a facility in Indian country?*

A: Under general principles of federal Indian law and policy, primary jurisdiction in Indian country generally rests with the federal government and the tribe inhabiting it, and not with the states. Accordingly, unless and until a tribal government is approved by EPA to implement a federal environmental program, EPA generally implements the program in Indian country. State contact may be appropriate under certain exceptions to this general rule. For example, on the Puyallup Reservation, an act of Congress allows the State of Washington to be the lead agency for administration of certain programs on non-trust land within the historic boundaries of the reservation.

At the same time, EPA's Indian Policy encourages cooperation between tribal, state, and local governments to resolve environmental problems of mutual concern. Therefore, it may be appropriate for EPA, after consulting with the affected tribe, to notify the state in which a facility is located when a facility's noncompliance may be of mutual concern to the state and tribe. In consultation with the affected tribe, EPA may also in appropriate circumstances coordinate with the state and the tribe in ensuring that adequate compliance assistance is provided. Where a state asserts jurisdiction in Indian country, EPA's regional staff should notify the Office of Regional Counsel and the Office of General Counsel, as appropriate, of the situation, consult with the relevant tribe, and confer with the state.

IV. Has EPA Developed a Written Compliance Plan?

10. **Q:** *What is the purpose of the written compliance plan?*

A: The written compliance plan is used to communicate to the facility and the tribal government identified noncompliance at tribal facilities and the steps necessary to return the facility to compliance. Putting the plan in writing helps to ensure that the tribe understands its responsibilities and the opportunities for assistance EPA will make available to the tribe as it works to achieve compliance. The compliance plan also gives the facility and the tribe clear notice of EPA's expectations with respect to progress toward compliance and EPA's timeline for initiating an enforcement action if compliance is not achieved. As such, the compliance plan emphasizes EPA's compliance and enforcement expectations and should help the facility achieve compliance consistent with the Indian Policy and the Enforcement Guidance.

1 **Q:** *When should the Region develop a compliance plan?*

A: Regions should develop a compliance plan as soon as is practicable after non-compliance is identified. The Region should develop and implement the compliance plan in consultation with the affected tribe. In that way, the compliance plan can simultaneously serve as notice to the tribe of the compliance and enforcement issues and an indication of EPA's willingness to work cooperatively to resolve the matter. Therefore, the Region should send a draft compliance plan to the tribal government and the affected facility for review. The Region should provide the tribe with a specific deadline by which to submit comments. If the tribe does not submit comments or otherwise respond to the compliance plan, the Region should notify the tribe that the plan will be implemented as drafted.

12. **Q:** *Should Regions develop compliance plans in all cases of noncompliance involving tribal facilities?*

A. While a compliance plan is generally warranted whenever there is a reasonable expectation of cooperation from the tribe or facility, there are circumstances in which development of a compliance plan would not be effective. For example, a compliance plan may not be appropriate when EPA has consulted with the tribal government and there is a documented history of disinterest in or resistance to EPA's efforts to provide compliance assistance. In addition, a compliance plan may not be appropriate if the Region has previously provided compliance or technical assistance to the facility and EPA believes that additional assistance will not result in a return to compliance (for example, at a drinking water system with the proven ability to perform monitoring and reporting requirements yet repeatedly fails to actually monitor and report, despite EPA assistance). Finally, a compliance plan might not be immediately feasible when exigent circumstances exist and an immediate enforcement action is necessary to address the hazard (see questions 30 - 31, below). If the Region decides not to develop a compliance plan to address a particular tribal facility, they should inform the tribe in writing of that decision and the reasons why a compliance plan may not be an appropriate means to address that noncompliance.

13. **Q:** *What should the compliance plan cover?*

A: Compliance plans vary in length and detail based on the specifics of the situation and nature of the noncompliance. At a minimum, the compliance plan should include the following:

- a description of the noncompliance that EPA identified;
- the nature of the assistance to be provided to the facility and the timeline for providing the assistance;
- the specific steps the facility will take to come into compliance based on the types of activities needed and the milestones associated with the activities; and
- the enforcement response anticipated if the facility's compliance does not improve according to the milestones stated in the plan.

The compliance plan could provide that the Region will discuss with the tribal government whether to pursue prompt enforcement action against the tribal facility if key milestones are missed.

