



July 13, 2023

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U.S. Environmental Protection Agency
Office of International and Tribal Affairs
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Kenneth Martin
U.S. Environmental Protection Agency
American Indian Environmental Office
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

SENT VIA EMAIL

RE: Proposed Updates to the 2011 EPA Consultation Policy and 2016 Treaty Rights Guidance

Dear Ms. Nishida and Mr. Martin:

The Region 6 and 10 Tribal Operation Committees (“RTOCs”),¹ which collectively work to serve 337 federally recognized Tribes, jointly submit these comments on the proposed updates to the 2011 EPA Consultation Policy and 2016 Treaty Rights Guidance.

COMMENTS ON CONSULTATION POLICY²

General Comments: The RTOCs offer the following general comments on the Consultation Policy:

- While it may not be the intent, the proposed changes appear to be diminishing EPA’s consultation obligations. For example, on page 6, EPA strikes the definite requirements for formal, written communication as the standard for EPA’s feedback to consultation in favor of a vague standard that could be met in “a number of ways.”
- The Policy should recognize that individual Tribes may adopt their own consultation procedures and that EPA should, to the extent practicable, utilize those procedures.

¹ This statement of principles is solely submitted on behalf of these organizations and not submitted on behalf of any individual Tribe and is not intended to replace government-to-government consultation between EPA and Tribal governments on this matter.

² Comments are on the redline/strikeout version. Page numbers follow that version.

- The Policy should explicitly state that a failure by a Tribe to consult on one matter does not relieve and shall not be construed as relieving EPA from consulting on other matters or prevent a Tribe from consulting later.
- The addition of the disclaimer on page 11 is concerning. Rather than providing that the Policy is discretionary and has no binding effect, EPA should strive to set enforceable standards for itself now and in the future that set a minimum requirement for Tribal consultation. The RTOCs urge EPA to remove the disclaimer language and consider methods for ensuring that the Policy is enforceable against EPA, instead of the opposite.
- The term Tribal “interests” has been removed from certain sections but has been added to others. It is not clear why this occurred.

Specific Comments:

Page 1:

- Second Paragraph: The term “institutional controls” should be returned. This establishes the Policy as something more than aspirational for the Agency.

Page 2:

- First Word: Although term “regulatory” is in the Executive Order, this policy should not be limited to regulatory policies, but to all decisions that may impact Tribes and their interests.
- The first two deleted paragraphs should be retained.
- Section III (B): The “Coordination” definition should be clear that coordination must occur prior to an EPA action or decision.

Page 3:

- Section IV: This section should recognize that statutes that EPA implements that benefit Tribes are to be construed liberally in favor of the Tribes, with ambiguous provisions interpreted to their benefit. The Policy should also set an expectation that EPA will provide Tribes with information about when and how information provided to EPA may be subject to disclosure under the Freedom of Information Act.
- Last Paragraph: Federal statutes are not the “supreme law of the land.” The section should also recognize other reserved rights, such as those created by executive order or statute.

Page 4:

- Fourth paragraph: EPA should state that any actions involving sacred sites should include any consultation required by Section 106 of the National Historic Preservation Act.

Page 5:

- Second Paragraph: What does the term “appropriate” mean? If a tribal leader requests consultation on an EPA action or decision how could that be inappropriate? EPA should honor any request for consultation.
- Section 2 (Notification Phase): Making email the default method of notification risks insufficient or “token” consultation. One email should not be sufficient to demonstrate consultation. The Policy should require following up emails with letters and/or telephone calls so EPA can assure that tribal officials understand the issue and that the EPA wants to consult in good faith. The Policy should ensure that “established consultation or coordination opportunities” do not include large, multi-Tribe webinars, which are not consultation. These might be coordination but not consultation.
- Last Paragraph: Add that notification must occur prior to any decision or action.
- Section 3 (Input Phase): Retain the deleted examples of consultation methods (“... written and oral communications including exchanges of information, phone calls, meetings, and other appropriate interactions depending upon the specific circumstances involved”). This section should clarify that EPA staff will assist in providing Tribes with information necessary to meaningfully consult without the need to file a Freedom of Information Act request.

Page 6:

- Section 3 (Input Phase)(continued): In the top sentence, does “may” apply to the second part of this sentence? If so, it is unacceptable to make tribal input subject to the discretion of agency staff. Clarification is required. In the sentence that states, “Allow appropriate opportunities for tribes to submit and discuss input with EPA,” the words “prior to any decision or action” should be added. This section should also state that EPA should be represented by AAs or RAs, if EPA is meeting with elected tribal leaders.
- Section 4 (Follow-up Phase): The deleted language should be retained (“... should be formal, written communication from a senior EPA official involved to the most senior tribal official involved in the consultation”). Each Tribe that submits comments should receive individual replies addressing their specific comments..

Page 7:

- Section 2(a): The language that EPA “attempts” to honor consultation request is unacceptable. This should be rephrased so that EPA “shall honor requests.”

Page 8:

- Section D: The language stating that “subsequent input and follow-up phases need not be followed” if the consultation offer is not accepted is concerning. EPA must continue to inform Tribes of the status of its actions and allow consultation later in the decision-making process if requested by a Tribe.
- Section E: This section should be revised to state that EPA must start their consultation early enough to meet any legal deadlines. Moreover, EPA should honor requests for consultation even for matters involving “statutory, regulatory, and legal deadlines, matters

in litigation, budgetary, certain EPA compliance monitoring and enforcement activities.” EPA could address limits to its discretion, applicable time frames, and how litigation may impact its decisions. Importantly, EPA could listen to Tribal concerns despite any limitation it may have in sharing information.

Page 10:

- Section B (Consultation Process Review): This section should be modified to remove the requirement that a tribal official “must” first raise their concern to the office responsible for action or decision. EPA must recognize that Tribal leaders retain the right to speak to the EPA Administrator at any time. Moreover, there may be situations that limit the ability or willingness for a Tribe first raise concerns to the EPA office. Moreover, the requirement that notification occurs “[w]ithin a reasonable amount of time” is vague and requires clarification.

Page 11:

- Disclaimer: As stated above, the disclaimer should be removed or modified to provide a meaningful and enforceable obligation on the part of EPA to consult.

COMMENTS ON TREATY RIGHTS GUIDANCE

General Comments: The RTOCs offer the following general comments on the Treaty Rights Guidance:

- The Treaty Rights Guidance should utilize the term “or other reserved rights” instead of “or similar rights.” The RTOCs recommend utilizing a modified version of the definition provided in the Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights, specifically “any rights to natural resources reserved or held by tribes, either expressly or implicitly, through treaties, statutes, executive orders, or other sources of Federal law, including subsistence rights utilized by Alaska Natives.”
- Finalization of the Treaty Rights Guidance should be delayed, allowing finalization of the Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights. Refinement of this Guidance may be necessary to facilitate implementation of the Reserved Rights rules.

We look forward to working with EPA, to your consideration of this request, and to jointly working with EPA to finalize changes to the 2011 EPA Consultation Policy and 2016 Treaty Rights Guidance.

Sincerely,

A handwritten signature in blue ink that reads "Ethel E. Cook". The signature is written in a cursive, flowing style.

Ethel E. Cook, Chief
Ottawa Tribe of Oklahoma
Region 6 Tribal RTOC Co-Chair

A handwritten signature in blue ink that reads "Raymond Paddock". The signature is written in a cursive, flowing style.

Raymond E. Paddock III
Central Council of the Tlingit and Haida Indian Tribes of Alaska
Region 10 Tribal RTOC Co-Chair