

CIVIL ENFORCEMENT AND COMPLIANCE ASSISTANCE IN

REGION 5 INDIAN COUNTRY:

QUESTIONS AND ANSWERS

Dated: October 27, 2003

This question and answer document describes how Region 5 intends to carry out its civil enforcement responsibilities in Indian country. U.S. EPA's 1984 Indian Policy states that Tribal governments have the primary responsibility for protecting Tribal environments. EPA, however, has the responsibility to implement federal environmental laws in Indian country until a Tribe has assumed this responsibility for itself. When EPA implements federal environmental laws in Indian country, this is called "direct implementation." This question and answer [Q&A] document will answer some frequently asked questions about direct implementation of civil enforcement authority, and will help you identify the contacts that you need within Region 5 and for each of the tribes in Region 5. This Q&A document supersedes the Region's previous Communication Plan for U.S. Environmental Protection Agency - Region 5 Compliance Monitoring and Civil Enforcement in Indian Country," which was issued on May 10, 2001.

Included in this Q&A document are several tools for use by enforcement staff and managers. These tools include:

- (1) Office of Compliance and Assurance **"Final Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy," January 17, 2001** [Attachment A];
- (2) a contact list for tribal officials [Appendix B];
- (3) a checklist for enforcement in Indian country [Appendix C].

Regional Enforcement personnel are encouraged to contact the Indian Environmental Office [IEO] and the Regional Office of Enforcement and Compliance Assistance [OECA] for further guidance.

1. What are EPA's Goals in Approaching Enforcement Actions in Indian Country?

EPA policies, including the 1984 Indian Policy and the Office of Enforcement and Compliance Assurance **"Final Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy," dated January 17, 2001** [Attachment A] (hereafter "OECA Enforcement Guidance"), outline EPA's key goals for the enforcement of federal environmental statutes and regulations in Indian country. These goals include:

- For facilities owned or managed by the Tribal government, or facilities in which the Tribe has a substantial proprietary interest or control ("Tribal facilities"), EPA will work cooperatively with the Tribal government to assist the facility to come into compliance before taking an enforcement action.

- EPA recognizes Tribal governmental sovereignty over reservation environments and nothing in this document is intended to diminish the sovereignty of Tribal governments or the primary responsibility of Tribal governments for protecting reservation environments.
- If a federal enforcement action is planned for a Tribal facility, EPA will coordinate with the Tribal government on a Government-to-Government basis by soliciting and considering the opinion on the Tribal government and sharing relevant information except in specific instances where the enforcement program believes that the public interest would be best served by keeping enforcement information confidential.

2. What Enforcement Activities are Covered by this Q & A document?

Enforcement activities include (1) inspections, (2) notices of violation or notices of warnings, (3) issuance of a complaint (administrative or judicial), (4) issuance of an administrative consent order, (5) issuance of a consent agreement with final order, (6) issuance of a judicial consent decree, (7) preparation for and the conduct of a hearing, trial, or appeal, and (8) follow up activities in the event an administrative court order or judicial decree is violated.

3. Does this Q & A document apply to Criminal Enforcement Activities?

No. This Plan applies solely to violations of EPA's civil regulatory programs. It does not apply to criminal conduct, criminal investigations or enforcement pursuant to criminal provisions of laws or regulations which are enforced by EPA.

4. How do I know if a tribe is federally recognized?

The Indian Environmental Office (IEO) maintains a current listing of federally recognized tribes in Region 5. You should check with the Indian Environmental Liaison (IEL) for the appropriate state in which the tribe is located for more information. For help contacting the IEL, please refer to Question 7.

5. What is Indian Country?

EPA looks to federal law to define the types of Tribal lands which are considered "**Indian country**." 18 U.S.C. § 1151. Although the term "Indian country" includes other elements, for most purposes you need to know that it includes (1) *all* lands within the borders of an Indian reservation, whether those lands are held in trust for a Tribe (trust lands) or privately owned (fee lands), and (2) all trust lands even if they are not within the borders of a reservation.

