

EPA REGION 8'S RESPONSE TO PETITION FOR REVIEW

Attachment T

Administrative Record Document No. 47

EPA Memorandum from Walker Smith re: Transmittal of the Questions and Answers on the
Tribal Enforcement Process



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

APR 17 2007

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Transmittal of the Questions and Answers on the Tribal Enforcement Process

FROM: Walker B. Smith, Director *WBS*
Office of Civil Enforcement

TO: Senior Enforcement Managers, Regions I - X
Regional Counsel, Regions II - VII, IX, X
Senior Legal Enforcement Managers Region I, VIII

This memorandum transmits the final “Questions and Answers on the Tribal Enforcement Process.” The Office of Enforcement and Compliance Assurance (OECA) worked with the American Indian Environmental Office, the Office of General Counsel, and the regional offices in developing this guidance. We also circulated the document to federally recognized Indian tribes and solicited their input.

This document provides assistance in implementing the “EPA Policy for the Administration of Environmental Programs on Indian Reservations” (November 8, 1984) (Indian Policy) and responds to questions raised by tribes and EPA regional offices since OECA issued the “Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy” (Enforcement Guidance) in January 2001. It covers case-specific issues surrounding compliance assistance, inspections, and enforcement. It also emphasizes points in the enforcement response process when it is particularly important to keep the affected tribe apprised of developments and to consult and coordinate with the tribal government. Key points that are expanded in this guidance include:

- what is considered a “tribal facility” for purposes of the Enforcement Guidance,
- the development and implementation of a written compliance plan,
- when enforcement action may be appropriate, and
- examples of exigent circumstances affecting the applicability of the processes set forth in the Enforcement Guidance.

We hope this document assists EPA’s regional offices in their efforts to ensure that the process of compliance assurance in Indian country, from inspection planning to formal

settlement, is as straightforward and transparent as possible. Our goal is to give Regions and tribes the tools they need to ensure protection of human health and the environment in Indian country to the same extent it is assured outside of Indian country. We reiterate our resolve to use compliance and technical assistance to help tribal facilities achieve compliance with environmental laws and regulations. However, where such compliance assistance does not achieve a timely return to compliance, we also want to ensure that the Regions carefully consider their enforcement options in a time frame that ensures that human health and the environment in Indian country are not compromised.

If you have any questions, please contact me or have your staff contact Mary Andrews of my staff at (202) 564-4011. I appreciate your continued efforts to ensure human health and environmental protection in Indian country through your work on, and implementation of, this document.

Attachment

cc: Enforcement Coordinators, Regions I-X
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Questions and Answers on the Tribal Enforcement Process

Table of Contents

I. Is the Facility a Tribal Facility?	3
Q: Who is responsible for determining whether a facility is a tribal facility? How do I coordinate with the affected tribe in determining whether the facility is a tribal facility?	4
Q: Is the facility owned, managed, or operated by a tribal government?	4
Q: Does a tribal government have a substantial proprietary interest in or control over the facility?	4
Q: Can a tribal government have a substantial interest in the facility that is not “proprietary”?	4
Q: How do I respond if the facility is not a “tribal facility”?	5
II. What Do I Do When Planning Information Requests and Inspections of Facilities in Indian country?	5
Q: Should OECA concurrence be obtained before issuing information requests?	5
Q: Should OECA concurrence be obtained before conducting inspections?	5
Q: Should I meet with the tribe before the inspection?	6
III. What Do I Do If I Identify Noncompliance?	6
Q: What is the role of the state in which the facility is located when EPA is addressing noncompliance at a facility in Indian country?	6
IV. Has EPA Developed a Written Compliance Plan?	7
Q: What is the purpose of the written compliance plan?	7
Q: When should the Region develop a compliance plan?	7
Q: Should Regions develop compliance plans in all cases of noncompliance involving tribal facilities?	7
Q: What should the compliance plan cover?	8
Q: Can the compliance plan include assistance provided by another agency?	8
Q: What should Regions do if milestones contained in the compliance plan are missed?	8
Q: How do I provide compliance assistance for a violation that is not continuing in nature?	8
V. What Is an “Enforcement Action” and When Is it Appropriate?	9
Q: Does the guidance apply in cases where EPA has authorized a tribe to administer the federal program under which the violations occurred?	9
Q: Are actions regarding grants to tribes, such as a cost recovery action under the grant regulations in cases where the tribe did not perform the required grant activities, enforcement actions calling for application of the guidance?	9
Q: When is enforcement action appropriate against a tribal facility?	9
Q: When does EPA have to demonstrate that it meets the threshold criteria for taking an enforcement action against a tribal facility?	10

