

## **Tribal UST Compliance Pilot - Tribal Consultation and Coordination Effort Response to Comments**

### **Introduction**

On August 3, 2020, the Office of Enforcement and Compliance Assurance (OECA) initiated consultation and coordination with federally recognized Indian tribes on a proposed pilot (Pilot) to improve compliance at tribal underground storage tanks (USTs) facilities. The Pilot was designed to facilitate EPA's communications with tribes about UST inspections, compliance assistance, noncompliance, and civil enforcement. In addition, it will enable the Agency to address noncompliance in a timely and expeditious manner by simplifying the use of expedited enforcement tools that are used widely in the UST compliance program. OECA conducted the consultation on behalf of the entire Environmental Protection Agency (EPA or Agency) as the Pilot is applicable throughout Indian country.

OECA used the Tribal Consultation Opportunities Tracking System (TCOTS) to notify tribes of the consultation opportunity. In addition, OECA sent consultation letters via email directly to tribal leaders using information supplied by the Bureau of Indian Affairs. OECA initially planned to host five conference calls with tribal leaders as part of a 90-day consultation period, ending the consultation opportunity on October 30, 2020. OECA also coordinated with, and presented information to, multiple EPA-Tribal Partnership Groups, including the National Tribal Caucus, the Tribal Waste and Emergency Response Committee, Regional Tribal Operations Committees, and the Tribal Lands and Environment Forum.

During the 2020 consultation, OECA received feedback indicating that the COVID-19 public health emergency precluded multiple tribes from engaging fully with the Agency. Tribes requested that OECA suspend the consultation and restart efforts when the public health emergency had receded. In recognition of this request, on September 9, 2020, OECA informed the tribes of its decision to pause the consultation. We clearly heard that tribal resources necessary to participate in the consultation opportunity could be better allocated during this difficult time.

On July 1, 2021, OECA restarted the consultation and coordination process on the Pilot, again using TCOTS to notify tribes of the consultation opportunity and emailing consultation letters to tribal leaders. During the 90-day 2021 consultation period, OECA held two national conference calls designed to serve as both the opportunity to obtain information about the Pilot and to convey consultation comments received to date about the Pilot. As suggested by some tribal commenters, we scheduled the national conference calls for 90 minutes, and sent out email reminders prior to the second call. OECA also presented information on the Pilot, as requested, to multiple EPA-sponsored tribal partnership groups. This consultation and coordination period closed on September 30, 2021.

Below is a summary of comments, both written and oral, received by OECA during both the 2020 and 2021 consultation and coordination efforts, along with OECA's response to those

comments. In addition, OECA will be responding directly to the three tribal leaders who submitted comments on the Pilot. OECA is responding on behalf of the entire Agency; the term EPA is used to reflect the fact that the Pilot is applicable throughout Indian country.

This Response to Comments document and other documents related to the Pilot are available on the internet at <https://www.epa.gov/enforcement/tribal-underground-storage-tank-compliance-pilot>.

## **1. General Comments About the Consultation/Coordination Effort**

- 1.1. Impact of COVID-19 Pandemic on Ability to Participate in Consultation and Coordination Process: During the initial consultation in 2020, one tribal leader and several tribal commenters indicated that the impact of COVID-19 on tribes was severe, and that the tribes did not have the ability to take on the additional task of reviewing the consultation documents and participating in the consultation process. They requested that EPA postpone the consultation.

*In response to these concerns raised during the initial 2020 consultation, the Agency paused the consultation on September 8, 2020, and did not reinstate it again until July 2021.*

- 1.2. Adequacy of the Consultation and Coordination Process: Several tribal commenters raised questions about the consultation and expressed concern that EPA was not properly conducting the consultation.