14. **Q:** *Can the compliance plan include assistance provided by another agency?*

A: Yes, where appropriate, EPA should include other federal agencies in its compliance efforts as early as is reasonable under the circumstances. Federal agencies such as the Bureau of Indian Affairs, the Indian Health Service, and the Rural Utility Service have significant resources to assist tribes in protecting human health and the environment. Where another federal agency has provided technical assistance to a tribal facility and has documented the assistance given, EPA may take into account such assistance in drafting and implementing its compliance plan, providing additional compliance assistance as appropriate. In consultation with the tribe, EPA and a tribe may occasionally want to take advantage of compliance assistance resources of state agencies. EPA should document in the case file its contacts with other agencies. The Regional Indian Coordinator can assist with such interagency coordination.

15. **Q:** *What should Regions do if milestones contained in the compliance plan are missed?*

A: The milestones contained in a compliance plan should outline the specific steps the facility will take to come into compliance based on the types of activities needed. Regions should notify the tribe when milestones are missed; if oral notification occurs, the discussion should be memorialized in writing. In addition, Regions should review the missed milestone(s) and decide whether or not it is appropriate to revise the compliance plan and associated milestone(s) or proceed with the outlined enforcement action. Missed milestones are an important indicator of whether or not the facility is able to return to compliance in a timely manner.

16. **Q:** *How do I provide compliance assistance for a violation that is not continuing in nature?*

A: For some types of violations, technical assistance can help a facility achieve and maintain compliance. For example, EPA and other entities may provide hands-on assistance in the operation of a public water supply system over a period of months or even years. For other types

of violations, however, such as dredging and filling wetlands without the necessary permit, EPA may not be able to provide compliance assistance after the fact. In such cases, the Region may be able to provide information on avoiding a repeat violation and may provide technical assistance in planning and carrying out mitigation measures. For example, in the dredging and filling context, EPA generally would provide technical assistance to the tribal facility regarding the development and implementation of a restoration plan or mitigation plan, such as providing information concerning the proper qualifications for the consultants for restoration and/or mitigation work and a timeline for the necessary tasks. This would assist the tribal facility in retaining a consultant and developing appropriate plans for EPA review and approval.

V. What Is an “Enforcement Action” and When Is it Appropriate?

Consistent with the Indian Policy, the Enforcement Guidance, and the protection of human health and the environment, enforcement in Indian country may be an appropriate response to noncompliance.

7. **Q:** *Does the guidance apply in cases where EPA has authorized a tribe to administer the federal program under which the violations occurred?*

A: The Enforcement Guidance does not apply to enforcement actions taken by tribes under tribal codes, including any tribal action under an EPA-authorized program. However, the Enforcement Guidance does apply to all of EPA’s civil enforcement actions in Indian country. Even if the tribe has an approved program in place, EPA maintains jurisdiction and authority to initiate an independent enforcement action to address violations of the requirements of an approved program. Similarly, if the tribe is authorized for a portion of an EPA program but has left the enforcement authority to EPA, the Enforcement Guidance applies to any EPA enforcement.

18. **Q:** *Are actions regarding grants to tribes, such as a cost recovery action under the grant regulations in cases where the tribe did not perform the required grant activities, enforcement actions calling for application of the guidance?*

A: No, the Enforcement Guidance does not apply to either the grant process or any actions taken under the grant regulations.

19. **Q:** *When is enforcement action appropriate against a tribal facility?*

A: Under the Indian Policy, EPA may consider taking an enforcement action against a tribal facility when it determines that (1) a significant threat to human health or the environment exists, (2) the action would reasonably be expected to achieve effective results in a timely manner, and (3) the federal government cannot use other alternatives to correct the problem in a timely fashion.

20. **Q:** *When does EPA demonstrate that it meets the threshold criteria for taking an enforcement action against a tribal facility?*

A: EPA should determine that the threshold criteria have been met before bringing a formal enforcement action against a tribal facility, unless the exigency of the situation requires otherwise. Regions do not need to determine that the three threshold criteria for bringing an enforcement action have been met prior to pursuing informal enforcement actions, such as Notices of Violation or Notices of Noncompliance, which merely request prompt return to compliance.

21. **Q:** *Can a tribe request enforcement action against a tribal facility without full application of the Enforcement Guidance?*

A: Yes, the Enforcement Guidance states that a tribal government “may express the view that EPA should pursue prompt enforcement action against [a tribal] facility as the most appropriate response, without undertaking the cooperative measures and compliance assistance otherwise contemplated by [the] guidance.” In consultation with the tribal government, the Region may determine that it is appropriate to pursue such prompt enforcement. In that case, “the Region should also obtain, and submit to Headquarters as part of the concurrence process, a written statement from the tribal government expressing [the tribal government’s] view that prompt enforcement is appropriate” and conveying the tribal government’s understanding of the nature of the proposed enforcement action, including “the violations that will be alleged, [and] the potential penalty and injunctive relief that will be sought.” The Assistant Administrator for OECA will review and, if appropriate, concur on such requests.

