

# Region 8 Policy for Environmental Protection in Indian Country

## I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA), Region 8, has developed this document to provide guidance and information to Regional managers and staff. This guidance is intended to respond to and clarify questions that are most frequently raised by our internal and external customers and constituents, relating to: (1) Agency protocol in working with federally recognized tribes, (2) Agency support of federally recognized tribal governments in building capacity to manage environmental programs, and (3) Agency positions on environmental program responsibilities and jurisdiction.

## II. BACKGROUND

In November 1984, Administrator Ruckelshaus formally signed and adopted an EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS. Subsequently, Administrator Reilly in February 1990 and Administrator Browner in March 1994 formally reaffirmed the 1984 Indian Policy. Although much was accomplished in the intervening decade, most of the work of establishing environmental programs on Indian Reservations remains to be done. Thus, in recognition of its responsibility to human health and the environment throughout the Region, Region 8 has adopted this Policy to implement the 1984 EPA Indian Policy.

The overarching task in implementing the 1984 Indian Policy is to develop environmental programs for Indian Country that are as comprehensive and as effective as the programs now in place in the rest of the Region. This effort will emphasize the central role of tribal governments in environmental protection, and will give first priority to developing EPA/tribal partnerships patterned after the EPA/state partnerships already in place.

The Region's approach to implementing the 1984 Indian Policy is presented only in part in the guidance of this policy document. It will be presented in more specific detail in the Region 8 Tribal Work Plan and Tribal/EPA agreements called for in Administrator Browner's directive of July 14, 1994. These documents are now under development.

## III. PRINCIPLES

- A. Region 8 will work with tribal governments on a government-to-government basis.
- B. Region 8 will support the principle of tribal self-government in the implementation and administration of environmental programs.
- C. Region 8's primary focus will be to protect human health and the environment in Indian Country.
- D. Region 8 will seek tribal government agreement before making decisions on environmental matters (other than certain enforcement actions) [\(1\)](#) affecting tribal governments and/or tribal natural resources. If no agreement can be reached, then a formal dispute resolution process [\(2\)](#) can be invoked by either Region 8 or the tribal government.
- E. Region 8 will assist tribal governments in building tribal capacity to manage reservation environmental programs.
- F. Region 8 will encourage cooperation between tribal and state governments to address environmental issues.
- G. Region 8 will work cooperatively with other federal agencies to protect reservation environments.
- H. Region 8 will work with tribal governments to encourage the development of public participation processes as part of authorized tribal environmental programs.

#### **IV. PROTOCOL FOR WORKING WITH TRIBAL OFFICIALS**

##### **A. INTRODUCTION**

In Region 8's recent reorganization, the Tribal Assistance Program Office was created as a central core tribal program for overall management and accountability of the Regional Indian Program. This approach promotes the direct government-to-government relationship that is the basis of the 1984 Indian Policy.

This protocol does not govern conduct of criminal investigations or criminal enforcement. Such activities are not undertaken by Region 8.

Region 8 will work with each tribal government through the development of Tribal/EPA Agreements (TEAs) to determine what, if any, cultural components each tribe wants to include in the TEA.

##### **B. PROCEDURES FOR VISITS OR INSPECTIONS TO RESERVATIONS**

1. Regional employees scheduling trips to Indian Country in Montana will inform the Tribal Assistance Program Office and the Montana Operations Office of the intended inspection/visit.
2. Regional Administrator/Deputy Regional Administrator non-issue-specific visits to reservations will be coordinated by the Tribal Assistance Program Office including coordinating the pre-visit briefing.
3. Issue or program-specific visits will be coordinated by the Office responsible for the issue. Programs and Offices will inform the Tribal Assistance Program Office

of the scheduled visits.