*EPA acknowledges that conducting national consultation and coordination efforts can be difficult for both tribes and the Agency. EPA was particularly sensitive to the difficulty of conducting a consultation as the COVID-19 public health emergency's impact on Indian country continued. EPA originally notified tribes of the consultation opportunity on July 1, 2020. In response to feedback from tribal commentators about limited staffing to review the Pilot documents, EPA paused the consultation on September 8, 2020. EPA re-initiated the consultation and coordination on July 1, 2021 with an end date of September 30, 2021. Both the initial consultation and the re-started consultation and coordination were undertaken consistent with the "EPA Policy on Consultation and Coordination with Indian Tribes" (Consultation Policy). Under this Consultation Policy, EPA distributed information directly to tribal leaders and provided information to tribal environmental departments and various EPA-Tribal partnership groups; EPA also conducted informational sessions and provided consultation opportunities to tribal leaders.*

*EPA acknowledges that some tribes may have issued individual consultation policies. EPA strives to accommodate tribal consultation needs and procedures when able to do so while maintaining consistency with the EPA Consultation Policy. In addition to notifying tribal leaders of consultation opportunities, the EPA Consultation Policy makes it clear that tribal officials may request consultations. EPA attempts to honor the tribal government's request with consideration of the nature of the activity, past consultation efforts, available resources, timing considerations, and all other relevant factors. EPA*

would be pleased to discuss with any tribe with such policies how to improve national consultations in the future.

## **2. General Comments On or About the Pilot and UST Compliance**

- 2.1. General Support for the Pilot: Several tribal commenters indicated support with the concept of a Pilot to improve compliance at UST facilities, including the increased use of enforcement as well as enhanced communications with the tribal leadership. Several tribal commenters supported the use of expedited tools as an effective way to address noncompliance. Overall, there was belief that greater compliance will protect Indian country and drinking water. One commentator discussed alternative approaches to encouraging and achieving compliance, but generally supported the Pilot and in particular the quick “sting” of an expedited enforcement tool.

*EPA appreciates the supportive comments regarding the Pilot. We agree that enhanced communication with tribal leadership is an important element of the Pilot, and that expedited enforcement also is an important tool to help ensure compliance and the protection of Indian country.*

- 2.2. General Opposition to the Pilot: Several tribal leaders and tribal commenters stated that they did not think EPA should proceed with the Pilot.

2.2.1. One tribal leader indicated that the tribes have doubts as to whether the Pilot would increase UST compliance at tribal facilities. The tribal leader explained that although tribes want to avoid groundwater contamination and want to clean up USTs in their communities, there may be costs and other barriers preventing a tribe from achieving rapid compliance with the UST program, and that the Pilot is not the answer. The tribal leader expressed concern that non-negotiable penalties and tight turn-around requirements will place additional burdens on tribal governments that may be under-resourced.

2.2.2. As discussed further elsewhere, many tribal commenters suggested that EPA should instead focus on better understanding the underlying root causes of noncompliance at tribal UST facilities and providing more compliance assistance. At least one commentator stated that tribes should not be penalized with monetary penalties when they have better uses of their resources. It was suggested that EPA focus on positive reinforcement for facilities in compliance more than enforcement against violators. One tribal commenter suggested EPA focus on repeat violators.

*EPA appreciates that many tribal UST facilities face challenges to compliance with the UST requirements (see Section 2.4 below). However, it is important that any entity which owns or operates an UST understands and complies with the regulatory requirements that help ensure the USTs are operated in a manner that protects human health and the environment. Based on decades of an approach focused mainly on providing compliance assistance, and rarely following up with enforcement, at tribal*

*UST facilities, EPA believes that this Pilot is the appropriate next step in efforts to improve the compliance rate at tribal UST facilities and protect the environment and public health.*

*EPA undertaking this Pilot does not diminish the Agency's commitment to continuing its strong and primary focus on compliance assistance. In fact, a critical element of the Pilot is ensuring that communications with tribal leaders, tribal environmental departments, and tribal UST operators include information on where and how to access existing EPA and EPA-supported compliance assistance and training resources. As discussed in Section 2.6 below, EPA provides a broad range of compliance assistance and will continue to do so during, and as part of, this Pilot.*

*See below for a response to concerns raised about penalties and the period to return to compliance. (Sections 3.4 and 3.5). See Section 2.7 below for a discussion of data about noncompliance and analyzing it to help determine the root cause of noncompliance.*

- 2.3. Need for Pilot: Two tribal leaders and one environmental professional questioned whether the Pilot and increased use of enforcement tools was necessary for their tribes given the rate of compliance of their tribal UST facilities, and the prompt response to any noncompliance. They also discussed the relationship they have with the EPA regional office and how that relationship already involves good communications, coordination, and compliance assistance.

