



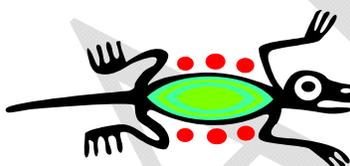
Consulting
With
Indian Tribal
Governments



Draft as of July 27, 2007

Disclaimer

This document is intended solely for guiding employees of the United States Environmental Protection Agency (EPA) Office of Air Quality Planning and Standards (OAQPS). This guidance is not a regulation and does not create any legal obligations or any right or trust responsibility. This document does not address the requirements of, or procedures called for by, Executive Order (EO) 13175, 65 Fed. Reg. 67249 (November 9, 2000). Notice of EPA's draft approach to consultation under that EO was provided in *Review of Environmental Protection Agency Draft Guidance for Implementing Executive Order 13175, Consultation and Coordination with Indian Tribal Governments*, 71 Fed. Reg. 20314-20329 (April 19, 2006). Any final EPA approach to implementing Executive Order 13175 will be set forth in a separate document. This document refers to consultation with federally-recognized Indian Tribes that OAQPS undertakes generally, as a matter of policy. This document may be updated as appropriate without notice.



OAQPS Tribal Program Primary Contact

The OAQPS primary contact for all issues relating to Tribes is the Community and Tribal Programs Group (CTPG) located in the Outreach and Information Division (OID). In addition, there is a cross-divisional OAQPS Tribal team comprised of representatives from the various divisions which can be a resource to you. This document provides OAQPS staff guidance on consulting with federally-recognized Tribes; however, it is important that you contact CTPG, or your division tribal representative, early in the process of addressing issues relating to Tribes for additional guidance and assistance.

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Introduction

Why develop guidance for OAQPS?

This guidance is important to describe OAQPS' views regarding tribal consultation and to assist OAQPS personnel in reviewing EPA actions for effects on Tribes and consulting with Tribes. Early and meaningful Tribal involvement is consistent with the federal trust responsibility to federally-recognized Tribes and furthers the Agency's overall goal of protecting human health and the environment.

This document will help OAQPS introduce staff and managers to the basics of government-to-government consultation with American Indian governments within the context of the work performed in OAQPS. It provides a background to the subject matter that involves many important, historical, complex, and challenging issues. This document will help management and policy, guidance or regulation writers determine if there are impacts or effects on tribes and if so how to proceed. For the purpose of this document, the term "**action**" refers to any policy, guidance, or regulation developed by OAQPS. This can include actions such as the area source regulations, National Ambient Air Quality Standards (NAAQS) promulgations, implementation, and guidance.

It should also be noted that there is a separate process being undertaken within EPA to develop guidance implementing EO13175 entitled "Consultation and Coordination with Indian Tribal Governments" and that the draft (and any final) guidance from that process should be consulted for purposes of complying with that EO, which may raise different issues than those covered in this OAQPS reference document. Once the final Agency guidance is released, we will determine if this OAQPS guidance documents needs to be revised.

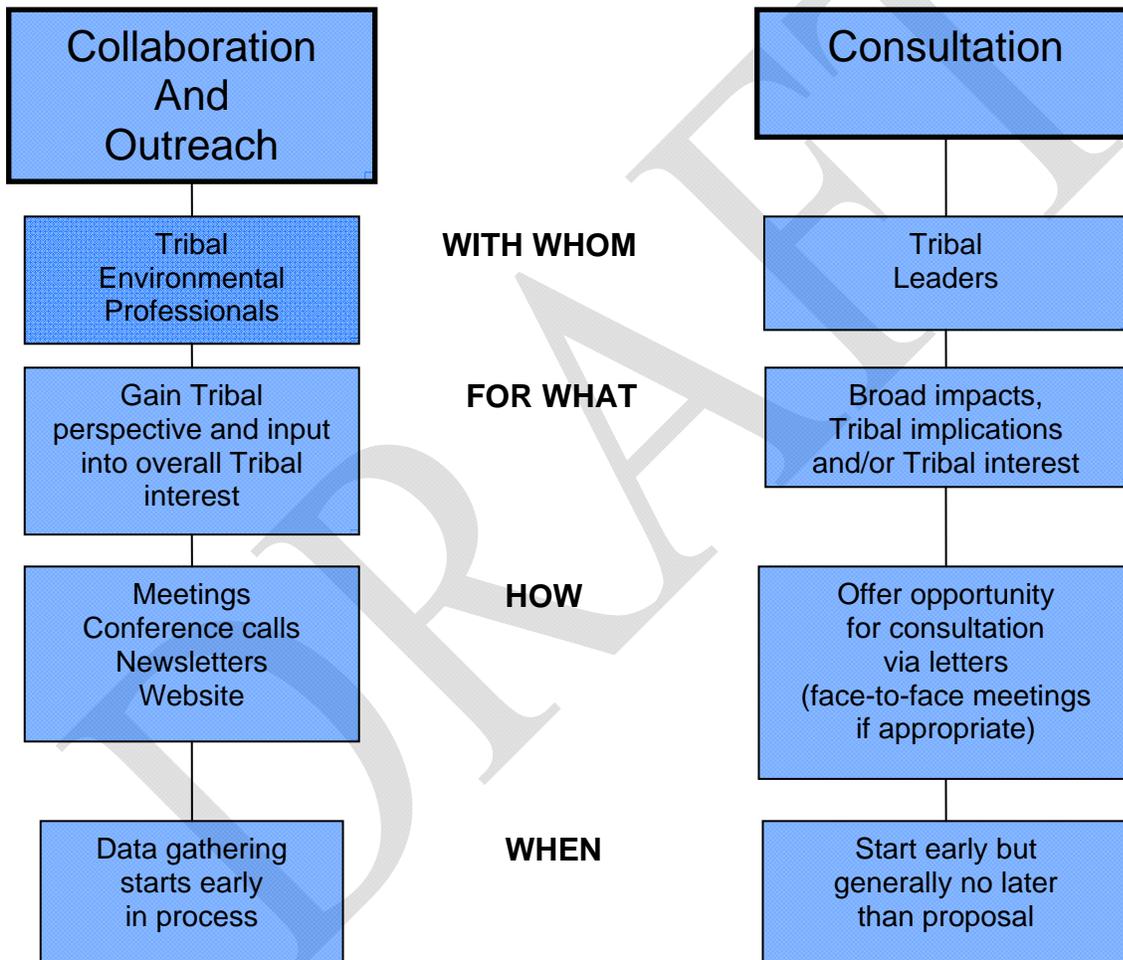


This guidance is divided into 3 sections – **screening, collaboration and outreach, and consultation**. The first section, **screening**, consists of identifying impacts or effects on tribes and how to determine if there are any in regards to your action. The second section, **collaboration and outreach**, discusses how to provide information to Tribes on actions with potential impacts or effects on tribes and how to get them involved in the development process. The third section, **consultation**, discusses how to have full consultation with Tribes that may be affected by, or Tribes that ask to be directly involved in, actions developed by OAQPS.