4. Region 8 will notify the Tribal Chair and the Tribal Environmental Official of inspections in Indian Country at least seven calendar days prior to the inspection. Other criteria and procedures for unannounced inspections may be developed in Tribal/EPA agreements. Region 8 will offer entrance and exit interviews concerning announced inspections to the appropriate Tribal Chair and Tribal Environmental Official. This notification may be by telephone unless the tribe requests other means of notification.

5. In environmental emergency situations in Indian Country, Region 8 will notify as appropriate the Tribal Environmental Official of the inspection/visit by phone.

6. Region 8 employees will take photographs of reservation areas only for official use and with tribal permission. The tribe may designate a tribal official to oversee the photography.

7. If state inspectors request to accompany EPA inspectors to a reservation site, Region 8 will inform the Tribal Environmental Official of the state's request in writing. Region 8 will consult with the tribe, and where appropriate may defer to the tribe's conclusion on whether state inspectors will accompany EPA to the site. This issue may be addressed otherwise in Tribal/EPA Agreements.

### **C. PROCEDURES FOR WRITTEN ROUTINE MATTERS WITH TRIBAL OFFICIALS**

1. Letters to the Regional Administrator from Tribal Chairs will be answered within ten working days of receipt and will be prepared for the Regional Administrator's signature.

2. If a response cannot be provided by the ten-day deadline, a phone call from the Tribal Assistance Program Office or the Montana Operations Office will be placed to the Tribal Chair and/or the Tribal Environmental Official indicating that the letter has been received and that a reply is being prepared. An explanation of the delay and an anticipated date of reply will be provided.

3. Letters to the Regional Administrator from a Tribal Chair will be treated as controlled correspondence by the Regional Administrator's Office. The letters will be assigned to the appropriate ARA or Office Director.

4. Letters from Tribal Chairs or Tribal Environmental Officials that involve specific program issues and are directed to EPA ARAs, the Montana Operations Office or program staff will be answered by program staff for signature by the appropriate ARA or Office Director, or his/her designee.

5. Letters concerning inspections in Indian Country will be directed to the Tribal Environmental Official with a copy to the Tribal Chair.

6. Grant documents signed by the Assistant Regional Administrator for Technical and Management Services or his/her designee, will be sent directly to the Tribal Chair with a copy to the Tribal Environmental Official.
7. Letters of decision involving broad policy issues, grant and program eligibility (Treatment as a State) determinations, jurisdictional issues, delegations and significant enforcement actions (as defined in program-specific enforcement response policies) will be prepared for the signature of the Regional Administrator or his/her designee and sent to the Tribal Chair. A courtesy copy will be sent to the Tribal Environmental Officer.
8. EPA notices of inspection form(s) and final inspection reports will be provided upon completion to the Tribal Environmental Official. Preliminary results that identify significant environmental problems will be sent to the Tribal Chair and Tribal Environmental Official immediately.
9. EPA or state inspection reports on sites situated outside Indian Country that may have an impact on people or the environment in Indian Country will be forwarded by EPA to the appropriate Tribal Environmental Official.
10. EPA or Tribal inspection reports on sites situated in Indian Country that may indicate an impact on people or the environment outside Indian Country will be forwarded to the appropriate State Environmental Official.
11. The disclosure of inspection reports with a tribe or state will be consistent with regulation and policy on disclosure of EPA records and confidentiality of business information 40 CFR Part
12. Region 8 will make the fullest possible disclosure consistent with the policy.

#### **D. PROCEDURES FOR TRIBAL VISITS TO REGIONAL OFFICE**

1. ARAs and Office Directors will notify the Tribal Assistance Program Office and the Regional Administrator/Deputy Regional Administrator of upcoming visits by Tribal Chairs.
2. Visiting Tribal Chairs will be invited to meet with the Regional Administrator/Deputy Regional Administrator, ARAs or the Montana Operations Office Director, as appropriate.
3. Regional staff will notify the Tribal Assistance Program Office of tribal official visits so that additional meetings can be scheduled if requested by tribal official.

