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***EPA POLICY ON  
CONSULTATION WITH INDIAN TRIBES***

*December 7, 2023*



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## I. Policy Statement

The U.S. Environmental Protection Agency’s policy is to consult on a government-to-government basis with federally recognized Tribal governments when EPA actions or decisions may affect Tribes. Consultation is a process to ensure meaningful and timely input by Tribal officials prior to EPA taking actions or implementing decisions that may affect Tribes. The consultation process may include several methods of interaction that occur at different levels between EPA and Tribal governments. The appropriate level of interaction is determined by this Policy, continuing dialogue between EPA and Tribal governments, program and regional office consultation procedures, and specific consultation requirements of various statutes and regulations.

This Policy establishes national guidelines for consultation across EPA. EPA program and regional offices have the responsibility to consult with Tribes. Program and regional office consultation procedures must be consistent with this Policy. This Policy seeks to strike a balance between providing sufficient guidance for purposes of achieving consistency and predictability and allowing for, and encouraging, the tailoring of consultation approaches to reflect the circumstances of each consultation situation.

## II. Background

EPA developed the *EPA Policy on Consultation and Coordination with Indian Tribes* (Policy) in 2011 to implement the *EPA Policy for the Administration of Environmental Programs on Indian Reservations*<sup>1</sup> (EPA Indian Policy) and Executive Order 13175 *Consultation and Coordination With Indian Tribal Governments*<sup>2</sup> (Executive Order), with the ultimate goal of strengthening government-to-government relationships between Tribal governments and EPA. This Policy was updated in 2023 and supersedes the 2011 version.

The EPA Indian Policy remains the cornerstone of the agency’s Indian program and “assure[s] that Tribal concerns and interests are considered whenever EPA’s actions and/or decisions may affect” Tribes (EPA Indian Policy, p. 3, Principle no. 5). Moreover, the Executive Order specifies that each agency must have an accountable process to ensure meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications. This Policy expands upon the consultation standard in the Executive Order to also apply to EPA actions or decisions that may affect Tribes, consistent with the EPA Indian Policy. Consultation, as demonstrated by this Policy, is implemented as a standard EPA practice.

## III. Definitions

A. “Consultation” is a two-way, government-to-government exchange of information and dialogue between official representatives of EPA and federally recognized Tribal governments.

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<sup>1</sup> <https://www.epa.gov/tribal/epa-policy-administration-environmental-programs-indian-reservations-epa-indian-policy>

<sup>2</sup> <https://www.federalregister.gov/documents/2000/11/09/00-29003/consultation-and-coordination-with-indian-tribal-governments>

**B.** “Coordination” is communication among EPA and Tribal officials, Tribal environmental staff, or other Tribal representatives that can support the consultation process. Coordination is used to inform representatives of potentially affected Tribes or Tribal groups prior to an EPA action or decision and can help determine whether government-to-government consultation is appropriate. Coordination does not exclusively occur in support of consultation and may be conducted in other contexts.

**C.** “Indian Tribe” or “Tribe” means an Indian or Alaska Native Tribe, Band, Nation, Pueblo, Village, or Community 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. 5130-5131.

**D.** “Tribal official” means an elected or appointed official of a Tribe, or an official or employee of a Tribe designated by an elected or appointed official of a Tribe.

**E.** “Indian country<sup>3</sup>” means:

**1.** All land within limits of any Indian reservation<sup>4</sup> under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights- of-way running through the reservation;

**2.** 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

**3.** All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

#### **IV. Guiding Principles**

Meaningful consultation follows the process and guiding principles outlined in this Policy. The following guiding principles should be applied to the implementation of this Policy to the extent practicable and permitted by law:

EPA’s fundamental objective in carrying out its responsibilities in Indian country is to protect human health and the environment.

EPA recognizes and works directly with federally recognized Tribes as sovereign entities with primary authority and responsibility for each Tribe’s land and membership, and not as political subdivisions of states or other governmental units.