Q: Can a tribe request enforcement action against a tribal facility without full application of the Enforcement Guidance? 10

Q: What is a “significant threat” to human health or the environment? 10

Q: How does EPA assess whether the federal government may use other alternatives to enforcement against a tribal facility to correct the problem in a timely fashion? 10

VI. What is the Process for Obtaining OECA Concurrence for Enforcement Against Tribal Facilities? 11

Q: When should OECA concurrence be obtained for enforcement against a tribal facility? . . . 11

Q: When is OECA concurrence NOT required for enforcement against a tribal facility? 11

Q: Is a field citation or another expedited enforcement response an “enforcement action” calling for OECA concurrence when issued to a tribal facility? 11

Q: Should OECA concurrence be obtained if the enforcement action does not seek penalties but does include stipulated penalties for future violations at the tribal facility? 12

Q: Is OECA concurrence called for with regard to amending an administrative order issued to a tribal facility? 12

Q: When should the Regions begin discussions with OECA concerning noncompliance at a facility in Indian country? 12

Q: Can EPA conduct emergency actions at tribal facilities? 12

Q: What is the difference between “imminent and substantial endangerment” and “exigent circumstances,” as used in the Enforcement Guidance? 13

Q: Is the immediate expiration of the statute of limitations an exigent circumstance that warrants immediate action without full application of the Enforcement Guidance? 14

Q: Who determines whether exigent circumstances exist? 14

Q: What happens after OECA concurs 14

Q: What should EPA document in the file when proceeding with an action under the Enforcement Guidance? 14

VII. Other Questions Concerning Tribal Facilities 15

Q: Does the Enforcement Guidance apply to federal facilities? 15

Q: With whom should EPA consult when working with a tribe 15

Q: When consulting with a tribe pursuant to the Enforcement Guidance, how does EPA address concerns about the release of confidential information? 15

Questions and Answers on the Tribal Enforcement Process

In 1984, the U.S. Environmental Protection Agency (EPA or Agency) issued the “EPA Policy for the Administration of Environmental Programs on Indian Reservations” (Nov. 8, 1984) (Indian Policy), which sets forth principles to guide the Agency in dealing with federally recognized tribal governments and in its actions to protect human health and the environment in Indian country.¹ The Indian Policy established a policy of graduated response to noncompliance for facilities owned or operated by tribes, in which a tribal government has a substantial interest, or over which a tribal government has control (tribal facilities). In 2001, the Office of Enforcement and Compliance Assurance (OECA) issued a “Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy” (January 17, 2001) (Enforcement Guidance), which sets forth procedures for EPA to follow when conducting compliance evaluations in Indian country.

The Enforcement Guidance established a process whereby EPA will consult with tribal governments and allow tribal facilities an opportunity to return to compliance with EPA assistance, and if this is insufficient, to allow EPA to proceed with enforcement action so as to protect human health and the environment. This document responds to questions about compliance assistance, compliance monitoring, and enforcement at facilities in Indian country that have been raised since the Enforcement Guidance was issued.

The questions and answers in this document apply only to violations of EPA’s civil regulatory programs. They do not apply to criminal conduct, criminal investigations, or enforcement pursuant to criminal provisions of laws or regulations that are enforced by EPA.

This document is intended solely as guidance for employees of EPA. It is not a regulation and does not impose any legally-binding requirements on EPA or the regulated community. It may not be relied upon to create a right or benefit. EPA retains the discretion to adopt approaches on a case-by-case basis that differ from this guidance.

I. Is the Facility a Tribal Facility?

If a facility is owned, managed, or operated by a tribal government, or a tribal government has a substantial interest in, or exercises control over, the facility, then the facility is a tribal facility and EPA should follow the process set forth in the Enforcement Guidance in proceeding with compliance assistance and enforcement. Tribal facilities can include facilities located within or outside Indian country.

¹ Indian country is defined in 18 U.S.C. § 1151 to include Indian reservations, dependent Indian communities, and Indian allotments.