What is the difference between Tribal collaboration or outreach and consultation?

Before we begin, it is important to note the difference between "**collaboration and outreach**" and "**consultation.**" Collaboration and outreach is generally conducted with Tribal

environmental professionals in advance of policy, guidance, or rulemaking in which we think Tribes will have an interest. Consultation generally involves meeting or discussions with Tribal leaders or some other more formal opportunity for Tribal leaders to interact with EPA decision makers. Consultation with Tribal leaders would generally occur no later than at the point an action is ready to be proposed, but it is best to conduct consultation as early as possible in the policy, guidance, or rule development process. OAQPS would generally send a letter to Tribal leaders with brief information in plain language describing the action and offering the Tribal leaders the opportunity for consultation. *See Appendix for a sample consultation letter*. The OAQPS CTPG is your primary contact, along with the OAQPS Tribal team member for your division, for helping to decide the most appropriate method for consulting with Tribes and obtaining Tribal views.



Background

The Federal Government-Indian Tribal Relationship

Before we address the details and procedures for consulting with Indian Tribes, it is important to

understand the federal government’s relationship with Tribes and some of the basic principles underlying the importance of Tribal consultation. The federal government has a unique government-to-government relationship with federally-recognized Indian Tribes that arises from Indian treaties, statutes, executive orders, and the historical relations between the United States and Indian Nations. Among other things, the federal government has a trust responsibility to federally-recognized Tribes, and EPA, like other federal agencies, must act in accordance with that trust responsibility when taking actions that affect Tribes. Part of this responsibility includes a need to consult with Tribes and consider their interests when taking actions that may affect Tribes or their resources. In EPA’s landmark 1984 Indian Policy, the Agency stated that the keynote of EPA’s efforts to protect human health and the environment on Indian reservations “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.” EPA Policy for the Administration of Environmental Programs on Indian Reservations, November 8, 1984. Similarly, in a 1994 memorandum, the President directed all federal agencies to assess the impacts of their plans, projects, programs, and activities on tribal trust resources, assure that tribal rights and concerns are considered in decision making, and, to the extent practicable and permitted by law, consult with tribal governments before taking actions that affect them. Memorandum: Government-to-Government Relations with Native American Tribal Governments, April 29, 1994 (59 Fed. Reg. 22951). EPA has significant experience across the Agency working and consulting with Tribes on a government-to-government basis. This OAQPS Policy is designed to raise awareness regarding the importance of such consultation as well as information to assist OAQPS personnel in assessing impacts of EPA actions on Tribes and consulting with Tribes.

Protocol for EPA Interactions with Tribes

There is no one set of protocols to guide you through successful interactions with Tribes. Rather, there are general considerations that should be reviewed before communicating with Tribes and visiting Indian country. Each Tribal Nation is unique and differs in leadership and in governmental and economic infrastructure. It is important for EPA staff to approach all Tribes with appropriate respect and sincerity. It is recommended that all OAQPS staff take the training entitled, “Working Effectively with Tribal Governments,” available through the OAQPS CTPG, to gain a better understanding of relevant Federal law, Indian programs and government, and Indian culture. An online course is also available through AIEO.

Below are some guidelines to be familiar with prior to interacting with Tribes:

- The perception of encroachment on Tribal sovereignty is one of the most significant issues for Tribes today. Tribes should, as much as possible, be included early in the policy, guidance, or rule development process to help ensure their input is meaningful.
- Tribes often have two tiers of government, e.g., legal/political and traditional. The Tribal head is not always the decision-maker. You should learn the system of government used by a specific tribe before initiating contact. The OAQPS CTPG and the appropriate Regional Office can assist you with this.

- While environmental issues are a concern of most Tribes, many Tribes have limited familiarity with environmental issues. They have to focus on many issues such as poverty, unemployment, education, and health issues.
- There may be only one or a few Tribal environmental professionals working on all environmental issues for a Tribe. Therefore, any apparent lack of interest in a particular matter may, in reality, may be based on limited time and resources.
- One size does not fit all. Appropriate consultation may be different for each action and as between Tribes, so it is important to highlight different options that the rule writer/program lead should consider for their effort.
- Tribes may be skeptical of federal or state governments so they may not be very receptive to you at first. You should take some time to appropriately inform them of the program and action at issue and to build a relationship. The OAQPS CTPG can help since they have already developed relationships with many Tribes.

Section I – Screening

The screening phase consists of identifying potential impacts or effects on tribes and how to determine if there are any in regards to your action. This section will describe what “impacts and or effects on Tribes” really mean, provide some questions to help you determine if there are potential impacts or effects, and then, if necessary, how to proceed into either “collaboration and outreach” or “formal consultation” with the Tribes.

What does “impacts or effects on Tribes” really mean?

In EO 13175, *policies with Tribal implications* are defined as “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.”¹ As a general rule, OAQPS policy, guidance, or rule writers should begin to think about what “impacts or effects on Tribes” their action may have.

How do I determine if there are impacts or effects on Tribes?

