



OFFICE OF INSPECTOR GENERAL

Catalyst for Improving the Environment

Evaluation Report

Tribal Superfund Program Needs Clear Direction and Actions to Improve Effectiveness

Report No. 2004-P-00035

September 30, 2004



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Carol Kwok

Abbreviations

| | |
|--------|--|
| CERCLA | Comprehensive Environmental Response, Compensation, and Liability Act (also known as Superfund) |
| EPA | U.S. Environmental Protection Agency |
| NPL | National Priorities List |
| NTEC | National Tribal Environmental Council |
| OIG | Office of Inspector General |
| OSWER | EPA's Office of Solid Waste and Emergency Response |
| TASWER | Tribal Association on Solid Waste and Emergency Response |

Cover photo: Acid mine drainage from the Leviathan Mine in California has impacted Washoe tribal resources (photo courtesy of Washoe Tribe).



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

OFFICE OF
INSPECTOR GENERAL

September 30, 2004

MEMORANDUM

SUBJECT: Tribal Superfund Program Needs Clear Direction and Actions to
Improve Effectiveness
Report No. 2004-P-00035

FROM: Carolyn Copper
Director, Hazardous Waste Issues
Office of Program Evaluation

TO: Thomas P. Dunne
Acting Assistant Administrator
Office of Solid Waste and Emergency Response

This is the final report on our evaluation of the Tribal Superfund Program conducted by the Office of Inspector General (OIG) of the U.S. Environmental Protection Agency (EPA).

This report contains findings that describe problems we have identified and corrective actions we recommend. This report represents the opinion of the OIG; the findings in this report do not necessarily represent the final EPA position. Final determinations on matters in this report will be made by EPA managers according to EPA audit resolution procedures.

We provided you with a draft report on June 9, 2004. The EPA Office of Solid Waste and Emergency Response (OSWER) on July 28, 2004, provided us the Agency responses, including those on behalf of Regions 9 and 10. In addition, we received extensive tribal comments. OSWER agreed to take action on our recommendations. Regions and tribes made suggestions for improving the accuracy of the draft report.

Action Required

According to EPA Manual 2750, you (as the action official) are required to provide this office with a written response to this report within 90 days of its issuance. The response should specifically address each recommendation. For corrective actions planned but not completed by the response date, please provide the specific milestone dates for completing these actions.

We have no objection to release of this report to the public. Additional copies of this report may be obtained from us or our website, www.epa.gov/oig. If you or your staff have any questions, please contact me at (202) 566-0829, or Katherine Thompson, Assignment Manager, at (916) 498-6535.

Executive Summary

Purpose

The U.S. Environmental Protection Agency's (EPA's) strategy to achieve its goals, including those addressing the cleanup of hazardous waste, is dependent upon partnerships, notably those with tribes and States. While American Indian tribes are treated substantially similar to States regarding Superfund activity, EPA's Federal trust responsibility creates a special obligation to consult with tribes, consider tribal interests, and protect tribal rights. Formidable challenges in EPA's partnership efforts with tribes include the large number and wide dispersion of tribes and a "close to the land" lifestyle that results in disproportionate impacts to tribes.

EPA's Office of Solid Waste and Emergency Response asked that we evaluate the progress the Agency is making enhancing the role of Indian tribes in the Superfund program. We evaluated the effectiveness of: actions EPA has taken to enhance the role of the tribes; EPA's primary initiative for enhancing tribal relationships in Superfund; EPA's system for measuring and accounting for progress; and regional processes in enhancing working relationships with tribes.

Results

Tribal representatives recognized that EPA has been a Federal leader in its efforts to develop tribal relationships and fulfill trust responsibilities. EPA was the first Federal agency to adopt a formal Indian policy. It has also established an American Indian Environmental Office and a Tribal Operations Committee. EPA has undertaken three major efforts since 1998 to enhance the tribal role in the Superfund program and improve its relationships with the tribes, but those initiatives have had limited success. The primary initiative, the development of a 1998 enhancement plan, has provided some benefits but it is no longer playing a significant role. Also, EPA has yet to complete its 1999 action plan in response to a national forum, and an EPA-created tribal association has not met its goals. These efforts have not been completed or benefits fully realized because EPA has not monitored their progress and effectiveness or taken necessary action when needed. Moreover, incomplete critical actions, such as development of a baseline inventory and risk tools, are hampering the development of the tribal Superfund program. In turn, the degree to which the Superfund program is effectively addressing risks to human health and the environment in Indian country, and enhancing tribal participation in Superfund, has been impacted.

EPA has not fully developed its tribal strategy in relation to Superfund, even though it was initiated in 2002. A key factor for this occurring is that the tribal strategy lacks a detailed implementation plan, including milestones, priorities,

targets, and resources, along with corresponding measures to track its progress and effectiveness. Also, strategy completion has been hindered because of little emphasis from top leadership, a lack of clear goals, missing critical information such as an inventory, and EPA regions not being included in its development. In the absence of clear direction, EPA regions have developed divergent regional tribal programs. Consequently, the Agency does not have a sufficient accountability system in place to measure or evaluate its progress in enhancing the tribal role in the Superfund program. This makes it difficult for EPA to meet its responsibility to consult with and protect the interests of tribes when making Superfund decisions, and complete critical actions necessary to fully enhance the tribal role in the Superfund program.

Case studies of six tribes show that EPA can improve its working relationships with tribes. Typically, tribes initiate relationships with EPA. The stronger and more effective relationships exhibit four important characteristics: frequent and timely communication, appropriate information sharing, addressing issues raised by tribes, and operating in a government-to-government relationship. Tribal and EPA staff also indicate good interpersonal relationships and funding contribute to successful relationships. There are various reasons for conflicts in EPA-tribal relationships, including varying expectations of roles and responsibilities, differences in views, unclear consultation procedures, and a lack of transparency of EPA's Superfund process. Successful relationships can decrease both the time and resources necessary for investigation, provide access to tribal expertise and information, and encourage tribal participation in mitigation. Ultimately, successful partnerships create stronger, more effective decisions.

Recommendations

We recommend that the Acting Assistant Administrator for Solid Waste and Emergency Response take a leadership role in developing a Superfund tribal strategy and policy, and deploy resources accordingly. We also recommend that EPA establish a stronger foundation for tribal working relationships by providing clear guidance for tribal consultation and establishing site-specific written agreements for significant tribal relationships. EPA should also establish a forum for exchanging best practices and "lessons learned."

Agency Comments, Tribal Comments, and OIG Evaluation

The Agency concurred with our recommendations and agreed to take actions to finalize its tribal strategy, with tribal and regional input, during fiscal 2005. To meet this goal, the Office of Solid Waste and Emergency Response stated it would identify, evaluate, and communicate the Superfund program's current tribal priorities and provide a general outline and timeframe to accomplish activities to fulfill our recommendations.

Region 9 stated the draft report misrepresented the facts in several key areas with respect to the Leviathan Mine case study (Washoe Tribe). The Region provided additional information regarding its efforts to respond to tribal concerns, and asked that we not publish the full text of its comments.

The Washoe Tribe pointed out additional issues related to effective EPA-tribal coordination. While it agreed that risk assessment inputs have taken longer than anticipated, it noted that schedule delays for reasons unconnected with the Tribe have resulted in submission of the Tribe's risk assessment deliverables when needed. It also observed that more effective coordination would help avoid delays.

We received extensive comments from the Navajo Nation Waste Regulatory Compliance Department staff, which are included as Appendix B. The Navajo waste department staff identified issues that have hampered effective cleanup; described perceived shortfalls in EPA's processes, standards, and regulations; and made numerous recommendations for improving the program.

A Navajo waste official noted that the cultural survival of tribes is directly affected by a tribe's cultural and traditional values that are central to protecting human health and the environment in Indian country. The official stated that EPA standards and regulations are not sensitive to tribal values even when these values are a part of tribal regulations and decisions. Too often, the official stated, EPA's cleanup decisions are in direct conflict with a tribe's cleanup decision, weighing tribal decisions against cost and going so far as to exclude tribal lands from cleanup decisions.

We have fully considered the comments we received from EPA's Office of Solid Waste and Emergency Response, Regions 9 and 10, as well as the tribes, and made changes to the report as we deemed appropriate.

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Chapter 1

Introduction

Purpose

The Environmental Protection Agency's (EPA's) Office of Solid Waste and Emergency Response (OSWER) asked that we evaluate the progress the Agency was making in enhancing the role of Indian tribes in the Superfund program. To address EPA's question, we sought to answer the following questions:

- What actions has EPA taken to enhance the role of Indian tribes in the Superfund program?
- Has EPA's primary initiative for enhancing tribal relationships in Superfund (the Superfund Enhanced State and Tribal Role initiative) been effective?
- What is EPA's system for measuring and accounting for progress on its objective to enhance the role of tribes in the Superfund program?
- Have EPA regional processes or actions to enhance the role of tribes in the Superfund program been effective in enhancing working relationships with tribes?

Background

Tribes Present Unique Challenges

EPA faces substantial challenges in its efforts to enhance the tribal role in the Superfund program. These challenges include the number and dispersion of tribes, unique aspects of tribal culture and tribal governments, Federal trust responsibility, complex land and jurisdictional issues, and declining Superfund resources.

There are over 560 Federally-recognized tribes scattered geographically throughout the United States in 9 EPA regions (there are no recognized tribes in Region 3). This includes about 225 Alaskan native villages in Region 10, but they have a significantly different relationship with the Federal Government than tribes in the 48 contiguous United States; one reason is because of the Alaska Native Claims Settlement Act of 1971. Indian tribes and individual Indians have rights in land that were established and are held in varying ways. The term "Indian country" describes Indian land and has legal importance; it determines where Federal Indian law and tribal laws apply (State laws generally have no effect). Congress has codified the definition of "Indian country" and it includes

Indian reservations and Indian allotments.¹ Ceded territory (aboriginal lands sold by treaty or agreement with the United States) generally do not constitute Indian country, but many tribes retain resource rights in these territories (known as treaty-right areas). Generically, Indian land describes land historically held by Indians under some restriction or some attribute peculiar to Indian status and can include treaty-right areas.

Due to subsistence lifestyles, spiritual practices, and other cultural behaviors, tribes have multiple exposures from resource use that could result in disproportionate environmental impacts to tribes. The tribal government constituency is predominantly poor (see figure 1-1) and tribal governments generally do not preside over healthy economies, which limits their revenue sources. Indians have the worst health statistics in the country, and environmental mitigation in tribal communities is significantly behind that of non-tribal communities.

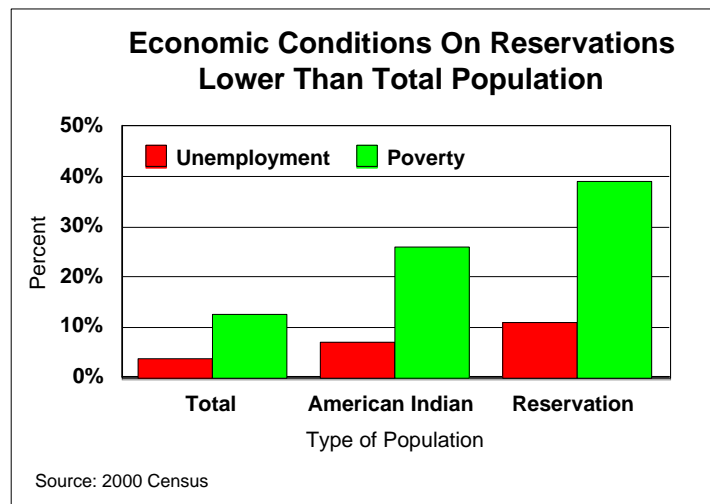


Figure 1-1

According to a recent report, “Native America at the New Millennium,” while a growing number of tribes are building sustainable economies, Indian country has a long way to go before economic prosperity becomes a widespread reality. Moreover, the low base of income, wealth, and human capital from which Indian economic development started means that even where casino and other enterprises have been successful, much still needs to be done.

Because tribes are sovereign, EPA must honor a direct government-to-government relationship with tribes. Tribal sovereignty is the right of tribes, as “domestic, dependent nations,” to exercise self-determination and the right to self-government, unless these powers have been modified by treaties or an act of Congress. Tribes have the authority to, among other things, assert jurisdiction over the people and their land, and create and enforce legislation. Moreover, EPA has a Federal trust responsibility to consult with and consider the interests of tribes in conducting its activities and ensure its actions protect tribal treaty rights. The general trust provides one basis for the legal principle that ambiguities or doubts in statutes must be construed in favor of Indians.

¹Indian country is (1) land within the limits of any Indian reservation; (2) dependent Indian communities within original or acquired territory; and (3) Indian allotments, the Indian titles to which have not been extinguished.

Considering the interests of tribes can be a difficult matter because tribal rights may not be readily apparent. In a number of Indian treaties, especially in the Pacific Northwest and Great Lakes areas, tribes explicitly reserved rights pertaining to the environment, including rights to fish, hunt, and gather in ceded territories (outside of reservations) that were their “usual and accustomed” hunting and fishing areas. For example, the Suquamish Tribe’s treaty-reserved resources included its adjudicated usual and accustomed fishing area – about 3,500 square miles in the Puget Sound area – resulting in the tribe having a vested interest in 11 Superfund sites that impact its fishing rights.

Tribal Superfund Authorities and Resources

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA – also known as Superfund), Indian tribes are treated similar to States and can serve as co-implementors of Superfund response actions. However, unlike States, CERCLA does not provide tribes with authority to designate their highest priority sites for placement on the National Priorities List (NPL). Also, unlike States, tribes have a unique legal status that includes a trust responsibility on the part of the Federal Government. According to its trust responsibility, EPA must consider the interests of tribes in conducting its activities and ensure its actions protect tribal treaty rights.

Throughout the 1980s, awareness of the need to address tribal environmental problems increased, for several reasons. One was that tribes were asserting their sovereignty and specific jurisdiction over governmental functions in Indian country, including environmental programs (notably, water quality programs). Further, in 1984, EPA adopted its Indian policy that supported Indian self-government for environmental management as well as government-to-government relationships with tribes. Last, in the early 1990s, tribes began to become involved with Superfund sites. For example, EPA Region 2 provided financial assistance to the St. Regis Mohawk Tribe to facilitate its involvement in Superfund response activities at the General Motors-Massena NPL site.

In 1998, two important actions propelled EPA’s efforts to enhance the tribal role in Superfund:

- In February 1998, the National Tribal Environmental Council (NTEC) hosted a national tribal forum on impediments to implementing tribal waste programs. In response to forum recommendations, OSWER in 1999 issued an action plan to address these impediments and enhance the tribes’ Superfund role.

- In March 1998, EPA issued its *Plan to Enhance the Role of States and Tribes in the Superfund Program*. This important initiative included numerous recommendations for enhancing the tribal role, and also resulted in initiation of nine tribal pilot projects that further spurred EPA’s tribal involvement.

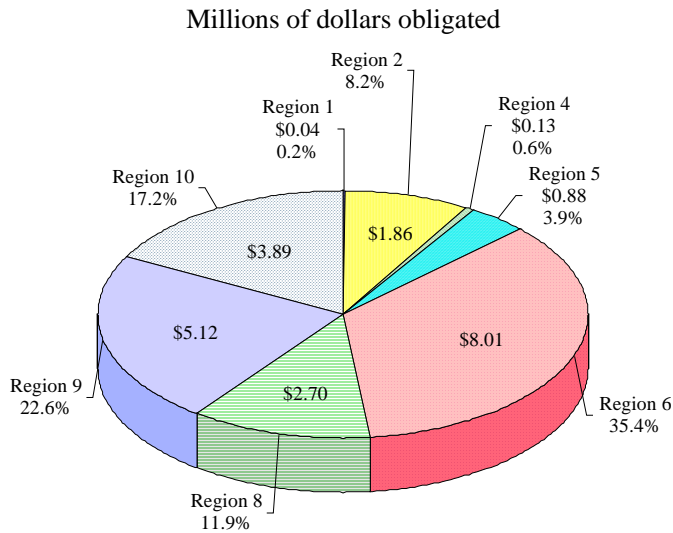


Figure 1-2: Superfund Obligations by Region

By 2003, about \$22.6 million in Superfund monies had been obligated for about 60 tribes, or tribal consortia. These monies provided funding for various activities, including assessments and investigations, Superfund “core” program funding, and tribal support work at sites. Figure 1-2 shows the breakdown of funds by region for fiscal years 1996 through 2003. Most of these funds (87 percent) were obligated by EPA Regions 6, 8, 9, and 10. The most common involvement of the tribes is at the site-specific level.