EPA recognizes the federal government’s trust responsibility, which derives from the historical relationship between the federal government and Indian Tribes as expressed in certain treaties, statutes, executive orders, and other sources of federal Indian law. Consistent with the federal trust responsibility, EPA consults with and considers the

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<sup>3</sup> See 18 U.S.C. § 1151

<sup>4</sup> EPA’s definition of “reservation” encompasses both formal reservations and “informal” reservations, i.e., trust lands set aside for Indian Tribes. See 56 Fed. Reg. 64876, 64881 (1991); or 63 Fed. Reg. 7254, 7258 (1998).

interests of Tribes when taking actions that may affect them.

EPA ensures the close involvement of Tribal governments and gives special consideration to Tribal input whenever EPA's actions or decisions may affect Tribes.

EPA recognizes the importance of respecting Tribal treaty or similar rights and its obligation to do so. In situations where Tribal treaty or similar rights may be affected by a proposed EPA action or decision, EPA seeks information and recommendations regarding such rights during consultation.<sup>5</sup>

Effective consultation means that information obtained from Tribes be given meaningful consideration and EPA should strive for consensus or a mutually desired outcome.

When EPA actions or decisions involve other federal agencies, EPA carries out its consultation responsibilities consistent with this Policy, working jointly with other agencies, as appropriate.

EPA considers and values Indigenous Knowledge for potential use in federal actions. EPA seeks input based upon Indigenous Knowledge during consultation.

EPA honors and acknowledges the importance of sacred sites. In situations where sacred sites may be affected by a proposed EPA action or decision, EPA seeks input regarding sacred sites during consultation.<sup>6</sup>

## V. Consultation

**A. The Consultation Process.** The consultation process at EPA consists of four phases: Identification, Notification, Input, and Follow-up:

**1. Identification Phase:** EPA identifies whether a proposed agency activity may be appropriate for consultation (see Section V.B below) as early as possible in the planning and development of the activity. The identification phase should include a determination of the type of activity, its potential implications for Tribes, and any time and/or resource constraints relevant to the consultation process.

This phase should also include an initial identification of the potentially affected Tribe(s) and Tribal treaty or similar rights. If the activity may affect Tribal

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<sup>5</sup> EPA published the *EPA Policy on Consultation with Indian Tribes: Guidance for Discussing Tribal Treaty or Similar Rights* to enhance consultation under this Policy and provide additional detail on consideration of treaty or similar rights during consultation. "Tribal treaty or similar rights" refers to rights reserved or held by Tribes, either expressly or implicitly, through federal laws, such as treaties, statutes, or executive orders. The Guidance is available at <https://www.epa.gov/tribal/consultation-tribes>.

<sup>6</sup> EPA seeks and considers information regarding sacred sites consistent with federal authorities, such as the National Historic Preservation Act (NHPA), the Native American Graves Protection and Repatriation Act (NAGPRA), and the American Indian Religious Freedom Act (AIRFA). Section 106 of the NHPA requires federal agencies to take into account the effect of their undertakings on historic properties, including sacred sites. Consultation with Tribes as part of compliance with NHPA Section 106 has specific requirements and is conducted separately from to government-to-government consultation as defined in this Policy.

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treaty or similar rights, the *EPA Policy on Consultation with Indian Tribes: Guidance for Discussing Tribal Treaty or Similar Rights* should be followed during the consultation process.<sup>7</sup>

As noted in Section V.B.2.a below, a Tribe may also request consultation on an EPA action or decision. To the extent that the agency has not yet performed an analysis to determine whether consultation is appropriate, EPA shall conduct such an analysis as soon as possible and respond to the Tribe within a reasonable time period.

**2. Notification Phase:** EPA notifies Tribal governments of identified opportunities to consult.

Notification generally occurs via email, but it can occur in other ways depending on the EPA action or decision subject to consultation, the number of Tribes potentially affected, and/or established Tribal preference, as appropriate. EPA maintains the Tribal Consultation Opportunities Tracking System (TCOTS) website<sup>8</sup> where EPA consultation opportunities are listed publicly.