Initially, to help determine if there are impacts or effects on Tribes there are a few questions you, the policy, guidance or rule writer, should answer. To assist you, these questions can be answered on an **Impacts or Effects on Tribes Form**. If you can answer **YES** to any of the following questions then your action has potential impacts or effects on Tribes and more analysis should be done to determine if there are actual implications you can work with the OAQPS CTPG who will assist you. In addition, if there are potential effects or impacts on Tribes a **Tribal Consultation Plan** could be developed. The OAQPS CTPG can assist you with this. (*See example Impacts or Effects on Tribes form and Tribal Consultation Plan in Appendix.*)

The **Impacts or Effects on Tribes Form** includes these questions:

- Are there substantial effects on:

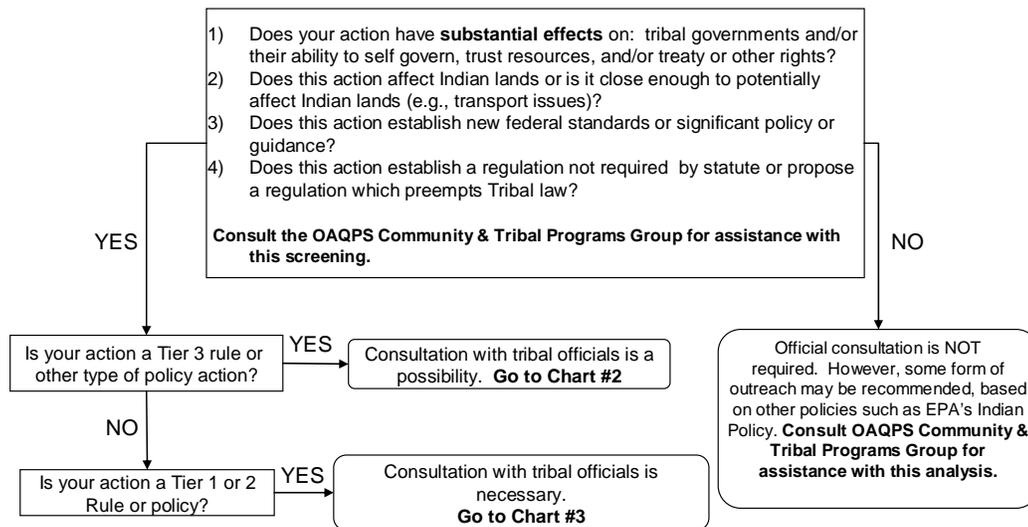
¹ EO 13175, November 6, 2000

- Tribal governments and/or their ability to self-govern
- trust resources
- treaty or other rights
- Does this action affect Indian country or is it close enough to potentially effect Indian country (e.g., transport issues)?
- Does this action establish new federal standards or significant policy or guidance?
- Does this action establish a regulation not required by statute or proposes a regulation which preempts Tribal law?

If you cannot clearly answer **NO** to the questions listed above, then you should begin thinking about how to proceed with Tribal outreach. First of all, you should contact the OAQPS CTPG, along with your OAQPS division Tribal team representative, who can help you proceed through the next steps of the process to determine if there are in fact impacts or effects on Tribes and if so, how to effectively collaborate and consult with affected Tribes. There may also be situations when a Tribe may request an opportunity to consult even if there are no clear impacts or effects on Tribes. In this case, you should have discussions with the Tribe regarding the action. The OAQPS CTPG can provide you with supplemental information to assist you with the specific steps of the process and to initiate appropriate Tribal contacts.

To further assist you in determining if there are impacts or effects on Tribes refer to the following flow charts:

Incorporating Tribal Considerations into All OAQPS Actions (Chart #1)



Incorporating Tribal Considerations into Tier 3 or Other Policy Actions (Chart #2)

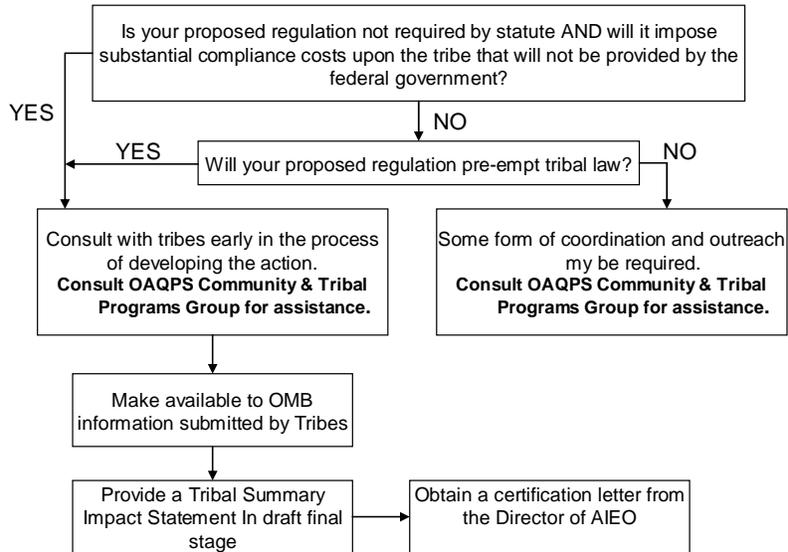
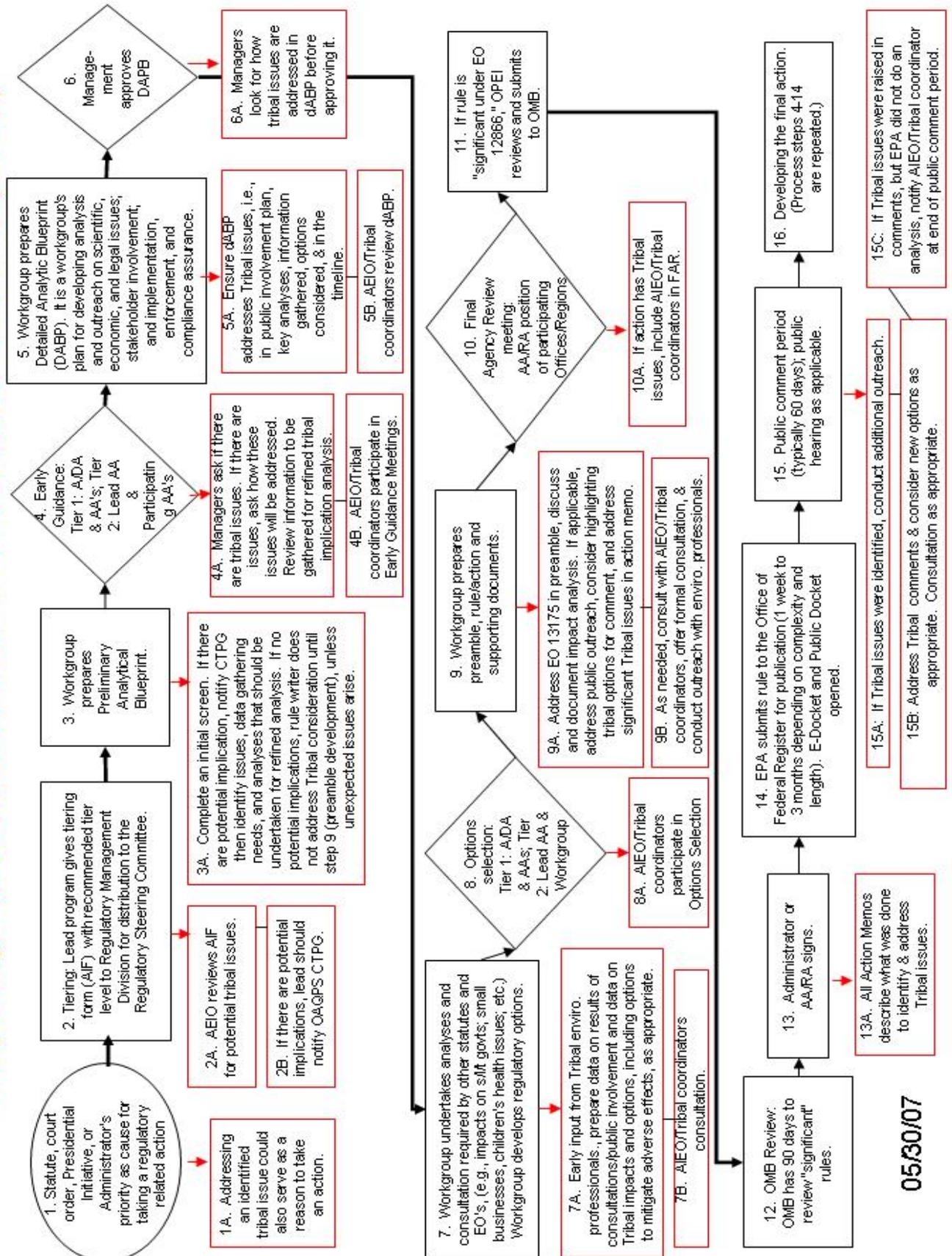