EPA treats trust lands formally set aside for use by Tribes as reservations, and, therefore, as Indian country, even if the trust land has not formally been designated as a reservation. Many

tribes own parcels of trust land outside the exterior boundaries of their reservations. Enforcement staff should check with the Indian Environmental Office and the Office of Regional Counsel if questions come up about the status of land.

6. How do I know if a Facility is Located in Indian Country?

Generally, a facility is located within Indian country when it is located on lands within the exterior boundaries of a federally recognized Indian reservation (see Question 5).

Mapping resources maintained by the Region may be useful (e.g. Indian Lands Browser). Since landholding patterns within reservations can be complex, and since some tribes may own lands outside the boundaries of their reservations, you should contact the IEL for the state in which the tribe is located for further information. In some cases, it may be necessary to contact the Office of Regional Counsel where the Indian country status of the land is or may be in dispute.

7. How can I find the right Indian Environmental Liaison?

The names of the IEL for each state are listed in Appendix B. The IEL can assist in identifying the location of a facility with respect to tribal boundaries, verifying tribal contact information, facilitating pre-inspection meetings, and providing general background information on the tribe. If you are unable to reach the IEL after a reasonable attempt, you should contact the IEO director for further assistance.

8. How can I find the Right Contact for a Tribe?

Refer to Appendix B. Please coordinate with the appropriate IEL prior to making contact with the tribe. Please be aware that although IEO updates the contact information in Appendix B periodically, the information may have changed. That is why it is important to keep the IEL informed of your plans to contact the tribe.

9. What Should I do Before I Visit a Tribe?

Contact the appropriate IEL to let him or her know of your planned visit and to coordinate travel plans **before you enter a reservation**. You should also plan to coordinate with the Tribal contacts who are identified in Attachment B. This contact usually will occur via telephone or a face-to-face meeting. The checklist at Attachment C is a useful guide for the steps you should follow. You should remember to allow sufficient time before your visit to have a ***pre-inspection meeting*** with the Tribe.

10. Do I have to plan a pre-inspection meeting with the Tribe?

Yes! Plan to schedule a pre-inspection meeting with tribal staff immediately before your scheduled inspection or other activity. The purpose of the meeting is to describe your program

(if your program has not done so previously) and to go over the planned schedule activities for your visit. You will want to make sure that you have communicated with the Tribe on at least the following topics: (1) federal program activities that you will implement during your visit and the range of potential follow-up actions that may be taken; (2) the current inventory of regulated facilities (potential and actual) and those specifically targeted for inspection during your visit; (3) information available to EPA regarding ownership of the facilities targeted for inspection and determination of any substantial Tribal interest or control over those facilities; (4) Tribal information or concerns regarding the facilities to be inspected; (5) verification of appropriate contacts at Tribal government and EPA.

11. Why Do I Need to Determine Whether a Facility is a “Tribal Facility”?

You should determine whether a facility is a “Tribal Facility” because EPA offers compliance assistance to “tribal facilities” to encourage them to come into voluntary compliance before EPA will make a decision to take an enforcement action. You must also seek concurrence from the OECA national office if you pursue an enforcement action against a Tribal facility if compliance assistance does not work. If a tribal government does not have the level of ownership or control over a facility necessary to designate a facility as a “tribal facility,” then the compliance assistance and OECA concurrence portions of this Q&A document do not apply.

12. What Resources Can Help Me identify a “Tribal Facility”?

To determine whether a Tribe has an interest in a facility, which would make the facility a “*Tribal facility*” that is subject to the process outlined in this Q&A document, Region 5 will be guided by the 1984 Indian Policy and the OECA Enforcement Guidance.

The OECA Enforcement Guidance defines Tribal facilities as: (1) facilities owned or managed by Tribal Governments, and (2) non-Tribally-owned or managed facilities in which a Tribal Government has a substantial proprietary interest or over which a Tribal Government has control. Under the Enforcement Guidance, Tribal facilities “do not include facilities owned simply by Tribal members without any proprietary interest or control residing in the Tribal Government.”

You should plan to coordination with ORC and IEO, who will help you to consult with Tribal program staff as early as possible to determine which facilities subject to investigation are Tribal facilities. EPA will follow the OECA Enforcement Guidance in making this determination.

