



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

OCT 14 2005

OFFICE OF  
WATER

Dear Tribal Leader:

We are writing today to discuss an issue that is of importance to both the Environmental Protection Agency (EPA) and tribes. The issue concerns records, information, and data which are generated under an EPA assistance agreement and required to be submitted to EPA under the agreement. We wish to inform you of the Agency's position on this issue, to promote use of EPA's national data systems, and to discuss what, if any, legal protections may be available to exempt this information from release in the event EPA receives a Freedom of Information Act (FOIA) request for it.

On May 11, 2005, EPA circulated a draft tribal leaders' letter with a call for comments throughout Indian country by way of the Tribal Caucus of EPA's Tribal Operations Committee. These issues were also discussed with tribes in June at the National Tribal Environmental Management Conference in Traverse City, Michigan and prior to that in May at the River Network's 2005 River Rally in Keystone, Colorado. Thank you for the thoughtful comments EPA received. Enclosed is a Comment and Response document to provide a more detailed explanation of the information in this letter.

Be assured that EPA's primary purpose in collecting this information is to help us implement the purpose of the relevant assistance agreement. EPA awards assistance agreements to tribes to carry out various statutory and program goals established in the Federal laws that EPA administers. In addition, by obtaining appropriate environmental data and information from tribes, EPA can ensure that it has a long-term and complete record of tribal environments from which to make necessary decisions, allocate resources, direct efforts, and mark progress over time. Using EPA's national data systems also provides EPA and tribes the ability to understand the tribes' important positioning within air sheds and watersheds that cross tribal-state boundaries, and will allow all parties to work together to improve the environment and human health.

At this time when Congress and the President are requiring EPA to clearly demonstrate accountability and results from the financial assistance we provide to recipients, it is necessary for EPA offices to have this information available to make this showing. The Federal assistance agreements law makes clear that Federal agencies have full rights to information and data generated from activities financed by assistance

agreements. The American Indian Environmental Office (AIEO) supports making this information available. We believe that a lack of tribal information may hinder EPA's ability to justify and account for its programs in Indian country to the overall detriment of tribes.

Once information is obtained by EPA, any person may request a copy of the information through FOIA. FOIA contains nine exemptions from releasing records, but no specific restriction preventing public access to tribal information in general. You should not assume that tribal information generated under an assistance agreement is automatically exempt from release. Certain information may be protected from release, for example, confidential business information, some personal privacy information, and limited other tribal information may be exempt from disclosure under FOIA.

Please be assured that EPA will continue to work closely with our tribal partners on a government-to-government basis to discuss EPA's program needs and ensure the appropriateness of our information collection requirements. We have heard many thoughtful comments regarding the need to protect tribally known sacred sites, medicinal plant locations, and particular species. In general such information is beyond the scope of EPA funded activities and would not be requested by EPA. AIEO will continue to emphasize to all EPA offices the importance of becoming knowledgeable about the effects that these requests have on tribal program capacity, the differences between working with states and tribes, and the overall sensitivity that this issue has in Indian country.

If you have any questions please contact me, Carol Jorgensen, Director, AIEO, at (202) 564-0303, or have your staff contact Jeff Besougloff, AIEO, at (202) 564- 0292.

Sincerely,



Benjamin H. Grumbles  
Assistant Administrator



Carol J. Jorgensen  
Director  
American Indian Environment Office

Enclosure

cc: Indian Program Policy Council  
National Tribal Caucus

# **Tribal Information Access: EPA Responses to Tribal Comments Regarding Tribal Leaders Letter and Conference Presentations**

## **September 2005**

EPA's American Indian Environmental Office received written comments from five tribes and evaluated feedback at two meetings in response to the May 11, 2005, draft tribal leaders letter on Tribal Information Access from Carol Jorgensen, Director of EPA's American Indian Environmental Office. EPA had provided a copy of this draft letter to the Tribal Caucus of EPA's Tribal Operations Committee for wider distribution to tribal leaders for comment prior to the letter being finalized. Additionally, these issues were also discussed with tribes in June at the National Tribal Environmental Management Conference in Traverse City, Michigan, and prior to that in May at the River Network's 2005 River Rally in Keystone, Colorado. The comments are summarized and combined by topic from all comments received. All attempts were made to use the original commenting language.

### **STORET/Other Data Systems**

Tribal Comment: STORET is a cumbersome and excessively time-consuming and nonuser-friendly database. Also, using the program is incredibly labor-intensive and will take away from time and grant money that could be used for more beneficial programs. Tribes find it unreasonable of EPA to require the use of this program to store data.

