

NTTC Discussion Points on Consultation

OPPT/EAD/LB Response (Oct. 15, 2012)

ASSUMPTIONS:

It is important to be clear on some basic points regarding Tribal consultation, to build the foundation for a true “meeting of minds.” The Tribal Consultation Process proposed below is based on the following assumptions, which should each be evaluated and assessed for validity, and are offered merely as a starting point for discussion.

1. **The NTTC cannot consult on behalf of Tribes.** The NTTC is a EPA Tribal Partnership Group. Its members can provide input and feedback to EPA, but are not authorized to Consult on behalf of their own Tribes, nor any other Tribes.

Response: OPPT is in agreement with that assumption, while the NTTC members cannot consult per EO and the EPA Policy, it can play a vital role in assisting in the consultation process mainly in terms of providing expert advice on OPPT programmatic specific issues and topics that Tribes may have an interest for Consultation. NTTC can also play a role in providing outreach to the Tribes on upcoming items for Consultation.

2. **Consultation is a top priority.** No issue gets to the heart of Tribal Sovereignty like the consultation issue. Further, almost every major conflict between Federal Agencies and Tribes has been about the lack of Consultation. The Core Water Quality Standards and the ANPRM are examples of this. Consultation must be dealt with before the substance of these issues can be addressed

Response: OPPT agrees with this assumption, and will make a good faith effort to give Consultation actions top priority and respect for Tribal Sovereignty and our government-to-government relationships as outlined in our guiding principles in the 1984 EPA Tribal Policy

3. **“Notice” is not “Consultation.”** Likewise, Tribes are not merely the “public,” but sovereign entities. These are basic points that are still often lost on Federal rule makers.

Response: OPPT is educating its entire staff, including its rule makers, on responsibilities of tribal Consultation. One of the first efforts by the Agency to do this is illustrated by Administrator Jackson’s request that the Agency’s “Working Effectively with Tribal Governments” training (on-line) be mandatory for all employees annually. Secondly, OPPT is working on a Consultation Factsheet to remind all employees, especially rule makers, of their responsibilities under the EO and EPA’s Consultation Policy.

4. **“Tribal Consultation” is mostly about “opportunity.”** The pilot project regarding the Tribal New Source Rule (NSR) showed that effective Consultation could be achieved on a national level by providing each Tribe with the opportunity to Consult, letting the

Tribes decide whether or not, and in what manner (conference call, regional meeting, individual face-to-face meeting) they would like to be consulted. Confounding the U.S. EPA's fears of 565 requests for them to visit each Tribe and engage in a lengthy process, only 72 Tribes requested consultation, with only 10 requesting that the U.S. EPA meet directly with their Councils.

Response: We appreciate the above listed example, and would note that the EPA policy is still new and flexible and that we will continue to work with the NTTC to enhance this process to make Consultation more effective and make the most sense within the scope of our resource capacities.

5. **Consultation does not have to be Complicated.** Currently, the task of Consulting with Tribes seems daunting from a Federal perspective, mostly because there is a void where accurate Tribal information should be. It is difficult to find agreement on how many Tribes there actually are (there are 565 Federally recognized Tribes, according to the BIA), never mind an up-to-date list of Tribal Leaders (who are often too inundated with information to reply to anything but the Tribe's major priorities), and then there is the diversity of Tribes, which means that effective Consultation has to be tailored to each one separately.

The task seems immense from the Tribal perspective also. First, the Tribes must breach the fear and uncertainty and lack of understanding often exhibited by Federal agencies who have not worked directly with Tribes (i.e. HQ). Once that (still ongoing) task is complete, then the Tribes have to confront the specter of approximately 223 (in 2006) extremely technical rules from 25 different agencies – each having a different “Tribal Consultation Policy” – which can only overwhelm Tribal resources. A simple, practical consultation procedure is needed to overcome the hit-or-miss present policy.

Response: OPPT looks forward to working with the NTTC to improve the process and make it more effective and efficient for the tribes and the Agency.