Chart #3 is for those actions which have been designated as either Tier 1 or Tier 2 rules under the Agency's Action Development Process (ADP). Chart #3 depicts the Agency's official process, however, we have added boxes, designated in red, to show when Tribal considerations should be incorporated into the Agency's official process.

Incorporating Tribal Considerations into Tier 1 and 2 Actions under the ADP (Chart #3)



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Section II – Collaboration and Outreach

Collaboration and Outreach

Collaboration and outreach are important if through screening, we have determined that an OAQPS policy, guidance, or rulemaking activity may affect Tribes or if Tribes are interested in finding out more information. Collaboration and outreach provide the opportunity for EPA to interact with Tribal environmental professionals (TEP) and other Tribal officials on the potential impacts or effects. This is an opportunity for EPA to talk with the Tribes to find out if government to government consultation is necessary. This is different than consultation which occurs with Tribal leaders. It is not a situation where we conduct collaboration and outreach versus consultation but rather where we conduct collaboration and outreach for all actions that may have potential impacts or effects on Tribes or where there is Tribal interest. There will be situations when there are no impacts or effects on Tribes but you will still find it appropriate to interact with the Tribes. Consultation occurs after collaboration and outreach when an action is targeted directly toward Tribes, has impacts or effects on Tribes or has broad Tribal interest. The next section will discuss consultation in greater detail. Remember that outreach activities can help you and can be tailored to the specific needs of your action. They can range from as little as notification to the tribes via the list serve website or newsletter to establishing work groups. The OAQPS CTPG can help you design the appropriate scope of interaction.

General Recommendations

- Identify Issues, Interests, and Impacts
 - What are the issues?
 - What are the critical time lines and events?
 - Who is involved?
 - Who has an interest?
 - Who is potentially impacted?
- Involve Tribes from the beginning
 - The earlier the better.
 - Carefully set up work groups to ensure needed expertise.
 - Outreach schedules should reflect critical and appropriate points for interaction.
 - Allow for a full range of opinion and interaction.
- Plan Outreach Strategies and Mechanisms
 - Outreach process also requires calls for planning, with strategies about audience, method of communication, and content.
- Involve EPA Regional Offices
 - Regional Tribal and program offices should be actively involved in identifying and working with elected Tribal officials from their Regions. One way to raise issues quickly is to work with the sub-lead Region for Tribal Air Issues and schedule time on one of the monthly Tribal Air Coordinator calls.

Steps for Effective Outreach or Collaboration

1. Identify which Tribes may be affected
 - a. Initiate discussion with OAQPS CTPG and/or division tribal team representative and appropriate EPA Regional Office(s) Tribal Air Coordinator (TAC).
 - b. Determine type of Tribal government and appropriate tribal contacts
 - c. Identify special Tribal considerations and protocols (e.g. subsistence seasons) for those Tribes
2. Write a fact sheet in plain English which:
 - a. Describe the actions being considered (i.e., policy, guidance, rulemaking)
 - b. Describe how those actions may impact or effect tribal governments
 - c. Include information on how to contact you and receive additional information
 - d. Request that tribes respond to whether they believe the action has impacts or effects on tribes, and in so, how they would like to be involved
3. Coordinate and collaborate with Tribal environmental professionals
 - a. Work with the OAQPS CTPG and the EPA Regional Office(s) where the tribe is located to develop an outreach/communication strategy.
 - b. Notify all affected Tribal governments at an early stage by disseminating early information to Tribal officials on action development. In addition, to sending out the fact sheet described above you can also send out a listserv or Tribal Air Website message with EPA contact's address, participate in NTAA monthly calls, and send information to Regional Tribal Operations Committee contacts.
4. Consultation with Tribal leaders where needed
 - a. If it is determined that formal consultation is called for, please proceed to section 3 of this document, consultation, for more information on how to proceed. If not, continue coordination through updates and consideration of input from Tribes at an appropriate degree of specificity needed.