13. Can a “Tribal Facility be Located Outside Indian country?

Yes. The OECA Enforcement Guidance defines Tribal facilities as: (1) facilities owned or managed by Tribal Governments, and (2) non-Tribally-owned or managed facilities in which a Tribal Government has a substantial proprietary interest or over which a Tribal Government has

control. In some cases, Tribal facilities may be located outside Indian Country.¹

14. How Can I Decide if a Facility is a “Tribal Facility”?

Generally, if a Tribal government (not simply a Tribal member) has a substantial proprietary (i.e. the tribal government owns 51% or more) of the interest or control over the facility, the facility should be treated as if owned or managed by that government. Remember that this determination does not depend on whether the facility is located on trust land or not. You should coordinate with ORC and IEO as early as possible when a question arises as to whether the Tribal government should be considered an owner or manager. EPA will hold Government-to-Government consultation, as appropriate, to address issues raised regarding specific facilities and actions to be taken.

15. What if there is a Dispute between the Tribe and EPA over Tribal Interest in a Facility?

EPA is aware that there are many different relationships between Tribal governments and facilities within each reservation. EPA will seek to ascertain a Tribal government’s information and concerns regarding specific facilities, and will examine the nature of a Tribal government’s proprietary interest in a facility on a case-by-case basis. Criteria EPA will examine include, but are not limited to:

- a. Whether the Tribal government owns and/or manages the facility;
- b. Whether the Tribal government has a “substantial proprietary interest” over a non-Tribally-owned or managed facility;
- c. Whether the Tribal government has control over a non-Tribally-owned or managed facility;

EPA will consider the information provided by the Tribe and consider the views expressed by the Tribe in making a determination as to whether the information provided by the tribal government justifies some approach other than a formal enforcement action. You should plan to work with the IEL and ORC in making this determination. If agreement cannot be reached, the issue will be raised as appropriate to the Deputy Regional Administrator or Regional Administrator. If, after consultation with the Tribal government, EPA concludes that the information provided does not warrant any different treatment based on the claimed tribal interest, the appropriate EPA program will so inform the Tribal chair or president via an explanatory letter, and, if necessary, followup calls or meetings.

16. What if the Tribe does not have an Interest in the Facility but the Facility is in Indian Country?

¹See OECA Enforcement Guidance at 3.

If, after considering the factors in Question 14 above, you decide that the Tribe does not have an interest in the facility, you should proceed as with other similar facilities outside Indian country.

You should still notify the affected Tribal government of any anticipated Agency action against the facility and consult with that Tribal government on a Government-to-Government basis to the greatest extent practicable and permitted by law. You should plan to inform the Tribal government of the facility name and location, the date the action is to take place, the type of action being taken, the value of the action (if determined), and the EPA contact.

You should plan to notify the appropriate tribal contact listed in Appendix B, a minimum of two business days prior to initiating the action.

17. What if the Tribal Facility is Out of Compliance?

When EPA becomes aware that a facility subject to this guidance is not in compliance with federal environmental law, EPA will notify the Tribal Government of the potential non-compliance and EPA's intent to work cooperatively with the Tribal Government to resolve the matter through a *compliance plan*.

18. How do I Coordinate between my Program's Enforcement Response Policy and the Regional Q&A Document and the OECA Guidance?

Many Programs operate under their own enforcement response policies. These policies may set out penalty matrices or other means for calculating penalties and other appropriate steps to remedy non-compliance. Please consult with ORC and the Regional OECA office if you have questions about coordinating actions under these different documents.

19. What is a Compliance Plan?

A compliance plan is a short written plan through which EPA will provide compliance assistance to the facility. The compliance assistance plan will be developed in consultation with the Tribe, and the facility manager, where appropriate. The plan should explain what assistance EPA will provide to the facility and the time frame for the compliance assistance activities to take place. The plan should also explain what consequences or next steps EPA will take if the facility does not come into compliance on the schedule outlined in the compliance plan. The compliance plan should also outline the expected enforcement actions that EPA will take if compliance assistance does not bring the facility into compliance.² You should plan to work together with the appropriate IEL, IEO, and ORC to conduct consultation with the Tribe and to develop the contents of the written plan for providing compliance assistance to the facility.