1 **Q:** *Who is responsible for determining whether a facility is a tribal facility? How do I coordinate with the affected tribe in determining whether the facility is a tribal facility?*

A: The EPA regional offices are responsible for making this determination. However, unless the tribal interest is already known, EPA Regions should give the affected tribe an opportunity to provide information regarding its interest in the facility and to consult with EPA regarding the tribe's interest. In order to obtain the tribe's views, and to obtain any other information which may be useful in assessing the facility's status, the Region may send the tribal government a letter outlining the Enforcement Guidance and soliciting the tribe's views, summarizing any information the Region already has in this regard. Informal discussions with tribal government staff, such as the tribal environmental department, prior to or after sending the letter, may also be useful and may help to obtain a prompt response. In cases where it is obvious that a non-compliant facility is a tribal facility, discussion with the tribe on this issue would be unnecessary. For example, if the facility is a tribally-operated public water supply system, such discussions would be unnecessary. EPA's analysis of this information and its determination should be sent to the tribe and documented in the case file.

2. **Q:** *Is the facility owned, managed, or operated by a tribal government?*

A: A facility in which a tribe holds a substantial ownership, management, or operational interest is a tribal facility. For example, a facility operated by a tribally-owned utility service is a "tribal facility." A facility owned, managed, or operated by tribal members is not a tribal facility unless a tribal government has a substantial interest in, or exercises control over, the facility, as described further below.

3. **Q:** *Does a tribal government have a substantial proprietary interest in or control over the facility?*

A: The Region should consider the nature and extent of the tribal government's ownership interest, and the tribe's input concerning its interest, when determining whether the tribe has a "substantial proprietary interest" in the facility. Depending on the circumstances of a particular facility, a significant ownership interest, corporate relationship, or other factors may give the tribe control over operations such that it is a tribal facility. For example, a manufacturing facility or agricultural operation owned and operated by a tribal development corporation would typically be a "tribal facility."

4. **Q:** *Can a tribal government have a substantial interest in a facility that is not "proprietary"?*

A: The Enforcement Guidance recognizes that a tribal government may have a substantial interest in a facility that is not a proprietary interest. For example, if a facility provides a significant source of employment for the tribe, the Region may consider this interest before proceeding to address the noncompliance. The existence of a lease between a tribe and the operator of a facility does not, in itself, establish a substantial non-proprietary interest. However, the terms of a particular lease may give the tribe control over operations such that it is a tribal

facility. In addition, the income generated by the lease may in some cases give the tribe a significant financial interest in the facility such that it is appropriate for EPA to treat the facility as a tribal facility.

In these circumstances it may be appropriate to ask the tribe about the nature of its lease revenue to determine whether it constitutes a substantial interest within the meaning of the Enforcement Guidance. An inquiry into non-proprietary interests is intended to capture situations where a tribe has a sufficient interest in a facility that it is appropriate for EPA to work cooperatively with the tribal government to help the facility achieve compliance. However, since an enforcement action does not typically influence ongoing facility operations, lease payments and employment numbers are unlikely to be affected by an enforcement action against the facility. For example, in one instance, a tribe indicated that it had a substantial non-proprietary interest in an oil production facility operated by a private oil company due to the lease payments to the tribe and the number of tribal members employed at the facility. Based on this information, EPA determined that the facility should be treated as a tribal facility. However, the tribe asked EPA to proceed with enforcement action against the facility without applying its process for enforcement at tribal facilities.

5. **Q:** *How do I respond if the facility is not a “tribal facility”?*

A: Once EPA has determined that a facility is not a tribal facility, EPA generally responds to noncompliance in the same manner as with a facility outside Indian country. EPA should notify and consult with the affected tribal government on a government-to-government basis to the greatest extent practicable and to the extent permitted by law. However, EPA communications with the tribal government may be constrained by the need to preserve the confidentiality of enforcement sensitive or confidential business information.

II. What Do I Do When Planning Information Requests and Inspections of Facilities in Indian country?

6. **Q:** *Should OECA concurrence be obtained before issuing information requests?*

A: No, the OECA concurrence process does not apply to requests for information. However, the Region should inform the relevant tribal government when issuing information requests to tribal facilities, and where appropriate, may inform tribal governments of information requests issued to non-tribal facilities located in Indian country.

7. **Q:** *Should OECA concurrence be obtained before conducting inspections?*

A: No, OECA concurrence is not called for before conducting inspections. Consistent with the Indian Policy and the “Presidential Memorandum on Government to Government Relations with Native American Tribal Governments” (April 29, 1994), the Region should generally notify the tribal government in advance of visiting a facility in the tribe’s Indian country, and offer the tribe an opportunity to coordinate further with EPA regarding the inspection where practicable. If advance notice is not possible or if the visit involves an unannounced inspection, EPA should

contact the tribal government as soon as possible after the inspection.

