

Working with Tribes during Superfund Responses

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Topics

- EPA Consultation Policy
- New Tribal Treaties Guidance
- Funding Opportunities at Superfund Sites
- Sources for More Information
- Questions/Discussion



Consultation Policy

- 1984 - EPA Indian Policy
- 2000 - Executive Order 13175
- 2011 - EPA Consultation Policy
- 2014 – Admin. McCarthy memo regarding EPA’s Indian Policy
- 2016 - Guidance for Discussing Tribal Treaty Rights ****NEW****



EPA Consultation Policy (2011)

- Consult on a government-to-government basis with federally recognized tribes when EPA actions and decisions may affect tribal interests.
- Process of meaningful communication and coordination between EPA and tribal officials *prior* to EPA taking action.



Consultation vs. Coordination

“Consultation is a process of meaningful communication and coordination between EPA and tribal officials prior to EPA taking actions or implementing decisions that may affect tribes.”

Coordination...

- is sharing information, education, and outreach.
- can be part of consultation.
- cannot substitute for consultation.

Source: EPA Policy on Consultation and Coordination with Indian Tribes, 2011



Consultation and Coordination under Superfund

- Tribal roles are provided under the Superfund law (CERCLA*)
- Tribes may be lead or support agency
- Tribal law may be applicable or relevant and appropriate requirements for cleanup

* CERCLA = Comprehensive Environmental Response, Compensation and Liability Act



Consult about What?

- Regulations or rules
- Policies, guidance documents, directives
- Budget and priority planning development
- Legislative comments – potentially
- Permits
- Civil enforcement and compliance monitoring actions – consistent with other agency guidance
- ***Response actions and emergency preparedness***
- State or tribal authorizations and delegations
- EPA activities in implementation of U.S. obligations under an international treaty or agreement



Examples of Superfund Remedial actions or decision points**:

- Site listings
- Proposed Plans/Records of Decision (ROD)/ ROD Amendments
- Site deletions

**The Superfund process may consist of multiple actions – and each action may need a separate consultation.



Consultation has four parts under the EPA policy

- Identification
- Notification
- Input
- Follow-up

Identification of the Need to Consult

- Tribes request consultation
- EPA identifies activities and potentially affected tribal interests





Notification of the Tribe

- EPA notifies tribe early in the process
- Notification includes sufficient information and how to provide input
- Multiple tribes may be involved
- Tribal Consultation Opportunity Tracking System (TCOTS) database



Input from the Tribal Government

- Tribes provide input to EPA on consultation activities
- Listen to the tribal representatives
- Consider the tribe's views and concerns
- Weigh possible changes to the EPA action based on the tribal concerns



Follow-up with the Tribal Government

- EPA provides feedback to the tribes involved to explain how their input was considered in the final action
- Notify the tribe of the action taken by EPA
- These are formal, written communications
- Document consultation in the Site Administrative Record



Are Tribal Interests Affected?

- Does a tribal treaty cover the area where the site lies?
- Do tribal members use resources from the impacted zone?
- Is a tribe a Natural Resource Trustee of the affected resource?
- Are there lands held in trust for tribes?
- Is the affected area within a tribal historic area or traditional cultural property?
- Is the affected area linked ecologically, culturally, visually or hydrologically to tribal resources or uses?



Emergency Response and Removal

- Emergency responses – Regional Contingency Plan procedures used – primarily notification
- Time-critical removals – consult as time allows
- Non-time critical removals – consultation occurs
- Tribes may have Tribal Emergency Response Committees and can participate in Unified Command during a response in Indian Country



Consultation at Federal Facility Superfund Sites

- At Federal Facility sites (i.e., Departments of Energy, Defense, Interior, etc.), the other federal agency (OFA) is the lead agency for consultation
- These federal agencies have their own consultation procedures
- EPA may play a facilitation or coordination role if necessary
- More information about EPA's Federal Facilities Restoration and Reuse Office's Tribal Activities and OFA information can be found at <http://www2.epa.gov/fedfac/tribes-and-federal-facilities>