EPA Response: EPA is aware of the challenges involved in the use of STORET by tribal Clean Water Act Section 106 grant recipients and we have been working with tribes in several Regions to help facilitate submittal of tribal water quality monitoring data to EPA. Our Region 8 office has been working with tribes to load data into a copy of STORET hosted by an EPA contractor. Region 5 has been working with tribes on development of a simple Excel spreadsheet for use by tribes that can provide data in a consistent format that is readily accessible to STORET through the STORET Input Module (SIM) tool. EPA is currently embarking on the development of a new data management system (Water Quality Exchange, or WQX) that will free tribes and states from the burden of maintaining a local copy of STORET in order to submit their data to EPA. The Wind River Reservation is currently partnering with EPA in this effort. As we implement the Clean Water Act Section 106 tribal grant guidance, we will continue to work with tribes to implement better tools to manage water quality data and to submit that data to EPA.

Tribal Comment: The tribe is willing to use STORET if EPA is willing to input the data into the database for tribes.

EPA Response: In addition to the steps outlined in EPA's response above, some EPA Regional programs are exploring the feasibility of developing tools to facilitate the entry of entering tribal Clean Water Act Section 106 information into STORET in order to ease the resource burden on the tribes and EPA.

Tribal Comment: The tribe would be willing to use a workable database provided by EPA to replace STORET. The tribe opposes use of other databases (SDWIS, AQS, or any other) that operate similarly to STORET and take time and resources away from tribal priorities.

EPA Response: EPA is working to ensure that any data and information system used by tribal funding award recipients meets the needs of tribes as well as EPA. EPA recognizes that there may exist significant challenges to requiring tribal use of some EPA systems that were designed for input by non-tribal recipients and users. EPA is currently working with tribes to modify systems, such as the Air Quality System, to create a more tribal user friendly platform. EPA will continue to work with tribes to ensure that these challenges are recognized and resolved and that the need for data and information does not negatively impact tribes' ability to conduct other activities under the EPA award.

Tribal Comment: If issues regarding EPA positions on tribal data and information are not addressed, and data reporting becomes too costly and burdensome, then the tribe will have to consider pursuing other funding sources to implement its water quality program in a way that is consistent with tribal needs, goals, and priorities.

EPA Response: It is EPA's desire to strengthen its tribal program and tribal environmental programs to ensure the highest level of protection of human health and the environment in Indian country. To maintain and grow programs, EPA has identified a need for information that allows EPA to examine the effectiveness of its programs. At a time when all federal programs are being required to show results and positive benefits for the tax dollars spent, combined with decreasing federal resources for domestic programs, such self-examination is occurring in all federal programs. EPA is committed to working with the tribes to minimize the burden on the data providers as implement the Clean Water Act Section 106 tribal guidance.

## **Consultation and Coordination by EPA with Tribes**

Tribal Comment: Direct consultation needs to occur between EPA and tribal leaders before positions can be taken on general data and information issues and before a finalized Clean Water Act Section 106 tribal guidance is released.

EPA Response: EPA takes seriously its government-to-government relationship with tribes and its consultation and coordination obligations. The release of the May 11, 2005, draft tribal leaders letter on Tribal Information Access from Carol Jorgensen, Director of

EPA's American Indian Environmental Office, is part of EPA's effort to consult and coordinate. These efforts will continue to occur. Related actions, such as finalization of the Clean Water Act Section 106 tribal guidance, will also receive the proper level of coordination and consultation.

Tribal Comment: The tribe questions the statement that there is a lack of tribal information regarding environmental quality in Indian country available to EPA. Tribes submit reports to Regional offices.

EPA Response: EPA lacks comprehensive national information in a number of media areas for Indian country. EPA Regional offices have worked very hard with tribes to develop the information necessary to allow EPA Regional Programs to operate and continue funding. There is an additional need for EPA to have an ability to make comprehensive national statements regarding the environment in Indian country in order to support and maintain the current program levels. With the exceptions of limited circumstances, this is not occurring. The information submitted, in various manners and forms, to EPA Regional offices is not able to be combined in such a way as to present a national picture of need, nor of effectiveness of the work being performed in Indian country under EPA funding. A number of EPA programs are expected develop national data systems for their programs in the coming years. Tribal leaders can expect to see additional EPA activity regarding tribal data. This activity is likely to take the form of requiring information that can be used on a national level.

## **Legal Issues**

Tribal Comment: There was no citation to the laws cited in the draft letter regarding access to data and information.

