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OFFICE OF
LAND AND EMERGENCY
MANAGEMENT

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OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

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MEMORANDUM

SUBJECT: Consideration of Tribal Treaty Rights and Traditional Ecological Knowledge in the Superfund Remedial Program

FROM: James E. Woolford, Director
Office of Superfund Remediation and Technology Innovation

TO: Superfund National Policy Managers

Purpose

The purpose of this memorandum is to provide recommendations to the Superfund Remedial Program¹ regarding the role of tribal treaty rights and traditional ecological knowledge (TEK).² This memorandum follows the February 2016 *EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights* ("Treaty Rights Guidance") and the January 2017 Office of Land and Emergency Management (OLEM) *Considering Traditional Ecological Knowledge during the Cleanup Process* ("OLEM TEK memorandum").

Background

The U.S. Environmental Protection Agency (EPA) has a strong history of working collaboratively with federally recognized tribes in a government-to-government relationship. In addition, pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) section 126(a), tribes "shall be afforded substantially the same treatment as a state" with regard to a number of specific provisions in the statute, including those dealing with consultation on remedial actions, and roles and responsibilities under the National Oil and Hazardous Substances Pollution Contingency Plan (NCP).

In 2011, EPA issued its policy on *Consultation and Coordination with Indian Tribes* ("Consultation Policy"), which established national guidelines for EPA's consultation with federally recognized Indian

¹ For purposes of this document, hereafter "Superfund Remedial Program" refers to the Superfund remedial and non-time critical removal processes.

² This document provides guidance to regional staff regarding how the Agency intends to interpret and implement the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), which provides the blueprint for Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) implementation. However, this document neither substitutes for those provisions or regulations, nor is it a regulation itself. Thus it cannot impose legally binding requirements on EPA, states, or the regulated community and may not apply to a particular situation based upon the circumstances. Any decisions regarding a particular situation will be made based on the statute and the regulations, and EPA decision-makers retain the discretion to adopt approaches on a case-by-case basis that differ from the guidance where appropriate.



tribes across all Agency programs. It reflects the principles for interacting with tribes expressed in the 1984 *EPA Policy for the Administration of Environmental Programs on Indian Reservations* and provides for EPA to consult with tribes on a government-to-government basis and consider their interests “when EPA actions and decisions may affect tribes and tribal interests.” The 2011 Consultation Policy also fulfilled the Agency’s responsibilities under Executive Order 13175, which requires federal agencies to have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.

In July 2014, the Agency issued *EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples* for all Agency programs. Principle 6 of this policy states:

The EPA encourages, as appropriate and to the extent practicable and permitted by law, the integration of Traditional Ecological Knowledge into the Agency’s environmental science, policy, and decision-making processes, to understand and address environmental justice concerns and facilitate program implementation.

As a continuation of its commitment to engage meaningfully with federally recognized tribal governments, EPA built upon its 2011 Consultation Policy by issuing the Treaty Rights Guidance in February 2016. The Treaty Rights Guidance follows the statement issued by Administrator McCarthy in December 2014 that recognizes EPA’s commitment to its partnership with federally recognized Indian tribes and to tribal self-government in implementing environmental protection programs.³ The Administrator’s December 2014 memorandum states that under the U.S. Constitution, treaties have the same legal force as federal statutes.” The 2014 memorandum further states that

(w)hile treaties do not expand the EPA’s authority, the EPA must ensure its actions do not conflict with tribal treaty rights. In addition, EPA programs should be implemented to enhance protection of tribal treaty rights and treaty-covered resources when we have the discretion to do so.

