



Tribal Consultation and Coordination at Federal Facilities

DECEMBER 12, 2024

FEDERAL FACILITIES RESTORATION AND REUSE OFFICE

FEDERAL FACILITIES TRAINING

1

The purpose of this course is to discuss how Tribal consultation and coordination are used at Federal Facilities listed on the National Priorities List (NPL) in accordance with the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

Overview

- Consultation and Coordination
- Federal Facility Cleanups and Consultation Roles
- Identifying a Need for Consultation
- Tips for Developing Partnerships



This Photo by Unknown Author is licensed under CC BY-NC

This course will review how tribal consultation and coordination apply at federal facilities given the role EPA and the lead agency have at these sites. Keep in mind that there is no “one size fits all” when it comes to working with Tribes and the process will vary from site to site.

CERCLA Language

CERCLA §126(a): The governing body of an Indian tribe shall be afforded substantially the same treatment as a State with respect to the provisions of:

§104(c)(2) (regarding consultation on remedial actions),

The President shall consult with the affected State or States before determining any appropriate remedial action to be taken pursuant to the authority granted under subsection (a) of this section. [Section 104 provides the authority for the U.S. to respond to releases with either a removal or remedial action.]

a) Treatment generally

The governing body of an Indian tribe shall be afforded substantially the same treatment as a State with respect to the provisions of section 9603(a) of this title (regarding notification of releases), section 9604(c)(2) of this title (regarding consultation on remedial actions), section 9604(e) of this title (regarding access to information), section 9604(i) of this title (regarding health authorities) and section 9605 of this title (regarding roles and responsibilities under the national contingency plan and submittal of priorities for remedial action, but not including the provision regarding the inclusion of at least one facility per State on the National Priorities List).

CERCLA §126(a): The governing body of an Indian tribe shall be afforded substantially the same treatment as a State with respect to the provisions of:

§103(a) (regarding notification of releases),

§104(c)(2) (regarding consultation on remedial actions),

The President shall consult with the affected State or States before determining any appropriate remedial action to be taken pursuant to the authority granted under subsection (a) of this section. [Section 104 provides the authority for the U.S. to respond to releases with either a removal or remedial action.]

§104(e) (regarding access to information), §104(i) (regarding health authorities) and §105 (regarding roles and responsibilities under the national contingency plan and submittal of priorities for remedial action, but not including the provision regarding the inclusion of at least one facility per State on the National Priorities List)

NCP Language

§ 300.500 General.

(a) EPA shall ensure meaningful and substantial state involvement in hazardous substance response as specified in this subpart. EPA shall provide an opportunity for state participation in removal, pre-remedial, remedial, and enforcement response activities. EPA shall encourage states to enter into an EPA/state Superfund Memorandum of Agreement (SMOA) under § 300.505 to increase state involvement and strengthen the EPA/state partnership.

§ 300.500 General. (a) EPA shall ensure meaningful and substantial state involvement in hazardous substance response as specified in this subpart. EPA shall provide an opportunity for state participation in removal, pre-remedial, remedial, and enforcement response activities. EPA shall encourage states to enter into an EPA/state Superfund Memorandum of Agreement (SMOA) under § 300.505 to increase state involvement and strengthen the EPA/state partnership.

1984 EPA Policy for the Administration of Environmental Programs on Indian Reservations

- ❑ First formal Indian policy adopted by a federal agency.
- ❑ Outlines nine principles to guide interaction with tribes.
- ❑ Includes the following:
 - Works directly with tribal governments on a one-to-one basis
 - Removes barriers to working with tribes
 - Keep with the Federal Trust Responsibility, assures that tribal concerns and interests are considered in EPA decisions
 - Coordinates with other federal agencies to support tribes

The 1984 EPA Indian Policy, formally known as the EPA Policy for the Administration of Environmental Programs on Indian Reservations, was the first formal Indian policy adopted by a federal agency. It outlines nine principles that guide the Agency in interacting with tribes and administering environmental programs in Indian country:

1. Works directly with tribal governments on a one-to-one basis;
2. Recognizes tribal governments as the primary parties for setting standards, making environmental policy decision and managing program for reservations consistent with Agency standard and regulations;
3. Assists tribes in assuming regulatory and program management responsibilities;
4. Removes barriers to working with tribes;
5. Keep with the Federal Trust Responsibility, assures that tribal concerns and interests are considered in EPA decisions;
6. Encourages cooperation between tribal, state, and local governments;
7. Coordinates with other federal agencies to support tribes;
8. Works to ensure compliance with federal environmental laws on tribal lands and;
9. Incorporates these principles in planning and management activities

Although not specific to federal facility cleanups, principle 7 discusses the coordination with other federal agencies to support tribes. Available at <https://www.epa.gov/tribal/epa-policy-administration-environmental-programs-indian-reservations-1984-indian-policy>

Executive Order 13175 - Consultation and Coordination with Indian Tribal Governments (2000)

- “The U.S. has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions.”
- “...in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory.”

Executive Order (EO) 13175, Consultation and Coordination with Indian Tribal Governments, was issued by President Clinton in 2000. Pursuant to EO 13175, executive departments and agencies are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes. EO 13175 available at <https://www.federalregister.gov/documents/2000/11/09/00-29003/consultation-and-coordination-with-indian-tribal-governments>.

EO 13175 Consultation and Coordination with Indian Tribal Governments (2000)

- “The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.”

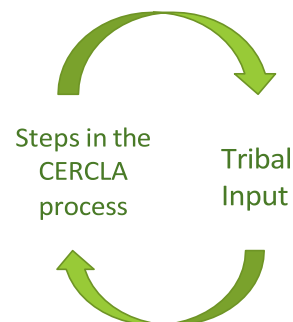


This Photo by Unknown Author is licensed under [CC BY-SA](#)

The EO 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. It is important to remember that a government-to-government relationship is different than the relationship between federal agencies and public stakeholder groups. Engagement with Indian tribes goes beyond requesting public comment and hosting public meetings by having consultation and coordination between the United States and Indian tribes.

2023 EPA Policy on Consultation with Indian Tribes

- Establishes national guidelines for consultation across EPA.
- Consultation should occur early enough for tribes to provide meaningful input to be considered prior to a decision (including CERCLA actions).
- Consultation and coordination should be continued as proposals and options are developed.
- There is no single formula for appropriate consultation.
- A less formal process may be sufficient for routine operational matters.



The 2023 EPA Policy on Consultation with Indian Tribes establishes national guidelines for consultation across EPA. Other federal agencies serving as the lead agency have their own policies and guidance to follow. Consultation should occur early enough to allow tribes the opportunity to provide meaningful input. As proposals and options are developed, consultation and coordination should be continued, to ensure that the overall range of options and decisions is shared with all concerned parties. A regular meeting schedule can also be considered. For example, quarterly meetings might work best to maintain regular contact and receive updates on cleanup activities. The 2023 policy is available at [EPA Policy on Consultation with Indian Tribes](#)

EPA's 2023 consultation policy defines consultation as a process to ensure meaningful and timely input by Tribal officials prior to EPA taking actions or implementing decisions that may affect tribes. This policy seeks to balance the need for consistency with the latitude to tailor the consultation approach to reflect the circumstances of each consultation situation and to accommodate the preferences of tribal governments. Coordination captures a great portion of an agency's communication, education, and outreach efforts, not just with tribes but communities, states and members of the public. General education and outreach efforts can supplement, but not take the place of consultation.

Consultation vs. Coordination

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

Apply Your
Understanding

Identify which of the following activities is a Consultation activity.