Tribes have also been provided Superfund funding for developing emergency response plans and for Brownfields projects. (Beginning in fiscal 2003, Brownfields projects are funded separately.) In some cases, funding has benefitted a consortium of tribes; for example, Region 6 has provided over \$4.1 million to the Cherokee Nation to fund activities of an intertribal consortium of over 30 member tribes. In most cases, however, tribes are not leading assessments, investigations, or remediation efforts.

Although the scope of hazardous waste issues impacting tribes has not been fully identified, as of September 30, 2002, regions reported that 561 preliminary assessments or site investigations had been performed. They also reported 602 sites on or impacting Indian country and 172 sites with tribal funding or a

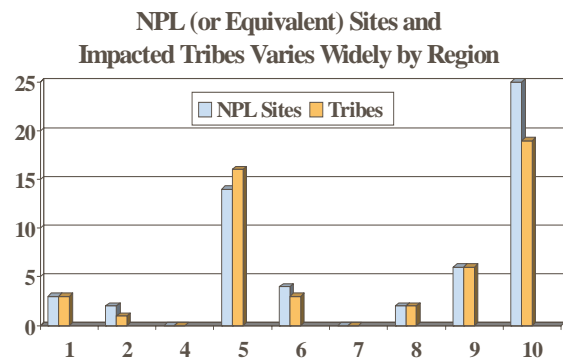


Figure 1-3

tribal-lead action.² As shown in Figure 1-3, regions identified approximately 55 NPL sites or equivalent sites impacting 50 tribes.³

Tribes can receive funding from other EPA programs and sources to address their hazardous waste issues. For example, the Resource Conservation and Recovery Act has limited authority for hazardous waste cleanup. EPA's General Assistance Program for tribes provides funding to build tribal capacity for developing environmental programs, including the development and implementation of solid and hazardous waste management programs. Other Federal programs also address hazardous waste issues on Indian land. For example, the Department of Defense has a Native American Lands Environmental Mitigation Program to address environmental impacts on Indian lands.

Scope and Methodology

We conducted the field work for our evaluation from January to September 2003. We performed our evaluation in accordance with *Government Auditing Standards*, issued by the Comptroller General of the United States.

We took into account the results of prior OIG reviews and decisions, including:

- *Costs Claimed by Tribal Association on Solid Waste and Emergency Response Under EPA Assistance Agreement No. CR827181-01* (Report No. 2003-4-00119, dated September 19, 2003).
- *EPA Needs to Develop Measurable Goals for Its State and Tribal Superfund Roles Initiative* (Report No. 2001-M8-000002-01337, dated November 17, 2000).
- *Immediate Action Needed to Address Weaknesses in EPA Efforts to Identify Hazardous Waste Sites in Indian Country* (Report No. 2004-P-00003, dated January 30, 2004).

To evaluate EPA systems for measuring progress and the status of actions, we interviewed OSWER headquarters staff and regional staff. Using a semi-structured survey, we interviewed staff from the regions with responsibilities for Federally-recognized tribes. These questionnaires were administered orally and regions provided supporting documentation, when requested.

²We requested the most recent data on the number of preliminary assessments and site investigations performed. However, we did not receive this information before final printing of this report.

³NPL-equivalent sites are those that qualify for the list based on their Hazard Ranking System score but have not yet been placed on the list.

In addition, we interviewed and obtained documentation from the Tribal Association on Solid Waste and Emergency Response (TASWER). TASWER is the current EPA grantee conducting and managing activities designed to produce the inventory of hazardous waste sites on tribal lands. We also interviewed NTEC, a tribal membership organization, and the Inter-Tribal Environmental Council, a tribal membership organization created to service many tribes in EPA Region 6.

Using a case study approach, we evaluated six EPA-tribal relationships in two EPA regions (see Figure 1-4). We selected Regions 9 and 10 for our evaluation because they had the largest number of tribes and obligated the majority of funding related to Superfund tribal activities, excluding Region 6. Within each region, we selected three tribes for our case studies. Our goal was to include a range of working relationships in our sample.

| EPA-Tribal Relationships Evaluated | |
|---|---|
| Region 9 | <ul style="list-style-type: none"> • Navajo Nation • Shoshone-Paiute Tribes of the Duck Valley Reservation • Washoe Tribe of California and Nevada |
| Region 10 | <ul style="list-style-type: none"> • Coeur d'Alene Tribe • Confederated Tribes of the Colville Reservation • Suquamish Tribe |

Figure 1-4

In concert with EPA and NTEC officials (which include Cherokee Nation staff), we identified seven characteristics of effective working relationships with tribes. Based on semi-structured surveys of tribal and regional staff (including project managers, community involvement specialists, and project officers), along with the examination of related documentation, we determined whether these characteristics were present. We also identified success factors, obstacles, lessons learned, and recommendations for improvements.

Chapter 2

Important Initiatives to Enhance Tribal Role and Relationships Remain Incomplete

EPA has undertaken three major efforts since 1998 to enhance the tribal role in the Superfund program and improve its relationships with the tribes, but those initiatives have had limited success. Specifically:

- The primary initiative – the development of a 1998 enhancement plan – has provided some benefits but it is no longer playing a significant role.
- EPA has yet to complete its 1999 action plan in response to a national forum.
- An EPA-created tribal association has not met its goals.

The benefits from these efforts have not been completed or fully realized because the Agency is not monitoring their progress and effectiveness or taking necessary action when needed. Moreover, as discussed in Chapter 3, incomplete critical actions, such as development of a baseline inventory or risk tools, hamper the development of a sound strategy for the tribal Superfund program. In turn, the degree to which the Superfund program is effectively addressing risks to human health and the environment on Indian land, and enhancing tribal participation in Superfund, has been impacted.

EPA Has Taken Actions to Enhance Tribal Relationships

EPA is a Federal leader in its efforts to enhance tribal relationships. In 1984, EPA became the first Federal agency to adopt a formal Indian policy. When the policy was reaffirmed in 1994, an action agenda was established for strengthening tribal operations. This same year, the Agency established the American Indian Environmental Office and the Tribal Operations Committee. The American Indian Environmental Office is responsible for ensuring the Agency's trust responsibility to tribes is carried out. The mission of the Tribal Operations Committee, which includes tribal leaders (the "Tribal Caucus") and EPA senior management, including the American Indian Environmental Office, is to advance the protection and improve the conditions of tribal health and the environment in Indian country. The Committee provides input into Agency "operational" decision-making affecting Indian country.

Starting in 1998, the Agency undertook three initiatives to further enhance the tribal role in the Superfund program: (1) EPA's March 1998 "Plan to Enhance the Roles of States and Tribes in the Superfund Program"; (2) an action plan to address tribal issues raised in a 1998 national forum on impediments to tribal waste programs, known as the Albuquerque Forum; and (3) establishment of TASWER.

Enhancement Plan Yields Results, But Benefits Not Fully Realized

The “Plan to Enhance the Role of States and Tribes in the Superfund Program” yielded positive results, ultimately helping regions enhance the tribal role in the Superfund Program. The Plan made 35 recommendations to improve the involvement of the tribes in the Superfund Program and established 9 pilot projects in 6 EPA regions. According to the Agency’s evaluation of the Plan and our interviews with regions, the Plan removed barriers and helped regions build tribal capacity. For example:

- EPA removed unintended regulatory barriers to funding inter-tribal consortia and demonstrating eligibility for certain cooperative agreements.
- Regions said the pilots enhanced their relationships with tribes, helped resolve issues, provided training to tribes, built tribal capacity, and raised an awareness of potential Superfund tribal activities.

The Agency took other actions to make the Plan more effective. It performed a formal evaluation of the Plan’s pilot projects to identify lessons learned and evaluate effectiveness of the Plan’s recommendations and strategies. This evaluation, issued in December 2000, made recommendations for improving Plan implementation. In January 2001, the Agency had directed its regions to use the Plan as a tool to achieve work sharing arrangements with States and tribes.

However, despite EPA’s investing of over \$3 million in the Plan and performing an extensive evaluation, our interviews with regions found that, generally, the Plan no longer plays a role in regional relationships with tribes. The Plan’s usefulness is limited because the Agency has not developed a specific implementation strategy. The Plan includes 17 recommended regional actions for providing tribal assistance, including encouraging tribes to build program capacity, helping tribes to develop tracking and notification systems, and assisting tribes in finding cleanup alternatives for sites that cannot be addressed under Superfund. These recommendations are not prioritized or tailored to address disparities in regional workloads. At least one region concluded the Plan is not “practical,” and another noted the Plan cannot be implemented under “current budget realities.” Also, the Agency determined that “key elements” of the Plan have not been effectively communicated.

Further, the Agency does not have meaningful measures to track Plan implementation and, thus, is unable to evaluate its progress or effectiveness. Specifically, the Agency is not:

- Using measurable goals or tracking the cost of Plan implementation, despite EPA OIG recommendations in November 2000 to do so.
- Systematically monitoring the progress of tribes undertaking new activities, as recommended by EPA’s 2000 Plan evaluation.

- Monitoring the status of four “priority” recommendations critical to enhancing the tribal role in the program.
- Reporting on the final benefits and lessons learned from all tribal pilot projects.

The lack of goals and measures belies the status of incomplete pilot projects and other actions critical to enhancing the tribal role in Superfund. We found that important pilot projects, such as those addressing cultural risk factors, were incomplete or delayed.

Little Progress Made on Critical Albuquerque Forum Commitments

In response to a 1998 national tribal forum, EPA identified various actions to enhance the tribal role in the Superfund program. In its corresponding 1999 document, “Response to Recommendations From The National Tribal Environmental Council’s February 10-11, 1998 Albuquerque National Tribal Forum,” the Agency established a detailed action plan, including activities and milestones, to address the recommendations. While the Agency took beneficial actions, such as delivering a training course on working effectively with tribal governments, EPA did not take sufficient action on four critical actions (see Figure 2-1). Details on each of these four actions follow.

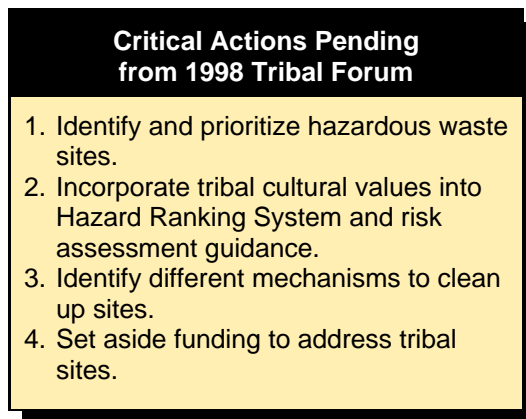


Figure 2-1

Inventory Needed to Develop Plans and Evaluate Progress

Although EPA’s 1998 action plan called for development of a tribally-approved list of hazardous waste sites by September 1999, and such an inventory is required by law, the Agency has not produced an inventory or revised its milestones for inventory completion. Unless EPA redirects its efforts, the Agency’s current activities to develop an inventory of hazardous waste sites impacting tribes will not produce credible, useful, or effective results. In January 2004, we separately reported on these problems in a flash memorandum. The Agency agreed to take action on our recommendations.

Unique Tribal Use of Resources Not Accounted for by EPA

The Agency’s methods for screening, assessing, and prioritizing hazardous waste sites are based on risk principles that do not specifically account for tribal use of natural resources. Due to subsistence lifestyles that involve living close to the land, spiritual practices, and other cultural aspects, tribes have multiple exposures

that, if not considered, are likely to result in insufficient protection of human health in Indian country. Further, according to a 2002 National Environmental Justice Advisory Committee report, government agencies' approaches to risk assessment and management fall short of taking into account that affected groups consume and use fish, aquatic plants, and wildlife in different cultural, traditional, religious, historical, economic, and legal contexts than the "average" American. According to one tribal risk assessor, subsistence lifestyles alone may result in 10 to 100 times more exposure than suburban lifestyles. Tribes also have culturally-unique exposure pathways, such as sweat lodges⁴, that may expose members to additional risks. These exposures may make tribal cultural activities unsafe.

In its response to the 1998 Forum, EPA agreed to work with tribes to incorporate tribal cultural impacts into the Hazard Ranking System and risk assessment process. However, we found that these efforts have stalled:

- *Hazard Ranking System.* A primary tribal criticism of the Superfund program has been the exclusion of tribal risks and impacts from guidance for the Superfund Hazard Ranking System, a mathematical scoring system used by EPA to assess relative risk posed by sites and their eligibility for the NPL. Generally, the Hazard Ranking System is based on suburban exposure scenarios, which assume little exposure to the environment.
- *Risk Assessment Guidance.* Similarly, Superfund risk assessment guidance is seen as flawed because it does not account for tribal cultural uses of natural resources. The risk assessment process plays an important role in the characterization and cleanup of Superfund sites. Risk assessment is used to develop cleanup levels and develop tribal regulatory standards.

EPA's projects to incorporate tribal risks into its risk assessments tools have not been successful in the past, and the Agency's current grant-funded efforts are unlikely to meet the Agency's informational needs necessary to modify its risk tools.

Since 1998, EPA has funded two pilot projects to develop approaches to incorporate tribal cultural values into its risk assessment tools. However, these pilot projects, involving the Hazard Ranking System and addressing risk assessment, have been incomplete and unsuccessful, due to grant management problems and other obstacles. EPA is currently engaging NTEC and TASWER in further study of tribal risk issues and development of risk models. However, this further study does not specifically address the Hazard Ranking System guidance.

⁴A sweat lodge is one of the most important Indian rituals, providing physical and spiritual benefits, and is used for ceremony.

Additional Mechanisms to Address Tribal Sites Still Needed

The Agency recognized at the Albuquerque Forum that mechanisms other than the Superfund NPL are needed to clean up sites impacting tribes. The Action Plan called for the Agency to “evaluate initial [tribal] pilot results in identifying mechanisms to achieve environmental cleanup with the intent to implement on a wider basis.” An Agency preliminary evaluation of the pilots in December 2000 identified ways to fund tribes for various aspects of the Superfund program, but the purpose of these pilots was not to find alternatives to the NPL to clean up sites. According to the Agency’s 2002 draft tribal strategy, the Agency needed to develop a strategy to clean up non-NPL sites. Also, while EPA personnel said they are developing a Superfund training course for tribes that will address grants and other funding avenues, this course was still under development as of the end of our field work.

Funding Set-Aside Not Addressed

In response to the Albuquerque Forum, EPA agreed to address the need for a funding “set-aside” in Superfund for tribes. However, this issue has not been addressed. As discussed in Chapter 3, the regional funding allocations for pipeline activities (which include tribal Superfund grants) do not consider tribal workload. The Agency is considering changing the funding mechanism for tribal projects because it does not consider tribal funding needs, leaving regions with large numbers of impacted tribes at a disadvantage. No dates have been set for initiating, evaluating, or completing this initiative.

Anticipated Benefits from TASWER Not Received

EPA’s establishment of TASWER has had little success. TASWER has not met the goals of its cooperative agreement and, until recently, the Agency has not critically evaluated its performance.

In response to tribal leaders’ requests, EPA in September 1998 entered into a cooperative agreement to establish TASWER. The agreement provided \$3.1 million to TASWER over 5 years to provide a government-to-government mechanism through which tribes could be proactively involved in policy discussions. TASWER encountered serious problems and, according to the Agency, was just beginning to accomplish its workplan goals in 2003, approximately 5 years after it was established.

TASWER has encountered numerous difficulties and has not performed as expected. For example, TASWER:

- Experienced grant management failures, including awarding a non-competitive contract, and paying \$500,000 of the \$750,000 contract amount to the recipient in advance of work performed.

- Provided misguided information to the Agency on the status of actions.
- Had difficulty fulfilling its mission to proactively involve tribes. EPA's Tribal Operations Committee expressed concerns in February 2001 over whether TASWER was meeting its objective of soliciting support and guidance from tribal governments, and an inter-tribal association of 24 Federally-recognized tribes notified EPA in November 2001 that TASWER had failed to properly represent tribes.
- Did not hire sufficient staff to perform program activities.
- Had not provided tribal input to the Agency's baseline inventory of hazardous waste sites although it had been managing the tribal effort since July 2000.