*EPA is pleased that these tribes have high compliance rates and good working relationships with the Agency's regional offices. In this national Pilot, the expedited enforcement tools would only be utilized in the event noncompliance is not corrected in a timely manner following notification after an inspection. If EPA does not find noncompliance or if any noncompliance is corrected quickly, no enforcement would proceed under this Pilot.*

- 2.4. Challenges to Compliance: Several tribal commenters noted that there is significant turnover at gas stations that impacts compliance, and that the personnel may be focused on other responsibilities (e.g., compliance with other federal laws). Other tribal commenters noted that the retail side of tribal businesses are often disconnected from the tribal environmental protection departments, and that the tribal government isn't really involved in the running of retail businesses. Several tribal commenters discussed how the UST regulations are complicated, and that it is not easy to understand them as required to ensure compliance (see Section 2.6 below regarding compliance assistance). Other tribal commenters stated that it is difficult to get contractors and service providers to travel to the tribal UST facilities. One tribal commenter discussed how, in Indian country, there is a wide variety of: the types of USTs; the overall structure of who is responsible for compliance; and who has control of them.

*EPA understands the challenges facing tribal UST facilities, whether it be the range of expertise and knowledge about the applicable statutory and regulatory requirements, the level of involvement of tribal leadership in the running of UST facilities, the*

*relationship between the tribal retail and environmental protection activities, or the difficulties surrounding finding and scheduling adequate service providers and contractors. However, it is important that any entity which owns or operates an UST understands and complies with the regulatory requirements that help ensure the UST is operated in a manner that protects human health and the environment. The Pilot highlights enhanced communication with the tribal leadership and environmental department to help address some of these concerns. Moreover, EPA remains committed to offering compliance assistance to owners and operators to increase their understanding of the applicable requirements. This information is provided both directly to owners and operators and on an "as-needed basis." The Pilot includes ensuring that tribal leadership and environmental departments are provided with the information they need to correct any violations at tribal UST facilities.*

- 2.5. Timing of the Pilot: Several tribal commenters and at least one tribal leader questioned the timing of the Pilot given the COVID-19 pandemic. Some stated that due to the COVID-19 pandemic, some UST facilities were not able to perform monthly compliance measures. Other tribal commenters raised problems with obtaining the services of contractors or equipment service providers generally, which are exacerbated during the pandemic. The tribal commenter noted that access to supplies needed to improve and maintain compliance are not as readily available during the current pandemic, because equipment manufacturers and retail suppliers which make these supplies are unavailable. The commenters indicated that the Pilot occurs at a time when tribes are prioritizing and managing the well-being of their communities, personal health, economic security, food security, and childcare.

*EPA appreciates that the COVID-19 pandemic continues to present real obstacles and challenges to tribes, as it is for many others across the country. In the UST context, EPA acknowledges that the pandemic exacerbated the already difficult task of scheduling UST contractors or service providers. But it is important that programs like the UST program, that are designed to protect public health and the environment, continue to be implemented and, if necessary, enforced. The enhanced communications that are a key element to the Pilot should help ensure that the tribal leadership is aware of EPA's compliance and enforcement activities, and present additional opportunities for the tribal leadership to convey important information to EPA about how the pandemic may be impacting efforts to comply with the UST program.*

- 2.6. Compliance Assistance: Several tribal commenters suggested that EPA focus on providing more compliance assistance, either in lieu of, or in addition to the Pilot. Several specific suggestions were made regarding types or areas of compliance assistance, including: additional compliance assistance for the requirements that became effective in 2018; tools to help tribal environmental departments help ensure compliance; a daily/monthly/yearly task checklist; assisting tribes with development of training; and providing plain language guides. One tribal leader suggested that EPA set aside funding as well as technical assistance for tribes that want to handle compliance measures themselves.