Notification includes sufficient information in plain language<sup>9</sup> for Tribal officials to make an informed decision about the desire to consult and understand how to provide informed input. Information provided in a notification should include: the topics to be discussed and why they may be important to the identified Tribes; the date, time, and location of any established consultation and/or coordination opportunities, whether virtual or in-person; how Tribes may receive additional information, submit input, and request government-to-government consultation; the deadline for written comments; and EPA staff points of contact.

Notification should provide information known to the agency on any limitations to EPA's authority and/or any time or resource constraints anticipated to impact the consultation process.

Notification should occur sufficiently early in the activity planning or development to allow for meaningful input by the Tribe(s). Additional notification may be needed to provide updates on the activity, schedule, or consultation opportunity. EPA may need to undertake subsequent rounds of consultation if there are significant changes in the originally proposed activity or as new issues arise.

**3. Input Phase:** EPA receives and considers input from federally recognized Tribes on the agency activity or decision. EPA coordinates with federally recognized Tribes during this phase to be responsive to requests for information, receive input, and discuss whether and how to engage in government-to-government consultation. Input may be provided during in-person or virtual government-to-government consultation meetings, by written submission from

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<sup>7</sup> See Footnote 5

<sup>8</sup> <https://tcots.epa.gov>

<sup>9</sup> <https://www.plainlanguage.gov/>

Tribal officials, or by other appropriate means.

Consultation meetings are government-to-government exchanges of information and dialogue between official representatives of EPA and of federally recognized Tribal governments. During consultation meetings with elected Tribal leaders or their designee(s), EPA should be represented by the Headquarters Office Director or Regional Division Director level of management, or higher. Consultation should generally include both EPA and Tribal officials with decision-making authority regarding the proposed action or decision. This level of EPA participation is not needed if EPA and the Tribe establish an alternate expectation for the consultation meeting during coordination.

EPA acknowledges that individual Tribes may adopt their own consultation procedures and EPA may, to the extent practicable and consistent with this Policy, seek to accommodate the consultation preferences of the Tribal government engaging in government-to-government consultation.

The input phase may be an ongoing dialogue and may consist of successive consultation meetings between EPA and Tribal officials, as needed and appropriate.

**4. Follow-up Phase:** EPA provides feedback to the Tribes(s) involved in the consultation to explain how their input was considered in the EPA action or decision subject to consultation. Written comments submitted by Tribal officials and/or input provided during a government-to-government consultation meeting should be responded to with a formal, written communication from a senior EPA official involved in the agency action or decision.

## **B. What Activities May Involve Consultation?**

**1. General Categories of Activities Appropriate for Consultation:**  
The broad scope of consultation contemplated by this Policy creates a large number of EPA actions that may be appropriate for consultation.

The following, non-exclusive list of EPA activity categories provides a general framework from which to begin identifying whether any particular action or decision that may affect one or more Tribes is appropriate for consultation:

- Regulations or rules
- Policies, guidance documents, directives
- Budget and priority planning development
- Legislative comments<sup>10</sup>

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<sup>10</sup> Due to short legislative timeframes, consultation in advance of EPA submitting legislative comments may not always be possible. Nevertheless, EPA strives to inform Tribes when it submits legislative comments on activities that may affect Indian country or other Tribal governmental interests.



- Permits
- Civil administrative enforcement<sup>11</sup>
- Response actions and emergency preparedness<sup>12</sup>
- State or Tribal program authorizations or delegations
- EPA activities in implementation of U.S. obligations under an international treaty or agreement.

This Policy may not apply to certain agency activities or decisions, which include, but are not limited to: internal personnel matters; certain budget decisions; certain EPA enforcement activities to address and resolve noncompliance with federal requirements; or matters where the agency has no discretion. This Policy is not intended to apply to non-EPA actions or decisions.