Section III - Consultation

Formal (or Full) Consultation

Consultation is called for in connection with any policy, guidance, or rule that is targeted directly toward Tribes, has impacts or effects on Tribes or has broad Tribal interest. Examples include the Tribal Authority Rule, New Source Review Rule for Indian Country, Mercury Maximum Achievable Control Technology Standards for utilities, Landfill Maximum Achievable Control Technology Standards, Tribal Implementation Plan Guideline, and Rules for Implementing New National Ambient Air Quality Standards.

While EPA Headquarters (i.e., OAQPS) has the lead in consultation, staff should work closely with the EPA Regional Office contacts. Formal consultations, including any letters sent to Tribes, are initiated by the OAQPS Division Director level or higher.

OAQPS should perform outreach with Tribal environmental professionals in advance of any action for which we think Tribes will have an interest. If more than a few Tribes are interested or concerned about an action, OAQPS generally sends a letter to Tribal leaders with brief information and an offer to the Tribal leader of an opportunity for consultation. This action would be taken prior to the point we are ready to take a federal action, i.e., a proposed rule. Early communication is important. The goal is a dialogue between informed Tribal leaders and federal officials with a preference for a consensus decision.

Recommendations for Developing Tribal Consultation Plans

As part of the collaboration and outreach process you developed an outreach/community strategy which can now be used to develop a Tribal consultation plan. The consultation plan will serve as the road map. Below are suggestions and recommendations in developing your plan. EPA's American Indian Environmental Office (AIEO) is the principal point of contact for coordinating the interaction of Tribes and other EPA offices and officials; however, your first point of contact is the OAQPS CTPG and your division tribal representative.

Options to Consider

- The Intergovernmental Stakeholders
 - Who are the principal Tribal government stakeholders likely to be affected by and interested in this action?
 - Are there particular Tribal elected officials who have expressed interest in the subject area under development?
 - Which Tribal environmental or technical agencies will administer the rule?
 - What other Tribal governmental entities will have to take action (e.g., pass legislation, raise funds, be subject to requirements) because of the rule?
 - Any other Tribal government agencies (e.g., economic development, transportation, agriculture) likely to be affected or have an interest?
- Governmental Impacts
 - What is known about costs and other implications of the rule?
 - Will the rule impact different Tribal entities to different degrees or in different ways?
- Unique Impacts
 - Will the rule have disproportionate impacts on any Tribes in a particular region of the country?
 - Will the rule affect Tribes in urban, rural, or other areas differently?
 - How will outreach and consultation efforts be targeted and tailored in light of these unique or disproportionate impacts?
 - Will Tribes be affected or be presented with unique compliance issues?
 - What steps will be taken to notify Tribes of the planned rule and to secure their participation?
- Major Issues/Areas of Concern

- What information will Tribal government officials need to help them understand the potential implications of the proposed rule and why they should (or may) be interested?
- What issues are likely to be major concern to the different Tribal government officials?
- What steps should be taken to identify additional issues?

- Tribal Participants
 - Are Tribal organizations such as NCAI, NTAA, ITCA, ITCG, and other consortia involved?
 - What EPA organizations provide/offer Tribal perspectives?
 - What other ways can EPA solicit Tribal government views?
 - How can other individual Tribal officials interested in the rule be identified?
 - How can Regional offices assist in securing their participation?

- Outreach/Collaboration Activities
 - What outreach and consultation efforts have already been undertaken?
 - Are there potentially interested Tribes that have not yet been informed about the proposed rulemaking?
 - What is the plan for disseminating information about the rule?
 - What kinds of information materials are needed?
 - How can Tribal government officials be involved in resolving issues and areas of concern?
 - How and when are Tribal officials informed about the results of cost and other impact analyses?

- Expertise Needed
 - What kinds of expertise from Tribal officials would be especially helpful in designing this policy, guidance, or regulation? Examples include:
 - Experts in particular technologies, industries, or scientific disciplines;
 - Economists, lawyers, or policy analysts specializing in particular areas, and
 - Managers with expertise administering comparable programs at another level of government

- Schedule/Resources
 - What is the schedule for key outreach and consultation activities?
 - What resources – staff, extramural funds, or other resources – may be needed to carry out the consultation plan?
 - What assistance is needed from other EPA offices (e.g., Regions, Office of General Counsel, Office of Policy, Economics, and Innovation, or the American Indian Environmental Office)?

Steps to Effective Consultation

1. Continue discussions with OAQPS CTPG, OAQPS division representative, and EPA Regional Office(s) Tribal Air Coordinator (TAC).
2. Develop and send out consultation letters to all Tribal leaders providing them an opportunity to consult (*see appendix for example letter*)
3. Develop a Tribal consultation plan which will serve as the road map for consulting with the Tribes.
 - a. Using the outreach/communication strategy developed earlier, a consultation plan will now be developed for the consultation phase. As this plan is developed, you will take into consideration the response received from the consultation letters sent out to Tribal leaders.
4. Communicate with Tribes
 - a. Consult with tribes early in the process of developing the action(s).
 - i. In some cases, you may only have 1 or 2 Tribes and you will be able to communicate and consult with them directly. In other cases, where the action is more ambiguous and there is greater Tribal interest, you may need to communicate with a much larger group. In addition to one-on-one meetings, reaching a larger Tribal audience can be accomplished through national meetings and with the assistance of the National Council of American Indians and the National Tribal Operations Committee.
5. Make available to the Office of Management and Budget information submitted by Tribes
 - a. As you move closer to finalizing your action, you will make available to OMB information submitted by the Tribes through the outreach and communication phase and the consultation phase.
6. Develop a Tribal Summary Impact Statement
 - a. A copy of the Tribal Summary Impact Statement will be submitted to AIEO when in the final stage of the action.
 - b. In return, you will receive a certification letter from the Director of AIEO which will be submitted with the final action.
7. What needs to be included in the action to document consultation?
 - a. If consultation was conducted, briefly discuss in the relevant section of your preamble: the consultation process, the Tribal concerns, and how you addressed these concerns or why you did not



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Appendix

KEY TERMS & CONCEPTS

Authorized Inter-Tribal Organization

An “authorized inter-Tribal organization” is an organization that has been officially designated by the elected or duly-appointed leader of a federally recognized Tribal government to represent that Tribe on a particular issue.