*Compliance assistance continues to be EPA's top priority. In addition to a wide variety of compliance assistance available online (see below), EPA provides a wide array of resources and training for UST owners and operators and tribal environmental professionals. The Agency also traditionally awards approximately \$2 million in compliance assistance grants per year; 20 tribes received funding in FY 2021. EPA remains committed to strengthening relationships, communication, collaboration, outreach, and information sharing with tribal UST facilities.*

*As mentioned above, EPA has a vast array of information generally about compliance assistance, training, and funding information available online (see <https://www.epa.gov/ust>). The topics for which information is available via this webpage include [learning about USTs](#), [meeting UST requirements](#), [preventing and detecting releases](#), [emerging fuels and USTs](#), and [cleaning up releases](#).*

*In addition, there is a section of this online presence that focuses specifically on USTs in Indian country (see <https://www.epa.gov/ust/underground-storage-tanks-usts-program-indian-country>). EPA even developed a series of seven compliance assistance brochures that provide best management practices to help UST owners and operators in Indian Country comply in particular with the requirements that became effective in 2018 (see <https://www.epa.gov/ust/managing-your-usts-indian-country>).*

*While EPA agrees that compliance assistance is an important tool to help tribal UST facilities comply with UST requirements, and is committed to maintaining and improving on existing compliance assistance, EPA does not believe it is the only tool that should be used. Based on decades of an approach focused mainly on providing compliance assistance, and rarely following up with enforcement, at tribal UST facilities, EPA believes that this Pilot is the appropriate next step in efforts to improve the compliance rate at tribal UST facilities and protect the environment and public health.*

*EPA undertaking this Pilot does not diminish the Agency's commitment to continuing its strong and primary focus on compliance assistance. In fact, a critical element of the Pilot is ensuring that communications with tribal leaders, tribal environmental departments, and tribal UST operators include information on where and how to access existing EPA and EPA-supported compliance assistance and training resources.*

- 2.7. **Data:** EPA received several questions about the data related to UST noncompliance in Indian country. What specific noncompliance did the compliance rate in the consultation materials indicate? How did the compliance rate of tribal versus non-tribal facilities in Indian country compare? How did compliance rates compare between tribes with more versus fewer USTs? One tribal leader questioned whether EPA had done an adequate analysis of the data and causes of noncompliance to support the Pilot. Another tribal commenter questioned how well the expedited tools have worked at non-tribal facilities. One commenter asked if gas stations are still the leading source of groundwater contamination.

*EPA continues to improve and increase transparency related to UST noncompliance both in and outside Indian country. One recently completed step is creating access to an on-line “UST Finder” map containing comprehensive information on USTs and leaking USTs (LUSTs) in the United States. The UST Finder also contains information about the proximity of UST facilities and LUST sites to surface and groundwater public drinking water protection areas, estimated number of private domestic wells and numbers of people living nearby, and flooding and wildfires. See <https://www.epa.gov/ust/ust-finder>.*

*EPA also compiles and releases multiple compliance-related “performance measure” data on USTs in Indian country and outside Indian country. These data include information such as the number of active and closed petroleum tanks and hazardous substance tanks, releases confirmed, cleanups initiated and completed, and inspections conducted. These data also include the percentage of facilities in significant operational compliance and those in compliance with UST technical requirements, operator training, financial responsibility, and walk-through requirements. However, EPA does not currently have data that easily compares the rates of compliance between tribal and non-tribal USTs. Performance measurement data is available at <https://www.epa.gov/ust/ust-performance-measures>. Gas stations remain a leading source of groundwater contamination.*

*As discussed in the Pilot documents, there are about 2,400 active USTs in Indian country, and tribal governments own and/or operate many of these USTs. According to the [End of Fiscal Year 2021 Report of UST Performance Measures](#):*

- *41% of USTs in Indian country are not in compliance with the 2015 spill prevention requirements (compared to 21% nationally);*
- *37% are not in compliance with 2015 overfill prevention requirements (compared to 22% nationally);*
- *43% are not in compliance with the 2015 leak detection requirements (compared to 31% nationally); and*
- *58% are not meeting the Technical Compliance Rate (compared to 42% nationally).*

*This data indicate that noncompliance remains a problem at USTs in Indian country. It is important that any entity which owns or operates an UST understands and complies with the regulatory requirements that help ensure the USTs are operated in a manner that protects human health and the environment. EPA will continue to investigate, and where appropriate, enforce against non-tribal UST facilities. Moreover, based on decades of an approach focused mainly on providing compliance assistance, and rarely following up with enforcement, at tribal UST facilities, EPA believes that this Pilot is the appropriate next step in efforts to improve the compliance rate at tribal UST facilities and protect the environment and public health.*

## **2.8. Confusion About Whether State or Federal UST Regulations Applied in Indian Country:**

Several tribal commenters indicated that contractors and service providers are often confused about which UST regulations apply in Indian country; the contractors and service providers believe that the state regulations apply, but it is the federal UST

regulations that apply in Indian country. This misunderstanding makes it difficult for tribes to get adequate assistance from these entities.