22. **Q:** *What is a “significant threat” to human health or the environment?*

A: A significant threat to human health or the environment can include the direct threat posed by the release or potential release of contaminants into the environment and the exposure of humans or the environment to pollutants, as well as an indirect threat to human health or the environment, such as the threat to the regulatory program and the threat posed by failure to monitor or to maintain proper records. The existence of a significant threat is determined on a case-by-case basis.

23. **Q:** *How does EPA assess whether the federal government may use other alternatives to enforcement against a tribal facility to correct the problem in a timely fashion?*

A: The Enforcement Guidance suggests three factors for EPA to weigh in determining whether it is appropriate to delay enforcement and, instead, consider other alternatives appropriate to the particular circumstances of a case. EPA should consider: (1) the facility’s good faith efforts to remedy noncompliance in a timely manner, including the resources expended; (2) any relevant history of noncompliance with EPA regulatory requirements, including any requirements stated in administrative or judicial orders previously issued to facilities owned, managed, operated, or controlled by the same tribe; and (3) the degree of willfulness.

VI. What is the Process for Obtaining OECA Concurrence for Enforcement Against Tribal Facilities?

24. **Q:** *When should OECA concurrence be obtained for enforcement against a tribal facility?*

A: OECA concurrence should be obtained when:

- EPA is considering a formal enforcement action against a tribal facility, unless exigent circumstances exist;
- an administrative order on consent or other settlement includes penalties;
- an administrative order is issued unilaterally by EPA; and
- an enforcement action or settlement involves issues that OECA has identified as nationally significant.

As set forth in the Enforcement Guidance, OECA will consult with the American Indian Environmental Office and the Office of General Counsel in reviewing regional requests for concurrence. When EPA pursues enforcement action against a tribal facility, it should continue to consult with the tribal government about compliance status as appropriate.

25. **Q:** *When is OECA concurrence NOT needed for enforcement against a tribal facility?*

A: Regions need not obtain OECA concurrence for informal enforcement actions. Informal enforcement actions include actions such as a Notice of Noncompliance or Notice of Violation and show cause orders.

In addition, Regions do not need to obtain OECA concurrence before issuing administrative orders on consent that do not include penalties, or before entering consent agreements filed simultaneously with a complaint and final order where no penalty is sought, as provided in the Consolidated Rules of Practice, 40 C.F.R. Part 22. However, there may be other reasons for OECA concurrence or consultation on these types of actions, such as the existence of issues identified in OECA delegations as nationally significant issues. If regional staff have questions about whether their anticipated enforcement response calls for OECA concurrence, they should contact the tribal coordinator for OECA's Office of Civil Enforcement.

26. **Q:** *Is a field citation or another expedited enforcement response an "enforcement action" calling for OECA concurrence when issued to a tribal facility?*

A: Yes, the Enforcement Guidance calls for OECA concurrence before EPA issues to a tribal facility a field citation or other expedited enforcement response that seeks to collect a penalty.

27. **Q:** *Should OECA concurrence be obtained if the enforcement action does not seek penalties but does include stipulated penalties for future violations at the tribal facility?*

A: No, OECA concurrence need not be obtained for a consent order that includes provisions for stipulated penalties if the order does not seek a civil penalty. However, when stipulated penalties are triggered by failure to comply with the terms of an administrative order on consent, Regions should consult with OECA prior to assessing any penalties.

28. **Q:** *Is OECA concurrence called for with regard to amending an administrative order issued to a tribal facility?*

A: If the amendment to the administrative order is on consent, Regions need not obtain OECA concurrence. If the amendment is issued unilaterally, Regions should obtain OECA concurrence if the amendment significantly changes the nature or scope of requirements in the order.

29. **Q:** *When should the Regions begin discussions with OECA concerning noncompliance at a facility in Indian country?*

A: When addressing issues of noncompliance at tribal facilities, the Region should contact the tribal coordinator for OECA's Office of Civil Enforcement as soon as the Region discerns that compliance assistance alone may not achieve compliance. Regional enforcement personnel should consult with the regional tribal office and the affected tribe upon identification of non-compliance by a tribal facility. Where appropriate, OECA can assist the Region in developing the appropriate measures to resolve the violations, including both compliance assistance and enforcement. Advance notice to OECA will help to ensure that if the Region decides to proceed with an enforcement action, the concurrence process can be completed as expeditiously as possible. Under the guidance, OECA should issue a response within 20 business days of receipt of the concurrence package.

