Consulting and Coordinating with Tribes for Superfund Sites

Moderator
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Overview of Law and Policy
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Best Practices in Superfund
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Tribal Lands Forum * August 21, 2012 * Coos Bay, Oregon
Why Consultation Talk Now?

- Presidential Memorandum issued 11-9-2009, directs agencies to develop a plan to fully implement EO No. 13175

- Executive Order No. 13175 signed in 2000
  - Each federal agency
  - Meaningful and timely input by tribal officials
  - Regulatory policies that have tribal implications
EPA Policy and Tribal Governments

- EPA Indian Policy, 1984

**Principle #1:** The EPA stands ready to work directly with Indian tribal governments on a one-to-one basis (the “government-to-government” relationship)

**Principle #5:** In keeping with the Federal Trust Responsibility, EPA will ensure that tribal concerns and interests are considered whenever EPA actions may affect reservation environments

**Principle #9:** The agency will incorporate the 1984 Indian policy goals into its policy development
Government-to-Government

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

E.O. No. 13175, Sec. 2(b) (November 6, 2000)
EPA Policy on Consultation and Coordination with Indian Tribes

- National guidelines for all EPA programs and Regions where offers to consult are
  - Consistent and predictable
  - Consider circumstances and preferences of tribal government
  - Consider tribal interests when EPA actions and decisions may affect Indian Country environments
- Continue coordination and communication with Tribes
When is Consultation Appropriate under EPA’s Policy?

EPA Consultation Policy – “may affect tribal interests”

EO 13175 – “tribal implications” and “substantial direct effects”
Functional Definition of Consultation

- Government-to-government communications, meetings, and discussions
  - Written offers to consult at management levels
- On matters with tribal implications
- Early enough for “meaningful and appropriate” interaction
- Sufficient opportunity/process for tribes to comment or interact
- Consider input and communicate outcome
Consultation and Coordination under CERCLA

- CERCLA is the federal program to cleanup hazardous waste sites
- CERCLA identifies roles for tribal governments
- Consult/coordinate in government-to-government relationship
  - Tribes are partners with EPA in cleanups
  - EPA substantial role implementing CERCLA
Why Consult under CERCLA?

- Tribal roles are provided for under CERCLA
- CERCLA authorizes EPA to treat Tribes in same manner as states for some purposes
- Consultation and Coordination
18-Mile Creek Site

- Site in Lockport, NY
- Sediment contains PCBs, mercury, lead copper, pesticides and dioxin
- Site placed on National Priorities List March 2012
- EPA notified Tuscarora Nation – Site is within traditional use area
Tribal Roles under CERCLA

- Tribes may be Lead or Support Agency
- Tribal applicable or relevant and appropriate requirements for cleanups
  - Tribal law may be ARAR
  - ARARs criteria must be achieved or can be waived
Tribal Roles, continued

- CERCLA designates Tribes as Natural Resource Trustees
- Tribal Institutional Controls in Indian Country
  - Tribal land use controls
- Tribal participation in site-specific groups
  - Biological Technical Assistance Group
  - Community Technical Assistance Group
Tribal Roles, continued

- Tribal jurisdiction/authority on-site
- Tribal concerns off-site, too
  - Off-reservation reserved treaty rights
  - Historical/cultural/sacred sites
Coordination on Cleanups

- Notice of release of hazardous substances
- Access to property
- Davis-Bacon Act wage rates for cleanup workers
- Identifying potential location-specific ARARs
  - Consider legal and policy requirements when American Indian artifacts, grave sites, sacred sites are discovered during cleanup
EPA Policy on Consultation and Coordination with Indian Tribes

Best Practices in Superfund
What is Consultation?

• “Consultation is a process of meaningful communication and coordination between EPA and tribal officials prior to EPA taking actions or implementing decisions that may affect tribes.”

• Coordination is sharing information, education, and outreach.

• Coordination can be part of consultation.

• Coordination cannot substitute for consultation.
Consult about What?

- Regulations or rules
- Policies, guidance documents, directives
- Budget and priority planning development
- Legislative comments
- Permits
- Civil enforcement and compliance monitoring actions
- *Response actions and emergency preparedness*
- State or tribal authorizations and delegations
- EPA activities in implementation of U.S. obligations under an international treaty or agreement
What Triggers Consultation?

- EPA is taking an action
- EPA action may affect tribal interests
Are Tribal Interests Affected?

• Does a treaty signed by a tribe cover the area where the site lies?
• Do tribal members use resources from the impacted zone?
• Is a tribe a Natural Resource Trustee of the affected resource?
• Are there lands held in trust for tribes?
• Is the affected area within a tribal historic area, a traditional cultural property, or a tribally important landscape?
• Is the affected area linked ecologically, culturally, visually or hydrologically to tribal resources or uses?
Emergency Response and Removal

- Emergency responses
  - Regional Contingency Plan procedures used
  - Primarily notification
- Time-critical removals
  - Consult as time allows
- Non-time critical removals
  - Consult with tribes
Site Assessment

- Commencing a Preliminary Assessment/Site Investigation
- Final assessment decisions
Jackpile Mine Site

- Uranium mining impacts
- Consultation with Laguna Pueblo begun in 2009
- Preceded by staff-to-staff coordination
- Formal meetings with Council and Governor
- Obtained letter of support for listing from Tribe
- Proposed for listing in March 2012
Jackpile Mine Site

- EPA and Laguna Pueblo signed a Superfund Memorandum of Agreement in 2010
Remedial Process

- Remedial Investigation/Site Assessment
- Human Health/Ecological Risk Assessment
- Proposed Plan
- Record of Decision
- Remedial Design approval
- Remedial Action completion
- Five-Year Reviews
- Delisting
St. Regis Paper Co. Site

- Dioxin cleanup in place from 1980s
- Remedies for residual soil contamination being evaluated
- Ongoing coordination with Leech Lake Band
- Consultation initiated prior to Proposed Plan in 2011
- Result was convening of EPA/Tribal/State/PRP Soil Technical Work Group
St. Regis Paper Co. Site

- Soil sampling at depth completed August 2012
EPA Consultation Phases

- Identification
- Notification
- Input
- Follow-up
Identification Phase

- EPA is taking an action
- EPA action may impact tribal interests
- Tribe requests consultation
Notification Phase

- Invitation letter to the Tribe
- Multiple tribes may be involved
- Tribal Consultation Opportunity Tracking System (TCOTS) database

http://www.epa.gov/tribal/consultation/index.htm
Input Phase

- Tribes provide input to EPA
  - Oral (face-to-face meetings, video or telephone conference)
  - Written
- EPA considers tribal input
Follow-up Phase

- EPA provides feedback to Tribe to explain how tribal input was considered in final action
- Feedback is in formal, written communication.
Bunker Hill Site

- Mining impact spread across basins in two states
- Affects the interests of Coeur d’Alene and Spokane Tribes
- EPA hoping to amend the Record of Decision this fiscal year
- Consultation initiated in December 2011
- Involved meetings of Tribal and EPA staff and managers
- Recent meetings with each Tribal Council
Bunker Hill Site
Contacts

- Tribal Consultation Advisors
- Site Remedial Project Manager, On Scene Coordinator or Site Assessment Manager