*EPA directly implements the UST program in Indian country. As a result, federal laws and regulations are applicable to UST facilities in Indian country. As a general matter, state UST regulations are not applicable. The Agency recognizes that some service providers are confused. EPA is committed to continuing to seek opportunities to educate all parties about the applicability and requirements of the federal regulations to UST facilities in Indian country.*

- 2.9. How the Pilot is Consistent with EPA Tribal Policy: One tribal environmental professional asked how the Pilot is going to operate within the confines of existing EPA policy such as the [EPA Policy for the Administration of Environmental Programs on Indian Reservations](#) (Nov. 8, 1984) (*Indian Policy*) and existing enforcement policy, expressing concern that the Pilot may be inconsistent with those policies.

*The UST Pilot is consistent with the Indian Policy and the Agency's [Guidance on the Enforcement Principles of the 1984 Indian Policy](#) (January 17, 2001) (Tribal Enforcement Guidance). The Pilot is specifically designed to ensure that EPA work cooperatively with tribal leadership to facilitate compliance, including providing notice of announced inspections, compliance assistance, notices of potential violation with opportunities to remedy noncompliance, and, and potential enforcement consequences of noncompliance. When appropriate, EPA will escalate to enforcement to address the significant direct and indirect threats to the environment and human health that arise when USTs violate federal standards.*

### **3. Specific Comments on Particular Aspects of the Pilot**

- 3.1. Scope of the Pilot: Several tribal commenters expressed concern that this Pilot would result in more enforcement at tribal facilities and less at non-tribal facilities in Indian country. Others indicated that the Pilot should cover all UST facilities in Indian country, not just tribal facilities. Several tribal commenters suggested that EPA be clear regarding what facilities are covered by the Pilot.

*Consistent with the Tribal Enforcement Guidance, the term “tribal UST facilities” is defined to include UST facilities in Indian country that are owned or operated by tribal governments. The term also includes privately owned/operated UST facilities in which the tribal government has a substantial proprietary or non-proprietary interest or control. The term does not include facilities owned or operated by tribal members, but not the tribal government.*

*The goal of the Pilot is to improve compliance at tribal facilities by enhancing communication with the tribal government who can address any noncompliance, and, only if noncompliance remains despite the enhanced communication, by utilizing expedited enforcement tools that have proven to be effective at non-tribal facilities.*



*The Pilot should not impact (e.g., reduce) enforcement at non-tribal facilities. Non-tribal facilities are not included in the Pilot because EPA already uses the expedited tools included in this Pilot at non-tribal facilities. EPA will continue to inspect, and pursue enforcement as appropriate, at non-tribal facilities.*

- 3.2. Implementation: One tribal commenter questioned how the Pilot will work with EPA-credentialed inspectors who are not EPA employees, since these inspectors fulfill that role for EPA in many areas. The tribal environmental professional expressed concern that ambiguity in terms of how the Pilot will address inspections conducted by these inspectors may delay the impact of the expedited tools in the Pilot.

*The Pilot applies to EPA activities in Indian country, including the activities conducted by an EPA-credentialed inspector, including a tribal inspector with an EPA UST credential. Thus, when a tribal inspector conducts inspections on EPA's behalf, the inspector provides the Agency with an inspection report and EPA is responsible for determining whether violations exist and whether enforcement is appropriate. EPA's enforcement decisions, including the issuance of a field citation, expedited settlement agreement, and/or delivery prohibition will all be made consistent with this Pilot. EPA-authorized tribal inspectors with EPA credentials cannot issue field citations, ESAs or delivery prohibitions.*

- 3.3. Communications: Several tribal commenters raised questions about, support for, or concerns about the communications aspect of the Pilot. For example, one tribal commenter asked how the communications in the Pilot differ from existing practice. At least one tribal commenter recommended that EPA should ensure that the tribal environmental department is part of any communications with the tribal leadership, because the environmental department is well situated to help EPA and the tribal facility address any noncompliance. Other tribal commenters supported increased communication and elevation to the tribal government, and encouraged sharing the inspection report.