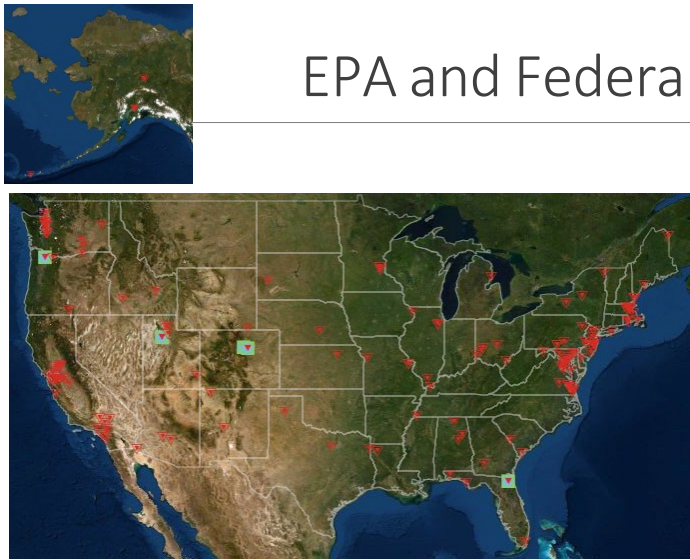
- A. Hosting an open house on a Non-Time Critical Removal Action
- B. Meeting with Tribal leadership to discuss tribal concerns on a proposed plan and providing feedback on how their input was considered in the final remedy decision
- C. Exchanging emails with Tribal technical representatives to clarify information and discuss concerns
- D. Having a technical meeting to discuss issues with tribal representatives and staff

FEDERAL FACILITIES TRAINING

12

Overview of Federal Facility Cleanups

EPA and Federal Facilities



- 175 federal facilities on the National Priorities List (NPL)
- Some are contaminated with hazardous wastes and may be located in areas that are culturally or historically significant to American Indian or Alaskan Native groups.

FEDERAL FACILITIES TRAINING 14

Federal facilities include active and closed military installations, former nuclear production plants, abandoned mines and landfills. Types of contamination include radioactive waste, munitions and unexploded ordnance, mining waste, fuels and solvents. There are 175 federal facilities on the National Priorities List (NPL) and EPA is responsible for overseeing their cleanup under the Superfund law (Comprehensive Environmental Response, Compensation, and Liability Act - Section 120). Some are contaminated with hazardous wastes and may be located in areas that are culturally or historically significant to American Indian or Alaskan Native groups. For example, some groups retained rights to hunt and fish on lands that are not located on tribal land but are impacted by releases from federal facilities.

Federally Recognized Tribes

- Federally Recognized Tribes
 - Secretary of the Interior acknowledges a group to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1944, 25 U.S.C. 479a. B.
 - 574 recognized tribes

- State Recognized Tribes or Heritage Groups
 - Acknowledges their status within the state but does not guarantee funding from the state or the federal government.

A federally recognized tribes is 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 1944, 25 U.S.C. 479a. B. A list of federally recognized tribes by state is available through the Department of Interior Bureau of Indian Affairs (BAI) at <https://www.bia.gov/service/tribal-leaders-directory>.

Federal agencies work 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.

“Lead Agency” Definition

- The National Contingency Plan (40 CFR 300.5) states that:
 - The **Lead Agency** is the agency that provides the On-Scene Coordinators (OSCs)/Remedial Project Mangers (RPMs).
 - The Department of Defense (DoD) or Department of Energy (DoE), then DoD or DoE will be the **lead agency** for their sites.
 - For sites other than those of EPA, the US Coast Guard (USCG), DOD, or DOE, then that other federal agency will be the **lead agency** for remedial actions and removal actions other than emergencies.

The National Contingency Plan (40 CFR 300.5) states the cases where another federal agency besides EPA serve as the lead agency.

- The Lead Agency is the agency that provides the On-Scene Coordinators (OSCs)/Remedial Project Mangers (RPMs) to plan and implement response actions under the NCP.
- In the case of a release of hazardous substance, pollutant or contaminant, where the release is on or where the source of the release is from any facility or vessel under the jurisdiction, custody, or control of Department of Defense (DoD) or Department of Energy (DoE), then DoD or DoE will be the lead agency.
- In the case of a release on or the source of the release is from any facility or vessel under the jurisdiction, custody, or control of a federal agency other than EPA, the US Coast Guard (USCG), DOD, or DOE, then that agency will be the lead agency for remedial actions and removal actions other than emergencies.