8. **Q:** *Should I meet with the tribe before the inspection?*

A: Before an inspection the Region should contact the tribe to discuss the planned activities for your visit, including:

- facilities targeted for inspection during your visit;
- what you will do during your visit and what potential follow-up actions may be needed;
- tribal information and concerns regarding the facilities to be inspected; and
- verification of appropriate contacts for the tribe and EPA.

Where appropriate, the Region should also offer the tribe an opportunity to meet with EPA before the inspection. This is particularly important when the Region has not recently visited this tribe or has not established a routine working relationship with the affected tribe.

III. What Do I Do If I Identify Noncompliance?

EPA should inform the tribal government of the results of each inspection in a timely manner. If EPA identifies potential non-compliance at a tribal facility, EPA should follow the procedures in the Enforcement Guidance as clarified below.

9. **Q:** *What is the role of the state in which the facility is located when EPA is addressing noncompliance at a facility in Indian country?*

A: Under general principles of federal Indian law and policy, primary jurisdiction in Indian country generally rests with the federal government and the tribe inhabiting it, and not with the states. Accordingly, unless and until a tribal government is approved by EPA to implement a federal environmental program, EPA generally implements the program in Indian country. State contact may be appropriate under certain exceptions to this general rule. For example, on the Puyallup Reservation, an act of Congress allows the State of Washington to be the lead agency for administration of certain programs on non-trust land within the historic boundaries of the reservation.

At the same time, EPA's Indian Policy encourages cooperation between tribal, state, and local governments to resolve environmental problems of mutual concern. Therefore, it may be appropriate for EPA, after consulting with the affected tribe, to notify the state in which a facility is located when a facility's noncompliance may be of mutual concern to the state and tribe. In consultation with the affected tribe, EPA may also in appropriate circumstances coordinate with the state and the tribe in ensuring that adequate compliance assistance is provided. Where a state asserts jurisdiction in Indian country, EPA's regional staff should notify the Office of Regional Counsel and the Office of General Counsel, as appropriate, of the situation, consult with the relevant tribe, and confer with the state.

IV. Has EPA Developed a Written Compliance Plan?

10. **Q:** *What is the purpose of the written compliance plan?*

A: The written compliance plan is used to communicate to the facility and the tribal government identified noncompliance at tribal facilities and the steps necessary to return the facility to compliance. Putting the plan in writing helps to ensure that the tribe understands its responsibilities and the opportunities for assistance EPA will make available to the tribe as it works to achieve compliance. The compliance plan also gives the facility and the tribe clear notice of EPA's expectations with respect to progress toward compliance and EPA's timeline for initiating an enforcement action if compliance is not achieved. As such, the compliance plan emphasizes EPA's compliance and enforcement expectations and should help the facility achieve compliance consistent with the Indian Policy and the Enforcement Guidance.

1 **Q:** *When should the Region develop a compliance plan?*

A: Regions should develop a compliance plan as soon as is practicable after non-compliance is identified. The Region should develop and implement the compliance plan in consultation with the affected tribe. In that way, the compliance plan can simultaneously serve as notice to the tribe of the compliance and enforcement issues and an indication of EPA's willingness to work cooperatively to resolve the matter. Therefore, the Region should send a draft compliance plan to the tribal government and the affected facility for review. The Region should provide the tribe with a specific deadline by which to submit comments. If the tribe does not submit comments or otherwise respond to the compliance plan, the Region should notify the tribe that the plan will be implemented as drafted.

12. **Q:** *Should Regions develop compliance plans in all cases of noncompliance involving tribal facilities?*

A. While a compliance plan is generally warranted whenever there is a reasonable expectation of cooperation from the tribe or facility, there are circumstances in which development of a compliance plan would not be effective. For example, a compliance plan may not be appropriate when EPA has consulted with the tribal government and there is a documented history of disinterest in or resistance to EPA's efforts to provide compliance assistance. In addition, a compliance plan may not be appropriate if the Region has previously provided compliance or technical assistance to the facility and EPA believes that additional assistance will not result in a return to compliance (for example, at a drinking water system with the proven ability to perform monitoring and reporting requirements yet repeatedly fails to actually monitor and report, despite EPA assistance). Finally, a compliance plan might not be immediately feasible when exigent circumstances exist and an immediate enforcement action is necessary to address the hazard (see questions 30 - 31, below). If the Region decides not to develop a compliance plan to address a particular tribal facility, they should inform the tribe in writing of that decision and the reasons why a compliance plan may not be an appropriate means to address that noncompliance.

