

Enforcing Federal Environmental Laws in Indian Country

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I. Introduction

The mission of the United States Environmental Protection Agency (EPA) in Indian country, as elsewhere, is to protect human health and the environment. In addition, EPA shares the United States' trust responsibility to federally-recognized Indian tribes, and has policies of supporting tribal self-government and of working with Tribes on a government-to-government basis. EPA uses a wide range of legal authorities and informal compliance assistance to achieve compliance with federal environmental laws in Indian country. Due to the complexities in dealing with multiple sovereigns and related jurisdictional issues, limited tribal and federal resources, and vast geographic areas, EPA further employs extensive consultation, collaboration, and creativity to carry out its objectives. The purpose of this paper is to provide a basic introduction to EPA Region 8's enforcement presence, policy and process in resolving environmental noncompliance in Indian country.¹

II. Environmental Regulation in Indian Country

A. EPA Authority

1. General

Nationwide, EPA is responsible for administering and enforcing environmental statutes including the hazardous waste, solid waste, and underground storage tank requirements in the Solid Waste Disposal Act (SWDA) (as amended to include the Resource Conservation and Recovery Act (RCRA) of 1976 and the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. § 6901 et seq.); the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 et seq.; the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 et seq.; the Clean Water Act, 33 U.S.C. § 1251 et

¹ The authors are attorneys with the Region 8 office of the U.S. Environmental Protection Agency. The views in this paper are those of the authors and do not necessarily represent those of EPA Region 8, any office within EPA Region 8, the U.S. government. Any errors or omissions in this outline are the authors'.

seq.; the Oil Pollution Act (OPA), 33 U.S.C. § 2701; the Safe Drinking Water Act (SDWA) (including the Public Water Supply (PWS) and Underground Injection Control (UIC) provisions), 42 U.S.C. § 300f; the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*; the Clean Air Act (CAA), 42 U.S.C. § 7401 *et seq.*; the Emergency Planning and Community Right-to-Know Act, (EPCRTKA), 42 U.S.C. § 11001 *et seq.*; and the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*²

2. Indian Country

EPA's authority to protect human health and the environment extends to Indian country. As defined by 18 U.S.C. § 1151, "Indian country" means:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

EPA directly implements virtually all federal environmental laws in Indian Country, except where otherwise delegated to a tribe adequately demonstrating jurisdiction. (As a rule EPA will not authorize a State to implement a federal program in Indian country except in the rare case that Congress has expressly granted the State jurisdiction sufficient to support delegation.) Direct implementation means that EPA undertakes all federal compliance, monitoring, and enforcement. EPA direct implementation on Indian reservations is fundamental to EPA's fulfillment of its trust responsibilities and also to ensuring that minority and low income populations receive the equal protection of the laws.

States generally lack authority to regulate in Indian country. Nonetheless, at times some states have implemented parts of their environmental laws in Indian country. Any such implementation of state programs does not negate EPA's regulatory authority or the regulated community's obligation to comply with federal environmental statutes and regulations.

² Links to many Federal environmental laws and regulations are at <http://www.epa.gov/epahome/rules.html>. Generally, the EPA documents referenced in this paper can be obtained by searching within <http://www.epa.gov/>.

Regulations enacted by other federal agencies may overlap but do not negate or supersede EPA regulations. EPA statutes and regulations must be complied with regardless of compliance with any other tribal, state, local or federal regulation.

B. Tribal Authority

As sovereign entities and where statutorily permitted, tribes may seek full delegation to implement federal environmental programs on tribal lands or partial delegation in partnership with EPA. EPA will authorize a tribal government to implement a particular environmental program consistent with the criteria set forth in EPA statutes and regulations, and the view that tribal governments are the appropriate non-federal parties for making decisions and carrying out the program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. EPA reverts to an oversight role when a tribal government seeks program approval or authorization. Where a tribe cannot demonstrate jurisdiction over one or more reservation sources, EPA will retain enforcement primacy for those sources.