#### **E. PROCEDURES FOR ELEVATION OF ISSUES AND DISPUTE RESOLUTION**

Timely resolution of issues is important and Region 8 recognizes the need for an elevation procedure. If a tribe requests a timetable for resolution of an issue

requiring Agency decision, a response will be provided by the appropriate Assistant Regional Administrator (ARA). If a timely decision or response is not then provided, the Tribal Chair may elevate the issue to the Regional Administrator. Region 8 is committed to resolving issues at the Regional level and strongly encourages tribes to work within the Regional framework.

When an elevation process has begun, the project manager will keep the Tribal Assistance Program Office Director informed and involved in the process.

Where tribal agreement and dispute resolution are called for in this document in making EPA decisions, every reasonable effort will be made to obtain tribal agreement. Region 8 will endeavor to accommodate the tribe to the extent the law allows. In cases of continuing disagreement, the responsible ARA may, to the extent permitted by law and upon tribal request, refer the issue to the Regional Administrator, who--following consultation with the tribal chair, the Director of the American Indian Environmental Office (AIEO) and the Headquarters program office, as appropriate--will make a final decision.

Existing Memoranda of Agreement between Headquarters program offices and the Region will be augmented by this policy. The Regional Administrator will raise substantive issues to the appropriate Assistant Administrators consistent with these MOAs.

## **V. TRIBAL CAPACITY BUILDING**

### **A. INTRODUCTION**

Region 8 views tribal governments as the appropriate party for making decisions and carrying out program responsibilities affecting the health and welfare of the reservation population and environment where they can demonstrate the capability and authority to do so. In order to achieve the Agency objective of protecting the environment and human health in Indian Country, in a manner consistent with support of tribal self-government, EPA will assist tribes in developing the technical, fiscal, and administrative infrastructure necessary to implement environmental protection programs.

EPA is cognizant of the differences between tribes and states, and among tribes. In assisting tribes in building environmental capacity, EPA will be sensitive to the unique qualities of each tribe, including varying customs, beliefs, environmental protection experience and technical, fiscal, and administrative infrastructure.

### **B. BACKGROUND**

The 1984 EPA Indian Policy outlines nine principles for ensuring that the Agency carries out its responsibilities on Indian reservations. The third principle asserts that the "Agency will take affirmative steps to encourage and assist tribes in assuming

regulatory and program management responsibilities for reservation lands." This principle guides Region 8 in its development of a tribal capacity-building policy which describes objectives that will assist tribal governments in developing programs and in preparing to assume regulatory and program management responsibilities in Indian Country.

### **C. POLICY STATEMENT**

Region 8 will provide outreach, education, training, and technical, financial and legal assistance to develop, implement, and maintain comprehensive tribal environmental programs.

**Objective 1:** Region 8 will work directly with each Indian tribe to provide guidance and develop a Tribal/EPA agreement for building tribal capacity, to include identification of resources, milestones for progress, and timetables.

**Objective 2:** Region 8 will develop an integrated grants process to fund tribal environmental programs. In each planning cycle, EPA will, where appropriate, make every effort to reprogram Regional funds, and request appropriate funding levels from Headquarters programs as necessary to ensure reasonable progress toward full tribal program administration, consistent with the Tribal/EPA agreement developed in Objective 1. The goal of this integrated approach is to simplify the grant application and award process and to encourage each tribe to implement a core environmental management program tailored to that tribe's specific needs. It is Region 8's policy to make reasonable progress toward the necessary funding for every tribe to have the ability to assess problems, rank risks, develop adequate infrastructure, and develop a core program. We will use all available grant authorities to implement this integrated approach, including multi-media (General Assistance Program) grants and single media grants to Indian tribes or tribal consortia.

**Objective 3:** Region 8 will provide appropriate financial and programmatic oversight for each of these grants based on the needs of the Indian tribe receiving funding consistent with statutory and regulatory requirements. As tribes demonstrate continuous improvement in grants management and program development, oversight will be adjusted accordingly. This oversight will include providing necessary program specific guidance.