²More detail on the compliance plan can be found in the OECA Enforcement Guidance at 4-5.

20. Can EPA Conduct Unannounced Inspections at Facilities in Indian Country?

Yes. Nothing in the Revised Plan prevents EPA from using its existing authorities to conduct unannounced inspections and investigations in Indian country. While EPA will not provide advance information of when such unannounced visits will occur, EPA will inform the Tribal government of the results.

21. Can EPA Conduct Emergency Actions in Indian Country?

Yes. EPA has statutory and regulatory obligations to respond to emergencies under the federal environmental statutes. In an emergency situation, where there is an immediate threat to human health or the environment, EPA will follow this Plan to the greatest extent practicable. EPA enforcement staff will provide prompt notice to the IEL, IEO, and affected Tribal government as soon as possible, and ensure an opportunity for consultation with the affected Tribal government on actions taken where prior communication and consultation was not possible.

22. What if the Compliance Plan Fails to Bring the Tribal Facility into Compliance?

If the Tribal facility does not come into compliance as a result of the steps and timetables provided in the compliance plan, you should consider whether an enforcement action is necessary to achieve compliance. The OECA guidance provides that three conditions be present when taking an enforcement action against a Tribal facility. These are:

- (1) There is a significant threat to human health or the environment
- (2) An enforcement action would reasonably be expected to achieve effective results in a timely manner;
- (3) The federal government cannot utilize other alternatives to correct the problem in a timely fashion.

EPA will consult with the Tribal Government to obtain information about how the enforcement action may impact Tribal interests. You should document any Regional attempts to communicate with the Tribe. You should send correspondence by certified letter, and should document oral communications with written memoranda.

23. When Do I need to Involve the OECA National Office?

You should notify OECA of your determination that an enforcement action is necessary if the tribal facility has not achieved compliance as a result of the compliance plan. Concurrence by the OECA national office is needed before initiating any formal enforcement action against a Tribal facility, including issuing an administrative enforcement compliant, order, or citation (including field citation), or referring an enforcement matter to the U.S. Department of Justice. You should coordinate with the regional OECA office, ORC and IEO in making the

determination of whether a referral to OECA is appropriate.

24. Are there any Actions that Do Not Require OECA Concurrence?

Informal enforcement actions do not require OECA concurrence. Informal enforcement actions include: (1) issuing letters or notices that contain only a list of the violation(s), schedule for returning facility to compliance, and an indication that failure to correct the violation(s) may result in a formal enforcement action. Examples included in the OECA Guidance include: NOV(s) (except under the CAA), notices of warning, and notices of non-compliance.

You also do not need OECA concurrence where you are issuing an administrative consent order to a Tribal facility, or in cases where you are issuing an administrative consent order simultaneously with an administrative complaint. Please refer to the OECA Guidance at pp. 9-10 and consult with ORC and the Regional OECA office for more information.

25. How do I obtain OECA Concurrence?

The OECA Guidance contains a detailed list of the factors needed for a referral to OECA. Please refer to the OECA Guidance at pp. 10-13 and consult with ORC and the Regional OECA office for more information.

26. OECA has Concurred on an Enforcement Action. What do I do Now?

Once EPA has determined that it is appropriate to initiate an enforcement action at a Tribal Facility, the Region 5 Program Office Branch or Section Chief shall notify the designated Tribal Contact (listed in Attachment B) for the affected reservation about the enforcement action. This notification will generally take place two (2) business days prior to initiation of the enforcement action. This notification should include:

- facility name and location;
- date action is to take place;
- type of action being taken;
- value of the action (e.g., penalty amount, whether there is injunctive or other relief); and
- EPA contact

Notification will be in the form specified (e.g. telephone call, electronic mail) for each tribe, as listed in Attachment B.