1. Inherent Authority

An estimated 326 tribal governments currently exercise some form of local environmental control using their inherent authority as sovereign governments. Tribes may create their own environmental programs by adopting and implementing tribal environmental codes and ordinances in lieu of seeking federal environmental program delegation. Use of this authority or general treaty authority may result in enforcement against tribal members in tribal court, and enforcement against non-tribal members under limited circumstances. A tribe's use of inherent authority does not legally affect EPA's direct implementation authority.

2. Treatment in a Similar Manner as a State

A tribe can further its role in protecting the environment and human health in Indian country under a framework referred to as Treatment in a Similar Manner as a State (TAS). Several Federal environmental statutes, including the CWA, CAA, and SDWA, explicitly permit tribes to seek TAS delegation. In addition, CERCLA requires that the governing body of a federally recognized tribe is to receive substantially the same treatment as a state for several purposes, and there are components of FIFRA and TSCA that EPA has interpreted as providing for tribal programs. As for RCRA, based on the D.C. Circuit's ruling in *Backcountry Against Dumps v. EPA*, 100 F.3d 147 (D.C. Cir. 1996), EPA may not authorize tribes to be treated similarly to states for the purpose of administering RCRA Subtitle D in Indian country.¹

In Region 8, EPA has delegated authority to promulgate water quality standards (WQS) under CWA § 303 to the Confederated Salish & Kootenai Tribes, the Northern

¹ For more TAS information see <http://www.epa.gov/tribalportal/laws/tas.htm> ; also, there is an overview of the subject in David F. Coursen, EPA's New Tribal Strategy, 38 *Envtl. L. Rep. News & Analysis* 10643, 10647 (2008).

Cheyenne, the Ute Mountain Ute, and the Assiniboine and Sioux Tribes of the Fort Peck Reservation. This delegation only authorizes the tribes to set standards, not to enforce them. In addition, in 2008 EPA authorized the Fort Peck Tribes to implement the Underground Injection Control (Class II) program. Beyond TAS authorization to implement regulatory programs, EPA has issued grants to numerous tribes under programs including CAA section 105 and CWA sections 106 and 319, after finding that the tribes satisfied TAS eligibility criteria. Nationwide, some 200 tribal governments have received TAS for one or more federal programs, of which 45 tribes are exercising “regulatory” authority.

3. Direct Implementation Tribal Cooperative Agreement

As an alternative to seeking program delegation, a tribe can assist EPA in directly implementing federal environmental programs through a Direct Implementation Tribal Cooperative Agreement (DITCA). DITCAs enable tribes to implement environmental programs and develop capacity consistent with EPA’s support of tribal self-government, but avoid possible litigation over TAS approvals. If awarded a DITCA, a federally recognized Indian tribe or Intertribal consortium authorized by tribal members may be eligible for funding from EPA to: promulgate and review water quality standards, total maximum daily loads, section 401 certification, and National Pollutant Discharge Elimination Systems permits under the CWA; develop federal implementation plans, potential source determinations, and new source review under the CAA, along with implementation plan development and the Title V permit program; implement the PWS and UIC programs under the SDWA; implement the UST (Subtitle I) and Subtitle C programs under RCRA; implement certification and training programs for pesticide applicators under FIFRA; and implement the lead-based paint program under TSCA. Due to resource and funding limitations, EPA must work closely with tribes to identify direct implementation activities where there is a joint tribal and EPA priority for program implementation. No funds are specifically appropriated for DITCAs, although they may be obligated from other EPA sources, primarily STAG monies appropriated for tribal program grants and EPR funds available for direct implementation activities.

III. EPA Enforcement in Indian Country

A. Typical Violations

EPA enforcement activities in Indian country typically involve violations of the CWA, OPA, CAA, RCRA, UST regulations, CAA, FIFRA, and the PWS and UIC provisions of the SDWA. Of the 27 tribal nations and 26 reservations represented within EPA Region 8, there are approximately 124 public water systems and 214 permitted wastewater facilities serving an estimated population of 110,000 people. As pertains to the CAA, there are approximately 45 major stationary sources and 530 minor stationary sources. In addition, a large percentage of tribal housing and community buildings have asbestos and chronic indoor air and mold issues. Of the estimated 2,460 USTs, a known 426 are leaking. Pesticides are applied on approximately 2.2 million acres. With regard to waste management, in addition to the multiple transfer stations serving predominately

tribal populations, there are a handful of municipal solid waste landfills operated within Indian country for the purpose of disposing of off-reservation solid waste. Presently, EPA Region 8 estimates there are more than 300 open dumps and hundreds of smaller illegal dumps requiring assessment and cleanup. Coalbed methane and significant oil and gas activity on most of the reservations in EPA Region 8 involves compliance, monitoring, and enforcement under the CWA, the CAA, OPA, and the UIC provisions of the SDWA. An abundance of privately owned facilities in Indian country involving hazardous waste and combined animal feeding operations raise unique and different environmental violations.