The Treaty Rights Guidance outlines affirmative steps for EPA tribal consultations to help ensure EPA proposed actions and initiatives are consistent with treaties and treaty-protected resources “both inside and outside of the boundaries of reservations.”⁴ EPA intends for the Treaty Rights Guidance to provide assistance on consultation with respect to EPA decisions focused on specific geographic areas where tribal treaty rights relating to natural resources may exist in, or treaty-protected resources may rely upon, those areas. In these instances, during consultation with tribes, EPA will seek information and recommendations on tribal treaty rights in accordance with the Treaty Rights Guidance:

EPA will subsequently consider all relevant information obtained to help ensure that EPA’s actions do not conflict with treaty rights, and to help ensure that EPA is fully informed when it seeks to implement its programs and to further protect treaty rights and resources when it has discretion to do so.

³ See Memorandum from Administrator McCarthy to EPA employees, entitled “Commemorating the 30th Anniversary of the EPA’s Indian Policy” (December 1, 2014), available at <https://www.epa.gov/sites/production/files/2015-05/documents/indianpolicytribeysmemo2014.pdf>.

⁴ See *EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights* (February 2016) available at: https://www.epa.gov/sites/production/files/2016-02/documents/tribal_treaty_rights_guidance_for_discussing_tribal_treaty_rights.pdf.

EPA leadership has also heard many tribal leaders' request to enhance the use of TEK in the Agency's day-to-day actions of protecting human health and the environment in Indian country. In response to these comments, and consistent with the guidances and policies discussed above, OLEM issued the OLEM TEK memorandum in January 2017 to provide further guidance on use of TEK during the cleanup process. While there is no statutory or regulatory definition for TEK, for purposes of the OLEM TEK memorandum and this guidance, the working definition provided by the U.S. Fish and Wildlife Service⁵ is appropriate:

Traditional Ecological Knowledge, also called by other names including Indigenous Knowledge or Native Science, (hereafter, TEK) refers to the evolving knowledge acquired by indigenous and local peoples over hundreds or thousands of years through direct contact with the environment. This knowledge is specific to a location and includes the relationships between plants, animals, natural phenomena, landscapes and timing of events that are used for lifeways, including but not limited to hunting, fishing, trapping, agriculture, and forestry. TEK is an accumulating body of knowledge, practice, and belief, evolving by adaptive processes and handed down through generations by cultural transmission, about the relationship of living beings (human and non-human) with one another and with the environment. It encompasses the world view of indigenous people which includes ecology, spirituality, human and animal relationships, and more.

While tribal treaties may not address TEK, it may be appropriate for consideration at Superfund sites. However, it should be noted that TEK will not be the sole basis for decisions and should be considered in the context of other factors (e.g., the NCP's nine criteria for evaluating alternatives). This memorandum provides recommendations for considering TEK in the Superfund Remedial Program.

Implementation

Tribal Treaty Rights

EPA intends for this memorandum to provide recommendations for the regional Superfund Remedial Program to consider when evaluating tribal treaty rights and treaty-protected resources in program implementation. During the site assessment and National Priorities List (NPL) rulemaking process (ideally, early in that process), regions generally should evaluate whether any area under consideration may be subject to tribal treaty rights or affect treaty-protected resources. It is important to note that some "tribes may possess treaty rights both inside and outside the boundaries of reservations."³ In some cases, other programs within a region (e.g., water programs) or the Office of Regional Counsel may have already evaluated whether the area in question is subject to treaty rights. Therefore, regional Superfund Remedial Programs are strongly encouraged to reach out to other organizations within EPA to help ensure a consistent approach.

The Agency's Treaty Rights Guidance identifies three questions to raise "during consultations when proposing an action that may affect tribal treaty rights within a specific geographic area." The three questions are:

1. Do treaties exist within a specific geographic area?

⁵ Rinkevich, S., Greenwood, K., and Leonetti, C. U.S. Fish and Wildlife Service, Native American Program. (2011). *Traditional ecological knowledge for application by service scientists fact sheet*.

2. What treaty rights exist in, or what treaty-protected resources rely upon, the specific geographic area?
3. How are treaty rights potentially affected by the proposed action?

Depending on site-specific circumstances, these discussions may touch on issues of unique tribal sensitivity, such as cultural practices, environmental resource use and cultural resource locations. Therefore, EPA staff and managers should be mindful of these sensitivities when undertaking these discussions.