13. **Q:** *What should the compliance plan cover?*

A: Compliance plans vary in length and detail based on the specifics of the situation and nature of the noncompliance. At a minimum, the compliance plan should include the following:

- a description of the noncompliance that EPA identified;
- the nature of the assistance to be provided to the facility and the timeline for providing the assistance;
- the specific steps the facility will take to come into compliance based on the types of activities needed and the milestones associated with the activities; and
- the enforcement response anticipated if the facility's compliance does not improve according to the milestones stated in the plan.

The compliance plan could provide that the Region will discuss with the tribal government whether to pursue prompt enforcement action against the tribal facility if key milestones are missed.

14. **Q:** *Can the compliance plan include assistance provided by another agency?*

A: Yes, where appropriate, EPA should include other federal agencies in its compliance efforts as early as is reasonable under the circumstances. Federal agencies such as the Bureau of Indian Affairs, the Indian Health Service, and the Rural Utility Service have significant resources to assist tribes in protecting human health and the environment. Where another federal agency has provided technical assistance to a tribal facility and has documented the assistance given, EPA may take into account such assistance in drafting and implementing its compliance plan, providing additional compliance assistance as appropriate. In consultation with the tribe, EPA and a tribe may occasionally want to take advantage of compliance assistance resources of state agencies. EPA should document in the case file its contacts with other agencies. The Regional Indian Coordinator can assist with such interagency coordination.

15. **Q:** *What should Regions do if milestones contained in the compliance plan are missed?*

A: The milestones contained in a compliance plan should outline the specific steps the facility will take to come into compliance based on the types of activities needed. Regions should notify the tribe when milestones are missed; if oral notification occurs, the discussion should be memorialized in writing. In addition, Regions should review the missed milestone(s) and decide whether or not it is appropriate to revise the compliance plan and associated milestone(s) or proceed with the outlined enforcement action. Missed milestones are an important indicator of whether or not the facility is able to return to compliance in a timely manner.

16. **Q:** *How do I provide compliance assistance for a violation that is not continuing in nature?*

A: For some types of violations, technical assistance can help a facility achieve and maintain compliance. For example, EPA and other entities may provide hands-on assistance in the operation of a public water supply system over a period of months or even years. For other types

of violations, however, such as dredging and filling wetlands without the necessary permit, EPA may not be able to provide compliance assistance after the fact. In such cases, the Region may be able to provide information on avoiding a repeat violation and may provide technical assistance in planning and carrying out mitigation measures. For example, in the dredging and filling context, EPA generally would provide technical assistance to the tribal facility regarding the development and implementation of a restoration plan or mitigation plan, such as providing information concerning the proper qualifications for the consultants for restoration and/or mitigation work and a timeline for the necessary tasks. This would assist the tribal facility in retaining a consultant and developing appropriate plans for EPA review and approval.

V. What Is an “Enforcement Action” and When Is it Appropriate?

Consistent with the Indian Policy, the Enforcement Guidance, and the protection of human health and the environment, enforcement in Indian country may be an appropriate response to noncompliance.

7. **Q:** *Does the guidance apply in cases where EPA has authorized a tribe to administer the federal program under which the violations occurred?*

A: The Enforcement Guidance does not apply to enforcement actions taken by tribes under tribal codes, including any tribal action under an EPA-authorized program. However, the Enforcement Guidance does apply to all of EPA’s civil enforcement actions in Indian country. Even if the tribe has an approved program in place, EPA maintains jurisdiction and authority to initiate an independent enforcement action to address violations of the requirements of an approved program. Similarly, if the tribe is authorized for a portion of an EPA program but has left the enforcement authority to EPA, the Enforcement Guidance applies to any EPA enforcement.

18. **Q:** *Are actions regarding grants to tribes, such as a cost recovery action under the grant regulations in cases where the tribe did not perform the required grant activities, enforcement actions calling for application of the guidance?*

A: No, the Enforcement Guidance does not apply to either the grant process or any actions taken under the grant regulations.

19. **Q:** *When is enforcement action appropriate against a tribal facility?*

A: Under the Indian Policy, EPA may consider taking an enforcement action against a tribal facility when it determines that (1) a significant threat to human health or the environment exists, (2) the action would reasonably be expected to achieve effective results in a timely manner, and (3) the federal government cannot use other alternatives to correct the problem in a timely fashion.

20. **Q:** *When does EPA demonstrate that it meets the threshold criteria for taking an enforcement action against a tribal facility?*

A: EPA should determine that the threshold criteria have been met before bringing a formal enforcement action against a tribal facility, unless the exigency of the situation requires otherwise. Regions do not need to determine that the three threshold criteria for bringing an enforcement action have been met prior to pursuing informal enforcement actions, such as Notices of Violation or Notices of Noncompliance, which merely request prompt return to compliance.