B. The Regulated Community

A diverse regulated community is subject to EPA's authority over activities in Indian country. Violators range from single operators to large corporations. Where statutorily permitted, EPA initiates enforcement actions against federal facilities, seeking penalties and ordering compliance. EPA also may initiate an enforcement action against a tribally owned or operated facility in accordance with EPA's tribal enforcement policies discussed below and as authorized by statute.⁴

C. Tribes

Under EPA's policies and as part of its government-to-government relationship with tribes, the Agency notifies and consults with tribal governments and tribal environmental programs regarding all proposed enforcement actions in Indian country. For details on EPA's process and protocols for these communications, see the discussion of EPA policies below at section IV.

D. Other Interested Parties

Federal agencies and bureaus with special responsibilities for tribal affairs including the Bureau of Indian Affairs, the Indian Health Service, the Bureau of Land Management, and the Bureau of Reclamation are regularly notified of EPA enforcement actions in Indian country. Other federal agencies with an interest in a particular matter, including Housing and Urban Development and the Army Corps of Engineers, are involved by EPA on a case-by-case basis. In an effort to consolidate available funding and maximize technical and other resources, EPA may enter into pre-enforcement memorandums of agreement or compliance assistance plans with tribal, state and other federal agencies to remedy environmental noncompliance in a collaborative manner. This creative approach to returning a facility to compliance is often successful in dealing with tribal utilities where ownership and operational responsibilities may be shared by a tribe and a federal agency. Informal compliance assistance plans that pool resources from multiple federal agencies also assists in resolving violations at tribally owned or

⁴ Some statutes arguably do not provide EPA with enforcement authority against tribes, but it is a myth that EPA cannot enforce in Indian country or against a tribally owned or operated facility.

operated facilities where compliance can be achieved only by making costly physical repairs or improvements.

In 2000, EPA and fifteen other participating federal agencies entered into an agreement to identify areas of mutual responsibility to protect human health and the environment in Indian country. As a result of this agreement, EPA and its federal and tribal partners have completed a variety of projects relating to dynamite removal, solid and hazardous waste cleanup, UST removal and remediation, and drinking water improvements.

E. Coordination with Tribes

EPA Region 8's commitment to assisting tribes develop their environmental programs is a priority. EPA Region 8 provides General Assistance Program grants to each of the 27 tribes in the Region. In addition, Region 8 provides 22 tribes with CWA 106 grants, 18 tribes with CAA grants to monitor air and develop initial emission inventories; 5 tribes with pesticide grants; 8 tribes with wetland grants; 18 tribes with brownfields grants; and two tribes with environmental database grants.

In addition to promoting the development of tribal environmental programs through financial assistance, EPA provides tribal environmental programs with regular training and technical assistance. EPA and tribes have focused recently on issuing federal EPA credentials to tribal inspectors to assist with maintaining a strong federal environmental presence in Indian country.² Once EPA determines that issuing federal credentials fills an EPA need and the tribal inspector applying for federal credentials satisfies the designated training requirements, EPA and the tribe will execute a written authorization agreement defining the scope of the inspections and the inspector's role. Typically, the role of the tribal inspector is to perform inspections on EPA's behalf, accompany EPA inspectors on inspections in Indian country, support EPA enforcement actions, and provide enforcement follow-up. The authority, conditions and limitations for issuing credentials to tribal and state inspectors derives from the same statutory authority allowing EPA to use contractors. Federal credentials have been issued by EPA Region 8 to tribal inspectors for the following tribes and programs:

UIC: Ft. Peck Tribes

FIFRA: Cheyenne River Sioux, Confederated Salish & Kootenai Tribes; Southern Ute; Oglala Sioux; Assiniboine and Sioux Tribes; Three Affiliated Tribes; Standing Rock Sioux

SPCC: Ute Mountain Ute

UST: Assiniboine and Sioux Tribes; Confederated Salish & Kootenai Tribes.