Because of financial management deficiencies, EPA issued a stop work order to TASWER on July 3, 2002. Satisfied the deficiencies were corrected, the Agency lifted the stop work order on November 26, 2002. The Agency advised us that TASWER made major changes and improvements during 2003 and is just beginning to accomplish its workplan goals, approximately 5 years after TASWER was established. The Agency advised us it is critically looking at TASWER's performance.

Conclusions

While EPA's major tribal initiatives have produced positive results, their benefits have not been measured or fully realized. Critical actions remain incomplete and hamper the development of a sound strategy for the program. The lack of goals and measures belies the status of incomplete pilot projects and other actions critical to enhancing the tribal role in Superfund. Such measures are critical not only for measuring success and progress but for evaluating whether its strategy continues to achieve desired results.

Also, the Agency will not be able to fully consider the interests of tribes in identifying, prioritizing, and evaluating hazardous waste sites unless tribal cultural resource use is accounted for systematically. Further, if EPA does not take action to revise its risk tools, it could undermine its relationships with tribes and be at odds with its own Indian Policy, which calls for removing barriers to tribal participation in environmental programs. According to its Federal trust responsibility, EPA must consider the interests of tribes in conducting its activities and ensure its actions protect tribal treaty rights.

Recommendations

We recommend that the Acting Assistant Administrator for Solid Waste and Emergency Response:

- 2-1 Develop detailed plans for completing critical actions that identify milestones, priorities, and resources, and monitor the status of action plans, report on their progress to regions and tribes, and revise plans as necessary.
- 2-2 In concert with development of a tribal strategy, clearly identify Agency responsibilities for modifying risk tools, delineate how decisions to modify risk tools (including the decision to make no changes) impact tribes, determine how barriers can be addressed, and develop a specific plan to monitor and use model research that addresses risk tools.
- 2-3 For tribal initiatives, evaluate the Plan pilot projects before authorizing additional pilot projects, and share the benefits and lessons learned with others that may benefit, such as regions, tribes, and States.
- 2-4 Before providing additional funds to TASWER, objectively evaluate the benefits and costs of TASWER's cooperative agreement, along with alternative organizations, such as the NTEC.

Agency Comments and OIG Evaluation

The Agency has substantially agreed with our findings and recommendations and we look forward to its final response, which should include detailed plans for completing critical actions, along with milestones for their accomplishment.

OSWER stated that it believed the OIG's recommendations for Chapters 2 through 4 are interrelated and addressed them in a combined response. Its response "is intended to address the full intent of the recommendations without emphasizing individual components." Specifically, OSWER stated it intends to focus its strategy on several key actions/priorities:

- Completing a tribal waste inventory;
- Issuing guidance incorporating tribal cultural factors into the Hazard Ranking System and Superfund risk assessment processes;
- Establishing a forum for regions to share information related to their tribal Superfund efforts;
- Involving tribes early in the Superfund process, and developing guidance to that effect; and
- Providing technical support in cases where a site is on tribal land or affects traditional tribal cultural factors and life ways.

Through increased emphasis, OSWER will finalize its tribal strategy in fiscal 2005. To meet this goal, OSWER will identify, evaluate, and communicate the program's current tribal priorities and provide a general outline and timeframe to accomplish activities to fulfill OIG recommendations.

The Agency stated that efforts to incorporate tribal cultural factors into the Hazard Ranking System and risk assessment guidance are ongoing. Recently, OSWER approved a strategy for working with tribes to identify cultural factors it might define within the Hazard Ranking System guidance to more fairly account for tribal exposures to site contamination.

Incorporating cultural factors into risk assessment work is a larger project, according to the Agency. A number of other groups, in addition to OSWER, are researching this issue relating to specific interests, including EPA's Office of Research and Development (through the EPA Tribal Science Council); the Office of Prevention, Pesticides, and Toxic Substances; TASWER; and several tribes. EPA's American Indian Environmental Office is leading an effort to coordinate across the Agency efforts related to tribal traditional life ways and risk. OSWER stated it is fully participating in this coordinated effort. As this work progresses, OSWER commits to addressing the Superfund aspects of the remaining portions of recommendation 2-2.

The Agency stated that it continues to maintain close oversight of and substantial involvement in TASWER's activities. OSWER's senior program managers will discuss options for working with various tribal associations to achieve Superfund's long-term commitments to tribes. These options include a full analysis of TASWER, NTEC, and other alternative entities in relationship to their benefits to tribes nationally.

Chapter 3

EPA Needs to Improve Strategy for Tribal Superfund Program

EPA has not fully developed its tribal strategy in relation to Superfund, even though it initiated the draft strategy in 2002. We believe a key factor for this occurring is that the tribal strategy lacks a implementation plan, including milestones, priorities, targets, and resources, along with corresponding measures to track its progress and effectiveness. Also, strategy completion has been hindered because of little emphasis from top leadership, a lack of clear goals, missing critical information such as an inventory, and EPA regions not being included in its development. In the absence of clear direction, EPA regions have developed divergent regional tribal programs. Consequently, the Agency does not have a sufficient accountability system in place to measure or evaluate its progress in enhancing the tribal role in the Superfund program. This will make it difficult for EPA to meet its responsibility to consult with and protect the interests of tribes when making Superfund decisions, and complete critical actions necessary to fully enhance the tribal role in the Superfund program.

Agency's Program Accountability System

According to the Governmental Accounting Standards Board concept statement, accountability systems for government programs include establishing and achieving program goals; selecting (or rejecting) policy; using adequate processes, procedures, or measures in performing necessary actions; having efficient operations; and spending funds according to an approved budget and legal and regulatory requirements.

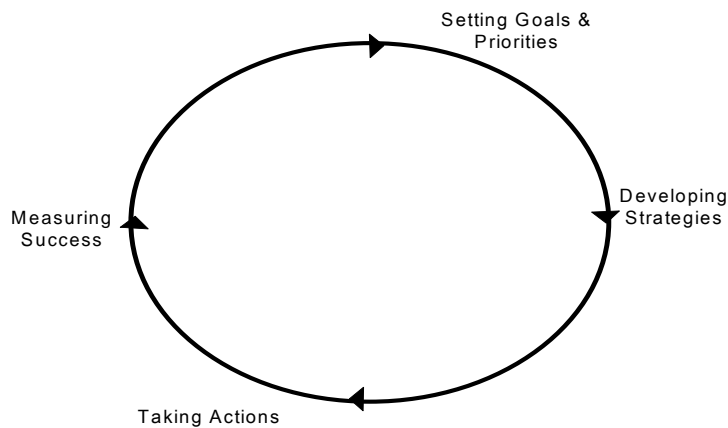


Figure 3-1: Model for Strategic Planning
Source Nature Conservancy

According to the EPA OIG's guide for assessing organizational systems, an organization's leadership should provide realistic, verifiable goals. A strategic planning process should be in place that links customer-driven goals with well-defined strategies, actions plans, and performance measurement. Action plans should include goals that link long-term strategic goals with day-to-day activities of management and staff. A process should be established for establishing clear priorities.

EPA's programmatic goals, objectives, measures, and strategies are identified in its 2003-2008 Strategic Plan. In 2002, OSWER developed a Tribal Program Strategy for 2003-2006 (draft) that includes its Superfund program. This strategy includes a goal and associated measures.

Program Direction Unclear

Agency efforts to develop a strategy for the Tribal Superfund Program have not reached fruition, resulting in unclear program direction. The Agency's 1998 *"Plan to Enhance the Role of States and Tribes in the Superfund Program"* no longer plays a significant role in regional efforts to involve tribes. The draft OSWER Tribal Program Strategy has not been provided to tribes and regions as of September 2003.

The lack of clear program direction is evidenced by the fact only two regions told us they have a specific strategy for the Superfund tribal program. Regions indicated there is "a disconnect" between regions and headquarters and a general lack of headquarters direction. Further, it appears there is little top management emphasis on completing and implementing the Superfund tribal strategy. Although a meeting was held in June 2003 to revise the strategy, program officials said very little has been accomplished since that time.

Without a clear goal and corresponding strategy, priorities, milestones, and resources, it will be difficult for the Agency to (1) meet its responsibility to consult with and protect the interests of tribes when making Superfund decisions, and (2) complete critical initiatives.

Draft Strategy Missing Key Components

The Agency's draft tribal strategy (2003-2006) for its Superfund program is missing key components that we believe are instrumental to its future success. Successful implementation will also be dependent upon development of an implementation plan and stakeholder involvement.

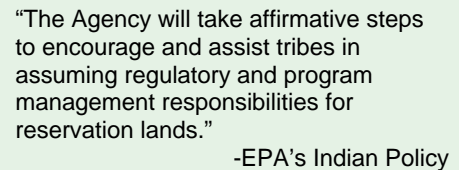
Draft Strategy Lacks Clear Superfund Goal

According to the draft tribal strategy, OSWER's Superfund goal is "continued emphasis on increasing the number of impacted Indian tribes participating in the Superfund program..." While this goal addresses, to a limited extent, the outcome of EPA activities (EPA-tribal relationship), it does not address an environmental outcome, such as Superfund site cleanup or natural resources returned to tribes. Strategic plans should include a set of outcome-related strategic goals that indicate the results a strategy is intended to achieve. The Agency's Superfund tribal goal of emphasizing increasing tribal participation is not verifiable or measurable; the Agency has yet to define how it will determine when this goal is met or how each region will contribute to its attainment.

Key Policies Not Defined

The Agency has not established clear policies that define the scope of its Superfund tribal activities, which is needed to set priorities and allocate resources. Further, program policies and criteria are needed for uniform national implementation, to ensure transparency and equity. To illustrate:

- **Core grant criteria.** The Agency has not established criteria for awarding core program cooperative agreements to tribes. Such agreements provide funding (“core grants”) for activities that support a tribe’s ability to implement CERCLA. Agency guidance and policy, such as the Agency’s Superfund Program Implementation Manual and EPA’s Indian Policy, note the importance of core grants. However, the Agency has not established:



“The Agency will take affirmative steps to encourage and assist tribes in assuming regulatory and program management responsibilities for reservation lands.”
-EPA’s Indian Policy

Figure 3-2

- ↳ Minimum criteria for funding program development under core grants.
- ↳ A policy that addresses how long core grants should continue.
- ↳ Priorities for issuing core grants.

The lack of a clear policy for providing tribal core grants results in the appearance that core grants are not being offered on an equitable or priority basis nationwide, and tribes have in fact expressed concerns about disparities. For example, in a letter to Region 10 in March 2001, the Confederated Tribes of the Colville Reservation noted that the Region has provided every State in Region 10 a core grant for as long as 10 years but has never issued a core grant to a tribe (the Region subsequently issued a core grant to the Colville Tribes). Other regions (1, 2, 6, and 9) have issued core grants to tribes.

- **Trust responsibility.** The Agency has not defined its trust responsibilities relative to the Superfund program and, thus, has not established criteria for how its Superfund program activities will consider tribal interests and protect tribal rights arising from treaties, statutes, and executive orders. While the Agency has acknowledged the need to discuss treaty rights in relation to the Superfund program on a national basis, to the best of our knowledge, this discussion has not occurred. As one tribal staff member observed, EPA staff do not always consider the impacts to critical tribal resources.
- **Sites impacting tribes.** There is not a common definition of sites impacting tribes, although this definition is critical for determining the scope of EPA’s activities. For example, Region 2 defined sites impacting tribes as those with contamination on or contiguous to tribal lands, while Region 10 stated there is

no clear definition. Complex Indian land and treaty rights issues complicate the determination of whether or not sites impact tribes, including sites not actually on a reservation.

Strategy Development Incomplete

In addition to insufficient goals and policies, we noted other issues that resulted in strategy development being incomplete:

- While the strategy includes many crucial activities, such as developing a baseline inventory and modifying guidance for the Superfund Hazard Ranking System, it does not specify priorities for these activities, which is necessary to ensure limited resources are used for the most important efforts first.
- EPA does not have a detailed action plan for its Superfund tribal strategy, including milestones. Further, the regional role in the national strategy has not been identified, and regions have not been consulted in draft strategy development.
- Since EPA has yet to develop a baseline inventory of hazardous waste sites impacting tribes, the full extent of the problem (number and type of sites, site status, impacted tribes) that the strategy is to address is unknown.
- Although the strategy acknowledges tribal needs are growing and budget projections made funding increases for tribes problematic, necessary resources to carry out the strategy have not been identified.
- Although EPA's tribal caucus participated in the strategy development, EPA needs to consult with tribes before the strategy is finalized.

Performance Measures Needed

Performance measures for the Superfund tribal program have been eliminated and, according to EPA personnel, are being redesigned in light of changes to EPA's Superfund cleanup program and EPA's national strategy. Good performance goals and measures and high-quality data supporting them are fundamental to strategic planning, budgeting, and accountability processes.

The Agency had developed four performance measures (see Figure 3-3) that indicate the extent to which the Superfund program is active at sites of concern to tribes and the level of involvement of those tribes. However, these measures were only used from 2001 to 2003. If those measure are to be used in the future, they can be more effective if they:

| Fiscal 2002/2003 Superfund Tribal Performance Measures |
|---|
| <ol style="list-style-type: none"> 1. Superfund assessments conducted at sites of concern to tribes. 2. Superfund dollars provided for building tribal capacity. 3. Tribes supported by a Superfund cooperative agreement. 4. Percentage of Superfund sites that are of concern to tribes where a tribe is actively involved. |

Figure 3-3: Source: Superfund/Oil Program Implementation Manual FY 02/03, Appendix J.

- Include national and regional target measures or goals since existing measures do not include target measures or goals; thus, regions have not been required to set target goals that were consistent with national goals.
- Measure the effectiveness of relationships with tribes.
- Address environmental outcomes, such as natural resources returned to tribes.

Without more informative measures, the Agency will not be able to measure the effectiveness of its program and progress toward its goal, or hold managers accountable for performance. Further, it will not be able to determine the extent to which regional actions are contributing to its goals and whether regional goals are aligned with national goals. We believe there are several reasons why the strategy, goals, and performance measures are not fully developed and effective, including:

- **Need for direction.** No one was clearly accountable for the Superfund tribal program results; although there is a Superfund tribal coordinator, the coordinator said this structure is not conducive to a well-coordinated effort.
- **Potential conflict with milestones.** Full tribal involvement can add time to studies, delaying completion of project milestones, and meeting milestones is a key and readily identifiable factor for measuring success.
- **Formidable coordination challenges.** EPA has a formidable challenge trying to coordinate with over 560 Federally-recognized tribes.
- **Insufficient information.** EPA lacks critical information needed to develop a clear strategy with associated priorities, such as a baseline inventory of sites.
- **Funding.** Management is reluctant to set performance measures for activities that may not be fully funded.
- **Measurement difficulties.** Measuring outcomes, such as the degree to which the Agency has enhanced the tribal role in the Superfund program, is difficult, and to do so EPA needs to establish measurement criteria and create a mechanism for collecting corresponding data.

Divergent Regional Programs Developed in Absence of Clear Direction

We believe the lack of clear program direction was a prime factor in resultant divergent regional programs that operated under different policies, procedures, and priorities. Other factors included the wide variations in regional tribal workload. Moreover, Superfund funding allocations to EPA regions do not consider tribal program priorities or workloads, which vary substantially.

Disparities in Tribal Funding by Region Existed

Based on our interviews with tribes and regions, there was insufficient funding for tribal consultation in four regions reviewed. Three of these regions accounted for the majority of tribes impacted by NPL (or equivalent) sites. For example:

- In Region 5, insufficient funding and responsible party negotiations delayed data collection efforts needed to protect the Tribe's treaty-granted resource use. According to the 2003 Superfund pilot project report prepared by the Leech Lake Band of the Ojibwe, data needed to fully characterize human health and ecological risks had not been collected due to a lack of funding. According to the Tribe, during the delays, residents have been exposed to contaminated soil and consumed contaminated fish.
- Region 8 noted proposed funding cuts adversely impacted accuracy of a risk assessment that considered cultural uses of the riparian zone and threatened a tribe's participation in the development of the site record of decision; tribal participation is considered crucial to reaching a workable solution.
- Region 9 said additional funding is needed for tribes working on Superfund NPL sites. Moreover, two of the three tribes we interviewed in Region 9 indicated insufficient funding impacts their ability to evaluate unique risks.
- Region 10 stated that funding for tribes impacted by Superfund NPL sites is about half of what is needed.