Regions should obtain OECA concurrence before initiating formal civil enforcement action against a tribal facility. However, in exigent circumstances, the Regions may need to act immediately to protect public health or the environment. In exigent situations, the Regions should follow the Enforcement Guidance to the extent practicable and should communicate promptly with the tribal coordinator for OECA's Office of Civil Enforcement and the appropriate tribal government regarding any actions for which prior communication and consultation was not possible. "Exigent circumstances" is discussed further in questions 30 and 31, below.

30. **Q:** *Can EPA conduct emergency actions at tribal facilities?*

A: Yes, EPA has statutory and regulatory authorities to respond to emergency situations where there is an immediate threat to human health or the environment. In exigent circumstances, the Region may need to proceed with emergency enforcement action before it can complete consultation with the tribal government, provide compliance assistance, or obtain OECA concurrence.

For instance, an exigent circumstance may exist where contamination is detected in a public water supply and the water is likely to be ingested. In these circumstances, it may be necessary to immediately issue an order requiring public notices of the contamination, boil orders, and/or bottled water, or it may be necessary to require that the system be shut down. These types of enforcement measures would address the exigent circumstance by preventing ingestion of contaminated water.

Even when addressing exigent circumstances, EPA should contact the tribal government to, at a minimum, alert them to the actions being taken. Formal consultation with the tribe should occur as soon as possible. Agency personnel should follow this guidance and all other applicable procedures to the extent practicable. Enforcement staff should also ensure prompt communication with OECA's tribal coordinator and the affected tribal government regarding any actions for which prior consultation was not possible. For example, where an order is issued within one or two weeks of detecting the threat, the Region will likely only be able to provide notice of the proposed action and a draft copy of the order before it is issued. Where an order is issued within a few days of detecting the threat, the Region should provide copies of the order and supporting documentation as soon as possible.

After the circumstances that prompted the action are addressed, the criteria and procedures of the Enforcement Guidance apply to any subsequent enforcement response at the tribal facility.

31 **Q:** *What is the difference between "imminent and substantial endangerment" and "exigent circumstances," as used in the Enforcement Guidance?*

A: "Imminent and substantial endangerment" is the threshold set forth in various statutory provisions authorizing EPA to respond to imminent risk of harm. These statutory authorities include RCRA section 7003, SDWA section 1431, and CAA sections 303 and 112(r)(9). These statutory provisions generally authorize EPA to issue administrative orders or proceed in court to require actions to protect human health and the environment. For example, pollutants or contaminants released into a wetland that have not yet harmed aquatic life may present an imminent and substantial endangerment. Similarly, hazardous constituents in an aquifer that may be used as a future source of drinking water may present an imminent and substantial endangerment.

"Exigent circumstances" is used to describe situations requiring an immediate response to protect human health or the environment. For example, exigent circumstances may exist when EPA has detected contamination in a public water supply and the water is likely to be ingested. In exigent circumstances, the emergency nature of the situation may preclude the full application of the guidance before steps are taken to abate the harm. On the other hand, some situations that EPA can address using its imminent and substantial endangerment authorities do not rise to the level of exigent circumstances; for example, groundwater contamination that is slowly moving toward a drinking water source or an open dump that may present a threat of groundwater contamination, combustion, or spread of disease. In those situations, the Region will likely be able to follow the OECA concurrence process before proceeding with an enforcement action.

32. **Q:** *Is the immediate expiration of the statute of limitations an exigent circumstance that warrants immediate action without full application of the Enforcement Guidance?*

A: Yes, the *immediate* expiration of the statute of limitations may warrant action without full application of the Enforcement Guidance. Ideally, Agency personnel will proceed in such a manner that the expiration of the statute of limitations will not be an issue and the process set forth in the Enforcement Guidance can be fully implemented. However, there may be circumstances where the statute of limitations will expire imminently and EPA believes that it can only assure protection of human health or the environment by preserving its legal claims. In any event, the Enforcement Guidance and all other applicable procedures should be followed to the extent practicable. The Regions should ensure prompt communication with OECA's tribal coordinator and the affected tribal government regarding any actions for which prior consultation was not possible.