² The Guidance document for issuing federal credentials to state and tribal inspectors dated September 30, 2004, is available at: <http://www.EPA.gov/compliance/resources/monitoring/inspection/statetribal/credentials>.

In several instances – for example, the UST inspector of the Assiniboine and Sioux Tribes – tribes have organized to have a tribal inspector with federal credentials act as a circuit rider and inspect multiple reservations. The use of tribal inspectors with federal credentials has increased significantly EPA’s enforcement presence in Indian country.

IV. EPA’s Enforcement Policy in Indian Country

A. Policy

In Indian country EPA works to fulfill its mission of protecting human health and the environment while also supporting the principle of Indian self-government and working with tribes on a government-to-government basis. These and other general principles applicable to EPA’s work in Indian country were laid out in a national Indian policy adopted by the Agency in 1984³ and reaffirmed by every Administration since then (most recently on July 22, 2009, by Administrator Lisa Jackson). EPA’s objective in implementing the 1984 Indian Policy has been to develop environmental programs for Indian country that are as comprehensive and effective as the programs now in place elsewhere while emphasizing the central role of tribal governments in environmental protection. In 1996, EPA Region 8 adopted its own Indian country policy document, to describe the Regional approach to implementing the 1984 Indian policy.⁴

EPA has also developed enforcement-specific policies. On January 17, 2001, EPA issued a “Final Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy,”⁵ incorporating the 1984 Indian policy by reference and elaborating on the enforcement process for facilities owned or managed by Tribal governments. In 2000, Region 8 adopted the “Region 8 Guidance for Compliance Monitoring, Compliance Assistance and Enforcement Procedures in Indian Country” (Region 8 Enforcement Policy).⁶ The Region 8 Enforcement Policy describes the Region’s procedures for compliance assistance and enforcement activities in Indian country. This policy was created to describe the Regional procedures for implementing the national policies on compliance assistance and enforcement activities in Indian country.

B. Principles of the EPA Enforcement Policy

1. The federal government has broad jurisdiction over pollution sources throughout the United States, including Indian Country.
2. 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.

³ “EPA Policy for the Administration of Environmental Programs on Indian Reservations” (Nov. 8, 1984), available at <http://www.epa.gov/tribalportal/pdf/indian-policy-84.pdf> .

⁴ “EPA Region 8 Policy for Environmental Protection in Indian Country” (March 15, 1996), available at <http://www.epa.gov/region8/tribes/Policy/r8policy.html> .

⁵ Available at <http://www.epa.gov/compliance/resources/policies/state/84indianpolicy.pdf> ; see also “Questions and Answers on the Tribal Enforcement Process” (Apr. 17, 2007), available at <http://www.epa.gov/compliance/resources/policies/civil/rcra/q&a/tribalenfprocess-041707.pdf> .

⁶ Available at <http://www.epa.gov/region8/tribes/Policy/r8enf.html> .

3. States applying to administer federal environmental programs within Indian reservations must adequately demonstrate their jurisdiction to do so.
4. EPA 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.

C. Principles of the Region 8 Enforcement Policy

1. Region 8 will work with tribal governments on a government-to-government basis.
2. Region 8 will support the principle of tribal self-government.
3. Region 8's primary focus will be to protect human health and the implementation and administration of environmental programs.⁷
4. Region 8's primary focus will be to protect human health and the environment in Indian country.
5. Region 8 will seek tribal government agreement before making decisions on environmental matters affecting tribal governments and/or tribal natural resources.
6. Region 8 will assist tribal governments in building tribal capacity to manage reservation environmental programs.
7. Region 8 will encourage cooperation between tribal and state governments to address environmental issues.
8. Region 8 will work cooperatively with other federal agencies to protect reservation environments.
9. Region 8 will work with tribal governments to encourage the development of public participation processes as part of authorized tribal environmental programs.