Regional Tribal Workload Varies

The nine regions we interviewed have wide variations in their tribal workloads. For example, Regions 1, 2, 4, and 7 each support 10 tribes or less; Region 9 supports 142 tribes, including the Navajo Nation that has substantial acreage. The regions also have large variances in the number of NPL sites (or equivalent) on or impacting tribes, along with the number of impacted tribes. Regions 4 and 7 have no tribes impacted by these priority sites, while Region 10 has 25 sites that impact 19 identified tribes. Regions 6, 9, and 10 have tribes leading cleanups, while no other regions reported tribal lead cleanups.

Funding Allocations Not Based on Tribal Priorities or Workload

Funding allocations for the Superfund tribal program are not strategically directed. We believe this contributes to divergent regional programs and the inability to fund certain critical consultation activities. The Superfund program provides regions funding for tribal activities using three “advices of allowance”:

- **Pipeline funding:** This major funding source for tribal activities funds pre-construction activities, including State and tribal agreements, information management, and site-specific work (such as that for site assessment, investigations and feasibility studies).
- **Removal funding:** This provides funding for time critical removal actions.
- **Remedial funding:** This provides funding for remedial actions.

Resources could not be directed to strategic priorities because, as noted, strategic priorities have not been developed for the Superfund tribal program. Moreover, our comparison of regional funding to NPL and equivalent sites indicates funding does not appear to be correlated to priority site workload. We compared regional tribal workloads based on the number of NPL or NPL-eligible sites that regions stated impacted or were of concern to tribes because, by definition, these sites represent some risk. As shown on Figure 3-4, Region 6, which has 4 priority sites that impact 3 tribes, obligated about \$8 million while Regions 5 and 10, which have a total of 39 priority sites impacting 35 tribes, obligated about 60 percent of this amount – about \$4.7 million.

| Regional Funding Compared to NPL-Eligible Sites and Impacted Tribes (dollars obligated in millions for fiscal years 1996 through 2003) | | | |
|---|----------------|-------------------|------------------------|
| Region | Funding | NPL+ Sites | Tribes Impacted |
| 1 | \$0.04 | 3 | 3 |
| 2 | 1.86 | 2 | 1 |
| 4 | 0.13 | 0 | 0 |
| 5 | 0.88 | 14 | 16 |
| 6 | 8.01 | 4 | 3 |
| 7 | 0.00 | 0 | 0 |
| 8 | 2.70 | 1 | 1 |
| 9 | 5.12 | 6 | 7 |
| 10 | 3.89 | 25 | 19 |

Figure 3-4. Source: EPA data

One apparent reason for this disparity is that headquarters’ pipeline allocations to regions do not consider tribal workload. Funding is distributed to regions based on a formula that considers historical obligations and site-specific workload. Agency staff told us there is “a strong culture of tribal support.” However, because of its trust responsibilities, EPA is likely to have additional workload requirements for tribal sites. In executing its duty to protect

tribal rights, EPA must be able to accurately assess and protect unique tribal interests (such as sacred sites) and specific treaty rights.

Another reason for regional funding disparities appears to be differences in regional tribal programs and priorities. Unlike other regions, Region 6 created a tribal consortium that performed about 125 preliminary site assessments (or investigations) for over 30 member tribes from 1996 to 2002. The Region provided this consortium approximately \$4.1 million during that period. On the other hand, Region 10, which obligated about \$2.8 million during the same period, put limits on funding for tribes. The Region, which is responsible for 19 tribes impacted by 25 NPL sites, limited tribal funding to about \$30,000 per year per tribe for tribes impacted by these sites. The Region acknowledged this amount was about half the amount needed.

Agency staff told us that a work group is considering a new base allocation formula to make fund distribution more equitable.

Regions Develop Divergent Programs

Regions have taken varying approaches to program implementation, depending on such factors as available resources, management emphasis, number of tribes, and the magnitude of waste issues. To illustrate:

- To determine the extent of hazardous waste sites impacting tribes, regions have undertaken various efforts. For example, Region 8 surveyed all of its 26 tribes in the late 1990s; Region 9 has not surveyed its 142 tribes; and Region 10 only surveyed tribes in Washington State.
- Regions 8 and 10 have developed procedures for consulting with tribes; the other regions told us they have not.
- Regions have different strategies for working with tribes. As discussed, Region 6 created a tribal consortium providing services for 32 member tribes. Region 8 funded development of emergency response plans for all interested tribes under core program agreements, while Region 9, which had nearly six times as many tribes, said it only provides funding to large tribes with the need for a Superfund program (although it is investigating ways to identify emergency response planning needs).
- Regions have differing definitions of success for their Superfund tribal programs. For example, Region 8 defines success as the effectiveness of its relationship with the tribes; Region 2 defines success as what the tribes had successfully accomplished and implemented; and Region 6, which had 66 tribes, told us it has no one measure of success.

- As previously, noted regions have different policies for issuing core grants, which are critical to the development of tribal program capabilities.

Tools, Practices, and Lessons Learned Need to Be Shared

The Agency does not have an ongoing forum to share tools, best practices, and lessons learned by regions and others involved in efforts to enhance tribal Superfund programs and also to develop more consistency amongst regions. During our interviews, the regions identified the following tools that enhanced their relationships with tribes:

- **Consultation Procedures.** Region 10 developed “guiding principles” for consulting with tribes. NTEC has observed that consultation procedures, tailored for each tribe, enable government to reach out to tribes.
- **Memoranda of Agreement.** Region 10 is in the process of establishing memoranda of agreement with its tribes, to help eliminate conflicts and build trust. Region 9 has a memorandum with one of its tribes, which it stated improved trust.
- **Training for EPA staff.** EPA’s course, “Working Effectively With Tribal Governments,” is identified as a good tool for enhancing regional relationships, but one region indicated more of this training is needed.
- **Tribal Evaluations.** Region 1 sends evaluation questionnaires to tribes on regional programs and the Region indicated it has received useful feedback.
- **Tribal Consortia.** As previously noted, Region 6 established an Inter-Tribal Environmental Council to create a cost-effective mechanism to perform site assessments. However, this approach may not be effective in some instances due to competing priorities and historic conflicts between tribes.

The Agency should share its tools, best practices, and lessons learned at least annually in a forum conducive to the transfer of knowledge. Such a forum would help regions build on each other’s successful practices and help eliminate ineffective practices and associated resources.

Conclusions

EPA is a Federal leader in its efforts to enhance tribal relationships; it was the first Federal agency to adopt a formal Indian policy. It has also established an American Indian Environmental Office and a Tribal Operations Committee. In spite of its efforts, Agency leadership has yet to establish a clear direction for the future of the Superfund tribal program, resulting in divergent regional programs whose effectiveness is not being objectively measured or evaluated. While OSWER developed a tribal strategy in 2002, it has not been deployed. Further,

there are significant limitations in its design, and the Agency has not designed a system to measure the effectiveness of its strategy and, ultimately, its Superfund tribal program. The Agency's progress in enhancing the tribal role in the Superfund program and meeting its trust responsibilities will continue to be challenged until leadership provides a clear plan that addresses the limitations in its strategy and accountability system.

Recommendations

We recommend that the Acting Assistant Administrator for Solid Waste and Emergency Response take a leadership role in developing a Superfund tribal strategy, policies, and performance measures and in sharing best practices. Specifically:

- 3-1 With regional and tribal input, fully develop a Superfund tribal strategy that includes:
 - Clear goals that include regional activities.
 - Detailed action plans (as identified in our Chapter 2 recommendation).
 - Policies that define the scope of Superfund activities.
 - Priorities for conducting activities.
 - Identification and action on data gaps that have constrained the strategy.
 - Resources required to implement the strategy.
 - Periodic refinement based on new data (such as the baseline inventory).
- 3-2 In further defining tribal Superfund policies, specifically identify:
 - Criteria for issuing and continuing tribal core program agreements.
 - Agency responsibilities relative to trust responsibilities and treaty rights as they impact the Superfund tribal program.
 - Criteria for defining sites impacting tribes.
- 3-3 Further develop performance measures that (1) include national and regional targets, (2) measure effectiveness of relationships with tribes, and (3) address environmental outcomes.
- 3-4 Better coordinate tribal Superfund efforts to ensure that funding is appropriately distributed and tribes in all regions get a reasonably close level of attention. At a minimum, ensure allocations consider tribal program priorities, address varying workloads among regions, and are adequate to meet EPA's Federal trust responsibility.
- 3-5 Develop a forum, to be held at least annually, for regions to share tools, best practices, and lessons learned related to their tribal Superfund efforts.

Agency Comments and OIG Evaluation

The Agency proposed several actions which generally meet the intent of our recommendations. We look forward to more specific plans to carry out these actions, to include milestones for issuing guidance.

OSWER identified priorities for its tribal strategy and stated it would finalize the strategy in fiscal 2005. It noted that OIG recommendations focus on the actions needed to fully implement and evaluate the effectiveness of the program's strategy over the long term. To accomplish this, OSWER stated, the program must better define the role of regions within the strategy (and create consistency with regional strategies), and work closely with tribes to shape the strategy as it is developed and consult with tribes in developing specific milestones.

In addition, another priority for OSWER is to issue guidance that facilitates working effectively with tribes early in, and throughout, the Superfund process as it is implemented at specific sites. OSWER's goal is to provide guidance that explains the Federal trust responsibility, describes how to adequately consult with tribes at particular sites, and presents examples of the most effective practices employed by regions. This guidance may also address criteria for tribal core program agreements. OSWER hopes to develop milestones early next year.

While the Agency is considering several performance measures, it has not fully addressed our recommendation to further develop performance measures. OSWER stated it recognizes the difficulties associated with establishing tribal program performance measures and is seriously considering several measures. OSWER stated it will track Government Performance and Results Act measures for tribal sites.

OSWER stated that one of its priorities is to provide technical support for sites on tribal land or affecting tribal interests. OSWER stated that incorporating the technical support priority into the tribal strategy will enable it to better consider funding allocations among regions and varying regional workloads. Also, OSWER stated it intends to establish a forum for regional discussions of tribal issues and lessons learned beginning in the fall of 2004.

We anticipate more details on how it plans to develop these measures and establish targets as part of its final response.

Chapter 4

Tribal Relationships Beneficial But Guidance Can Improve Consultation

Case studies of six tribes showed that EPA can improve its working relationships with tribes. These case studies showed that none of the EPA-tribal relationships exhibited all seven characteristics we identified as being needed for good working relationships. By design, our case studies included relationships with varying levels of tribal satisfaction – from “a compromise” to “excellent.” These relationships have changed over time, with some improving and others becoming more strained. Typically, tribes initiated relationships with EPA. The stronger and more effective relationships exhibited four important characteristics:

- Frequent and timely communication.
- Appropriate information sharing.
- Addressing issues raised by tribes.
- Operating in a government-to-government relationship.

Tribal and EPA staff also indicated good interpersonal relationships and funding contributed to successful relationships. There were various reasons for conflicts in EPA-tribal relationships, including varying expectations of roles and responsibilities, differences in views on acceptable project actions and outcomes, unclear consultation procedures, and a lack of transparency of EPA’s Superfund process. Successful relationships should be pursued since they can decrease both the time and resources necessary for investigation, provide access to tribal expertise and information, and encourage tribal participation in mitigation. Ultimately, successful partnerships create stronger, more effective decisions and enable EPA to provide for better human health and environment on tribal lands.

Tribal Partnerships Critical to Strategy, Trust Responsibilities

EPA’s partnerships with tribes are important to both the achievement of EPA’s national goals and fulfillment of its trust responsibility to tribes. Tribal partnerships are different than those with States or others because tribes are sovereign nations. EPA’s role is critical, too, in protecting the health of millions of Indians and non-Indians residing in Indian country.

According to the Agency's 2003-2008 Strategic Plan, the Agency's partnerships with tribes (and States) is a “cross-goal” strategy that plays a critical role in the accomplishment of all of the Agency's goals, including its goals to clean up and restore contaminated sites. The Agency’s strategy also acknowledges that tribal cultural survival depends on the protection of their tribal homelands.

According to its trust responsibility, EPA must consult with and consider the interests of tribes in conducting its activities and ensure its actions protect tribal treaty rights. The Federal Government’s general trust responsibility arises from Indian treaties, statutes, executive orders, and historical relations between the United States and Indian tribes. The U.S. Supreme Court has noted that the Federal government, as trustee, is “charged with moral obligations of the highest responsibility and trust.”

“EPA fulfills its cleanup and waste management responsibilities on tribal lands by acknowledging tribal sovereignty and recognizing tribal governments as being the most appropriate authorities for setting standards, making policy decisions, and managing programs consistent with Agency standards and regulations.”
 -EPA’s 2003 Strategy

Tribal sovereignty is the right of tribes to exercise self-determination and the right to self-government, unless these powers have been modified by treaties or an act of Congress. Tribes have the authority to, among other things, assert jurisdiction over the people and their land, define their tribal membership criteria, and create and enforce legislation. Because tribes are sovereign, EPA must honor a direct government-to-government relationship with tribes. Consequently, no decisions about tribal lands, resources, and people should be made without consulting with the tribal government.

Figure 4-1

More Effective Tribal Relationships Associated with Key Features

Review of EPA’s relationships with selected tribes indicated that the more effective relationships exhibited certain key features, such as frequent communication and information sharing. For our review, we focused on case studies of six EPA-tribal relationships, and included relationships with varying levels of tribal satisfaction – from “a compromise” to “excellent.” These

relationships have changed over time, sometimes improving and other times becoming more strained. The six tribes are shown in Figure 4-2; additional details on their selection are in Chapter 1.

| EPA-Tribal Relationships Evaluated | |
|------------------------------------|---|
| Region 9 | <ul style="list-style-type: none"> • Navajo Nation • Shoshone-Paiute Tribes of the Duck Valley Reservation • Washoe Tribe of California and Nevada |
| Region 10 | <ul style="list-style-type: none"> • Coeur d’Alene Tribe • Confederated Tribes of the Colville Reservation • Suquamish Tribe |

In concert with EPA officials, we identified seven characteristics of effective working relationships with tribes. Based on surveys of regional and tribal staff, along with the examination of related documentation, we determined whether these characteristics are present. It should be noted that the tribes and EPA regions did not always agree on whether a certain characteristic is in place, which resulted in a non-specific response. As shown in Figure 4-3, none of the EPA-tribal relationships exhibited all of the characteristics of good working relationships,

Figure 4-2

although Region 10's relationship with the Suquamish and Coeur d'Alene tribes and Region 9's relationship with the Shoshone-Paiute Tribes exhibit five of the seven characteristics.

| Characteristic | Tribe | | | | | |
|---|--------|---------------|----------|-----------------|------------------------|--------|
| | Navajo | Coeur d'Alene | Colville | Shoshone Paiute | Suquamish ¹ | Washoe |
| Proactive efforts at project inception (EPA initiates contact) | No | No | No | No | | No |
| Government-to-government dealings | | Yes | | Yes | Yes | Yes |
| Communication "early and often" (EPA communications begin upon release or threat discovery) | Yes* | Yes | | Yes* | Yes | |
| Sharing information appropriately with tribes | | Yes | | | Yes | |
| Addressing issues raised by tribes (with complete and prompt responses) | | Yes | No | Yes* | Yes | |
| Written agreements that specify clear roles and responsibilities | | | | Yes | | |
| Establishing mutual trust | | Yes | | Yes | Yes | |

Figure 4-3: **Yes*** = Qualified yes; communication was deficient earlier.

Blank entries represent instances with incomplete, inconclusive, or only partially observed detail. For example, we concluded the written agreement characteristic was partially observed for the Navajo Nation because a project management work plan that detailed respective roles and responsibilities was not developed until after a communication breakdown.

¹ Responses address relationship for Eagle Harbor-Wyckoff site only.