EPA Response: As a general matter a grant of federal funds subject to conditions which must be met by the grantee, creates a type of contract between the United States and the grantee. See, *McGee v. Mathis*, 71 U.S. (4 Wall.) 143, 155 (1866); *Pennhurst State School and Hosp. V. Halderman*, 451 U.S. 1, 17 (1981); *Bennett v. New Jersey*, 470 U.S. 632, 638 (1985). In carrying out its statutory grant authority, an agency is permitted to impose conditions on grantees who receive federal funds. *Virginia Dep't of Educ. v. Riley*, 23 F.3d 80, 87 (4th Cir. 1994). For example, EPA can impose grant conditions under the Clean Water Act which are related to the water quality goals of the Act. *Shanty Town Associates Limited Partnership v. EPA*, 843 F. 2d 782 (4th Cir. 1988). Grant conditions not only include specific terms and conditions and applicable regulatory requirements, but also commitments made in a grant work plan. For example, EPA's tribal environmental program grant regulations provide that a complete grant application must meet the requirements in 40 CFR Part 31 and include a proposed work plan. 40 CFR 35.505. The work plan is negotiated between a tribe and the Regional Administrator and reflects consideration of national, regional, and tribal environmental and programmatic needs and priorities. 40 CFR 35.507(a). The work plan is "the basis for the management and evaluation of performance under the grant agreement" and must

include “the work plan components to be funded under the grant” and the “commitments for each work plan component, and a time frame for their accomplishment.” 40 CFR 35.507(b). Thus, if EPA is awarding a Clean Water Act Section 106 grant to a tribe for purposes of assessing tribal water quality, EPA has the authority to require in the work plan a commitment that the tribe submits to EPA water quality data collected under the grant.

Tribal Comment: To ensure the appropriateness of EPA policies regarding access to data collected by tribes under federal assistance agreements, EPA should consider all existing Federal statutes some of which prohibit public disclosure of information. Limitations can be found in the Freedom of Information Act and the National Historic Preservation Act. The limitations should be utilized as much as possible to protect tribal information.

EPA Response: Under the Freedom of Information Act, a person may request any Agency record, including ones provided to EPA as part of a Federal assistance agreement. The requested record must be disclosed unless it is protected by one or more of the nine FOIA exemptions. Although FOIA does not contain a specific exemption to protect tribal-related information, such information may be protected under existing FOIA exemptions. Although several comments were received listing specific statutes that provide limitations on the disclosure of information under FOIA, most of these statutes have not been litigated, so their status as “Exemption 3” statutes is uncertain. Also, some of these laws appear to apply to information within specific agencies other than EPA. Tribal Comment: STORET is a data warehouse that is available to the public. For such data systems EPA must enter into a Memorandum of Agreement (MOA) or a Plan of Action (POA) with each tribe in each Region to address issues regarding sensitive data. EPA Response: The negotiated grant work plan contains any agreement regarding information requirements and data systems to be used under the funding award. No further agreement is required. EPA believes the issues of tribally-determined sensitive and cultural information warrants further discussion as these situations arise.

Tribal Comment: EPA's rights to access records of grantees under 40 CFR 31.42 (retention and access requirements for records), states in Section (f) that grantees do not have to allow public access and dissemination of records unless required by law.

EPA Response: The regulation cited, 40 CFR 31.42, provides EPA and the Comptroller General with the right of access to any pertinent books, documents, papers, or other records of the grantees and subgrantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts. Under Section (f), a grantee is not required to give the public the same right of access to these financial and programmatic records, unless otherwise required by law. This right of access is in addition to any other rights provided to EPA by the grant agreement itself, such as the requirement that a recipient submit water quality or other environmental data to EPA. Nothing in this regulation limits EPA's authority to collect information through workplan commitments, as discussed above.

## **AIEO's Role in the Process**

Tribal Comment: What role does AIEO play in this process?

EPA Response: AIEO plays an important role in developing EPA Tribal Program policies and in working with individual EPA Headquarters and Regional Offices on their activities with tribes. AIEO will continue to work with media specific offices – such as the Office of Water's Office of Wastewater Management on the incorporation of STORET use into tribal Clean Water Act Section 106 grants – to ensure respect for the government-to-government relationship and adherence to EPA's 1984 Indian Policy and its trust responsibility. AIEO has already begun discussions with EPA offices regarding the sensitivity of some tribal information and EPA's obligation to work with tribes to develop mutually beneficial solutions to any challenges. Through these efforts, AIEO promotes the concept of seeking holistic solutions across tribal-state political boundaries by including tribal concerns in national level discussions.