## 2. EPA's Mechanisms for Identifying Matters for Consultation:

The mechanisms EPA uses for identifying matters appropriate for consultation are as follows:

- a. ***Tribal Government-Requested Consultation.*** Tribal officials may request consultation on EPA actions or decisions. EPA strives to honor Tribal governments' requests with consideration of the nature of the activity, past consultation efforts, available resources, timing, and all other relevant factors.
- b. ***Action Development Process (ADP).*** Early in the ADP, the EPA office leading the agency activity assesses whether consultation is appropriate for the subject action.
- c. ***National Program Offices and Regional Offices.*** For those actions and decisions not in the ADP, program and regional offices identify if consultation is appropriate under this Policy. EPA's Designated Consultation Official and Tribal Consultation Advisors (see Section VI.A.4 below) provide assistance with that identification. Such identification may result from coordination with federally recognized Tribes.
- d. ***National and Regional Tribal Partnership Groups.*** EPA meets regularly with a number of national and regional Tribal partnership groups. Through this engagement, these groups may assist in the identification of matters that may be appropriate for consultation.

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<sup>11</sup> Primary guidance on civil administrative enforcement matters involving Tribes can be found in EPA's *Guidance on the Enforcement Priorities Outlined in the 1984 Indian Policy* and *Questions and Answers on the Tribal Enforcement Process*. Consultation on enforcement matters is undertaken consistent with the *Guidance on Restrictions on Communications with Outside Parties*. When EPA consults on such matters, the focus is on protecting human health and the environment to the same extent inside Indian country as outside Indian country. Applicable guidance is available at <https://www.epa.gov/tribal/compliance-enforcement-indian-country>.

<sup>12</sup> The term "response" as defined under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) includes removals and remedial actions.



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**C. When Consultation Occurs.** Consultation should occur early enough to allow Tribes the opportunity to provide meaningful input that can be considered prior to EPA deciding whether, how, or when to act on the matter under consideration. As proposals and options are developed, consultation and coordination should be continued to ensure that the overall range of options and decisions is shared and deliberated by all concerned parties, including additions or amendments that occur later in the process.

**D. How Consultation Occurs.** While consultation under this Policy generally follows the four phases and guiding principles referenced above, there is no single formula for what constitutes consultation. The analysis, planning, and implementation of each consultation should take into account all aspects of the action under consideration that are appropriate for consultation. For example, implementation of this Policy may be different for a national rulemaking that affects many Tribes than it may be for a localized action that only affects one Tribe. If a consultation opportunity is not accepted by any Tribe, the subsequent input and follow-up phases need not follow.

**E. Agency Disclosure of Information.** EPA consults with Tribes to the greatest extent practicable without divulging privileged or sensitive information, including, but not limited to, information relating to ongoing investigations, settlement negotiations, or litigation.

EPA is subject to the disclosure requirements provided by the Freedom of Information Act (5 U.S.C. § 552) (FOIA) and other applicable federal laws and regulations. Therefore, records created or exchanged during, or otherwise stemming from, Tribal consultation and coordination may be disclosed under FOIA or other applicable federal laws and regulations.

**F. Related Public Engagement Laws, Regulations, and Policies.** This document puts forward the EPA policy for consulting with federally recognized Tribal governments. It is helpful to note the distinction between the Policy, federal environmental laws and regulations pertaining to public involvement, and EPA's work to address the environmental concerns of non-federally recognized Tribes, individual Tribal members, Tribal community-based organizations, and other Indigenous stakeholders.<sup>13</sup>

This Policy is separate from the *Environmental Protection Agency's Guiding Principles for Consulting with Alaska Native Claims Settlement Act Corporations* (2022),<sup>14</sup> which clarifies the manner in which EPA consults with Alaska Native Claims Settlement Act Corporations.

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<sup>13</sup> The 2014 EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples articulates EPA's commitment to advance environmental justice and equity to ensure that the agency's mission to protect human health and the environment benefits all communities in the United States, including Tribal and Indigenous communities. The policy is available at <https://www.epa.gov/sites/default/files/2017-10/documents/ej-indigenous-policy.pdf>.

<sup>14</sup> <https://www.epa.gov/system/files/documents/2022-01/guiding-principles-for-consulting-with-ancsa-corporations.pdf>

## VI. Managing the Consultation Process

**A. Roles and Responsibilities.** The following roles and responsibilities are defined to ensure effective implementation of this Policy. These roles and responsibilities reflect the fact that program and regional offices are responsible for implementing the consultation process under this Policy. EPA's Office of International and Tribal Affairs (OITA) is responsible for national oversight and coordination of this Policy.