Our evaluation of these characteristics and their implementation for these six cases disclosed that:

- Generally, EPA is not proactive in engaging tribes, particularly at project inception. Conversely, tribes have made extensive efforts to engage EPA in site assessment, study, and cleanup.
- Four factors related to relationships are leading indicators of successful EPA-tribal relationships: (1) frequent, timely communication; (2) appropriate information sharing; (3) addressing issues raised by tribes; and (4) operating in a government-to-government relationship. Relationships that exhibit these characteristics also tend to have a strong degree of mutual trust.
- Sufficient funding for tribal engagement is also cited as an important issue of concern.

Details on these points follow.

Tribes Are Impetus for EPA Involvement

In nearly every case, tribes are the impetus for EPA's involvement in the site. Tribes spent years, and in one case decades, attempting to get EPA to address contamination problems. To illustrate:

- In 1997, the Washoe Tribe approached EPA Region 9 for assistance because it believed the State of California's cleanup actions for the Leviathan Mine were inadequate and the State had allowed unpermitted contaminated discharges into the creek system. The tribal staff stated involving EPA had been an arduous process. Region 9 stated that, after meeting with the Tribe, it took immediate actions to collect information and conducted extensive public outreach to gauge public support for listing the site on the NPL. The Region subsequently listed the mine on the Superfund NPL in 2000 and initiated actions to clean up the site.
- In 1991, the Coeur d'Alene Tribe began studies evaluating the effect of metals contamination in the Coeur d'Alene River Basin, an area impacted by the Bunker Hill NPL site in Idaho but not part of the remediation effort. For many years, the Tribe urged EPA to expand its Bunker Hill study and remediation efforts to include the basin. By the time EPA Region 10 began its remedial investigation of the basin in 1998, the Tribe had collected 7 years of data and conducted much of the investigative work.
- The Shoshone-Paiute Tribes have been involved with the Rio Tinto Mine, located in northeastern Nevada, for decades, raising concerns over violation of the Clean Water Act and independently performing several studies. In response to tribal concerns, EPA Region 9 conducted inspections and



Figure 4-4 - Rio Tinto Mine Tailing Pond (OIG Photo)

assessments. In 1995, the Region determined that the site was eligible for the NPL and, with tribal consent, deferred oversight to the State of Nevada. In 1999, the Tribes informed EPA that the State had fallen short in its oversight role and requested EPA to assume oversight responsibilities. In 2000, EPA again proposed to list the site but postponed over objections from Nevada. Tribal participation ultimately resulted in a November 2002 memorandum of agreement between the State, Tribes, and EPA that provided for EPA and tribal review of site characterization and remedial alternatives analysis.

- In the late 1980s, the Confederated Tribes of the Colville Reservation became aware of problems related to water quality and contaminated sediments in Lake Roosevelt, part of the Upper Columbia River, in the State of Washington. During the 1990s, the Tribes took a leadership role in investigating Lake Roosevelt’s water quality and were a driving force in numerous studies of fish and sediment contamination. In August 1999, “as a last resort,” the Tribes petitioned EPA Region 10 to conduct an assessment of the Upper Columbia River. As a result, in 2003, Region 10 finalized an expanded site investigation and determined that the site was eligible for the NPL.

The tribes’ experiences in engaging EPA in assessment and study likely contributed to the tone set for the future EPA-tribal relationship. For example, the Shoshone-Paiute Tribes, whom requested EPA to oversee the State’s cleanup of the Rio Tinto Mine site several times, are concerned that EPA staff have lacked independence from responsible parties.

However, we also observed that good relationships could develop once EPA became fully engaged, as was the case with the Suquamish Tribe. The Tribe has been aware of activities and issues associated with the Wyckoff-Eagle Harbor NPL site in the Puget Sound area (Washington State) since the 1980s. Although the Tribe attempted to enter into a cooperative agreement with EPA in 1991, tribal participation was limited and sporadic until 1998, when EPA allowed a deviation from grant regulations and entered into a support agency cooperative agreement. Currently, both EPA and Tribal officials said they have an excellent working relationship on the Wyckoff-Eagle Harbor site. In a 2002 letter to EPA, the Tribal Chairman lauded EPA project managers for developing a “positive governmental working relationship” and for implementing actions that supported the protection and enhancement of Tribal trust and cultural resources.



Figure 4-5 -A sheet pile wall, right, contains contamination impacting the Suquamish Tribe from the Wyckoff-Eagle Harbor site (OIG Photo)

Relationship Characteristics Key Indicators of Success

In our view, four characteristics are key determinants to whether the EPA-tribal relationship is successful: (1) frequent, timely communication; (2) appropriate information sharing; (3) addressing issues raised by tribes; and (4) operating in a government-to-government relationship.

A fifth characteristic, “mutual trust,” is related. The “excellent” Suquamish-Region 10 relationship for the Eagle Harbor-Wyckoff site (2003) exhibited these characteristics. The Tribe observed that successful relationships are based, in part, on EPA staff understanding rights and resources reserved by the tribe and working with

the tribe on a governmental basis. In particular, the importance of good interpersonal relationships has been noted. In various instances, insufficient communication practices led to conflicts. For example:

“I believe that open communication promotes a better understanding of Navajo Nation needs, which promotes a true partnership.”

- Letter from Executive Director of Navajo Nation EPA to Region 9, June 2001

Figure 4-6

- While EPA described its relationship with the Washoe Tribe as good, the Tribe said the relationship has endured some problems, such as with information sharing, response to tribal input, and consultation in decision making. For example, the relationship had been adversely impacted by EPA’s lack of a formal response to tribal technical reviews of a site management plan and early response action work plan (see Figure 4-7).

Consequently, the Tribe concluded “true” consultation does not exist. While recognizing EPA has made improvements, tribal staff stated its partnership should be better.

“The [Washoe] Tribe certainly does not want to impede efficient cleanup of the contamination from Leviathan Mine, but it is difficult for the Tribe to support a process which is not responsive to the Tribe’s comments and which is not inclusive of the Tribe at critical developmental stages. Until the Tribe, as well as other Trustees, have been afforded an adequate opportunity to provide input and to receive answers to questions...the Tribe objects to the development of the Early Response Actions Work Plan.”

-Letter from Washoe Tribal Chairman to Region 9, March 2001

Figure 4-7

- In response to a 1993 Congressional hearing requested by the Navajo Nation, EPA Region 9 started its work on the abandoned uranium mines project. In late 1999, there was a serious breakdown in communications between Region 9 and the Navajo Nation over the scope and results of a water data survey. The failure to fully engage the Navajo Nation resulted in work stoppage, which was costly and time-consuming.
- Although the Shoshone-Paiutes currently judged their working relationship with EPA as good, tribal staff stated EPA has not been responsive to tribal

concerns in the past. They said EPA did not share information or take the Tribes' suggestions seriously, and at one point there was no consultation.

Funding Also Key

All the tribes we interviewed stated that funding is critical to their participation. One tribe observed that inadequate funding is problematic not only because a tribe cannot fully participate, but because concerns not identified may be interpreted as tribal concurrence. As detailed in Chapter 2, tribes tend to have disproportionate risks because of their increased exposures to natural resources. Without knowledge of these risks, EPA cannot fully consider tribal interests and protect tribal resources, as required by its Federal trust responsibility.

The experiences of the Suquamish Tribe show a funding impact. The Tribe's fishery rights were adversely impacted by contamination from the Wyckoff-Eagle Harbor NPL site. The Tribe had been aware of issues associated with the site since the 1980s. Although the Tribe attempted to enter into a cooperative agreement with Region 10 in 1991, tribal participation was limited and sporadic until 1998, when EPA allowed a deviation from grant regulations and entered into a support agency cooperative agreement with the Tribe. Region 10 noted that the Tribe has been an effective participant at the site.

However, tribal participation at other sites has been adversely impacted by a lack of funding. The Washoe Tribe told us that EPA funding is insufficient to hire staff with relevant technical expertise; EPA later told us more funding was available for the tribe. Further, the Shoshone-Paiute Tribes indicated a lack of funding impacted their ability to perform a cultural risk assessment and develop a community involvement plan. It also impacted the Tribes' ability to evaluate the characterization of ground water, surface water, drinking water, and sediments.

The Navajo Nation stated EPA funding has declined drastically. As a result, there are fewer personnel, less training, fewer assessments of sites, and the overwhelming threat that "next year" funds will be cut. It noted that funding reductions will have a detrimental impact on whether cleanups will occur in Indian country.

Differences in EPA and Tribal Expectations Create Obstacles to Effective Relationships

Various expectations of roles and responsibilities often caused conflicts and obstacles during the course of EPA-tribal relationships. Differences in views of acceptable project outcomes, the lack of transparency of EPA's process, and the impact of tribal consultation on timeliness were also cited as concerns.

Relationship Roles, Responsibilities, and Processes Often Unclear

Unclear and varying expectations for key aspects of EPA-tribal relationships contributed to conflicts. Our evaluation of the three tribal relationships evaluated in Region 9 showed a tribal consultation process has not been clearly established or defined. For example, the Shoshone-Paiute tribal staff observed that no formal consultation process had been established between EPA and the tribe. Further, while communications with EPA have improved, tribal staff believe they have not reached “true” consultation, as defined by reaching consensus.

The Washoe Tribe also noted it had experienced insufficient consultation and stated that the requirement for “government-to-government” consultation obliged the Agency to make every effort to involve the tribe. In a March 2001 letter to Region 9, the Tribal Chairman provided his definition of EPA’s government-to-government consultation responsibilities:

....EPA consultation with Indian tribes must be conducted with the respect inherent in a government-to-government relationship. Government-to-government consultation is not coextensive with public participation, and requires an active, ongoing effort by EPA to encourage the participation of Indian tribes affected by EPA activities. This means that EPA must make every effort to involve the Washoe Tribe at all stages of the cleanup process at Leviathan Mine, even when participation of the general public may not be required.”

Further, the letter from the Washoe Tribal Chairman to Region 9 noted:

To ensure and clarify meaningful consultation between EPA and the Washoe Tribe, I would like to suggest that the Washoe Tribe and EPA enter into a Memorandum of Understanding on appropriate consultation.

Region 9 stated the letter from the Washoe Tribal Chairman resulted in an immediate offer to meet and EPA’s suspension of any progress at the site pending resolution. A subsequent letter from the Chairman in June 2001 noted that “in the month since our meeting, communication and the working relationship between EPA and Tribal staff have improved markedly.”

Meanwhile, Region 10, which has had successful tribal relationships, had established the following “working definition” of tribal consultation:

“Consultation” means the process of seeking, discussing, and considering the views of federally recognized tribal governments at the earliest time in EPA Region 10’s decision-making. Consultation generally means more than simply providing information about what the agency is planning to do and allowing comment. Rather, consultation means respectful, meaningful, and effective two-way communication that works toward a consensus reflecting the

concerns of the affected federally recognized tribe(s) before EPA makes its decision or moves forward with its action.

Generally, EPA and tribes have not established site-specific written agreements that address project roles and responsibilities, consultation procedures, and other government-to-government activities. For example, Region 9 excluded the Washoe's project manager from a technical meeting that the tribe deemed important because the tribal manager is an attorney. (Attorneys are routinely excluded from such meetings, according to the Region.) Regional staff were apparently unclear on tribal roles and responsibilities, since they stated they were unaware the attorney was the tribal project manager. The Washoe Tribe also indicated it did not receive important documents and had been excluded from a decision about changing dates in an enforcement order. The Tribe observed that an agreement that specifically addressed tribal involvement in decision making would be beneficial in defining the tribal partnership role.

An experienced community involvement specialist observed that written agreements between tribes and EPA can help build relationships and, thus, avoid future conflicts. Items that should be considered for inclusion are:

- Statement of a government-to-government relationship;
- Recognition that the tribe is a sovereign nation;
- A time line that describes the work to be performed;
- Details on respective roles and responsibilities;
- Procedures for consultation, including for obtaining tribal comments; and
- Procedures for accessing tribal land.

Such agreements have proven beneficial. After encountering a serious communication breakdown, Region 9 and the Navajo Nation developed a project management work plan that detailed respective roles and responsibilities. Region 10 is in the process of establishing formal memoranda of agreement with tribes to better its relationships.

Project Outcome Expectations Differ

EPA-tribal relationships have experienced difficulties due to differences in acceptable remediation alternatives. One apparent reason for this conflict is because, generally, tribes place greater importance than most on the contamination's impact on future generations (the "seventh generation"). Contamination problems can have a greater long-term impact because tribal homelands are considered permanent residences – tribes cannot "pick up and move."

As noted, tribal cultures tend to have stronger ties to natural resource use than most. Tribes are particularly susceptible to health impacts from contaminants because of the traditional and cultural uses of natural resources. Fishing, hunting,

and gathering are often part of a spiritual, cultural, social, and economic lifestyle and the survival of many Indians is dependent upon subsistence hunting, fishing, and gathering. Tribes often have treaties that reserve hunting, fishing, and gathering rights in territories beyond reservations. As discussed in Chapter 2, EPA's risk tools do not specifically account for these unique practices.

We observed several conflicts over remediation plans. For example:

- The Suquamish Tribe noted that one obstacle it has encountered involved EPA's consideration of institutional controls, such as harvesting prohibitions, as a long-term remedial action. Such institutional controls adversely impacted the Tribe's treaty right to harvest its fishery.
- The Shoshone-Paiute Tribes concluded removing mine tailings is the only acceptable remediation solution for addressing contamination from Rio Tinto Mine, while the responsible parties prefer the less costly alternative of diverting water from tailings.
- Region 10's relationship with the Coeur d'Alene Tribe is currently described as strained because the Tribe has major concerns with the cleanup plans for Lake Coeur d'Alene, which is partly on tribal land. For a variety of reasons, EPA excluded it from the Basin cleanup decision.

Transparency of Superfund Policy, Processes

Tribes observed that EPA's policies and processes, particularly the decision making process, are not fully transparent. This lack of transparency can lead to perceptions that EPA is not open in its communications and information sharing, the affected tribe is not a full partner in the process, and EPA is not objective in its actions. For example, the Confederated Colville Tribes' staff stated that, once Region 10 determined that the Upper Columbia River site was eligible for the NPL, they have been "out of the loop" on EPA's process, actions, and strategy. According to the Tribes, EPA's process and strategy for making further decisions is not transparent, nor did they believe they are a full partner. Given this situation, along with what the Tribes believe is a lack of consultation, they are concerned about EPA making "political" rather than objective decisions.

Impact of Tribal Consultation on Timeliness a Concern

Tribal consultation has the potential to increase the time and cost of Superfund actions. For example, the Washoe Tribe reported that the tribal input to the risk assessment proved to be a long process. Region 9 observed that Navajo Nation internal processes and coordination requirements were time consuming. Success

is measured in the Superfund program as a whole by accomplishment of project milestones, such as remedy selection and construction completions. Thus, tribal consultation has the potential to slow project process, delaying the accomplishment of Superfund programmatic goals.

Successful Tribal Involvement Provides Benefits

Tribal involvement resulted in the raising of awareness and initiation of Federal action on hazardous waste sites on Indian land. Because of concerns raised by the six tribes, the Leviathan Mine in California was included on the NPL and the Bunker Hill cleanup was expanded into the Coeur d'Alene Basin in Idaho. Region 10 staff questioned whether they would have been involved with the Coeur d'Alene River Basin project without the Coeur d'Alene Tribe's leadership. Three additional sites are being further investigated or remediated under EPA's direction or oversight: Rio Tinto Mine, Nevada; the Upper Columbia River, Washington; and abandoned uranium mines on the Navajo Nation.

Based on our case studies, successful EPA-tribal relationships engage tribes, provide for appropriate consultation, and fully consider tribal rights and resources. These relationships provide additional benefits to the Agency in terms of providing access to information, studies, and tribal expertise; spawning tribal participation in mitigation; and decreasing both the time and resources necessary for study and investigation. Ultimately, successful partnerships can create stronger, more effective decisions and make tribal and other lands safer.

Conversely, the failure to fully engage, communicate, and consult with tribes compromises trust in working relationships and, in one case, stopped a project. The failure to sufficiently consult with tribes also compromises the Agency's ability to meet its Federal trust responsibility to tribes to fully consider their interests and protect tribal rights and resources.