Tracking Consultations

- Tribal Consultation Opportunities Tracking System (TCOTS)
- For each consultation:
 - Consultation opening and closing dates
 - Information on the manner location of consultation events
 - EPA contact information
 - Additional information to assist tribes in consultation review
- Superfund process often consists of multiple actions and have separate consultations



Recent Policy Developments

- **Administrator's December 2014 Memo**
 - “While treaties do not expand the EPA’s authority, the EPA must ensure its actions do not conflict with tribal treaty rights. In addition, EPA programs should be implemented to enhance protection of tribal treaty rights and treaty-covered resources when we have discretion to do so.”
- **Guidance for Discussing Tribal Treaty Rights (Feb. 29, 2016)**
 - Signed following consultation with tribes
 - A path to implementing commitments in Administrator’s 2014 memo
 - Provides assistance for tribal consultations on EPA actions occurring within specific geographic areas where treaty rights may exist in, or treaty-protected resources may rely upon, those areas



****NEW**** Guidance for Discussing Tribal Treaty Rights (Feb. 29, 2016)

- Enhancement of consultations under *EPA's Consultation Policy*.
- Outlines affirmative steps for EPA tribal consultations in “situations where treaty rights [or treaty-protected resources] may be affected by an EPA action.”
- Actions focused on “specific geographic areas when tribal treaty rights relating to natural resources may exist in, or treaty-protected resources may rely upon, those areas and EPA’s action may affect the tribal treaty rights.”
- “*Guidance* does not create any new legal obligations for EPA, expand the authorities granted by EPA’s underlying statutes, nor does it alter or diminish any existing EPA treaty responsibilities.”



What are treaties and how do they affect EPA's work?

- Under the U.S. Constitution, treaties have the same legal force as federal statutes
- Treaties are legal obligations
- Just as EPA complies with environmental statutes and regulations, EPA also needs to ensure that its actions under those statutes and regulations do not conflict with treaty rights
- Treaties do not expand the EPA's authority but can limit or inform action if the action would infringe on a treaty right
- Treaty rights can inform how EPA's exercises discretionary authority
- Treaty rights can apply within and outside of reservation boundaries



Treaty-related Questions to Raise during Consultation (2016 policy cont.)

1. Do treaties exist within a specific geographic area?
2. What treaty rights exist in, or what treaty-protected resources rely upon the specific geographic area?
3. How are treaty rights potentially affected by the proposed action?



Guidance for Discussing Tribal Treaty Rights (2016 policy cont.)

EPA's next steps typically involve:

- Conducting legal and policy analyses
- Considering all relevant information to help ensure:
 - EPA's actions do not conflict with treaty rights, and
 - EPA is fully informed when it seeks to implement its programs to further protect treaty rights and resources, when it has discretion to do so



Tribal Subpart O Funding Opportunities at Superfund Responses



CERCLA Subpart O

- Cooperative Agreements (CA) opportunities are identified in CERCLA* Subpart O (40 CFR Part 35, Subpart O)
- Purpose – codifies CAs awarded pursuant to section 104(d)(1) of CERCLA

*Comprehensive Environmental Response, Compensation and Liability Act



Tribal Eligibility

- To be eligible, tribes must:
 - Be a federally recognized tribe
 - Meet criteria set forth in 40 CFR 300.515(b) of the NCP
 - Intertribal Consortium



Tribal Eligibility (con't)

- 300.515(b) Requirements
 - Federally recognized
 - Tribal governing body actively promoting health, safety, welfare of the affected population or protect the environment within a defined geographic area
 - Have jurisdiction over a site at which a fund-financed response is contemplated
 - Exception for Core Program CAs



Types of Superfund Cooperative Agreements Available

- Pre-Remedial Response CA
- Remedial Response CA
- Enforcement CA
- Removal Response CA
- Core Program CA
- Support Agency CA





CA Common Element

- Application for Federal Assistance (SF-424)
 - Budget Sheets
 - Project Narrative Statement
 - Site Description
 - Statement of Work
 - Identify Lead Site Project Manager
 - Site-Specific Community Relations Plan
 - Site-Specific Health and Safety Plan
 - Quality Assurance
 - Schedule of Deliverables
 - Other applicable forms and information