If imminent expiration of the statute of limitations results in filing an action against a tribal facility before all of the steps identified in the Enforcement Guidance are carried out, EPA should proceed with compliance assistance and full application of the Enforcement Guidance to the extent feasible given the progress of the litigation.

33. **Q:** *Who determines whether exigent circumstances exist?*

A: Typically, the Region makes the determination based on its judgment that exigent circumstances require immediate action and notifies the tribal coordinator in OECA's Office of Civil Enforcement and the tribal government as soon as possible. Where there is time to confer with OECA (rather than just notify) prior to making the determination that an exigent circumstance exists, the Region should do so.

34. **Q:** *What happens after OECA concurs?*

A: Once EPA has determined that it is appropriate to initiate an enforcement action at a tribal facility, the Region should notify the affected tribe of the impending enforcement action. This notification should include the specific action to be taken, including the amount of any penalty and the nature of injunctive relief sought. EPA should proceed with the enforcement action to ensure that the violations are addressed in a timely manner. Consultation with the tribe should continue throughout the enforcement process to the extent it is appropriate and consistent with the tribe's role at the facility. In enforcement matters involving the Department of Justice (DOJ), EPA should coordinate carefully with DOJ to define the scope and manner of communication and consultation with the tribe.

35. **Q:** *What should EPA document in the file when proceeding with an action under the Enforcement Guidance?*

A: Typically, every decision and communication should be documented in the case file. Oral communication with the affected tribal government or facility manager should be memorialized

in writing so EPA has a clear timeline of all steps taken to return the facility to compliance. Correspondence with the facility manager concerning noncompliance should be copied to the affected tribal government.

VII. Other Questions Concerning Tribal Facilities

36. **Q:** *Does the Enforcement Guidance apply to federal facilities?*

A: The Enforcement Guidance only applies if a federal facility also qualifies as a tribal facility. Where a federal facility is not a tribal facility, EPA will address noncompliance at federal facilities in Indian country in the same manner as with federal facilities not located in Indian country. Where a federal facility is also a tribal facility, such as a school established by the Bureau of Indian Affairs but managed or operated by a tribe, the Enforcement Guidance applies, including consultation with the affected tribe regarding appropriate responses to violations at the facility. Regions may also consult EPA guidance for addressing federal facility noncompliance, including "The Yellow Book: Guide to Environmental Enforcement and Compliance at Federal Facilities," February 1999.

[Http://www.epa.gov/compliance/resources/publications/civil/federal/yellowbk.pdf](http://www.epa.gov/compliance/resources/publications/civil/federal/yellowbk.pdf).

37. **Q:** *With whom should EPA consult when working with a tribe?*

A: In consultations concerning tribal interest in a facility and non-compliance at tribal facilities, EPA should consult with the head of the affected tribal government, such as the tribal chair, or the duly-designated representatives, in a timely manner. If the tribe has delegated the authority to work with EPA on environmental compliance to a tribal agency, committee, or individual, then EPA should document that delegation in the case file and consult with that agency or official as the primary tribal official. Designation of the contact for both EPA and the tribe should occur as early as possible in the process so as to avoid confusion.

38. **Q:** *When consulting with a tribe pursuant to the Enforcement Guidance, how does EPA address concerns about the release of confidential information [i.e., confidential business information, enforcement confidential information, or communications otherwise not releasable under the Freedom of Information Act (FOIA)]?*

A: EPA should protect confidential information during tribal consultation, whether internal Agency communications or communications with a private party involved in the enforcement action. Accordingly, EPA should consult with tribes to the greatest extent practicable without divulging privileged or confidential information. In certain cases, for example, enforcement actions brought jointly by EPA and the tribe, EPA has entered into special arrangements to share information. If such an arrangement is needed, staff should consult their regional attorneys. In addition, tribal inspectors who are authorized to conduct Clean Air Act inspections on behalf of EPA do have access to confidential business information obtained from the facility being inspected. However, internal Agency communications and documents in an enforcement action would still be withheld as enforcement confidential.

ATTACHMENT D

“Reaffirmation of Region 6’s Relationship with Tribal Governments”
(June 11, 2008)

June 11, 2008

MEMORANDUM

SUBJECT: Reaffirmation of Region 6's Relationship with Tribal Governments.

FROM: Regional Administrator

TO: All Region 6 Employees

The United States has a unique, legal relationship with Tribal governments. This relationship is governed by treaties, statutes, Executive Orders and court decisions. EPA has its own tribal policy that addresses and defines our relationship with our Tribal partners in protecting human health and the environment. This partnership has been built on mutual respect and the recognition of tribes as sovereigns.