Conclusions

The effectiveness of EPA's relationships with tribes is critical. EPA's national strategy is dependent upon partnerships, notably those with tribes and States, to achieve EPA's goals, including those addressing the cleanup of hazardous waste. Further, because of its trust responsibilities, EPA has a special obligation to consult with and consider tribal interests, and protect tribal rights.

Tribes have been leaders in the investigation of contamination, and EPA has successfully teamed with tribal staff to reduce the time and cost of the investigative and feasibility study process. Conversely, conflicts have delayed projects and increased costs. Insufficient communications have led tribes to conclude consultation is deficient. While some conflicts are unavoidable, clear guidance on consultation will help reduce misunderstandings over whether

consultation has been appropriately carried out. Site-specific written agreements that identify roles, responsibilities, and site-specific consultation procedures can further ensure the tribe is appropriately engaged. Besides frequent, timely, and open communications, sufficient tribal funding and knowledgeable, responsive Agency project managers are key ingredients to successful relationships. A periodic evaluation of tribal relationships that addresses significant indicators of EPA-tribal relationships would help EPA gauge the effectiveness of its relationships and provide a starting point for taking actions to correct problems.

Recommendations

We recommend that the Acting Assistant Administrator for Solid Waste and Emergency Response:

- 4-1 In concert with efforts to develop guidance to measure tribal relationships (recommendation 3-3), establish tribally agreed-upon criteria for measuring the effectiveness of long-term relationships. At a minimum, consider: (1) frequent, timely communication; (2) appropriate information sharing; (3) addressing issues raised by tribes; and (4) operating in a government-to-government relationship.
- 4-2 Provide clear guidance for tribal consultation, including defining consultation, providing an objective for consultation, setting minimal procedures or principles for the consultation process, and addressing the government-to-government relationship.
- 4-3 Establish site-specific written agreements for significant tribal relationships that include:
 - Statement of a government-to-government relationship.
 - Recognition that the tribe is a sovereign nation.
 - A timeline that describes the work to be performed.
 - Details on respective roles and responsibilities.
 - Procedures for consultation, including those for obtaining tribal comments.
 - Procedures for accessing tribal land.

Agency Comments, Tribal Comments, and OIG Evaluation

The Agency has addressed the intent of our recommendations. We anticipate receiving more specific plans and details about the development of performance measures, consultation guidance, and use of site-specific agreements in its final response to this report.

We received comments on our case studies from Region 9, the Washoe Tribe, and the Navajo Nation. We considered these comments and supporting

documentation and made revisions to the report, as needed. Specifically, Region 9 stated that the examples in the draft report were incomplete and presented a misleading picture of the “successful” relationship between EPA and the Washoe Tribe regarding Leviathan Mine. The Region noted that it had quickly responded to a March 2001 letter from the Tribal Chairman criticizing EPA’s approach to the project. A June 2001 letter from the Tribal Chairman indicated communication and the working relationship between EPA and tribal staff improved markedly. The Region provided reasons for excluding the Tribe from a “brainstorming” meeting. The Region noted it had followed an 1998 memorandum of agreement⁵ in providing the Tribe information about the meeting.

Region 9 also questioned the criteria the OIG used to evaluate EPA-tribal relationships and noted if the criteria were changed to reflect regional responsiveness to tribal concerns, its relationship with the Washoe Tribe would meet three additional criteria. Region 9 also suggested that the chart presented in Figure 4-3 appears to disregard major EPA actions that are completely in keeping with appropriate government-to-government relationships.

The Washoe Tribe disagreed that Region 9 exclusion of its tribal project manager from a technical meeting were justified or inadvertent. It also stated EPA did not provide additional requested funding for a technical review of the draft remedial investigation and feasibility study work plan.

Regarding the impact of tribal consultation on timeliness, the Washoe Tribe agreed the risk assessment inputs have taken longer than anticipated. It stated, however, that EPA has delayed the entire remedial investigation and feasibility study process (along with the responsible party) by extending the schedule for reasons unconnected with the Tribe. Consequently, the Tribe’s risk assessment deliverables will be submitted to EPA when needed. It also observed better coordination was needed for effective tribal participation.

The Navajo Nation Waste Regulatory Compliance Department provided the OIG extensive comments that further address and supplement information in the Navajo case study and identify issues that it believes have hampered and prevented a complete assessment, listing, and cleanup of sites, including “drastically” declining funding. The comments also describe perceived shortfalls in EPA’s processes, standards, and regulations. The full text of their comments are in Appendix B.

⁵The 1998 memorandum of agreement is between EPA and trustees conducting a natural resource damage assessment for the purpose of seeking compensation for interim lost value due to hazardous substance releases. The trustees are the Washoe Tribe, US Department of Interior, and US Department of Agriculture. The purpose of this agreement was to provide for framework for coordination among the trustees and EPA, given the differing authorities in relation to Leviathan Mine, so as to protect or restore injured resources.

Regarding the Navajo case study, the Navajo Nation noted that it was concerned the report assumed Region 9 was on the forefront to resolve the situation regarding its presentation of water data. It stated EPA actions were not a result of successful partnerships or effective decisions; the actions were a result of media and publicized events. It stated that insensitivity still exists and hampers the joint efforts.

In their response, Navajo staff reiterated the importance of properly informing communities about Superfund activities. The information must be communicated in the Navajo language; however, EPA Region 9 has stated that this takes too much time and will delay “their” project, according to the Navajo. Navajo staff noted that community input is critical. The Navajo stated EPA Region 9's schedule did not sufficiently take into consideration public input, nor the opportunity to improve public relations.

The Navajo waste official noted that the cultural survival of tribes is directly affected by a tribe's cultural and traditional values that are central to protecting human health and the environment in Indian country. The official stated that EPA standards and regulations are not sensitive to tribal values even when these values are a part of tribal regulations and decisions. Too often, the official stated, EPA's cleanup decisions are in direct conflict with a tribe's cleanup decision, weighing tribal decisions against cost and going so far as to exclude tribal lands from cleanup decisions.

Agency Response to Draft Report

July 14, 2004

MEMORANDUM

SUBJECT: OSWER Response to OIG Draft Evaluation Report Assignment
No. 2002-001135, Tribal Superfund Program Needs Clear Direction
and Actions to Improve Effectiveness

FROM: Barry N. Breen/s/
Deputy Assistant Administrator
Office of Solid Waste and Emergency Response

TO: Carolyn Copper
Director of Program Evaluation: Hazardous Waste Issues
Office of Program Evaluation, Office of Inspector General

The Office of Solid Waste and Emergency Response (OSWER) is providing its response to the recommendations of the Office of Inspector General (OIG) contained in the above-referenced draft assignment. On behalf of OSWER, I thank OIG for its careful consideration of the Superfund tribal program, and valuable suggestions for improving the program. This memorandum reflects input from the Office of Superfund Remediation and Technology Innovation (OSRTI). Due to the significant coordination effort with the Regions to review tribe-specific case studies in the OIG report, OSWER will send regional comments specific to the case study descriptions under separate cover within the next two weeks.

Previously, the Superfund program initiated a number of projects designed to enhance the tribal role and better address tribal hazardous waste sites, along with all other Superfund waste sites; the program has not prioritized tribal sites separately. OSRTI also developed a draft tribal strategy that outlined program challenges and actions planned to address tribal concerns. This was not finalized due to some of the factors you recognize in your report. Through increased emphasis, OSWER will finalize a tribal strategy in FY 2005. To meet this goal, OSRTI will identify, evaluate and communicate the Superfund program's current tribal priorities and provide a general outline/time frame to accomplish activities to fulfill OIG recommendations.

OSWER would summarize the OIG Report's recommendations into three overarching areas: (1) complete the remaining tribal commitments from the Albuquerque Forum; (2) establish a leadership role for OSWER to ensure completion of a Superfund tribal strategy and policies and provide for the refinement and evaluation of the strategy over time; and (3) establish a stronger foundation for tribal working relationships, especially in the form of consultation

guidance specific to Superfund. These recommendations may be further divided into 12 detailed recommendations presented in chapters two through four of your report. In some cases, we might further divide the 12 recommendations into numerous components. OSWER believes your recommendations are interrelated, and that we should address them in a combined response. Our response is intended to address the full intent of the recommendations without emphasizing individual components.

As the OIG report acknowledges, beginning in 2003, the Tribal Association on Solid Waste and Emergency Response (TASWER) made major changes and improvements, and started to accomplish its work plan activities. EPA continues to maintain close oversight of and substantial involvement in TASWER's activities and complies with relevant grant regulations and guidance in meeting its responsibilities. OSWER's senior program managers will discuss options for working with various tribal associations to achieve Superfund's long-term commitments to tribes. These options include a full analysis of TASWER, the National Tribal Environmental Council (NTEC), and other alternative entities in relationship to their benefits to tribes nationally.

The first action to address the OIG recommendations is for OSRTI to complete a Superfund tribal strategy. In our April 27, 2004, response to OIG Assignment No. 2004-P-00003, OSWER outlined the implementation of "core" elements of a plan for managing Superfund tribal program responsibilities. These included: completion of an inventory of hazardous sites of concern in Indian Country; a process for sorting sites into eligible response programs (including, but not limited to, Superfund); revitalizing the tribal strategy for Superfund; and ensuring that tribal cultural life ways are appropriately factored into stages of the Superfund process. As a part of that response, OSWER provided time frames for completing this work.

Superfund will concentrate on accomplishing actions which represent a high priority for tribes, as well as EPA, and for which it has the FTE and financial resources. Superfund will develop this strategy as part of the larger OSWER tribal strategy. At this point, OSRTI intends to focus its strategy on several key actions or priorities, consistent with those stated above and with current OIG recommendations:

- complete a tribal waste inventory;
- issue guidance incorporating tribal cultural factors (also referred to as tribal traditional life ways) into the HRS and Superfund risk assessment processes;
- establish a forum for regions to share information related to their tribal Superfund efforts;
- involve tribes early in the Superfund process, and develop guidance to that effect;
- provide technical support in cases where a site is on tribal land or affects traditional tribal cultural factors and life ways.

The priorities for the Superfund tribal strategy identified above address the remaining commitments from the 1999 Albuquerque forum, better define EPA's relationship with tribes, and support achievement of articulated goals.

The tribal waste inventory is an outgrowth of commitments made by EPA at the Albuquerque forum. The OIG recently conducted an extensive study of this project (OIG Assignment No. 2004-P-00003), and OSWER responded to your concerns by formulating a data management plan and putting in place extensive monitoring and other controls to oversee the work of TASWER. Through these activities, OSWER will ensure project success and timeliness to the extent allowable under the regulations. Previously, OSWER responded to the OIG that our goal is to complete an inventory of hazardous sites of concern in Indian Country by the end of FY 2005.

OSWER also recognizes that, on a variety of fronts, its programs are still addressing unfinished commitments from the Albuquerque forum. For example, the programs still seek other routes to address sites not eligible for Superfund and the National Priorities List (NPL). The increased emphasis for tribes to pursue Brownfields program grants, tribal response programs, and open dump cleanup grants (which EPA created in partnership with other Federal agencies) is a direct result of continued efforts to find response solutions for contaminated tribal sites. OSRTI concluded a successful State and Tribal Enhanced Role pilot with the Pueblo Office of Environmental Protection, which resulted in the cleanup of several sheep dip vat contaminated sites using an alternative mechanism to the NPL. Results of this pilot were shared in several national forums and were written in several publications.

Finally, as the OIG states, EPA personnel were developing training for tribes that would include grants and other funding avenues relevant to providing responses at contaminated sites. OSWER will incorporate this information into its training. OSWER will continue with this approach with respect to the inventory of hazardous sites of concern in Indian Country (discussed above). In its April 27, 2004 response to OIG Assignment No. 2004-P-00003, OSWER stated that as part of developing an inventory we will sort sites in the inventory into eligible response program categories. OSWER committed to working with other EPA offices and Federal agencies to determine the full range of response programs other than Superfund. OSWER will share the information from this analysis with regions and tribes.

Efforts to incorporate tribal cultural factors into HRS and risk assessment guidance are ongoing. Despite the initial interest of NTEC and the funding EPA offered to identify sites and develop case studies on this issue through an OSWER-NTEC cooperative agreement, this work was not a priority for NTEC in 2002 - 2003. Recently, to re-invigorate a solution for considering tribal traditional life ways as part of the HRS, OSWER approved a strategy for working with tribes to identify cultural factors it might define within HRS guidance to more fairly account for tribal exposures to site contamination. OSRTI is currently preparing options and a plan for communicating with tribes to ensure substantial and effective input. As a part of this plan, OSRTI is meeting with tribes to discuss the proposed options and process. For example, in its meeting, the Intertribal Environmental Council (ITEC) agreed to assist Superfund in its study of incorporating cultural factors into the HRS. Superfund intends to actively work with other tribes and tribal organizations. We anticipate completing this action in FY 2006.

Incorporating cultural factors into risk assessment work is a larger project. A number of other groups, in addition to the Superfund program, are researching this issue, including EPA's

Office of Research and Development (through the EPA - Tribal Science Council), the Office of Prevention, Pesticides, and Toxic Substances, TASWER, and several tribes relating to specific interests. EPA's American Indian Environmental Office is leading an effort to coordinate across the agency efforts related to tribal traditional life ways and risk. OSWER is fully participating in this coordinative effort. As this work progresses, OSRTI commits to addressing Superfund aspects of the remaining portions of recommendation 2-2.

OSRTI intends to establish a forum for regional discussions of tribal issues and lessons learned. OSRTI will issue a memorandum requesting that regions designate a tribal Superfund contact and establish monthly or bimonthly calls. This should begin in the fall of 2004 and will first involve regions and selected tribes. Based on results of preliminary calls, OSRTI will, as you recommend, consider expanding this to include states. Among the topics for these calls, OSRTI will include specific OIG recommendations, such as discussion of the tribal initiatives established under the State and Tribal Enhanced Role workgroup, and share the benefits of tribal involvement and lessons learned.

Another priority is to issue guidance which facilitates working effectively with tribes early in, and throughout the Superfund process as it is implemented at specific sites. Tribes are particularly concerned that they have the opportunity to effectively participate in technical reviews. Tribes may lack technical expertise relevant to Superfund documents. Others are concerned that Superfund may provide large volumes of technical material for tribes to review in a short period of time. Tribes fear that this may result in their inability to respond in a timely manner. Such actions could result in EPA checking the box, "tribe was consulted and had no comments." OSRTI's goal is to provide guidance that explains the Federal trust responsibility, describes how to adequately consult with tribes at particular sites, and presents examples of the most effective practices employed by regions. This guidance may also address criteria for tribal core program agreements, designed to help tribes develop the infrastructure needed to enhance their technical expertise. OSRTI believes site-specific written agreements for significant tribal relationships are assets to program implementation, and will include recommendations for their use in the guidance. While specifically applicable to Superfund, this guidance would be consistent with the Agency's national tribal consultation guidance under Executive Order 13175, currently being finalized by EPA's Regulatory Steering Committee, and national EPA training entitled, Working Effectively with Tribal Governments. This is a longer term project; OSWER hopes to develop milestones early next year.

The final priority for Superfund's tribal strategy is to provide technical support for sites on tribal land or affecting tribal interests. This work is ongoing in OSRTI. Incorporating the technical support priority into the tribal strategy will enable OSWER to better consider funding allocations among regions and varying regional workloads. OSRTI will work with tribes, using the results of the tribal inventory above, to identify which sites of tribal interest are eligible using defined Superfund criteria. For sites of highest tribal priority, OSRTI will work with tribes and regions to provide technical assistance, and where available, resources to support adequate involvement, and better ensure that tribes have the time needed to review necessary documents. While it may be infeasible to commit unlimited resources in support of all tribes gaining technical sufficiency, OSRTI, in tandem with the regions, will provide staff assistance, contractor assistance, and training, to the extent of available resources, that enable tribes to

effectively raise and discuss concerns with the agency. EPA recognizes that removing barriers to tribal participation is an issue separate from resolving all tribal concerns in a manner satisfactory to the tribe. EPA will continue to prioritize sites on the basis of risk. As we work within our statutory and regulatory authorities to protect human health and the environment in Indian Country, we will also continue to carry out the principles of our Indian policy.