Role of Federal Agencies



This Photo by Unknown Author is licensed under CC BY-NC-SA

- ❑ At Federal Facility sites (i.e., Departments of Energy, Defense, Interior, etc.), the other federal agency (OFA) is the lead agency for consultation
- ❑ Each federal agency has their own consultation procedures
- ❑ EPA may play a facilitation or coordination role if necessary.

EO 12580 delegated presidential authorities under CERCLA to the heads of various Executive Branch agencies under certain circumstances. In exercising these powers, such agencies are given the responsibility to provide an opportunity for public participation. This means that other federal agencies are the lead agency for CERCLA actions and Tribal Consultation at federal facilities.

At federal facilities, EPA encourages a tribe seeking to consult with the United States to work directly with the federal agency with the most direct responsibility for the action or decision in question. However, EPA would consider a tribe's request to consult with EPA based on the specific circumstances, including the extent of EPA's active involvement or influence in the decision or action, whether EPA has a range of options or discretion in connection with its role, and whether EPA involvement would contribute significantly to the tribe's direct consultation with the other federal agency, or agencies involved.

EPA's Federal Facilities Restoration and Reuse Office Tribal Program Goals

- ❑ Develop partnerships that will enhance participation through coordination
- ❑ Respect the unique needs of each tribal community
- ❑ Provide oversight at NPL sites to ensure protection of human health and meaningful public involvement
- ❑ Identify contaminated sites on or near tribal lands, as well as site property that may be transferred to tribes.

FFRRO's Tribal Program protects the health of American Indians and Alaskan Native Villagers at and near federal facilities. FFRRO's goals are to:

- Develop partnerships that will enhance participation and the environmental decision-making process at federal facilities through meaningful coordination that respects the unique needs of each tribal community.
- Provide technical and regulatory oversight at NPL sites to ensure protection of human health, effective program implementation and meaningful public involvement.
- Identify contaminated sites on or near tribal lands, as well as site property that may be transferred to tribes.

Role of Tribal Governments

- ❑ Tribal governments have distinct roles through government-to-government relationships in cleanups of federal facilities under Constitution, treaties, statutes, Executive Orders, and court decisions with the U.S government.

Tribal governments have distinct roles in cleanups of federal facilities under treaties with the U.S. government. Accordingly, EPA works in partnership with tribal governments, both at the facility level and at the national policy-making level. The framework for EPA tribal involvement is a tribal strategy that is designed to address the needs of—and mitigate impacts to—American Indian tribes, including Alaskan Native villages, living on or near federal facilities. It includes:

- Working with tribes on a government-to-government basis consistent with EPA's trust responsibility to protect tribal health and environments.
- Involving tribes in the cleanup process through meaningful dialogue that respects the unique needs of each community.
- Developing partnerships that will enhance capacity and participation in the environmental decision-making process at federal facilities.

More information is available at <https://www.epa.gov/fedfac/tribes-and-federal-facilities>.

Tribes as Natural Resource Trustees

- ❑ CERCLA and the Oil Pollution Act (OPA) authorize the United States, States, and Indian Tribes to act on behalf of the public as Natural Resource Trustees for natural resources under their respective trusteeship
- ❑ Tribes may have critical information about the effects of hazardous substances and sensitive habitats to assist in characterizing the nature and extent of site-related contamination
- ❑ Early coordination in investigation and planning stages can help both the CERCLA and Natural Resource Damages efforts

<https://www.epa.gov/superfund/natural-resource-damages-trustees>

CERCLA and the Oil Pollution Act (OPA) authorize the United States, States, and Indian Tribes to act on behalf of the public as Natural Resource Trustees for natural resources under their respective trusteeship [CERCLA §107(f)(1); OPA §1006(c)]. OPA also authorizes foreign governments to act as Trustees [OPA §1006(b)(5)]. Tribes often have information and technical expertise about the biological effects of hazardous substances, as well as the location of sensitive species and habitats that can assist in characterizing the nature and extent of site-related contamination and impacts. Tribes will also provide a unique perspective regarding species of plants and animals that have a distinct cultural value sometimes overlooked when considering sensitive species. Coordination at the investigation and planning stages can benefit both CERCLA and Natural Resource Damages efforts.