**Objective 4:** Region 8, will initiate activities to provide training and technical assistance to tribal governments. Our policy is to provide training to meet the tribes' needs to build technical, fiscal and administrative capacity, as identified by the tribes in consultation with EPA technical staff. This assistance will be coordinated through the Program Office to provide process guidance to

environmental program personnel developing technical assistance or training curricula specific to tribal programs.

**Objective 5:** Region 8 is committed to building tribal environmental capacity by working with tribes in the field. We will, in developing Tribal/EPA agreements, determine the appropriate number and scope of visits to each reservation.

**Objective 6:** Region 8 will make personnel available through short-term details, Intergovernmental Personnel Act (IPA), or similar assignments, to assist tribes in developing environmental protection programs. Region 8 will also encourage tribal representatives to visit both the Denver and Helena offices in the same capacity. This may include such assignments as short-term training visits, internship assignments, and IPAs.

#### **D. IMPLEMENTATION**

Each of the preceding objectives has been identified as a means to assist tribal governments in building environmental program capacity. Region 8 will incorporate these objectives into its Annual Strategic, Operating and Budget Plans and the Tribal/EPA agreements to be negotiated with each tribe.

### **VI. ENVIRONMENTAL PROTECTION IN INDIAN COUNTRY [\(3\)](#)**

#### **Program Implementation and Jurisdiction**

##### **A. JURISDICTION GENERALLY**

###### **1. Background**

The 1984 EPA Indian Policy states clearly that EPA recognizes tribal governments as the ". . . **primary parties for setting standards, making environmental policy decisions and managing programs for reservations consistent with Agency standards and regulations....The Agency will assist interested tribal governments in developing programs and in preparing to assume regulatory and program management responsibilities for reservation lands....Until tribal governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations."**

In accordance with the Agency's national policy, Region 8 supports tribal government assumption and management of environmental programs for Indian Country, to the maximum extent permitted by law. Until such programs are in place, Region 8 retains responsibility for direct implementation of environmental programs for Indian Country in the Region.

Most of the programs for which Region 8 is responsible are regulatory programs requiring enforcement of environmental standards and rules. Accordingly, jurisdiction is an important factor in policies and decisions relating to the assumption and management of regulatory programs in Indian Country.

Jurisdiction in Indian Country is a matter of federal law, based upon the U.S. Constitution, treaties, statutes and decisions of the federal courts.

Region 8 generally does not give "advisory" opinions on state and tribal jurisdiction. To date, Region 8 has given opinions on state and tribal jurisdiction only when faced with a federal decision, such as a "Treatment in the same manner as a State" application or request for program approval, that requires a prior determination of jurisdiction. In such cases, Region 8 has based its decision upon its understanding of the relevant statutes and principles of Federal Indian Law. The Agency has, in appropriate cases, consulted with legal experts in the Department of the Interior and the Department of Justice, and the Agency has had the benefit of the views of states, tribes and other interested parties as part of a public record.

## **2. Principles**

- a.** The federal government has broad jurisdiction over pollution sources throughout the United States, including Indian Country.
- b.** EPA presumes that, in general, tribes are likely to possess the authority to regulate activities which are regulated by EPA statutes and which affect resources on the reservation.
- c.** States applying to administer federal environmental programs within Indian reservations must adequately demonstrate their jurisdiction to do so. Through a transition process initiated by this Policy, Region 8 will begin to issue federal permits, under the priorities set forth in this Policy.
- d.** Region 8 encourages cooperative agreements between tribes and states for administering environmental programs in Indian Country, where this serves the mutual self-interest of the parties and the environment.

## **B. PROGRAM IMPLEMENTATION ISSUES**

### **1. Tribal Implementation of Programs**

- a.** Region 8 will authorize tribal governments to manage environmental programs in Indian Country, if permitted to do so by law and if the tribe applies and is qualified.