Consultation

Consultation generally consists of meaningful and timely communication between EPA officials and Tribal government officials in developing Agency actions that affect Tribes. Consultation means open sharing of information, the full expression of Tribal and EPA views, a commitment to consider Tribal views in decision-making, and respect for Tribal self-government and sovereignty. Consultation is different from input and interaction: consultation is government to government whereas input and interaction can be with communities, environmental staff, and others.

Consultation versus Community Involvement

It is important to distinguish between government-to-government consultation and community involvement activities. Community involvement typically involves members of the Tribal community directly and is normally separate from consultation or discussions with the Tribal government. Consultation occurs in addition to the public participation process.

Federal Indian Law

“Federal Indian Law” refers to the body of law that defines the legal relationship between the United States and the Indian Tribes, including federally-recognized Alaska Native entities. Federal Indian Law primarily concerns Tribal sovereignty, individual and Tribal property rights, and the division of jurisdiction between Tribes and states.

Federal Indian Trust Responsibility

The federal government has a “trust responsibility” to federally recognized Indian Tribes that arises from treaties, statutes, executive orders, and the historical relations between the United States and Indian Tribes. Like other federal agencies, EPA must act in accordance with the trust responsibility – which generally includes consulting with and considering the interests of Tribes – when taking actions that may affect Tribes or their resources. One of the tenets of trust responsibility is the obligation of the federal government to protect tribal sovereignty.

Government-to-Government Relationship

The relationship between federally recognized Indian Tribal governments and the federal government is a unique one. Indian Tribes possess an inherent sovereignty and are sometimes described as domestic dependent nations. Because each Indian tribe is a sovereign government, EPA officials (and those from other federal agencies) are expected to interact with Tribal officials as representatives of their government. EPA can consult – on a government-to-government basis – only with federally recognized Tribes. However, it is important to include all interested parties in the process in an appropriate manner.

Indian country

This term is defined by federal statute to include all land within federal Indian reservations, dependent Indian communities, and certain lands or allotments owned by Indians. Indian country also includes lands

held in trust by the United States. Tribal land issues can be quite complicated; therefore, there may be a need to talk to EPA Regional Indian Program representatives, Regional Counsel, or the Office of General Counsel for more in-depth information.

Indian Country Jurisdiction

With some exceptions, the borders of Indian country determine the extent of Tribal jurisdiction, the extent of certain types of federal jurisdiction, and the exclusion of state jurisdiction.² There are several different types of Indian country, and they are often found mixed together. See term “Indian country” for more information.

Indian Nations

“Indian nations” is a term used to describe the geographic area of an independent sovereign nation. This would include any land referred to as “Indian country” and/or “reservations.”

Indian Tribe

An “Indian tribe” is an entity that appears on the list of federally recognized Tribes published annually by the Bureau of Indian Affairs (BIA) of the Department of Interior (DOI). It is generally a community of Indians who are ethnologically similar, but who as a community also exist in a legal-political sense.

Indian Tribal governments determine who is a member of an Indian Tribe by ensuring that they meet specific Tribal membership criteria. Each tribe has its own laws and methods of determining membership, but typically it is based on ancestry. Indians also constitute an ethnic minority in the United States protected by the civil rights guarantee of the Constitution and Civil Rights Acts. Discrimination for or against Native Americans on the basis of race, color or national origin is as illegal as it is for other ethnic groups.

Multiple Tribes

More than one Tribe could have interest in the same area. In this type of situation, EPA should offer to consult with all interested Tribes. In some cases, Tribes may form a group to speak with one unified voice. If this does not happen, EPA should continue to consult with all interested Tribes. (The singular version of “Tribe” can also include more than one tribe and can be used if applicable.)

Native Americans (also referred to as Indian, American Indian, and Alaska Native)

The terms “Native American,” “American Indian,” “Indian” and “Alaska Native” can be used in a very broad sense to describe members of ethnically distinct groups of United States citizens who are indigenous to North America. All of these terms are generally accepted, but it is preferable to use individual Tribal affiliation whenever possible.

Native Hawaiians

“Native Hawaiians” can be described as Native American because they are indigenous to their areas and they are not descendents of European colonizers. The Native Hawaiian community has a different relationship with the U.S. Government. They are not recognized as a legal, political entity, or government.

Reservations

“Indian country” and “Indian reservation” are often used interchangeably, although reservations are a subset of Indian country. Today, reservations tend to be divided and may have been set aside from the public domain by an act of Congress, executive order, or treaty. The exterior boundaries of reservations

² 117 S.Ct. 1404 (1997)

often enclose lands not owned by the tribe, including, but not limited to, allotments and nonmember-owned fee lands.

Sovereignty

“Sovereignty” is the authority that a government draws upon to govern. In the United States, sovereignty is considered to be inherent, and existed in tribes prior to the country itself. The Tribes represent an independent sovereign of the United States and, therefore, can govern from their own inherent sovereignty. Tribes may choose whatever forms of government best suits their practical and cultural needs. No decisions about Tribal lands or resources and people should be made without consulting the Tribal government.

Treaties

Through treaties, Indian Nations ceded certain lands and rights to the United States and reserved certain lands (“reservations”) and rights for themselves. In many treaties, Tribal governments reserved hunting, fishing, and gathering rights in territories beyond the land that they reserved for occupation.

Tribal Air Coordinators (TAC)

Each Regional Office has a tribal air coordinator that participates in monthly conference calls organized by the sub-lead EPA Region for Tribal Air Issues. These regional contacts (see contacts list in appendix) are familiar with tribal issues specific to the tribes in their region and can serve as a good resource in early planning efforts and follow-up consultation.

Tribe

There is no definitive legal description of what constitutes a tribe that applies to all areas of this field of law. One of the most widely-used descriptions comes from the 1901 Supreme Court case, *Montoya v United States*: “a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular sometimes ill-defined territory.”³

Tribal Area

“Tribal area” is a generic term adapted from concepts used by the U.S. Census Bureau to discuss where Native Americans live. It includes American Indian reservations, Alaska Native Villages, and other special types of areas that represent ongoing centers of Tribal culture.