Federal Trust Responsibility

- ❑ The U.S. Government has a trust responsibility to federally recognized tribes, arising from Indian treaties, statutes, executive orders and historical relationships between the U.S. and Indian tribes.
- ❑ Tribes gave up or “ceded” certain rights and vast territory to the U.S. government through treaties. In those treaties, the federal government made promises to tribes regarding the protection of lands and rights that they did not give up.

The federal trust responsibility is a doctrine defining the United States’ unique relationship with federally recognized tribes. In simple terms, it includes both moral obligations and legal duties that lead the federal government to consult with tribes and consider tribal interests and welfare when performing government tasks.

To briefly summarize, tribes gave up or “ceded” certain rights and vast territory to the United States government through treaties. In those treaties, the federal government made promises to tribes regarding the protection of lands and rights that they did not give up. The federal trust responsibility arises from treaties, statutes, executive orders and the ongoing historical relations between the United States and tribes.

It is important to consider that the ceded lands may also hold spiritual/cultural meaning to the Tribes and affect their religious practices.

EPA Federal Trust Responsibility

- ❑ Cleanup actions should be consistent with the protection of tribal rights arising from treaties, statutes and executive orders.
- ❑ In many treaties (especially those negotiated in the 1850's and 1860's) the tribal governments reserved hunting, fishing, and gathering rights in territories beyond land that they reserved for occupation.

Cleanup actions should be consistent with the protection of tribal rights arising from treaties, statutes and executive orders. In many treaties (especially those negotiated in the 1850's and 1860's) the tribal governments reserved hunting, fishing, and gathering rights in territories beyond land that they reserved for occupation. For example, in the NW treaties, these were typically called "usual and accustomed places".

Apply Your
Understanding

At a federal facility listed on the NPL, the agency responsible for conducting consultation with Tribes:

A. EPA

B. State

C. Community Groups

D. Lead Agency

Identifying a Need for Consultation

Tribal Consultation

Consultation is triggered whenever an agency decision, activity, or action “may affect tribal interests.”

The consultation process may include several methods of interaction that may occur at different levels and in different forms (e.g., requests for comments to individual meetings).

FEDERAL FACILITIES TRAINING

25

Consultation is triggered whenever an Agency decision, activity, or action “may affect tribal interests.” Examples of tribal interests include those agency decisions, activities, or actions that may affect their health or environment.

Keep in mind that tribal consultation under CERCLA is different than the Section 106 review process under the National Historic Preservation Act (NHPA). Section 106 is concerned with Federal undertakings. Undertakings may take place either on or off federally controlled property and include new and continuing projects, activities, or

programs. Section 106 of the NHPA requires that each federal agency identify and assess the effects its actions may have on historic buildings. Under Section 106, each federal agency must consider public views and concerns about historic preservation issues when making final project decisions. In addition, Federal agencies are required to consult on the Section 106 process with State Historic Preservation Offices (SHPO), Tribal Historic Preservation Offices (THPO), Indian Tribes (to include Alaska Natives [Tribes]), and Native Hawaiian Organizations (NHO).

Tribal Consultation

- ❑ A process through which the lead agency interacts with tribal governments when actions and decisions in the remedial process may affect tribal interests.
 - ❑ Informal interactions can help improve consultation by allowing for regular interaction between the project team and technical representatives
 - ❑ Formal Consultation should be offered to tribal leadership

Tribal consultation is a process through which the lead agency consults with tribal governments when EPA actions and decisions may affect tribal interests. Regular informal interactions will help establish relationships and improve communication between all involved parties at the project level. A formal consultation event will include tribal officials and upper management from federal agencies.

Examples of Tribal Interest Considerations

- Do tribal members use resources from the impacted zone?
- Is a tribe a Natural Resource Trustee of the affected resource?
- Is the affected area within a tribal historic area or traditional cultural property?
- Is the affected area linked ecologically, culturally, visually or hydrologically to tribal resources or uses?