21. **Q:** *Can a tribe request enforcement action against a tribal facility without full application of the Enforcement Guidance?*

A: Yes, the Enforcement Guidance states that a tribal government “may express the view that EPA should pursue prompt enforcement action against [a tribal] facility as the most appropriate response, without undertaking the cooperative measures and compliance assistance otherwise contemplated by [the] guidance.” In consultation with the tribal government, the Region may determine that it is appropriate to pursue such prompt enforcement. In that case, “the Region should also obtain, and submit to Headquarters as part of the concurrence process, a written statement from the tribal government expressing [the tribal government’s] view that prompt enforcement is appropriate” and conveying the tribal government’s understanding of the nature of the proposed enforcement action, including “the violations that will be alleged, [and] the potential penalty and injunctive relief that will be sought.” The Assistant Administrator for OECA will review and, if appropriate, concur on such requests.

22. **Q:** *What is a “significant threat” to human health or the environment?*

A: A significant threat to human health or the environment can include the direct threat posed by the release or potential release of contaminants into the environment and the exposure of humans or the environment to pollutants, as well as an indirect threat to human health or the environment, such as the threat to the regulatory program and the threat posed by failure to monitor or to maintain proper records. The existence of a significant threat is determined on a case-by-case basis.

23. **Q:** *How does EPA assess whether the federal government may use other alternatives to enforcement against a tribal facility to correct the problem in a timely fashion?*

A: The Enforcement Guidance suggests three factors for EPA to weigh in determining whether it is appropriate to delay enforcement and, instead, consider other alternatives appropriate to the particular circumstances of a case. EPA should consider: (1) the facility’s good faith efforts to remedy noncompliance in a timely manner, including the resources expended; (2) any relevant history of noncompliance with EPA regulatory requirements, including any requirements stated in administrative or judicial orders previously issued to facilities owned, managed, operated, or controlled by the same tribe; and (3) the degree of willfulness.

VI. What is the Process for Obtaining OECA Concurrence for Enforcement Against Tribal Facilities?

24. **Q:** *When should OECA concurrence be obtained for enforcement against a tribal facility?*

A: OECA concurrence should be obtained when:

- EPA is considering a formal enforcement action against a tribal facility, unless exigent circumstances exist;
- an administrative order on consent or other settlement includes penalties;
- an administrative order is issued unilaterally by EPA; and
- an enforcement action or settlement involves issues that OECA has identified as nationally significant.

As set forth in the Enforcement Guidance, OECA will consult with the American Indian Environmental Office and the Office of General Counsel in reviewing regional requests for concurrence. When EPA pursues enforcement action against a tribal facility, it should continue to consult with the tribal government about compliance status as appropriate.

25. **Q:** *When is OECA concurrence NOT needed for enforcement against a tribal facility?*

A: Regions need not obtain OECA concurrence for informal enforcement actions. Informal enforcement actions include actions such as a Notice of Noncompliance or Notice of Violation and show cause orders.

In addition, Regions do not need to obtain OECA concurrence before issuing administrative orders on consent that do not include penalties, or before entering consent agreements filed simultaneously with a complaint and final order where no penalty is sought, as provided in the Consolidated Rules of Practice, 40 C.F.R. Part 22. However, there may be other reasons for OECA concurrence or consultation on these types of actions, such as the existence of issues identified in OECA delegations as nationally significant issues. If regional staff have questions about whether their anticipated enforcement response calls for OECA concurrence, they should contact the tribal coordinator for OECA's Office of Civil Enforcement.

26. **Q:** *Is a field citation or another expedited enforcement response an "enforcement action" calling for OECA concurrence when issued to a tribal facility?*

A: Yes, the Enforcement Guidance calls for OECA concurrence before EPA issues to a tribal facility a field citation or other expedited enforcement response that seeks to collect a penalty.

27. **Q:** *Should OECA concurrence be obtained if the enforcement action does not seek penalties but does include stipulated penalties for future violations at the tribal facility?*

A: No, OECA concurrence need not be obtained for a consent order that includes provisions for stipulated penalties if the order does not seek a civil penalty. However, when stipulated penalties are triggered by failure to comply with the terms of an administrative order on consent, Regions should consult with OECA prior to assessing any penalties.