- b.** Tribal governments are encouraged, but not required, to assume program responsibilities.
- c.** Tribal applications for program authorization will be approved if the applicant meets the criteria for program approval under the relevant EPA statutes and regulations. Although Region 8 must be assured that the applicant has met the minimum criteria for program effectiveness set forth in regulations, the Region recognizes the need for flexibility to respond to the special circumstances and legal status of Indian Tribes.
- d.** As stated in the 1984 Indian Policy, where a tribe is unwilling or unable to assume full responsibility under a program, "the Agency will encourage the tribe to participate in policy-making and to assume appropriate lesser or partial roles in the management of...[federal, direct implementation] reservation programs."
- e.** Region 8 retains responsibility for direct federal implementation of a program in Indian Country in the absence of an approved non-federal program. See paragraph B.2.a, below.
- f.** Where Region 8 has approved a tribal program or entered into a cooperative tribal/EPA agreement for the management and/or enforcement of a federal program, Region 8 will assist and support the tribe in carrying out its responsibilities under the program or agreement (including, if applicable, the exercise of tribal jurisdiction over non-member pollution sources located on non-member owned fee lands in Indian Country). EPA will maintain criminal enforcement authority for cases involving Indian lands.
- g.** Region 8 will look to the Bureau of Indian Affairs (BIA) and tribes for guidance concerning the boundaries of reservations and other parts of Indian Country. Relevant federal agency maps (e.g., BIA, BLM, USGS) although not legally definitive, are useful for general planning purposes. Questions as to the exact location of specific sites may need to be carefully researched.

## **2. Direct Federal Implementation of Programs**

- a.** Region 8 is responsible for direct implementation of environmental programs for Indian Country in the Region until tribal governments are formally authorized to implement programs, consistent with (1) the criteria set forth in EPA statutes and regulations, (2) the principle, reflected in the 1984 EPA Indian Policy, that tribal governments are the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace, and (3) the objective, reflected in the 1991 EPA/State/Tribal Concept Paper, of providing for coherent and consistent environmental regulation on reservations and

preventing checkerboarding. To the extent permitted, Region 8 will provide grant or contract support to tribes to manage all or part of the Federal program. In carrying out programs, Region 8 will be guided by Tribal/EPA agreements.

**b.** Region 8 will establish priorities for its direct federal implementation activities by addressing as its highest priority the most serious threats to public health and the environment in Indian Country that are not otherwise being adequately addressed substantively. This priority implements the mandate of the EPA and the principle that 'Region 8's primary focus will be to protect human health and the environment within Indian reservations.'

**c. Standards:** Region 8 will work with tribal governments in the development and adoption of environmental standards (e.g., water quality standards) for Indian Country under their control. All standards must meet applicable federal requirements. If agreement on standards cannot be reached with the tribe, the responsible ARA will invoke the dispute resolution process described in IV.E, page 5.

**d. Program Management (other than enforcement).** Region 8 is responsible for program management in Indian Country. Region 8 will work with the tribal government, through the Tribal/EPA agreement process, to reach agreement on program management. If agreement on program management cannot be reached with the tribe, the responsible ARA will invoke the dispute resolution process described in IV.E, page 5.

Region 8 may provide grant or contract support (as appropriate and to the extent permitted by applicable law) to a tribe to manage all or part of the federal program. Region 8 may provide grant or contract support to a state to manage all or part of a federal program if the tribe and state have reached a freely negotiated/mutually agreeable, written arrangement for the management (other than enforcement actions) of a federal program in Indian Country, to include funding support to the state.

**e. Enforcement Actions.** Region 8 has primary enforcement authority and responsibility until primacy is formally granted to a tribal government that has demonstrated adequate jurisdiction over Indian Country.

Region 8 will strive to ensure compliance with environmental statutes and regulations in Indian Country as set forth in the 1984 Indian Policy which states:

In those cases where facilities owned or managed by tribal governments are not in compliance with federal environmental statutes, EPA will work cooperatively with tribal leadership to develop means to achieve compliance, providing training, technical support and consultation as necessary to enable tribal facilities to comply.