6. **“Government-to-Government” relations must be made practical.** An actual “Government-to-Government” relationship would mean each Tribal Leader sitting across the table from the President to negotiate. Likewise, Tribal Environmental Directors are functionally equivalent to the U.S. EPA Administrator, and therefore should interact directly with that office – not a Project Officer within a regional Indian Program. As this is somewhat impractical, a successful Consultation Process will respect Tribal Sovereignty and the Government-to-Government relationship while also taking into account the reality of limited resources on both sides. Providing the opportunity for Tribes to make their own decisions based on their priorities achieves both goals.

Response: OPPT will continue to find ways to make the relationship meaningful and as practical as possible for Tribal governments as we gain more experience with Consultation and institute procedures and processes that are respectful and may also be flexible and inclusive in how we approach one another and fulfill our responsibilities.

7. **True “Sovereignty” includes the right to say “No”** If a Tribe decides after Consultation that it does not agree with the proposed policy, it should not get approved over the Tribe’s objections. A true Tribal consultation policy would entail that OMB requires Tribal approval (for those policies having “tribal implications”) as a prerequisite for its own approval.

Response: EPA will respect the Tribes’ input into the Consultation process and will respond to their concerns and interests as outlined in the EPA Consultation Policy. Specifically, we will respond in writing to those Tribal governments that provide us with written input during the designated Consultation period. EPA will respect Tribes’ sovereign interests to disapprove of an impending Consultation action, however, please note that there may be the possibility that a Tribe or Tribes may not agree with all of our proposed actions. It is our intent that EPA will clearly articulate its position, even if it may be contrary to a Tribe’s position.

Points Specific to Interaction with NTTC

- As a Tribal Partnership Group, the NTTC can be of most help to OPPT by being a central point/conduit for information to Tribes about upcoming opportunities for Consultation, working with OPPT staff to understand what the potential implications to Tribes might be, and creating clear statements of those potential impacts for distribution to Tribes

Response: We appreciate and agree with your position on how NTTC members can assist us with implementing the Consultation policy and improving the process.

- **Selection of issues for Consultation.** One of the primary difficulties with Tribal Consultation is that it puts the onus of determining whether or not an action may affect tribal interests rather than asking Tribes. Given the vast cultural, economic, and governmental diversity of the 565 Federally Recognized Tribes, it is difficult for EPA to make such a determination. A list of each of such actions would then be provided to the NTTC and other Tribes invited into conference calls, along with a “plain English” analysis of the potential impacts that the action may have on Tribes. The NTTC may be able to help with that part of it, after discussion with the relevant rule makers, etc. Then Tribes can help decide which of these actions/rules/policies might rise to a level of Tribal interest requiring consultation.

Response: We look forward to work with the NTTC to hone such a procedure, noting the tight time frames around actions and implementation requirements of the Agency’s Consultation Policy. As EPA suggests a list of potential actions for Consultation within the semi-annual reporting periods (October 1st and April 1st), we welcome feedback on these or other items from the semi-annual regulatory agenda for consideration. The NTTC could also play a key role outreaching to Tribal governments, either through an established Web site (e.g., the NTTC’s), conference calls, conferences, tribal meetings, a mass email, or any other form of communication, to help alert leaders to provide

feedback on potential items for Consultation or to participate in Consultations as the case may be.

As far as the “Plain English” analysis, this may be limited by what’s available at a particular point in time. It is also compounded by the tight timeframes under which the Agency needs to circulate invitations to a Consultation meeting in order to provide sufficient advanced notice. Perhaps we “pilot” this process in incremental steps to see what works or might need refinement.

- **Getting the word out to Tribes.** When the list of actions along with the analyses is complete, then a process can be started where the various proposed actions are distributed to Tribes, along with an invitation to Tribal representatives to participate in NTTC calls addressing those issues.

Response: This sounds like calls that might be independent of EPA involvement as not to conflict with formal Consultation calls.

- **The earlier, the better.** As the EPA is on a 6-month cycle in order to publish in the Federal Regulatory Agenda, this process would necessarily be an ongoing one, so that actions/rules/policies might get adequate discussion time with Tribes and the NTTC before the action actually gets set for Consultation.

Response: We agree, although timing will always be tight and the Federal Regulatory Agenda may not always be up-to-date as a point of reference.