28. **Q:** *Is OECA concurrence called for with regard to amending an administrative order issued to a tribal facility?*

A: If the amendment to the administrative order is on consent, Regions need not obtain OECA concurrence. If the amendment is issued unilaterally, Regions should obtain OECA concurrence if the amendment significantly changes the nature or scope of requirements in the order.

29. **Q:** *When should the Regions begin discussions with OECA concerning noncompliance at a facility in Indian country?*

A: When addressing issues of noncompliance at tribal facilities, the Region should contact the tribal coordinator for OECA's Office of Civil Enforcement as soon as the Region discerns that compliance assistance alone may not achieve compliance. Regional enforcement personnel should consult with the regional tribal office and the affected tribe upon identification of non-compliance by a tribal facility. Where appropriate, OECA can assist the Region in developing the appropriate measures to resolve the violations, including both compliance assistance and enforcement. Advance notice to OECA will help to ensure that if the Region decides to proceed with an enforcement action, the concurrence process can be completed as expeditiously as possible. Under the guidance, OECA should issue a response within 20 business days of receipt of the concurrence package.

Regions should obtain OECA concurrence before initiating formal civil enforcement action against a tribal facility. However, in exigent circumstances, the Regions may need to act immediately to protect public health or the environment. In exigent situations, the Regions should follow the Enforcement Guidance to the extent practicable and should communicate promptly with the tribal coordinator for OECA's Office of Civil Enforcement and the appropriate tribal government regarding any actions for which prior communication and consultation was not possible. "Exigent circumstances" is discussed further in questions 30 and 31, below.

30. **Q:** *Can EPA conduct emergency actions at tribal facilities?*

A: Yes, EPA has statutory and regulatory authorities to respond to emergency situations where there is an immediate threat to human health or the environment. In exigent circumstances, the Region may need to proceed with emergency enforcement action before it can complete consultation with the tribal government, provide compliance assistance, or obtain OECA concurrence.

For instance, an exigent circumstance may exist where contamination is detected in a public water supply and the water is likely to be ingested. In these circumstances, it may be necessary to immediately issue an order requiring public notices of the contamination, boil orders, and/or bottled water, or it may be necessary to require that the system be shut down. These types of enforcement measures would address the exigent circumstance by preventing ingestion of contaminated water.

Even when addressing exigent circumstances, EPA should contact the tribal government to, at a minimum, alert them to the actions being taken. Formal consultation with the tribe should occur as soon as possible. Agency personnel should follow this guidance and all other applicable procedures to the extent practicable. Enforcement staff should also ensure prompt communication with OECA's tribal coordinator and the affected tribal government regarding any actions for which prior consultation was not possible. For example, where an order is issued within one or two weeks of detecting the threat, the Region will likely only be able to provide notice of the proposed action and a draft copy of the order before it is issued. Where an order is issued within a few days of detecting the threat, the Region should provide copies of the order and supporting documentation as soon as possible.

After the circumstances that prompted the action are addressed, the criteria and procedures of the Enforcement Guidance apply to any subsequent enforcement response at the tribal facility.

31 **Q:** *What is the difference between "imminent and substantial endangerment" and "exigent circumstances," as used in the Enforcement Guidance?*

A: "Imminent and substantial endangerment" is the threshold set forth in various statutory provisions authorizing EPA to respond to imminent risk of harm. These statutory authorities include RCRA section 7003, SDWA section 1431, and CAA sections 303 and 112(r)(9). These statutory provisions generally authorize EPA to issue administrative orders or proceed in court to require actions to protect human health and the environment. For example, pollutants or contaminants released into a wetland that have not yet harmed aquatic life may present an imminent and substantial endangerment. Similarly, hazardous constituents in an aquifer that may be used as a future source of drinking water may present an imminent and substantial endangerment.

"Exigent circumstances" is used to describe situations requiring an immediate response to protect human health or the environment. For example, exigent circumstances may exist when EPA has detected contamination in a public water supply and the water is likely to be ingested. In exigent circumstances, the emergency nature of the situation may preclude the full application of the guidance before steps are taken to abate the harm. On the other hand, some situations that EPA can address using its imminent and substantial endangerment authorities do not rise to the level of exigent circumstances; for example, groundwater contamination that is slowly moving toward a drinking water source or an open dump that may present a threat of groundwater contamination, combustion, or spread of disease. In those situations, the Region will likely be able to follow the OECA concurrence process before proceeding with an enforcement action.