V. EPA's Enforcement Process in Indian Country

A. Criminal

⁷ In support of self-determination and as a measure of capacity building, EPA is working with several tribes to develop EPA/tribal partnerships patterned after existing EPA/state partnerships.

EPA is authorized to conduct criminal investigations and enforcement pursuant to criminal provisions of laws or regulations which are enforced by EPA. EPA will pursue criminal enforcement in instances where the Agency has evidence of a knowing, willful violation of the law. All criminal enforcement is conducted judicially, but in such situations the Agency may still choose to bring a civil action administratively in a parallel proceeding. In the case of knowing and willful violations, determinations are made on a case-by-case basis whether to proceed with a criminal and/or civil enforcement action.

B. Civil

EPA civil enforcement actions may be administrative or judicial. The circumstances in which an administrative enforcement process may be used are statutorily prescribed. In penalty cases, the choice of forum generally depends on the maximum penalty amount sought. As a general rule, cases with a proposed penalty amount at or below \$177,500 (\$295,000 in the case of CAA violations), adjusted based on the 2008 Penalty Inflation Rule, are heard administratively whereas those proposing a higher penalty amount are filed judicially. Some statutes authorize EPA to exercise discretion as to whether administrative or civil judicial enforcement is chosen in a particular case or in particular kinds of cases. RCRA, for example, has no administrative ceiling. The need for injunctive relief, and whether it is available administratively, often is a consideration in determining whether to file a case administratively or judicially.

1. Administrative

The purpose of administrative proceedings typically is to compel compliance with an ongoing violation, and/or to collect penalties for past or continuing violations. Administrative actions are conducted in accordance with the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits” set forth in 40 C.F.R. Part 22. Although not controlling, the Federal Rules of Civil Procedure are often relied upon as guidance where 40 C.F.R. Part 22 is silent. Administrative Law Judges (ALJs) preside over administrative hearings. An ALJ’s authority, derived from the Administrative Procedures Act (APA), 5 U.S.C. § 551 et seq., is very broad. ALJs are employees of the Agency but they are not subject to Agency efficiency ratings, promotions, or demotions, and compensation is not based on Agency recommendations to ensure their neutrality and independence from the Agency. ALJs work from the Office of the Administrative Law Judge located in Washington, D.C.

Where specifically delegated, Regional Judicial Officers (RJOs) may perform a variety of adjudicatory functions, including presiding over non-APA proceedings such as civil penalty cases. In 40 C.F.R. Part 22 proceedings, the RJOs are authorized to rule on pre-answer motions and may issue final orders on consent and on default. RJOs are Agency employees. There is typically one RJO in each region.

Interlocutory appeals, appeals from initial decisions and/or reconsideration of final orders are heard by the Environmental Appeals Board (EAB). The EAB is a

four-member appeals body that works directly for the Office of the Administrator. The EAB members are appointed by the Administrator and function independently of all EPA components outside the immediate Office of the Administrator. When oral arguments are held they take place at EPA Headquarters in Washington, D.C., and are open to the public.

The current practice of the Office of the Administrative Law Judge is to invite parties to participate in Alternative Dispute Resolution (ADR) upon the filing of an administrative complaint and answer. The ADR process is conducted pursuant to the Dispute Resolution Act of 1990, 5 U.S.C. §§ 571-583, by an ALJ serving as a neutral. ADR is utilized only with the consent of both parties for a limited time period of sixty (60) days from the date of its assignment to an ALJ. If no settlement is reached within the 60 day time-period, the case is assigned to another ALJ to commence the litigation process.

2. Judicial

Proceedings are conducted in accordance with the Federal Rules of Civil Procedure and the Federal Rules of Evidence in federal district court. EPA refers all civil judicial actions to the Department of Justice. These cases are typically handled by the Environmental Enforcement Section of the Environment and Natural Resources Division, with participation by the U.S. Attorney's Office as appropriate.