**1. Designated Consultation Official:** In addition to being EPA's National Program Manager for the EPA Tribal Program, EPA's Assistant Administrator for OITA is the EPA Designated Consultation Official under the Executive Order. Responsibilities of this position include oversight of Tribal consultation consistent with this Policy, the Executive Order, and the EPA Indian Policy.

The Designated Consultation Official has the authority for: (1) defining EPA actions appropriate for consultation, (2) evaluating the adequacy of that consultation, and (3) ensuring that EPA program and regional office consultation procedures are consistent with this Policy.

The Designated Consultation Official reports annually to the Office of Management and Budget (OMB) regarding the implementation of the Executive Order. Further, the Designated Consultation Official certifies compliance with the Executive Order for applicable EPA activities. The American Indian Environmental Office (AIEO), located within OITA, coordinates the operational details of this Policy and compiles consultation-related information for the Designated Consultation Official.

**2. Assistant Administrators:** Assistant Administrators oversee the consultation process in their respective offices, including analysis for potential consultation and the consultation process. Each program office develops a semi-annual projection of matters appropriate for consultation and an annual summary of consultation that has occurred. The Assistant Administrators provide this information to the Designated Consultation Official for reporting to OMB.

**3. Regional Administrators:** Regional Administrators oversee the consultation process in their respective offices, including analysis for potential consultation and the consultation process. Each region develops a semi-annual projection of matters appropriate for consultation and an annual summary of consultation that has occurred. The Regional Administrators provide this information to the Designated Consultation Official for reporting to OMB.

**4. Tribal Consultation Advisors:** Each program office and region designates a Tribal Consultation Advisor (TCA). TCAs are the in-office subject matter experts to assist staff and management in the implementation of this Policy. TCAs assist in identifying matters appropriate for consultation and in compiling information on consultation activities within their respective offices. TCAs also serve as a point-of-contact for Tribal governments interested in the consultation

process for a particular EPA program office or region.

**B. Consultation Process Review.** A Tribal official may identify an instance where they believe that this Policy has not been properly implemented. Concerns regarding implementation of this Policy should be raised to EPA as soon as possible to attempt to find a resolution before finalization of the agency action or decision subject to consultation. The concern may be regarding the sufficiency, timing, or agency implementation of the consultation process (Section V.A above). Concerns regarding the substance of the action or decision are not addressed by this consultation process review and should be raised with the decision-making EPA program office or region.

The consultation process review is initiated when a Tribal official raises a concern regarding the consultation process to the EPA program or regional office involved in the consultation. The program or regional office management attempts to resolve the concern with the Tribe. In the event that a resolution is not reached, the respective Assistant Administrator or Regional Administrator notifies the EPA Designated Consultation Official. The Designated Consultation Official then reviews the procedural concern regarding implementation of this Policy and, in coordination with the Assistant Administrator or Regional Administrator, identifies the appropriate response to the Tribal official.

**C. Consultation Policy Assessment and Implementation.** The Designated Consultation Official communicates regularly with the Assistant and Regional Administrators to assess the EPA consultation process, to consider any matters requiring senior management attention, and to make adjustments necessary to improve this Policy or its implementation.

EPA receives ongoing feedback on this Policy from all parties to assess its effectiveness and implement improvements.

EPA emphasizes staff training and knowledge of the importance of Tribal consultation for agency employees who work with Tribal governments or on agency activities or decisions that may affect Tribes.



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**DISCLAIMER:** This document identifies internal agency policies and procedures for EPA employees in consulting and coordinating with Indian Tribes. It is intended to improve the internal management of EPA and provide transparency on EPA's consultation process with Indian Tribes. This Policy does not change or substitute for any law, regulation, or any other legally binding requirement and is not legally enforceable. It is not binding and does not create a right or benefit, substantive or procedural, enforceable at law or in equity, against the agency, its officers or employees, or any other person.