Particular OIG recommendations focus on the actions needed to fully implement and evaluate the effectiveness of the program's strategy over the long term. To accomplish this, the program must better define the role of regions within the strategy (and create consistency with regional strategies), and work closely with tribes to shape the strategy as it is developed and consult with tribes in developing specific milestones. OSRTI priorities will seek to balance regional operational flexibility with clear national direction and priority.

OSWER recognizes the difficulties associated with: establishing tribal program performance measures; defining environmental outcomes specifically for Indian Country tied to Superfund; identifying and quantifying viable, feasible data; and evaluating the true priority of tribal activities. OSRTI is looking carefully at this issue and is seriously considering several measures. One option is tracking the extent to which regions follow a proposed evaluation form governing a process to adequately involve tribes on a site-specific basis. Another is a tracking program for sites identified by tribes, whereby EPA may track site investigations conducted, conditions found at the site, and cleanup conducted under either Superfund or an alternative program (e.g., Resource Conservation and Recovery Act, brownfields, underground storage tanks). We will, of course, track Government Performance and Results Act measures for tribal sites. Superfund will also coordinate with OSWER to ensure measures are consistent across programs.

OSWER intends to seek tribal and regional review of the draft tribal strategy and extensively publicize and coordinate implementation of the final strategy with regions and tribes through a communications strategy. These communications will include a discussion at the Superfund National Program Managers Meeting and at Superfund staff conferences (e.g., Site Assessment, National Association of Remedial Project Managers) with both regions and tribes. In addition, OSRTI will lay out its draft strategy before the Tribal Operations Committee in the fall of 2004.

Thank you for the detailed report and recommendations, which will assist us in enhancing the tribal role and priorities in the Superfund program.. If you have any questions, please contact Felicia Wright, OSWER Tribal Coordinator, at (202)566-1886, or Robert Myers, OSRTI Tribal Coordinator, at (703)603-8851.

CC: Michael B. Cook
Felicia Wright
Robert Myers

Navajo Nation Comments on Case Study (Chapter 4)

The tribes included in our case studies were provided the portion of our draft report that presented the six case studies (Chapter 4). The Navajo Nation Waste Regulatory Compliance Department provided the OIG extensive comments which: further address and supplement information in the Navajo case study; identify issues that it believes have hampered and prevented a complete assessment, listing, and cleanup of sites, including “drastically” declining funding; and describe shortfalls in EPA’s processes, standards, and regulations.

In a July 24, 2004, e-mail transmitting its comments, the Environmental Department Manager, Waste Regulatory Compliance Department, Navajo Nation Environmental Protection Agency (NNEPA), stated:

I am concerned about statements from EPA Region 9 and the assumption that they were at the forefront to resolve the situation pertaining to their presentation of the water data. We have documentation available that the idea of a work group and an agreement were recommended by NNEPA. We went so far as to have other EPA staff observe our joint EPA-NNEPA meetings and they also recommended that our meetings be facilitated properly.

The internal checks and balances were necessary after the breakdown. You will note in my comments how we document everything. You will also learn that insensitivity still exist and hampers our joint efforts. You will also see what we have resorted to (bringing in other partners) because we do not want some sites to go unaddressed. This study should have happen a long time ago. Perhaps we wouldn't be in the situation we are in now, and perhaps we would have been able to resolve our differences earlier and could have made more significant progress in cleaning up hazardous waste sites in Indian Country.

I would like to recommend a biennial review. Above all I recommend EPA Headquarters visit the hazardous waste sites in Indian Country, and perhaps Tribes would not need to resort to law suits to compel the Regions to react to our needs.

Trust responsibility is used so loosely by the federal agencies that is has lost its meaning. You don't know how many times Tribes have heard it again and again. If you use it in the final document please consider inserting a legal definition so that any recommendations that you provide will be taken seriously.

I would also recommend a timeframe for each Region to meet with the Tribes and a timeframe to negotiate and implement any agreements. I know that all of this will require additional funds and I know those cost will be justified by the number of sites that might get addressed within a year or so after the agreements are in place. Re-evaluation is very

important to readdress areas that aren't on schedule or where other issues hamper progress.

Thank you for the opportunity to comment on the draft. Your work might be completed with the final version; however, we may see you again if you all get to evaluate the outcome two years later. Good luck.

An additional e-mail from the Navajo hazardous waste department dated July 28, 2004, noted:

In 1988, the NSP [Navajo Superfund Program] started as a program under EPA Region VI, within an estimated annual funding of \$900,000 to support program operations and about 7 staff personnel. In this same year, NSP accomplished 36 Preliminary Assessment Reports, the initial step of the Superfund Process. In 2004, the NSP is under EPA Region IX, within an estimated annual funding of \$200,000 to support program operations and about 2 staff personnel, including 3 other cost-shared positions. In this same year, NSP will have accomplished 2 Preliminary Assessment Reports and 1 Site Inspection Report. This decline in program funding and staffing has minimized program services to the Navajo Nation.

We received comments from four other staff members, including the Environmental Program Supervisor for the Navajo Superfund Program, as presented in the following pages of this appendix.

Navajo Nation Environmental Protection Agency
Waste Regulatory Compliance Department

July 19, 2004

Comments on the Draft Evaluation Report
Tribal Superfund Program Needs Clear Direction and Actions to Improve Effectiveness,
(Excerpt – Tribal Case Study Information) No. 2002-001135, June 9, 2004

I reviewed the portion provided in the Draft Evaluation Report and my comments are as follows:

Case Studies Tribal Relationships Beneficial But Guidance Can Improve Consultation –

The statement is made that, “none of the EPA-tribal relationships exhibited all seven characteristics,” that EPA identified as “being needed for good working relationships.”

Comment – Are the seven characteristics listed in Figure 4-3? How were these characteristics identified? Note the lack of entries on Figure 4-3. Counting the blank entries and the entries that state “No” it appears that both the tribes and EPA need to work towards establishing relationships that will meet the needs of all tribes.

A purpose for the case study is not stated anywhere in the document. Assuming that the tribal portion is a part of a larger document, is the purpose described elsewhere? If the other part of the document pertains to states, were the seven characteristics also used to measure the EPA-state relationship?

The interview that I participated in was over the telephone and the Navajo EPA Superfund Program was interviewed at a very busy airport for what they considered was a “short” interview. How conducive was the setting for each of the interviews and were we all asked the same questions?

As for EPA-Navajo's relationships, there is only one characteristic that was rated with a "Yes" for communication "early and often" which was deficient previously. The rest of the characteristics are blank (incomplete, inconclusive, only partially observed) and one "No" rating for the characteristic for proactive efforts at project inception. Considering that the Navajo Nation was one of the first tribes to develop a program in 1988, we would have assume that the EPA-Navajo relationship would have all seven characteristics and that we would have a number of hazardous waste sites listed on the National Priority List, a number of sites cleaned up, a number of potential responsible parties identified for cost recovery, and be actively cleaning up non-listed sites using other mechanisms. It is very unfortunate that this is not the case.

Six tribes were interviewed and EPA identified four important characteristics for effective relationships: frequent and timely communication (4:2); appropriate information sharing (2:4); addressing issues raised by tribes (3:2:1); and operating in a government-to-government relationship (4:2). According to Figure 4-3, establishing mutual trust (3:3)

is also an important characteristic for establishing strong and effective relationships. Sharing information appropriately with tribes (2:4) appeared to be effective for only two tribes.

Based on Figure 4-3, ineffective relationships were based on the lack of proactive efforts (5:1) at project inception and it is inaccurately stated that “(EPA initiates contact)”, thereby implying that the tribes do not initiate contact and are not “proactive.” The Navajo Nation has been at the forefront at seeking partnerships with EPA. We contacted Regions 8, 9 and 6 and requested funds to assess Superfund sites. At EPA Region 8, we were told that if they gave the Navajo Nation funds, that other Region 8 tribes would also be asking for funds. At EPA Region 9, we were told that the Superfund Program was too complicated and that tribes would not be able to have a program! At EPA Region 6, we were provided with a Project Officer and funding to begin a program.

Ineffective relationships were also attributed to EPA not sharing information appropriately with tribes (2:4); not addressing issues raised by tribes (2:3:1); the lack of written agreements that specified clear roles and responsibilities (5:1); and the lack of establishing mutual trust (3:3). Interpersonal relationships were effective with EPA Region 6, and when the program was transferred to EPA Region 9 our relationships began to decline and Figure 4-3, depicts the current EPA-Navajo relationship.

Four reasons for conflicts are stated: varying expectations of roles and responsibilities; differences in views on acceptable project actions and outcomes; unclear consultation procedures; and a lack of transparency of EPA’s Superfund process.

The lack of transparency of EPA's Superfund process can be attributed to the structure and criteria that meets the needs of urban communities as opposed to rural and Indian communities. Population density and the lack of considering traditional cultural values in the federal Hazardous Ranking System impend the justification for further actions at hazardous waste sites in Indian Country.

Regardless of the number of site investigations or discoveries that have been completed by the Navajo EPA Superfund Program, we have yet to list a site. However, we have managed to accomplish some time critical actions at a couple of sites following intervention by the Agency of Toxics Substances and Disease Registry and national media coverage that resulted in a publicized visit by Congressman Patrick Kennedy. The EPA actions were not a result of successful partnerships or effective decisions; the actions were a result of media and publicized events.

Successful partnerships are desired not only by EPA but also by tribes who have a greater interest and investment to minimize the risks at hazardous waste sites on human health and the environments in Indian Country.

Tribal Partnerships Critical to Strategy, Trust Responsibilities –

Comment – EPA’s standards and regulations do not acknowledge tribal sovereignty and do not acknowledge tribal governments as the recognized authority in setting standards and making policy decisions (e.g., a tribe's decision to clean close hazardous waste sites based on cultural considerations). EPA's national goal to clean up hazardous waste sites in Indian Country and to fulfill its trust responsibility to tribes has not been accomplished. Based on six tribes, only three tribes could reasonably demonstrate that their relationship with EPA was effective.

Cultural survival of tribes is directly effected by a tribe’s cultural and traditional values that are central to protecting human health and the environments in Indian Country. EPA standards and regulations are not sensitive to tribal values even when these values are a part of tribal regulations and decisions. To often, EPA's clean up decisions are in direct conflict with a tribe's clean up decision.

Exercising and demonstrating trust responsibility is new to EPA. Even though EPA may go through the motions of consulting with tribes, listening to and acknowledging tribal positions to make clean up decisions is not occurring. EPA, like all tribes should know the treaty provisions and the rights that are protected. When tribes use the treaty provisions to emphasize the need to clean close hazardous waste sites or to require more stringent clean up standards, EPA no longer hears us. Instead, EPA's moral obligations and responsibilities are no longer relevant because tribal positions are weighing against the cost for clean closure and settling for the minimum clean up standards.

More Effective Tribal Relationships Associated with Key Features –

Comment – Reference is made as to how the six tribes were selected in “Chapter 1”, which was not provided for our review.

Tribes Are Impetus for EPA Involvement –

Comment – Prior to obtaining funds from Region 6 for the development of a Superfund Program, the Navajo Nation and the New Mexico Environmental Department listed two sites on the National Priority List. These sites were the Prewitt Refinery Site and the United Nuclear Corporation Uranium Mill Tailings Site. The Navajo Nation EPA Superfund Program, New Mexico Environmental Department and EPA Region 6 have joint oversight of these sites. Regions 8 and 9 did not acknowledge these efforts when the Navajo Nation sought EPA's support and requested federal assistance to begin a program.

Relationship Characteristics Key Indicators of Success –

Comment – The adverse impacts to human health and the environment resulting from past uranium mining and milling activities were documented in the 1980s by the Navajo Tribal Environmental Protection Commission (the predecessor to the Navajo Nation Environmental Protection Agency). As more abandoned uranium mines were identified

in more than 32 Navajo communities, the Navajo Nation requested a Congressional Hearing in 1993 to ensure that federal resources would be available to address our concerns. EPA Region 9 was provided the resources and preceded with “their” project that did not include the active involvement of the tribe.

When EPA Region 9 presented the one-time sampling results of the water data survey to the communities and told the community that using the water for drinking and various purposes would cause varying degrees of susceptibility to cancer, Navajo Nation EPA objected. We did not consider a one-time sampling event as representative sampling. We felt that sampling protocols needed to be followed, and that the information needed to be conveyed properly in the Navajo language. Despite our objections, EPA Region 9 published a document and stated again that Navajo Nation EPA was preventing them from releasing the information to the communities. EPA Region 9 never retracted their statement and these documents are still used by the communities, other federal and state agencies, environmental grassroots organizations and educational institutions.

The Navajo Nation EPA, on their own, recommended the development of a committee consisting of representatives from the community, public interest groups, environmental organizations, state and federal organizations, and colleges and universities to collaborate on how to address the uranium issues on Navajo. As a result, a chapter atlas for five of thirty uranium-impacted communities was initiated and other communities in the New Mexico portion of the Navajo Nation are being assessed.

Funding Also Key –

Comment – By comparison, when EPA Region 6 provided initial funding for the Navajo Nation, the funding was substantial and there were more personnel who were trained to assess sites. When EPA Region 9 assumed the lead for the Navajo Nation (among EPA Regions 6 and 8) the funding declined drastically. As a result, there are fewer personnel, less training, less assessment of sites, and the overwhelming threat that “next year” the funds will be cut.

Less funding will have a detrimental impact on whether clean ups will indeed occur in Indian Country. Overall, the continuous threat of receiving less funding has resulted in poor moral. We are compelled to “archive” more sites or we are told no hazardous waste sites can be listed because there are no funds to clean up the sites. We are resorting to other sources of funding through other federal agencies (e.g., the clean of dip vat sites by the Bureau of Indian Affairs). We are also resorting to improving the level of information that can be provided on hazardous waste sites in our communities (e.g., Chapter Atlases). Local planning committees are becoming aware of these sites and are able to avoid these sites, pending proper clean up decisions and actions.

Differences in EPA and Tribal Expectations Create Obstacles to Effective Relationships – Relationship Roles, Responsibilities, and Processes Often Unclear –

Comment – It is imperative that EPA consults with tribes individually. EPA tends to “lump” all tribes together and assumes that by consulting one tribe that all other tribes “think and feel” the same. Furthermore, EPA mistakenly assumes that by bringing up an issue at a national tribal meeting or by talking to a national Indian organization, that EPA has satisfied the consultation process. Regional and national tribal organizations do not represent all tribes, nor do the tribes usually support a position taken by these organizations.

As long as the concept of government-to-government relationship exist, EPA will be compelled by tribes to pursue one-on-one consultation with individual tribes.

The Navajo Nation and EPA Region 9 are challenge with re-establishing effective communication. Having effective communication and agreeing on clear define roles and responsibilities will help to some extent. However, having EPA Region 9 “listen” and developing mutual respect for one another will take time.

Project Outcome Expectations Differ –

Comment – EPA’s clean up decisions are driven by EPA’s standards and regulations. Tribal clean up decisions are driven by traditional and cultural values, practices and lifeways that may or may not be explicitly stated in tribal laws or tribal executive decisions. However, the federal governments acknowledgment of a tribes’ rights to fish, hunt and gather does provide the bases and justification for tribal clean up decisions. Unfortunately, EPA will always weight tribal clean up decisions against cost and go so far as to exclude tribal lands from clean up decisions (EPA Region 10).

For Navajo and perhaps for other tribes, we have exceeded the "seventh generation" indicator. It is unfortunate that EPA’s risk tools do not support tribal clean up decisions and that tribal members who live the traditional way of life will continue to be an EPA risk indicator at hazardous waste sites in Indian Country.

Chapter 2 was not provided for our review, which appears to have been devoted to discussions of EPA's risk tools. Tribes have expressed the need to change these tools because it does not take into consideration traditional and cultural values. Nevertheless, we are required to use these tools knowing that we cannot include all the pathways of exposure and targets that are relevant to tribes.

Institutional controls have long-standing impacts on a tribe's use of natural resources. The resources and plans to limit access and uses of natural resources effected by institutional controls may be appropriate in urban communities where zoning and restricts can be imposed. Institutional controls in rural and isolated Indian communities; however, are difficult to imposed because these communities are not supplemented with additional

resources to offset their losses. As a result, the communities will resort to continual uses of contaminated natural resources, which will continue to elevate their risks to exposure.