27. Should EPA Coordinate with State Enforcement Personnel for Indian Country Matters?

Generally no. You should not invite State enforcement personnel to accompany you on inspections in Indian country, nor should you agree to a request from State enforcement

personnel to participate in federal inspections in Indian country. EPA takes the position that States generally do not have jurisdiction to implement federal environmental programs in Indian Country. There may be some cases where Tribes and States or substate governmental entities may wish to cooperate in carrying out their respective environmental programs. You should consult the appropriate IEL if you have questions relating to a specific inspection.

28. Should I Share Enforcement Confidential Information With Tribes?

Generally no. EPA policy precludes Agency employees from disclosing enforcement confidential information to third parties, including the nature of ongoing investigations, information subject to Privacy Act or other federal statutory protections against the release of confidential data, negotiations, and decisions whether to take an enforcement action. If Region 5 and a tribe determine that a joint enforcement action is appropriate, the parties should enter into an agreement to protect the confidentiality of communications.

Attachment A

Final OECA Enforcement Policy

Attachment B

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Attachment C

CHECKLIST FOR CONDUCTING INSPECTIONS and ENFORCEMENT IN INDIAN COUNTRY

This checklist is designed to help enforcement personnel in conducting inspections and carrying out enforcement activities in Indian country. It should be used in conjunction with Region 5's "Civil Enforcement and Compliance Assistance in Region 5 Indian Country: Questions and Answers" dated October 27, 2003 (hereinafter "Q & A Document") and OECA's "Final Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy, dated January 17, 2001 (hereinafter "OECA Guidance"). This checklist can be used for inspections of a single facility or to plan for inspections at multiple facilities.

PART I - PRE-INSPECTION

1. Is the facility located in Indian Country?

- YES.**
 NO.

BOX 1

- DON'T KNOW. Follow Instructions in Box Below.**

The term “Indian country” is a term of art. It includes (1) all land that is within the exterior boundaries of an Indian Reservation whether or not the land is privately owned (sometimes called “fee land”) or held in trust for the benefit of the tribe (sometimes called “trust land.”) and (2) all trust land whether or not within the exterior boundaries of a reservation.

To determine whether a facility is located in Indian country, do the following:

(a) Consult Region 5's Indian Land Browser. This will give you a rough idea of whether a facility is within Indian country. However, be aware that it is not legally accurate, so it cannot be relied on with certainty. It is actually a composite of several different sources of information. However, if the Indian Land Browser shows that your facility is in or near Indian country, go to (b). The Indian Land Browser can be accessed as follows: [get info].

(b). Call the Indian Environmental Liaison for the State in which the facility is located. The liaisons are as follows:

MI: Jennifer Manville - 231-922-4769

MN: Ed Fairbanks - 612-845-4877

WI: Steve Dodge - 715-799-4612

If you have any difficulty reaching these individuals, call Bill Dew, Director of the Indian Environmental Office at 3-2087.

(c). This should provide a definite answer whether the facility is in Indian country. If there are any questions, please consult Rodger Field (3-8243) or Barbara Wester (3-8514).

2. Does a Tribal Government own or manage the facility OR does a Tribal Government have a substantial proprietary interest or control over the facility even if it does not own or manage it? [See Box 2 as to why this is important.]

- Yes.
- No.
- Don't Know. Follow Instruction in Box 2.

BOX 2

This question is intended to determine whether you are dealing with a Tribal facility. This is important for two reasons. First, the Q & A Document and the OECA Guidance apply to Tribal facilities whether or not they are located in Indian country. Second, under the Q and A Document and the OECA Guidance, different enforcement procedures will apply to Tribal facilities (as opposed to non-Tribal facilities that are located in Indian country). Therefore, if you don't know, one of the purposes of the inspection will be to help you make that determination. If you don't know before the inspection takes place, you will need to do three things.

- (a) Consult the Q and A Document (questions –) and the OECA Guidance (pages 3-4) where you will see a discussion of what constitutes a Tribal facility.
- (b) Call the Indian Environmental Liaison in Box 1 to get more information in order to apply this criteria. It may be necessary to get further information from the Tribe.
- (c) Develop a plan to obtain the necessary information in the course of the inspection. See No. 7 below.