The applicability of treaty rights to EPA actions is a complex inquiry that depends on the context and circumstances of each case. Moreover, when an EPA action may affect treaty rights, EPA's next step typically involves conducting legal and policy analyses to determine how to protect the rights. As the Treaty Rights Guidance notes, "[t]hese analyses often are complex" and may involve coordination with other federal agencies. Therefore, Superfund Remedial Program staff and managers should consider tribal interests and tribal treaty right implications as early as possible. Treaty rights analyses also depend upon the context and circumstances relative to a particular Superfund site and/or decision. Regions should recognize that a site-specific treaty right analysis may involve multiple tribes and can be potentially precedent-setting. In addition, such an analysis may require coordination with other federal agencies with relevant expertise, such as the U.S. Department of the Interior and the U.S. Department of Justice, as well as, natural resource trustees and partners working on natural resource damages. Similarly, the Superfund Remedial Program should recognize that there are other EPA Headquarters programs, including, but not limited to, the Office of Superfund Remediation and Technology Innovation (OSRTI), the Office of International and Tribal Affairs, and/or the Office of General Counsel, as well as the relevant regional tribal programs and Office of Regional Counsel that can provide valuable resources as necessary. In certain cases (e.g., overlapping treaty rights or tribal lands that span multiple EPA regions), it may be appropriate for regional Superfund Remedial Program offices to consult with other tribes and regions.

Section 300.430(d)(2) of the NCP indicates that, as part of the lead agency's efforts to characterize a site or to develop potential remedial options, it should assess a number of factors, including (v) "actual and potential exposure pathways through environmental media;" and (vii) "[o]ther factors, such as sensitive populations, that pertain to the characterization of the site or support the analysis of potential remedial action alternatives." Depending on the site-specific circumstances, as part of that analysis, regional Superfund Remedial Program offices should consider the human health and environmental risks to tribal members, treaty-protected resources and lifeways. In instances where the Agency determines that a Superfund remedial decision potentially affects tribal treaty rights or treaty-protected resources, EPA should identify the nature and extent of potential risks to tribal members exercising those rights. For example, as part of the baseline risk assessment, the tribal lifestyle may result in different risks, such as higher fish consumption rates due to subsistence fishing. Similarly, a portion of a site may be a sacred/ceremonial area or an area of cultural sensitivity that warrants consideration in remedy selection/implementation.

Traditional Ecological Knowledge

The 2017 OLEM TEK memorandum "provides direction to improve the decision-making process as it relates to site assessment, characterization, and cleanup activities." The memorandum offers the following suggested questions as a "starting point for EPA staff to ask when a tribe chooses to discuss TEK with the Agency:

- 1) What TEK, if any, does a tribe want to share?

- 2) Should we be aware of any tribal laws or policies established regarding the use of TEK?
- 3) How will the tribal government or their duly designated representative(s) transmit the information?
- 4) Have you informed the tribes that there are limitations on the Agency's ability to protect TEK from public disclosure which is a potential risk of sharing TEK with the Agency?
- 5) What implications can TEK have on the decision?

Consistent with the OLEM TEK memorandum, it is the Superfund Remedial Program's "intention to acknowledge and consider TEK during our cleanup process when the information is freely provided" by tribe(s). If the tribe decides not to share TEK, this decision may affect a region's ability to gather, understand and use this information to help inform decisions. In the 2014 *EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples*, Principle 7 states:

The EPA considers confidentiality concerns regarding information on sacred sites, cultural resources, and other traditional knowledge as permitted by law. The EPA acknowledges that unique situations and relationships may exist in regard to sacred sites and cultural resources information for federally recognized tribes and indigenous peoples.