C. Considerations

1. General

EPA determines its proposed penalty amounts based on the application of statutory factors and statute-specific penalty policies.⁸ At the outset of an enforcement action, EPA provides eligible respondents with a Small Business Information Sheet to notify small businesses of their rights and available compliance assistance for complying with federal and state environmental laws. EPA's penalties are calculated in consideration of the Equal Access to Justice Act (EAJA) and the Small Business Regulatory Enforcement Fairness Act (SBREFA). Applying EAJA to EPA's administrative cases, practitioners can find the "Implementation of the Equal Access to Justice Act in EPA Administrative Proceedings" at 40 C.F.R. Part 17. EPA enforcement actions also are subject to the Paperwork Reduction Act, 44 U.S.C. § 3512 *et seq.*

A violator's ability to pay a penalty is often a statutory factor considered when determining the appropriate penalty in a given proceeding. Even when not a statutory factor, as a matter of policy EPA will inquire at the onset of an action whether a violator believes it may not have the ability to pay, and invites the violator to support its claim by submitting a variety of pertinent financial information for EPA evaluation. In situations where the Agency determines that a violator has raised a legitimate ability-to-

⁸ Specific EPA statutory guidance and penalty policies are available on the internet at <http://es.epa.gov/oeca/> .

pay claim, the Agency will consider a variety of financial arrangements to ease the burden including a payment plan or performance of a supplemental environmental project (SEP). Although rare, EPA may reduce a proposed penalty amount based on a violator's ability to pay. An ability-to-pay claim may not negate a violator's obligation to return to compliance, regardless of the associated costs. Violators may elect to perform an approved SEP to offset a portion of the overall cash penalty as part of any case settlement.⁹

2. Specific to Indian Country

EPA's enforcement procedure in Indian country is governed by the Agency tribal policies and general considerations described above. Additionally, EPA considers environmental justice impacts on permitting and enforcement issues as appropriate. The Agency regularly consults with tribal governments regarding enforcement actions in Indian country in the course of performing its trust responsibility and consistent with EPA's policies.¹⁰

The nature of EPA's enforcement process involving facilities located in Indian country depends on whether a facility is tribally owned (51% or more) or managed or, alternatively, whether a substantial tribal proprietary interest exists. One of the first steps undertaken by EPA before conducting a planned inspection or initiating an enforcement action against a facility in Indian country is to determine whether the facility is owned, managed or controlled by the tribal government.

Where a facility is tribally owned or managed, EPA will attempt to return the facility to compliance through compliance assistance before initiating an enforcement action. The EPA Enforcement Policy provides that

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. In these instances, the EPA will proceed by contacting the facility and the tribal government. Direct formal EPA enforcement action through the judicial or administrative process 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

⁹ See <http://es.epa.gov/oeca/sep> for a thorough discussion of supplemental environmental projects.

¹⁰ See also Executive Order No. 13175 on Consultation and Coordination with Indian Tribal Governments, 65 Federal Register 67249 (November 9, 2000); Executive Memorandum on Government-to-Government Relations with Native American Tribal Governments, signed by former President Clinton on April 29, 1994; and Presidential Memorandum on Tribal Consultation, signed by President Barack Obama on November 5, 2009 (available at <http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president>).

expected to achieve results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion.

In instances where a facility is not tribally owned or operated, but EPA determines that a substantial tribal proprietary interest exists based on information provided by a tribe, EPA will provide tribal governments with appropriate contact and consultation, and any other specific treatment that EPA determines is warranted.

In those cases where facilities in Indian country are clearly owned or managed by private parties, Indian and non-Indian, and there is no substantial tribal proprietary interest involved, EPA will attempt to act in cooperation with an affected tribal government but will otherwise respond to noncompliance by private parties in Indian country as it would to noncompliance by the private sector elsewhere in the country.

Specific procedural steps generally followed by EPA when initiating an enforcement action in Indian country are set forth in the EPA Enforcement Policy and the Region 8 Enforcement Policy.

Presently, only the federal government is authorized to file actions under the federal environmental laws, with the exception of citizen suit provisions. Also, in the case of CERCLA and OPA, a tribal government may file natural resource damages claims on behalf of the tribe. Tribes may file claims in tribal court for damages arising out of an environmental violation. The Miscellaneous Receipts Act, 31 U.S.C. § 3302, prohibits penalty sharing between EPA and tribes by requiring that “funds properly payable to the United States must be deposited in the Treasury.” A tribe must bring its own claim and seek penalties in order to collect any penalties in a federal action.