If you still have a question, please consult with ORC (Rodger Field or Barbara Wester). Also, where there is a disagreement on how to make this determination, please refer to the Communication Plan, p.4.

If the answer to either No. 1 or No. 2 is “yes”, complete the rest of this checklist. If both answers are “no,” you do not have a facility covered by the Region 5 Q and A Document.

3. Have you called the Indian Environmental Liaison (see Box 1) to discuss the proposed inspection?

___ Yes.
___ No.

4. Have you notified the Tribal contact in accordance with the procedures outlined in Q & A Document, Attachment B to inform the Tribe of the proposed inspection?³

___ **Yes.**
___ **No.**

5. In the course of your first contact with the Tribe, have you arranged to meet with the Tribal representative(s) *before* the inspection in order to provide an overview of the enforcement process?

___ Yes.
___ No.

³ In certain circumstances, it may not be appropriate or possible to provide advance notice of the inspection to the Tribe. This would occur in emergency situations or where EPA has determined to conduct an unannounced inspection. In that case, see questions -- of the Q & A Document.

6. Indicate whether the Tribal representative will accompany you on the inspection and what arrangements have been made for access.

PART II - POST-INSPECTION

7. Did the inspection show non-compliance?

Yes. Proceed to No. 8.
 No. No need to proceed further.

8. Is the facility a “Tribal facility” based upon your consultations with the Indian Environmental Liaison and the Tribe and/or information obtained during the course of the inspection?

Yes. Proceed to No. 9.
 No. See Box 3 Below.

BOX 3

If the answer to No. 7 is “no,” then you have a private facility located in Indian country. You have a responsibility to notify the Tribe (as you would a State) prior to initiation of the enforcement action. You thereafter have a responsibility of consulting with the Tribe to the greatest extent possible (such as when a settlement is being considered), but otherwise you should proceed with the enforcement action as you would with any other party. See Q and A Document (questions –).
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9. Has the Tribe been notified of any noncompliance with an indication of Agency’s willingness to work cooperatively (see OECA Guidance, p.4.)?

Yes.
 No.

10. Has a short written plan for providing compliance assistance been developed? (See OECA Guidance, p.4-5).
- Yes.
 No.
11. Has EPA consulted with the Tribe about the need for formal enforcement action and documented all communications? (OECA Guidance, p.)
- Yes.
 No.
12. Do the following conditions exist? (OECA Guidance, p. 5-7)⁴
- a) There is a significant threat to human health or the environment. Yes No.
- b) An enforcement action would reasonably be expected to achieve effective results in a timely manner. Yes No.
- c) The federal government cannot utilize other alternatives to correct the problem in a timely fashion (such as the written compliance plan referred to in No. 9, above).
 Yes No.
13. Has EPA considered other relevant factors as identified in Guidance, p. 7?
- Yes.
 No
14. Have you received concurrence from the AA for OECA in accordance with the procedures outlined in Section II.C. of the OECA Guidance?
- Yes.
 No.
14. Have you provided notice to the Tribal contact at least two days prior to initiation of the enforcement action. Q & A Document, D.1.
- Yes.
 No.

⁴ These threshold criteria do NOT need to be met for the following: (1) informal enforcement actions, such as NOV's (as discussed in Guidance, p. 9); (2) the issuance of an administrative consent order; and (3) the issuance of a consent agreement with final order or filing of an administrative complaint simultaneously with consent order. See Guidance, p. 9-10.

NOTICE: This document is intended to provide an internal EPA Region 5 plan for civil judicial and administrative enforcement actions at facilities subject to the plan. This plan is designed to implement President Clinton's Executive Order 13175 directive to federal departments and agencies and EPA's Indian Policy for working with federally recognized Tribal Governments on a Government-to-Government basis. The document does not, however, substitute for requirements in federal statutes or regulations, nor is it a requirement itself. This plan is not intended to create any right or trust responsibility enforceable in any cause of action by any party against the United States, its agencies, offices or any other person. Thus, it cannot impose legally binding requirements on EPA, and may not apply to a particular situation based upon the circumstances. EPA may change this plan in the future, as needed.