Tribal Authority Rule

Tribes have the authority to assert jurisdiction over their people and their land; define their own Tribal membership criteria; create Tribal legislation, law enforcement, and court systems; and tax their members. “Tribal Authority Rule” implements the provisions of the Clean Air Act to authorize eligible Tribes to implement their own Tribal air quality programs.

Tribal Coordination

“Tribal Coordination” refers to harmonization of EPA’s Tribal outreach and information dissemination/exchange activities to ensure that Tribal governments are aware of EPA actions that might impact them and afforded the opportunity to alert EPA that they wish to be consulted according to the terms of Executive Order 13175 early in the process of developing those actions.

Tribal Consultation

“Tribal Consultation” consists of a meaningful and timely two-way exchange with Tribal officials in developing Agency actions, providing for open sharing of information, the full expression of Tribal and

³ 180 U.S. 261, 266.

EPA views, a commitment to consider Tribal and EPA views, a commitment to consider Tribal views in decision-making, and respect for Tribal self-government and sovereignty.

Tribal Governments

Federal law recognizes that Tribes may adopt whatever forms of government best suite their own practical cultural or religious needs. Most Tribal government structures combine traditional features with Western forms. More traditional Tribal governments may select political officials by consensus with decisions based on family, clan, or religious law; while other Tribal governments may use a more democratic process to elect officials.

Tribal Implications

Policies that have “Tribal implications” refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between Federal Government and Indian Tribes, or on the distribution of power and responsibilities between Federal Government and Indian Tribes.

Tribal Officials

“Tribal officials” means elected or duly appointed officials of Indian Tribal governments or authorized inter-Tribal organizations. EPA would generally recognize a representative of a Tribal government as a “duly appointed official” after receiving confirmation from an elected or duly-appointed Tribal leader that the representative is authorized to consult with EPA on the Tribe’s behalf. Such confirmation should be provided in writing.

Trust Responsibility

Under the general trust responsibility, the federal government is to consult with and consider the interests of the Tribes when engaged in any activity that may affect them. All federal agencies share in the trust responsibility.

TRIBAL ORGANIZATIONS *(referenced in this document)*

AIEO – The American Indian Environmental Office

AIEO is part of the U.S. EPA. The AIEO, working with its regional components, is responsible for coordinating the Agency-wide effort to strengthen public health and environmental protection in Indian country. AIEO oversees development and implementation of the Agency's Indian policy.

ITCA – Inter-Tribal Council of Arizona

ITCA provides a united effort to promote Indian self-reliance through public policy development. ITCA provides an independent capacity to obtain, analyze and disseminate information vital to Indian community development. The 19 member tribes of ITCA are the highest elected tribal official, tribal chairpersons, presidents, and governors.

ITEC - Inter-Tribal Environmental Council of Oklahoma

The ITEC was formed in 1992 by the signing of a Memorandum of Understanding between 20 Oklahoma tribes and EPA Region 6. Since that time other tribes have joined and the current membership is 31 of the 27 federally-recognized tribes in Oklahoma. The ITEC provides environmental management for air, land and water resources to the member tribes.

NCAI – National Congress of American Indians

Founded in 1944, NCAI is the oldest, largest, and most representative national Indian organization, serving more than three quarters of the American Indian and Alaska Native population. NCAI is organized as a representative congress of consensus on national priority issues.

NTAA – National Tribal Air Association

NTAA's mission is to advance air quality management policies and programs, consistent with the needs, interests, and unique legal status of American Indian Tribes, Alaska Natives and Native Hawaiians.

NTEC – National Tribal Environmental Council

NTEC was formed in 1992 and is a membership organization dedicated to working with and assisting tribes in the protection and preservation of the reservation environment. NTEC is open to membership to federally-recognized Indian tribes and currently has 182 member tribes.

NTOC – National Tribal Operations Committee

The (National) Tribal Operations Committee (NTOC) was formed in February 1994 in order to improve communication and build stronger partnerships between the tribes and EPA. NTOC comprises 19 tribal leaders or their environmental program managers (the National Tribal Caucus) and EPA's Senior Leadership Team, including the Administrator, the Deputy Administrator, and the Assistant and Regional Administrators.

RTOC – Regional Tribal Operations Committee

Federally-recognized Tribes reside in nine of the Agency's ten regions (Region 3 is the exception). Each of these nine regions has appointed a Regional Indian Coordinator, and some of the regions have established an Indian program office. Some regions have a formal Regional Tribal Operations Committee comprised of Tribes residing within that region.

TAMS - Tribal Air Monitoring Support Center

The TAMS Center is a partnership between OAR offices, OAQPS, and ORIA with support from NAU's **Institute for Tribal Environmental Professionals (ITEP)**. The mission of the TAMS Center is to develop the Tribal capacity to assess, understand, and prevent environmental impacts that adversely affect health, culture, and natural resources.

EPA TRIBAL AIR PROGRAM CONTACTS

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SAMPLE

OAQPS IMPACTS OR EFFECTS ON TRIBES FORM
(to be used for all OAQPS Actions – regulation, policy, or guidance)

Name of Action: _____

Project Lead Name & Number: _____

Division & Group: _____

Action Stage (e.g., data gathering, pre-proposal, proposal, final, other) _____

Estimated Date of next major action (e.g., proposal or final) _____

To determine if there are any potential **impacts or effects on tribes** please answer the following questions: (Please answer **YES** or **NO**. If the answer is **YES**, please explain on attached sheet.)

- Are there substantial effects on:
 - Tribal governments and/or their ability to self-govern _____
 - trust resources _____
 - treaty or other rights _____
- Does this action affect Indian lands or is it close enough to potentially affect Indian lands (e.g., transport issues)? _____
- Does this action establish new federal standards or significant policy or guidance? _____
- Does this action establish a regulation not required by statute or propose a regulation which preempts Tribal law? _____

Please consult with the OAQPS, Outreach and Information Division, Community and Tribal Programs Group for assistance in answering these questions.