32. **Q:** *Is the immediate expiration of the statute of limitations an exigent circumstance that warrants immediate action without full application of the Enforcement Guidance?*

A: Yes, the *immediate* expiration of the statute of limitations may warrant action without full application of the Enforcement Guidance. Ideally, Agency personnel will proceed in such a manner that the expiration of the statute of limitations will not be an issue and the process set forth in the Enforcement Guidance can be fully implemented. However, there may be circumstances where the statute of limitations will expire imminently and EPA believes that it can only assure protection of human health or the environment by preserving its legal claims. In any event, the Enforcement Guidance and all other applicable procedures should be followed to the extent practicable. The Regions should ensure prompt communication with OECA's tribal coordinator and the affected tribal government regarding any actions for which prior consultation was not possible.

If imminent expiration of the statute of limitations results in filing an action against a tribal facility before all of the steps identified in the Enforcement Guidance are carried out, EPA should proceed with compliance assistance and full application of the Enforcement Guidance to the extent feasible given the progress of the litigation.

33. **Q:** *Who determines whether exigent circumstances exist?*

A: Typically, the Region makes the determination based on its judgment that exigent circumstances require immediate action and notifies the tribal coordinator in OECA's Office of Civil Enforcement and the tribal government as soon as possible. Where there is time to confer with OECA (rather than just notify) prior to making the determination that an exigent circumstance exists, the Region should do so.

34. **Q:** *What happens after OECA concurs?*

A: Once EPA has determined that it is appropriate to initiate an enforcement action at a tribal facility, the Region should notify the affected tribe of the impending enforcement action. This notification should include the specific action to be taken, including the amount of any penalty and the nature of injunctive relief sought. EPA should proceed with the enforcement action to ensure that the violations are addressed in a timely manner. Consultation with the tribe should continue throughout the enforcement process to the extent it is appropriate and consistent with the tribe's role at the facility. In enforcement matters involving the Department of Justice (DOJ), EPA should coordinate carefully with DOJ to define the scope and manner of communication and consultation with the tribe.

35. **Q:** *What should EPA document in the file when proceeding with an action under the Enforcement Guidance?*

A: Typically, every decision and communication should be documented in the case file. Oral communication with the affected tribal government or facility manager should be memorialized

in writing so EPA has a clear timeline of all steps taken to return the facility to compliance. Correspondence with the facility manager concerning noncompliance should be copied to the affected tribal government.

VII. Other Questions Concerning Tribal Facilities

36. **Q:** *Does the Enforcement Guidance apply to federal facilities?*

A: The Enforcement Guidance only applies if a federal facility also qualifies as a tribal facility. Where a federal facility is not a tribal facility, EPA will address noncompliance at federal facilities in Indian country in the same manner as with federal facilities not located in Indian country. Where a federal facility is also a tribal facility, such as a school established by the Bureau of Indian Affairs but managed or operated by a tribe, the Enforcement Guidance applies, including consultation with the affected tribe regarding appropriate responses to violations at the facility. Regions may also consult EPA guidance for addressing federal facility noncompliance, including "The Yellow Book: Guide to Environmental Enforcement and Compliance at Federal Facilities," February 1999.

[Http://www.epa.gov/compliance/resources/publications/civil/federal/yellowbk.pdf](http://www.epa.gov/compliance/resources/publications/civil/federal/yellowbk.pdf).

37. **Q:** *With whom should EPA consult when working with a tribe?*

A: In consultations concerning tribal interest in a facility and non-compliance at tribal facilities, EPA should consult with the head of the affected tribal government, such as the tribal chair, or the duly-designated representatives, in a timely manner. If the tribe has delegated the authority to work with EPA on environmental compliance to a tribal agency, committee, or individual, then EPA should document that delegation in the case file and consult with that agency or official as the primary tribal official. Designation of the contact for both EPA and the tribe should occur as early as possible in the process so as to avoid confusion.

38. **Q:** *When consulting with a tribe pursuant to the Enforcement Guidance, how does EPA address concerns about the release of confidential information [i.e., confidential business information, enforcement confidential information, or communications otherwise not releasable under the Freedom of Information Act (FOIA)]?*

A: EPA should protect confidential information during tribal consultation, whether internal Agency communications or communications with a private party involved in the enforcement action. Accordingly, EPA should consult with tribes to the greatest extent practicable without divulging privileged or confidential information. In certain cases, for example, enforcement actions brought jointly by EPA and the tribe, EPA has entered into special arrangements to share information. If such an arrangement is needed, staff should consult their regional attorneys. In addition, tribal inspectors who are authorized to conduct Clean Air Act inspections on behalf of EPA do have access to confidential business information obtained from the facility being inspected. However, internal Agency communications and documents in an enforcement action would still be withheld as enforcement confidential.