The purpose of the memorandum is to reaffirm our regional commitment to a strong partnership with Tribal governments. As with any partner, we must continue to ensure the close involvement and consultation with Tribal governments in making decisions that affect their land or have tribal implications. In addition, and in the spirit of mutual respect, we will follow the tribes' communication and visitation protocols. There are 65 Tribes in our Region, and each may have a different protocol. We suggest that you contact the Office of Environmental Justice and Tribal Affairs (OEJTA) prior to making your initial visit to a tribal nation. We also invite you to take "Working Effectively with Tribal Governments" training which you can access online at www.epa/dwoe/soel.

Every EPA employee should reinforce our Agency's commitment to the government-to-government relationship between Federal and Tribal governments. We should also continue to recognize Tribal governments as sovereign entities with authority and responsibility for their populations and land. Please help us ensure that our daily interactions with Tribal partners reflect this commitment.

Region 6 Elevation Process for EPA and Tribal Governments

Pursuant to the federal trust responsibility and EPA's Indian Policy, Region 6 is committed to building cooperative partnerships with Tribes. As with any relationship, misunderstandings and disagreements may arise from time to time. EPA will seek to resolve issues in a timely manner with our tribal partners on a government-to-government basis. The following process is designed to effectively elevate issues through EPA and Tribal organizations in an effort to arrive at mutually agreeable solutions.

Elevation of an issue will typically follow this process:

1. An issue is raised by a tribal Environmental Staff or Director to the appropriate EPA Project Officer or program staff. If it cannot be resolved at this level within 15 days, then
2. The issue will be put in writing by the involved parties. EPA staff will elevate the issue to their supervisor(s) and management to seek a solution with Tribe's Environmental Director. If it cannot be resolved within 30 days, then
3. The issue will be formally elevated through EPA Senior Staff and senior tribal management, with final elevation to the Regional Administrator and the appropriate Tribal leader. Resolution should be accomplished within 30 days.

Notes: (a) This elevation process is not applicable in cases of formal enforcement actions in which the tribe is a defendant.

(b) If an EPA program has an issue with a tribe that needs resolution, program staff should contact the Ombudsman for assistance in negotiating with tribal staff. If it remains unresolved after 30 days, the Division Director should work with the OEJTA Director to communicate directly with tribal leaders. Negotiations with tribes should incorporate respect for cultural protocols. These can be determined with the assistance of the Ombudsman, Associate Director for Tribal Affairs, and OEJTA Director.

ATTACHMENT E

“Tribal Consultation Policy Statement”

REGION 6 TRIBAL CONSULTATION POLICY STATEMENT

Tribal consultation is the process of seeking, discussing, and considering the views of federally recognized tribal governments at the earliest time possible in EPA Region 6's decision-making process to the fullest extent feasible and permitted by law. Tribal consultation is more than providing information about what the agency is planning to do and allowing comment. Rather, it is respectful, timely and effective interactive communication that results in the open sharing of information, the full expression of Tribal and EPA views and the consideration of tribal perspectives in a decision making process that demonstrates respect for tribal self-governance and sovereignty. The goal of each tribal consultation shall be to reach mutually agreeable solutions.

Therefore, it shall be the policy of EPA Region 6 to provide a mechanism for consultation that affords tribal leadership access to the Agency's regional leadership. This is accomplished first through government-to-government communications by officials of appropriate authority, as determined by the Regional Administrator and the Tribal Chief/Chairman. The timeframe and manner of these communications should be negotiated between EPA and the Tribe(s), consistent with any national regulations and guidance. (Separate procedures would need to apply in cases of formal enforcement actions in which the tribe is a defendant.) In the case of disagreements, EPA and Tribal employees should follow the attached elevation protocol, which will ensure that issues are brought to senior officials for decision in a timely manner. Nothing in the elevation protocol would preclude direct communication by a Tribal Chief/Chairman with the Regional Administrator. In addition, where the Region is developing a significant new policy or decision affecting Tribes, or where the Tribal Chief/Chairman believes the issue so merits, EPA and the Tribe will engage in more formal consultation, involving direct face-to-face meetings at a senior level.

Understanding that each tribe is unique, tribal governments are not prevented from developing their own EPA/Tribal Consultation Policy, Protocol or Guidance and submit it for EPA review and concurrence.