EXAMPLE TRIBAL OUTREACH/COMMUNICATION STRATEGY

- 1) Early in Action Development Process
 - a. Contact sub-lead EPA Region and give brief overview of action of monthly TAC call.
 - b. Meet with Tribal Environmental Professionals (TEP) on monthly NTAA calls, RTOC meetings or other Tribal forum to present key concepts of the action and get input on whether there will be Tribal implications
 - i. work with CTPG to identify appropriate forum
 - ii. note in some cases CTPG can help communicate with the Tribes (attend meetings, help you develop materials that are Tribal friendly)
- 2) Prior to Proposal of Action
 - a. Meet with Tribes to present the key concepts in the proposal, generally this will be done with TEP staff but if there are Tribal implications a formal opportunity for consultation needs to take place.
 - i. If consultation is needed, send letters to Tribal leaders and key consortia to provide an opportunity for consultation.
 1. These letters should come from the division director or higher
 2. Copy (or cc) TEP so they are aware of the letter
 - ii. Respond to Tribal leaders as appropriate – generally there isn't much interest from the Tribal leaders, they will generally defer to coordination with TEP. However if they request conference calls or face to face meetings we will need to work with the tribe to set those up.
 1. Note the Regional Office can help with face to face meetings,
 2. If all agree consultation may take place at a joint meeting including Regional TOC other forums.
- 3) After Proposal of Action
 - a. Outreach to explain the content of the proposal and encourage input from the Tribes should be on going in the TAC calls, NTAA calls, RTOC meetings and other forums
 - b. Mechanisms for highlighting the proposal
 - i. Tribal Air Newsletter
 - ii. Tribal Air Website
 - iii. Tribal List serve
- 4) After Final Action
 - a. Outreach to explain the content of the final rule
 - b. Mechanisms for highlighting the final decision and identifying next steps
 - i. Tribal Air Newsletter
 - ii. Tribal Air Website
 - iii. Tribal List serve

SAMPLE CONSULTATION LETTER

Minor New Source Review in Indian Country

Dear Honorable Tribal Leaders,

The purpose of this letter is to seek your advice on how the US Environmental Protection Agency (“EPA”) can best consult with your Tribe and other federally-recognized Indian Tribes (“Tribes”) during rulemaking efforts. As a pilot project, we will be using a rule that we are just now developing to protect air quality in Indian Country. For this effort, we will use the minor source New Source Review in Indian Country (“Tribal NSR rule”). The rule we are developing may affect businesses located in Indian Country and may affect Tribal governments and communities.

The EPA is now developing the Tribal NSR rule to address significant regulatory gaps in the protection of air quality in Indian Country. The Clean Air Act requires a new source review program for sources of air pollution. The Tribal NSR rule will address smaller air pollution sources (usually called “minor sources”) of air pollution. Minor sources could be new businesses or existing businesses that are making changes in equipment or the method of operation that would result in small increases in emissions. Collectively, they may be a significant source of air quality problems in Indian Country because they are much more numerous than large sources. Examples of minor sources could include gasoline stations, dry cleaners, spray paint operations, automotive repair shops, etc. Currently, minor sources in Indian Country are unregulated, and Tribes have expressed concerns to us about the cumulative impacts. Although the States have developed regulatory programs for minor sources, these do not apply in Indian country, and there is currently no Federal minor source program. Our plan is that the Tribal NSR rule will put a Federal minor source program in place within Indian Country.

The EPA wishes to work with Tribal governments to develop sustainable processes for consulting meaningfully with Tribal governments. In this effort, we hope to conduct our efforts with sensitivity to the needs and culture of Tribes and with attention to the impact of our actions on Tribal sovereignty. We recognize that one Tribe does not speak for another, and that there is no one organization that represents all Tribes. The EPA’s goal, therefore, is to reach as many Tribes as possible through a consultation process.

We note that resource constraints upon the Tribes and the EPA make meaningful consultation with all Tribal governments an enormous challenge. The EPA will share information in an early, open and continuing basis and facilitate Tribal participation as much as possible. We will strive to clearly define our objectives, Clean Air Act requirements and the limitations on our activities. In recognition of the practical realities of undertaking this effort, we are asking for your help in developing these processes.

The EPA is considering several ways to consult with Tribes, such as calling Tribal contacts directly, or meeting at workshops and national Tribal meetings across the United States. Also, to develop a communication strategy, the EPA is considering electronic mailings, publishing articles in Indian Country newsletters, mailing information to Tribal governments and posting

Internal draft, work-in-progress document. Deliberative – DO NOT cite or quote.

materials on EPA's TribalAir website. Please let us know of other particular mechanisms that could be used between your Tribe and EPA. Attached below is a check list of various options. We would be grateful if you would please fill it out and either mail, email, or fax the sheet back to us at 919-541-5509 by **July 19, 2002**.

The input received will be invaluable to EPA in developing a consultation process which will best serve both Tribal needs and Clean Air Act requirements. The process will be developed in accordance with Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, and will facilitate coordination, if needed, for the requirements of the Small Business Regulatory Enforcement Fairness Act (SBREFA). The presence of small businesses on Tribal lands requires that these entities have an opportunity for meaningful input as required by the Small Business Regulatory Enforcement Fairness Act.

We encourage you or your staff to respond with your ideas and recommendations on how to develop the consultation process. We would also like to know your interest in consulting on the minor source New Source Review rule.

Sincerely,

cc:

The primary contact for the Tribal NSR rule is listed below if you or your staff would like additional information.

Joyce Barkley, Project Lead
US Environmental Protection Agency
OAQPS/Integrated Implementation Group
Mailcode-C339-03
Research Triangle Park, NC 27711
919-541-1877 tel.
919-541-5509 fax

Minor Source New Source Review

Please check off all options your Tribe would prefer for input on the Rule:

- Direct call with appropriate Tribal contact.
- Electronic mailings with appropriate Tribal contact.
- Participating in Tribal workshops/stakeholder meetings.
- Publish articles in Indian Country newsletters, asking for comment.
- Mail information to Tribal Governments/Environmental staff, asking for comment.
- Post materials on EPA's TribalAir website, asking for comment.
- Other recommendations. Explain: _____

- Would you prefer a face to face meeting if it could be arranged, and where?

- How much lead time prior to the meeting would you like? _____

Do you have a specific person we could talk to on a regular basis regarding the Tribal rule?

Name: _____ Phone : _____ Fax : _____

Mailing Address: _____

Please return this form to US EPA
ATTN: Joyce Barkley
Fax: 919-541-5509