Transparency of Superfund Policy, Processes –

To date, EPA Region 9 has been unable to provide information on the amount of federal funds they spent on Navajo in response to the 1993 Congressional Hearing. Likewise, the amount of funds to develop the Chapter atlases for the uranium impacted communities has not been disclosed and when the format and volume of information was reduced by EPA Region 9 from the original draft (Red Valley Atlas), a template for all the remaining atlases, we were told that the changes were necessary due to the lack of funding for the project. EPA Region 9's did not communicate the change to Navajo until later and tried to imposed the new format on us. We informed EPA Region 9 that we needed to communicate the changes to the Red Valley Chapter and obtain their input before agreeing to the change.

In 2005, to ensure that we are involved in all aspects of the project, we included our participation in the development of the atlases as a work plan task.

Impact of Tribal Consultation on Timeliness a Concern –

Comment – The government-to-government consultation process will always be time consuming. Although both tribes and EPA are committed to implementing this process, neither the tribe nor EPA are prepared to change their own internal processes so that it is timely and beneficial for all.

Recently, the Navajo Nation EPA's Executive Director sought and obtained authorization to signed federal assistance applications on behalf of the President of the Navajo Nation so that we could meet EPA Region 9's deadlines for submittal. However, EPA Region 6 would not accept the federal assistance application without the President's signature to continue funding for two National Priority List sites (United Nuclear Corporation and Prewitt Refinery) in the New Mexico portion of the Navajo Nation.

The Navajo Nation's internal processes and coordination requirements ensures that there are appropriate tribal resources and that EPA Region 9 is committed to the project. Past experiences with EPA Region 9 and other agencies has necessitated the implementation of the tribal processes and coordination requirements.

Successful Tribal Involvement Provides Benefits –

Comment – Tribes are the best position to know what and how hazardous waste sites adversely impact tribal people and their environment. For Navajo, EPA Region 9's past efforts to address the uranium issues (water data survey) has had repercussions on our relationship. We are more cautious, we want documentation before and after any major

meetings, we want and expect feedback, and we want guarantees ahead of time before devoting tribal resources to a project. We pursue and obtain in put for the Navajo Nation President and our oversight Committees to re-enforce tribal positions pertaining to uranium and other tribal environmental issues.

The Navajo Nation, like EPA, remains accountable to the people. As long as there are differences in expectations, standards and regulations, we will be challenged to seek, develop and implement unique mechanisms that are sensitive to addressing tribal needs and yet still be able to comply with federal standards and regulations.

Conclusions –

Comment – Although the conclusion is stated very well, it does not state how EPA will provide "clear guidance" for tribes. Will tribal partnerships be tailored to individual tribal needs? Will federal resource commitment limit the size and scope of the guidance? Will EPA isolate themselves from the tribes and develop the guidance? Will EPA expect all tribes to "fit into" the guidance? Will the guidance include consideration of tribal traditional cultural values?

We agree that tribes are leaders in the investigation of contamination in Indian Country. During the 1993 Congressional Hearing, the Navajo Nation expressed our needs and expectations. Congress directed EPA Region 9 to work with the Navajo Nation; however, in 2003, we cannot demonstrate any progress where actual clean up has occurred other than the demolishment of two traditional homes and actions at the Blue Lake (a.k.a. Haystack) sites after the Agency for Toxics and Disease Registry completed a health assessment.

Regional strategies to accomplish EPA' national goals differ. EPA Region 9 has cut federal funding for the Navajo Superfund Program, there is less staff, the staff's deliverables are questioned repeatedly, and instructions and federal resource commitments are inconsistent. This year, work plan approvals did not occurred until late as the second quarter. As a result, timeframes to implement and provide the deliverables are drastically effected; EPA Region 9 has capitalize on any deficiencies that are attributed to inconsistent, untimely, and non-committal communications by the project officer.

Recently, EPA Region 9 informed the Navajo Brownfields Program that we would not receive any federal funds if we did not complete the development of the tribal response program. We understood that the public record component must be completed in the first year and that we could continue to work on the other remaining components. We submitted the public record component in the second quarter and waited for comments from the project officer. Since we did not receive any comments, we implemented the component. Here again, timeliness and expectations were different. We expected timely review of the public record component knowing that completion of this deliverable would be the bases for continual funding. EPA Region 9 neglected to acknowledge the delivery of the component and assumed that we did not complete it and they readily

pointed out that we would not receive funding in 2005.

EPA's concept and mission to ensure the protection of human health and the environment are fundamental to meeting tribal needs. This concept and mission has always existing among tribes and for Navajo, the concept is harmony, "To walk in beauty."

EPA can learn from tribes and we are hopeful that one day soon we will see conditions in tribal communities improve. Then we will know that EPA's concept and mission can be demonstrated in Indian Country.

Thank you for the opportunity to comment on the draft report.

Navajo Nation Environmental Protection Agency
Waste Regulatory Compliance Department
Navajo Superfund Program

July 23, 2004

The Navajo Superfund Program ("NSP") was established in 1988 with a federal assistance grant from the U.S. Environmental Protection Agency Region 6. In 1991, a Memorandum of Agreement for the Implementation of Environmental Standards and Regulations was signed between the Navajo Nation and Regions 6, 8 and 9. As a result, Region 9 is responsible for providing federal financial and technical assistance.

The following issues have hampered and prevent the complete assessment and potential listing of sites; other issues pertain to the inconsistencies and lack of communication and resources to support our efforts to clean up hazardous waste sites:

- The Hazardous Ranking System is still an issue because it limits our ability to assess the impacts of hazardous waste sites on traditional cultural values of the people, land and the environment. These unique values are impacted and continual uses pose a potential risk to human health and the environment.
- We and other Tribes have expressed our concerns regarding the HRS and EPA has not taken and actions.
- We lack funding, personnel, analytical equipment and access to laboratory facilities to properly assess sites.
- EPA Region 9 is behind other Regions in implementing technical guidance that are necessary to complete field sampling activities. We are compelled to obtain this information from other Regions and sources to develop our plans for review by the project officer and technical personnel.
- Communities impacted by hazardous waste sites must be properly informed about Superfund activities. The information must be communicated in the Navajo language and EPA Region 9 has stated that this takes too much time and will delay "their" project (e.g., development of the Red Valley Atlas).
- Community input (e.g., Red Valley resident) is critical and very important. It is imperative that they know the content of the information so that they can effectively use the information in their land use plans and related infrastructure developments. EPA Region 9's schedule did not take into consideration public input, nor the opportunity to improve public relations, and to alley distrust of the federal government to investigate other hazardous waste sites in the community.
- Coordinating with other federal agencies, state environmental agencies,

universities, research institutions, etc., to obtain technical support, assessments and clean up actions that are not provided by EPA Region 6, 8, and 9.

The above issues were presented in full detail by NSP during an interview with representatives of the Office of the Inspector General in July 2003. None of the information we provided appears in the "Draft Evaluation Report, Tribal Superfund Program Needs Clear Direction and Actions to Improve Effectiveness" (Except – Tribal Case Study Information), Assignment No. 2002-001135, dated June 9, 2004.

1. Overall Comment – The report needs an executive summary and introduction to define the purpose and goal of the document.
2. Who authorized the case study? Who are the recipients of the document? Who, how and when will under take any actions to implement any recommendations? Who, how and when will monitor the results of the case study to ensure that EPA-Tribal partnerships improve and that hazardous waste sites are cleaned up in Indian Country?
3. The title of the document implies that the Tribes need the direction. The case study has determined that both EPA and the Tribes are in need of clear direction and actions to improve effectiveness. The title does not emphasize open communication, coordination, government-to-government relationship and partnerships.
4. The pages need to be numbered. It was difficult to review only the excerpt that pertained to Tribes because we do not know how the rest of the document relates to the need to improve partnerships and to be effective at clean up hazardous waste sites.
5. An introduction, background, purpose and methods for the development of the seven characteristics, and the process for the selection of Tribal participants would have been helpful. The information is general about hazardous waste sites on other Tribal lands is very important.
6. Page 1, last paragraph, referenced the EPA Strategic Plan 2003 to 2008. The Navajo Nation requested and received this document in June 2004. The EPA Region 9 project officer requested a certain statement from the strategic plan be included in the NSP work plan in May 2004. The project officer approved our work plan in February 2004 and never mentioned the strategic plan. Are Tribes required to include the EPA Strategic Plan in the Tribal work plan?
7. Page 2, Table (Figure 4-3), the table list the six Tribes that were interviewed. Was there a similar case study in Regions 6, 8 and Region 5? What were the results of that case study?
8. Page 8, second paragraph, "Impact of Tribal Consultation of Timeliness a Concern." This appears to be a comment by EPA Region 9. One of the seven characteristics states, "early and often" communication. Typically, we are informed when something is due or past due. The tribal process is necessary because of the repeated changes that occur to our work plans and budgets. Tribal officials expect EPA to guarantee the

amount of funds and to ensure that priority hazardous waste sites are properly addressed. EPA Region 9 needs to understand that Tribes have their own checks and balances.

9. Navajo Nation EPA values public input on all environmental projects and activities; however, EPA considers public input as a hindrance. Tribal interest and sensitivity of utmost importance to Navajo.
10. To enhance the understanding of our traditional and cultural values, EPA officials have met with Navajo people, grassroots organizations, Navajo leaders and officials on environmental issues and concerns about hazardous waste sites in the communities.
11. Last Page. The conclusion should include recommendations for EPA and Tribes.

M-E-M-O-R-A-N-D-U-M

TO : Arlene C. Luther, Department Director
Waste Regulatory & Compliance Department
Navajo Nation Environmental Protection Agency (NNEPA)

THRU: Diane J. Malone, Program Manager
Navajo Superfund Program (NSP), NNEPA

FROM: Stanley W. Edison, Chemist
Preliminary Assessment Site Assessment (PA/SI), NSP

DATE: July 26, 2004

SUBJECT: DRAFT Evaluation Report titled: "Tribal Superfund Program Needs Clear Direction and Actions to Improve Effectiveness".

Pursuant to the subject, staff reviewed the draft report, and provides the following comments: The title page of the report should be appropriately titled "USEPA and Tribal Superfund Programs Needs Clear Direction and Actions to Improve Effectiveness", which will indicate a cooperative approach and search for clearer directions and actions at both governmental levels. The current title and the report implies that USEPA is the only entity seeking better relationships with Tribes, where as Tribes have reviewed EPA as partners in addressing tribal environmental problems.

The construction of the report should have the following: A Table of Content is needed to allow the reader to glance at the construction and direction of the report. The report should have an introductory, purpose, and sections for each tribal evaluation to allow the reader a better understanding of the intent of the report. The report should have separate sections for each of the six tribes evaluated. This will allow each tribe to have a better understanding on what their short falls are in terms with their relationships with EPA, in reference to EPA's relationship indicators.

The report needs elaborate more on the following: The report needs to be more explicit on how the seven characteristics for good EPA/Tribal working relationship were developed. The report implies that EPA developed these seven items, placed tribes into these characteristic items to determine their relationship and work effectiveness. It would appear that the evaluation report would have more merit if Tribes and EPA mutually developed these good relationship characteristics/indicators for good working relations, which is to be achieved by both governments. The report should elaborate more on why only six tribes from EPA Region 9 and 10 were selected for this case study. Does EPA intend to have the selected tribes represent EPA's effectiveness in evaluating Tribal/EPA tribal relationships within the whole of "Indian Country"? There should be a total tribal involvement from each EPA region in the construction of this evaluation report.

An overall report needs to be mutually developed by both Tribes and EPA as an

evolution towards making a better government-to-government relationship. This overall "guidance" document must be developed at a national level to address overall needed improvements in Tribal/EPA relationships and consultation processes, to include current key success indicators. This guidance document can be further broken down at the regional level to address specific issues such as: Communication Protocols, Tribal Sovereignty, Tribal/EPA expectations, Roles and Responsibilities, and EPA Funding levels. In addition, a mutually developed follow-up mechanism needs to be in place to review Tribal/EPA relationships processes in all EPA regions on an annual basis. The follow-up report can be reviewed by both Tribe/EPA to gauge work and achievement progress.

This overall guidance needs to include processes where Tribal/EPA can work together to refine the national Superfund requirements to better address environmental problems unique to Indian Country. The "EPA only lead" at the National Priority Listing site status needs to change to include co-leads with affected Tribe. The changes should include the ability to refine site-ranking requirements such as Superfund's Hazard Ranking System to address problems in rural areas (Indian Country) and not just the city environment. Tribal involvement through out the whole Superfund Process can only lead to successful site remediation satisfactory to both governmental levels.

This draft report is a good start towards defining and developing good Tribal/EPA work relationships. All Tribes and regional EPA must work together at all levels in developing and maintaining good working relationships. Tribes and EPA working together as equal partners towards addressing the environmental problems in Indian Country can only lead better solutions and success for the all affected entities.

Thank you for the opportunity to review and comment on the subject report. If you have any questions or comments, please contact me.

Xc:D.Malone, Program Manager
NSP files

M-E-M-O-R-A-N-D-U-M

TO : Diana J. Malone, Program Manager
Waste Regulatory Compliance Dept./Superfund Program
Navajo Nation Environmental Protection Agency

FROM: Eugene Esplain, Health Physicist
Waste Regulatory Compliance Dept./Superfund Program
Navajo Nation Environmental Protection Agency

DATE: July 27, 2004

SUBJECT: Comments on Draft Evaluation Report – *Tribal Superfund Program Needs Clear Direction and Actions to Improve Effectiveness*

First, I apologize for the delay in providing comments on the U.S. Office of Inspector General's draft Evaluation Report titled "*Tribal Superfund Program Needs Clear Direction and Actions to Improve Effectiveness.*" It is of my opinion that the report is a very rough draft and needs additional work to make it helpful to the Navajo Nation, as well as to the other tribes who participated in the evaluation.

Initially the title of the draft evaluation report does not provide an accurate picture on its content. Its title should be reworded to "U.S. EPA with Tribal Superfund Program Needs Clear Understanding and Actions to Improve Effectiveness." As it is, it's giving U.S. EPA has all the answers and do not need directions or understandings to improve effectiveness.

There is no introduction or purpose in the report. It would be beneficial to know what prompted the evaluation and what its ultimate purpose is. Just to note that it is a compilation of case studies does not provide the report's intention.

Within the two Regions, the draft report had only six tribes evaluated and others left out? It would be beneficial to know how the other tribes rate the EPA/Tribal relationship. Regarding the recommendations made, how will they be implemented throughout?

According to Figure 4-3 (table), 19 out of 42 were not answered (blank) and no real explanation is provided. Will EPA continue its evaluation on the characteristics that were left unanswered?

Some items discussed were left out, i.e., traditional and cultural values not being taken into consideration in the Hazard Ranking System (HRS) criteria, and how the HRS is mostly geared towards urban settings and thereby leaving out tribal-related factors. This is a contention that tribes have been expressing for many years.

Where does the Agency for Toxic Substances Disease Registry (ATSDR) and Natural Resources Damage Act (NRDA) fit into this? Will the recommendations help tribes to cleaning up contaminated sites? Or will it help tribes in its Brownfields process of assessing and cleaning up sites?

Distribution

Environmental Protection Agency

Director, Office of Superfund Remediation and Technology Innovation (5201G)
Director, State, Tribal, and Site Identification Center (5204G)
Director, American Indian Environmental Office (4104M)
EPA Tribal Operations Committee
Tribal Coordinator, Office of Solid Waste and Emergency Response (5101T)
Director, Office of Acquisition Management (3801R)
Chief Financial Officer
Agency Followup Official (2710A)
Agency Followup Coordinator (2724A)
Associate Administrator for Congressional and Intergovernmental Relations (1301A)
Associate Administrator for Public Affairs (1101A)
Regional Administrators
Inspector General (2410)

Tribes and tribal organizations (included in report)

Coeur d'Alene Tribe
Confederated Tribes of the Colville Reservation
National Tribal Environmental Council
Navajo Nation
Shoshone-Paiute Tribes of the Duck Valley Reservation
Suquamish Tribe
Tribal Association on Solid Waste and Emergency Response
Washoe Tribe of California and Nevada