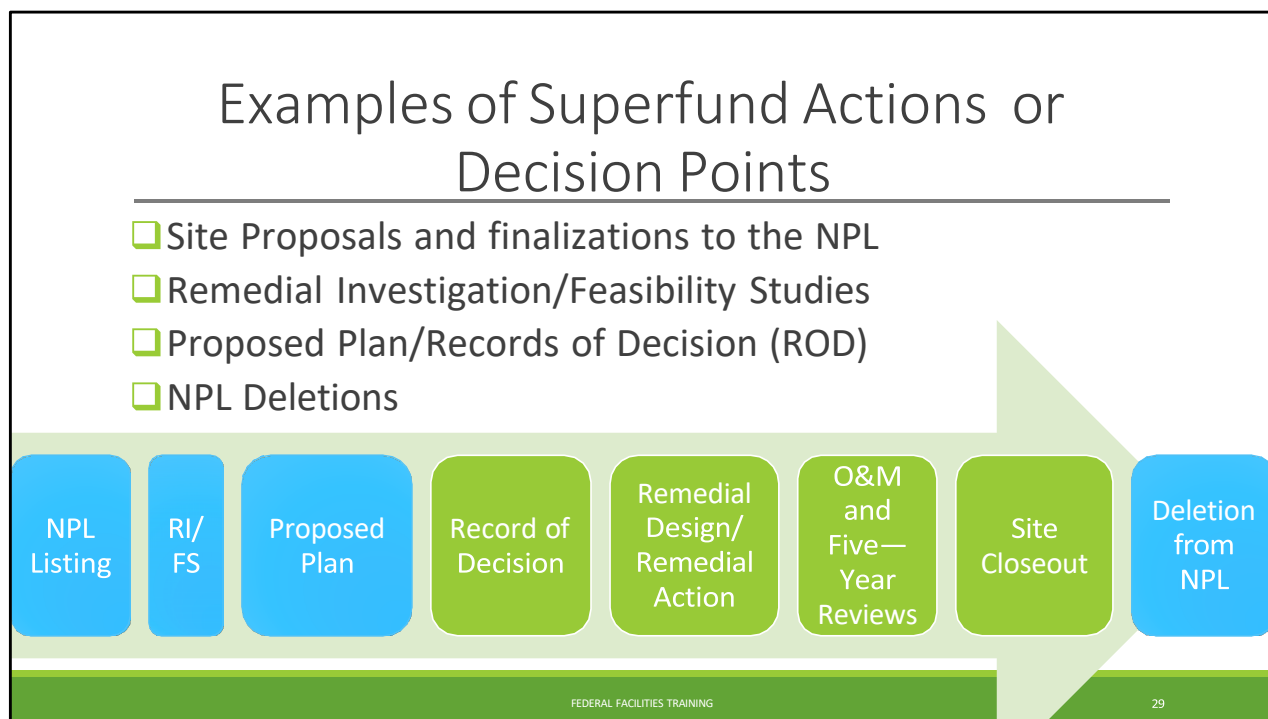
If you answered yes (or don't know the answer) to any of these questions, you likely need to reach out to the affected Tribe(s)

These are some potential questions that may help us decide if tribal interests may be affected and if there is a need to consult. The answers to some of these questions also point to the need for the lead agency to consider if it is appropriate to confer with a Tribal Historic Preservation Officer as required by the National Historic Preservation Act.

When to Offer Consultation in CERCLA Response Actions

- ❑ Emergency responses –primarily notification
- ❑ Time-critical removals – consult as time allows
- ❑ Non-time critical removals – consultation occurs
- ❑ Remedial actions – consultation occurs
 - May be needed at multiple points of the CERCLA process

EPA's 2011 Policy on Consultation and Coordination with Indian Tribes identifies response actions as CERCLA actions including removals and remedial actions. In an emergency response, there may only be time to notify affected tribes about releases that potentially impact tribal interests. For time-critical removal actions, the lead agency should coordinate with tribal staff and offer consultation prior to publishing the action memo, time permitting. If there is not enough time for consultation to occur, the tribe should be offered consultation as soon as possible afterwards. For non-time critical removal actions (NTCRAs), which have a minimum 6 month planning period, there should be enough time to implement a consultation process. For remedial actions, the lead agency should follow their consultation process.