Because of the distinct status of Indian tribes and the complex legal issues involved, direct EPA action through the judicial or administrative process will be considered where the Agency determines, in its judgment, that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion.

In those cases where facilities in Indian Country are clearly owned or managed by private parties and there is no substantial tribal interest or control involved, the Agency will endeavor to act in cooperation with the affected tribal government, but will otherwise respond to noncompliance by private parties in Indian Country as the Agency would to noncompliance by the private sector elsewhere in the country. Where the tribe has a substantial proprietary interest in, or control over, the privately owned or managed facility, Region 8 will respond as described in the paragraph above.

Region 8 will work with the tribal government, in the Tribal/EPA Agreement process, to reach agreement on federal enforcement. If agreement on enforcement issues cannot be reached with the tribe, Region 8 will follow applicable EPA enforcement guidance, and where appropriate, the responsible ARA may invoke the dispute resolution process described in IV.E, page 5.

Region 8 may, where appropriate, enter into three party Region 8/tribal/state cooperative enforcement agreements. See Part VII Cooperative Agreements. Region 8 will not provide funding support for enforcement activity in Indian Country without a cooperative enforcement agreement. Where any entity other than the tribe takes enforcement action in Indian Country without a defined basis for asserting jurisdiction, EPA will assert federal jurisdiction.

**f. Permits.** Region 8 is responsible for issuing permits in Indian Country until a tribal permitting program expressly applying to Indian Country is formally authorized. Region 8 will carry out this process in a prioritized manner, beginning with (1) facilities that must be but are not now permitted, emphasizing those that pose the greatest threat to public health or the environment; (2) facilities that are now permitted by a state where the standards being enforced by the state are significantly less protective of public health or the environment than tribal or EPA standards applicable to such facilities, or are otherwise substantively inadequate; and (3) instances where the tribal government raises important considerations. Over time and after assessment by Region 8 of the initial implementation, Region may add other criteria for prioritizing permit issuance. Region 8 will work with tribal governments and in consultation with affected states and permittees to compile and, as appropriate, revise a master list, by program, with a schedule for proposed

issuance. EPA will ensure regular compliance inspections and appropriate enforcement of such permits.

**g. Timeliness.** The pace of federal program implementation will be resolved in EPA/Tribal Agreements.

## **VII. TRIBAL/STATE/EPA COOPERATIVE AGREEMENTS**

### **A. INTRODUCTION**

Region 8 encourages tribal/state/EPA cooperative agreements as provided in the 1984 Indian Policy. The EPA American Indian Environmental Office issued policy guidance dated May 22, 1995 on tribal/state cooperative agreements. The policy guidance includes the following guidelines:

- 1.** First and foremost EPA should be building tribal capacity and comprehensive tribal environmental programs so that tribes can truly negotiate with states on an equal level to mutually determine a course of action to adequately protect common resources.
- 2.** Agreements should be recognized by the tribe as a reasonable option to address their environmental concerns and the tribe should initiate the process when the agreement is being developed to address tribal need.
- 3.** EPA should provide financial and technical support to the tribes during the development and implementation of the agreements to help ensure that the tribes are truly in a position to freely negotiate and fully address their environmental concerns.
- 4.** Agreements do not replace formal promulgation of a federal program or a delegation/authorization of a tribal program. Agreements are simply one tool, among many, for program implementation. The programs to be carried out under such agreements must still meet federal minimums/standards as set forth in the Code of Federal Regulations.
- 5.** Agreements do not abrogate the Agency's statutory and trust responsibilities for protecting tribal health and environments in a manner which does not endanger or compromise fundamental governmental rights of the tribe.
- 6.** Agreements do not, independent of explicit Congressional intent or judicial finding, confer regulatory jurisdiction.

**B.** (e.g., 40 CFR Part 123).

C. (4)