TEK may be related to or independent of tribal treaty rights. While some information may be obtained through literature reviews or through conversations with other federal agencies, it is recommended that Superfund Remedial Program staff confer directly with tribal representatives to learn whether a tribe wishes to share TEK with EPA. During the course of these conversations, it is important for Superfund Remedial Program personnel to understand the limits of EPA's ability to protect information from public disclosure especially in light of the Freedom of Information Act, and to refrain from making any assurances that EPA can keep confidential TEK that is provided by a tribe. In some instances, a tribe may want to protect information regarding tribal lifeways, subsistence practices and other sensitive resources from public disclosure due to its significance to their way of life and concerns about losing ownership of the information. Whether a particular tribe wishes to share TEK depends on a number of factors related to the specific situation but generally EPA personnel should be prepared for cases where direct knowledge is limited to certain individual tribal members, elders or representatives, who may not want to share such knowledge. EPA must respect a tribe's decision to withhold or only partially share specific information; however, if a tribe declines to provide information for whatever reason, the Superfund Remedial Program will not be able to consider the information in its decision-making process.

There are numerous aspects of the Superfund Remedial Program where consideration of TEK may be appropriate. For example, TEK may be relevant to aspects of site listing, development of the remedial investigation/feasibility study (RI/FS) and site decision-making. As part of the site listing process, the Superfund Remedial Program seeks to obtain information from tribes to assess releases of hazardous substances to support NPL decision-making activities. In particular, the Hazard Ranking System (HRS) Guidance Amendments (OSWER 9200.0-66) focus information gathering on Native American: resource usage, workers, and seasonal populations, as well as attractiveness and accessibility of recreational use areas. However, that guidance is limited to providing direction to EPA personnel regarding ways to consider tribal traditional lifeways when scoring sites under the HRS.

During the RI/FS and cleanup decision processes, TEK may be relevant to the formulation of sampling and analysis plans, conceptual site models, human and ecological risk assessments, remedial action objectives, remedial alternatives, and other analyses. For example, higher fish consumption rates due to

subsistence practices could inform the human health risk assessment and how the Agency assesses remedy protectiveness. Similarly, TEK may help inform the alternatives analysis when a site area is sacred (e.g., if a portion of the site is a place where ceremonies take place or an area where sacred plants grow, this cultural significance may affect the ability to implement various alternative cleanup approaches). In developing remedial action alternatives and carrying out the NCP's nine criteria analysis (see 40 CFR 300.430(3)(9)(iii)) during the feasibility study and formulating the proposed plan, regions may consider TEK. For example, TEK may help inform the alternative analysis when a site is on land that is sacred to a tribe or important to tribal lifeways.

Closing

There are numerous points in the Superfund Remedial Program where tribal treaty rights and TEK may be appropriate for consideration. Regions should exercise their best professional judgment early and throughout the Superfund cleanup process in concert with EPA's consultation policy and the federal government's general trust responsibility to federally recognized tribes. EPA is committed to ensure that its actions do not conflict with tribal treaty rights and to "further protect tribal treaty rights and resources when it has the discretion to do so."³ Similarly, as discussed in the OLEM TEK memorandum, "the Agency makes decisions based on multiple factors and considerations" and it should be recognized that "TEK will not be the sole determining factor" in EPA decision-making. To the extent that tribal treaty rights and TEK help inform Superfund Remedial Program implementation, their roles should be explained and documented, as appropriate, in site decision documents and administrative records. Regions are strongly encouraged to share their tribal treaty right- and TEK-informed decisions with OSRTI's Assessment and Remediation Division so that OSRTI can track such decisions nationally and share information across the regional Superfund Remedial Program offices. As the Superfund Remedial Program gains experience on tribal treaty rights and TEK, and builds upon growing knowledge, this approach may be modified to reflect the program's experiences.

If a region has a question regarding this guidance, please contact the Director of the Assessment and Remediation Division in OSRTI, Dana Stalcup (703-603-8702 or stalcup.dana@epa.gov). Alternatively, staff may contact Christine Poore (703-603-9022 or poore.christine@epa.gov) or Anne Dailey (703-347-0373 or dailey.anne@epa.gov).

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