Keep in mind that the need for consultation may arise multiple times for different parts of the CERCLA process. Examples of Superfund actions or decision points that may require tribal consultation include but are not limited to when the scope of work is being developed in the Remedial Investigation/Feasibility Study Work Plan; when alternatives being considered for development in the Feasibility Study are identified; and when a draft of the Proposed Plan is available.

EPA guidance requires notification to natural resource trustees when a Remedial Action Report, Preliminary Close Out Report, or Final Close Out Report" are near completion." The EPA 2011 guidance on Close Out Procedures for National Priorities List Sites is available at <https://www.epa.gov/superfund/close-out-procedures-national-priorities-list-superfund-sites>.

Importance of Documentation

- Correspondence (emails, letters, phone records, etc.) between the lead agency and the tribe providing documents, information or receiving comments from the tribe.
- Documentation of meetings.
- Request for or submission of ARARs.
- Ensure documentation is included in Administrative Record.

It is critical to document in the site file and administrative record (as appropriate) all of the interaction with the tribe(s) that meets the requirements of the policy for coordination with the tribe(s) that demonstrates that the lead agency has provided for meaningful and substantial tribal involvement. If consultation occurs, this should also be documented in the site file and AR, as appropriate. Be sure to include correspondence with the tribal environmental staff and elected leaders, meeting summaries, grant documents and other relevant documentation.

Apply Your Understanding

Which of the following is **NOT** an example of a way to build relationships between government agencies and tribal governments involved in federal facility cleanups?

- Interacting with representatives from each group on a regular basis.
- Hosting a technical meeting or workshop to discuss a proposed cleanup approach.
- Calling a representative from one of the groups with questions or concerns.
- Waiting until a cleanup decision is reached before engaging with tribal governments affected by the cleanup.

Tips for Developing Partnerships

Tips for Successful Consultation

- Engage early and often
- Respect the government-to-government relationship
- Recognize multiple tribes may be interested in consultation
- Document consultation but be sensitive to confidentiality concerns

It is best to build upon the ongoing communication and coordination with tribal representatives and tribal governments. Early engagement with tribal representatives is an important part of ensuring tribal concerns are considered in the decision-making process. Be aware and sensitive to confidentiality concerns and document appropriately.

Tips to Build Partnerships

- ❑ Although EPA does not serve as the lead cleanup agency at most federal facility cleanups, EPA can help provide information and opportunities for discussion with Tribal representatives.
- ❑ EPA can serve to communicate concerns and goals more thoroughly as the lead oversight agency.



This Photo by Unknown Author is licensed under CC BY-SA

Establishing and maintaining communication between the lead cleanup agency, EPA, and tribal representatives will facilitate identifying concerns and common goals earlier in the cleanup process. This will allow more time for issues to be worked and ultimately resolved. Although these efforts will initially require more time and effort, it will likely help avoid significant delays later in the process, particularly when developing and issuing a CERCLA record of decision.

Tips to Build Partnerships

- ❑ Communication can be a mix of:
 - Written comments (e.g., email, letters,)
 - Phones conversations
 - In-person conversations



There are multiple ways to communicate concerns. Written comments provided in hardcopy or by email may be helpful when communicating technical level concerns on a document such as an RI/FS or Proposed Plan. Phone conversations may be helpful to address questions on the purpose of a document or on the anticipated schedule for making a decision. Lastly, in-person meetings are also helpful when discussing technical concerns, clarifying a situation, and for helping to establish relationships between tribal and agency representatives.

Tips to Build Partnerships

- ❑ Encourage regular (informal) interactions between lead agency and/or regulators with Tribal representatives.
 - Discuss ongoing concerns and provide opportunities for face-to-face discussions.
 - May help groups be prepared in the event formal consultation is needed.
- ❑ Participants in these informal interactions will likely differ from those involved in formal consultation.



Regular interactions may include technical meetings, quarterly check-ins, or whichever type of interaction works best for those involved. Relationships are based on trust. Tribal representatives must believe that you, as a federal representative, are telling them the truth, that you are listening to their concerns with an open mind, and that you will consider changing the course of the action based on their input.