Pre-Remedial Response CA

- Eligibility
 - States, political subdivisions, Indian Tribes
- Eligible Activities
 - Preliminary Assessment
 - Site Inspection
 - Hazard Ranking System

Remedial Response CA

- Eligibility
 - State, political subdivisions, Indian Tribes
- Eligible Activities
 - Remedial investigations
 - Feasibility studies
 - Remedial design
 - Remedial actions
 - Oversee PRP cleanups





Enforcement CA

- Eligibility
 - State or Tribe must demonstrate that it has the authority, jurisdiction, and the necessary administrative capabilities to take an enforcement action(s) to compel PRP cleanup of the site or recovery of cleanup costs
- Submit
 - Letter from Indian Tribal Official certifying authority, jurisdiction and administrative capabilities
 - Copy of applicable Indian Tribal Statute(s) and description of how it is implemented
 - Any other documentation required by EPA



Enforcement CA (con't)

- Eligible Activities
 - Identify Potentially Responsible Parties (PRPs)
 - Conduct settlement negotiations
 - Take enforcement actions against PRPs





Removal Response CA

- Eligibility
 - States, political subdivisions, Indian Tribes
 - Planning period of more than six months
- Eligible Activities
 - When based on the site evaluation, EPA determines that a planning period of more than six months before removal activities must begin
 - Non-Time Critical Removal Actions



Core Program CA

- Definition: A CA that provides funds to a State or Indian Tribe to conduct CERCLA implementation activities that are not assignable to specific sites but are intended to develop and maintain a State's or Indian Tribe's ability to participate in the CERCLA response program.



Core Program CA (con't)

- Eligibility
 - Meet the definition above
 - Only the State or Indian Tribal government agency designated as the single point of contact with EPA for CERCLA implementation is eligible to receive a Core Program CA



Core Program CA (con't)

- Eligible Activities
 - Procedures for emergency response actions and longer-term remediation of environmental and health risks at hazardous waste sites
 - Provisions for satisfying all requirements and assurances
 - Development of legal authorities and enforcement support
 - Hire and train staff
 - Maintain sustained EPA/recipient interaction in CERCLA implementation



Support Agency CA

- Support Agency Definition: The agency that furnishes necessary data to the lead agency, reviews response data and documents, and provides other assistance to the lead agency.



Support Agency CA (con't)

- Eligibility
 - States, political subdivisions, Indian Tribes
 - To ensure meaningful and substantial involvement in response activities, as specified in sections 104 and 121(f)(1) of CERCLA and the NCP (40 CFR part 300)



Support Agency CA (con't)

- Allowable Activities
 - CERCLA 121(f)(1)
 - NCP Subpart F
 - Participation in five-year reviews



Support Agency CA (con't)

- CERCLA 121(f)(1)
 - PA/SI
 - Allocation of responsibility for HRS scoring
 - Site deletion
 - Participation in long-term planning process
 - Review and comment on : RI/FS, planned RA, engineering design, technical data and reports, ARAR waivers
 - PRP negotiations
 - Comments on Proposed Plan



Support Agency CA (con't)

- NCP Subpart F
 - PA/SI
 - NPL list process
 - Site deletion
 - ARAR identification
 - RI/FS review
 - Proposed plan review
 - ROD review
 - RD/RA
 - PRP negotiations
 - Removal actions





Other things to be aware of:

- Human health risk assessment
- Ecological risk assessment
- National Historic Preservation Act
- Native American Graves Protection and Repatriation Act
- Archaeological Resources Protection Act



Resources for more information

- EPA Tribal Program: www.epa.gov/tribalportal
- Tribal Superfund Working Group
- Superfund Regional Tribal Coordinators
- EPA Headquarters Tribal Contacts



Superfund Regional Tribal Contacts

- R1 – Karen Lumino
- R2 – Pam Tames
- R3 – Lisa Denmark
- R4 – Ofia Hodoh
- R5 – Rosita Clark
- R6 – LaDonna Turner
- R7 – Todd Davis
- R8 – Amelia Piggott
- R9 –Elena Neibaur
- R10 – Joanne Moore



EPA Headquarters Tribal Contacts

OLEM Tribal Coordinator:

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QUESTIONS/ DISCUSSION?