*The Pilot is designed to reinforce the Agency's commitment to ensuring that inspection and enforcement-related communications to tribal leaders are clear, complete, and timely. EPA agrees that tribal environmental departments are important partners in helping ensure compliance with UST requirements. EPA is revising Pilot documents to emphasize the important role that tribal environmental departments play and ensure that they are provided copies of communications distributed to the tribal leadership under the Pilot. Pursuant to OECA's [Interim Policy on Inspection Report Timeliness and Standardization](#) (June 29, 2018), inspectors are already providing a complete inspection report to the facility within 60 calendar days of the inspection.*

- 3.4. Penalties: One tribal leader expressed skepticism that expedited enforcement with "non-negotiable" penalties will reduce noncompliance at tribal government owned or operated USTs.

- 3.4.1. In particular, the tribal leader indicated that because the expedited tools in the Pilot are already "used widely in the UST compliance program" tribal governments should already be facing potential penalties for not complying with federal laws and regulations governing USTs; in other words, the Pilot won't change the status quo.
- 3.4.2. The tribal leader also expressed concern that the non-negotiable aspect of the penalties with the expedited tools means a loss of Due Process for tribes. More specifically, the tribal leader described how tribes will receive notice of a violation and the Agency's chosen enforcement mechanism (*i.e.*, which expedited tool), have 30 days to bring its UST into compliance, after which the tribe will still have to pay the "non-negotiable" penalty.
- 3.4.3. Finally, the tribal leader stated that the non-negotiable penalty structure could actually act as a disincentive for tribes to comply in a timely manner. The tribal leader asked that if a tribe must pay the penalty either way, why should it rush to comply within the 30-day period?

*While EPA has used the expedited tools in the Pilot successfully for years at non-tribal facilities inside and outside Indian country, it has rarely used them at tribal UST facilities. Based on decades of an approach focused mainly on providing compliance assistance, and rarely following up with enforcement, at tribal facilities, EPA believes that this Pilot is the appropriate next step in efforts to improve the compliance rate at tribal UST facilities.*

*While the penalties in a Field Citation or Expedited Settlement Agreement (ESA) are not negotiable as part of settling pursuant to the Field Citation or ESA process, they are significantly reduced from penalties usually assessed for the same non-compliance using more traditional administrative or civil judicial enforcement. Moreover, the owner/operator of the UST is always free to decline the terms of the Field Citation or ESA, in which case EPA will proceed with administrative or civil judicial enforcement as appropriate. However, the significantly reduced penalties assessed under a Field Citation or ESA are only available through the Field Citation and ESA process, which requires a quick return to compliance (see Section 3.5 for more about the return compliance period).*

*As stated above, the tribal government can decline to settle with EPA via the Field Citation or ESA process if the tribal government does not believe it is in noncompliance with UST requirements, or if the tribal government thinks that it is impossible to return to compliance within the time period provided via the expedited tools, or if the tribal government believes the expedited tools are not fair. However, please note that pursuant to EPA's broader guidance on expedited tools, EPA will pursue more traditional enforcement when a settlement is not achieved through expedited tools, and traditional enforcement is a more resource intensive effort that results in higher penalties than those assessed via expedited tools.*

3.5. Return to Compliance Period: One tribal leader and several tribal commenters indicated that a 30-day period to return to compliance, as condition of the expedited enforcement tool, is not sufficient for tribal facilities, which require more time to coordinate with tribal leadership (e.g., tribal councils may not meet during the 30-day period).

3.5.1. The tribal leader indicated that tribal governments deal with a great deal of correspondence, compliance requirements, and deadlines each month for numerous federal programs and policies, and often the tribal government offices are understaffed and underfunded, making it difficult, if not impossible, for tribes to be completely responsive to every notice or deadline that comes up within a 30-day period. Thus, the leader stated, a tribal government could quite understandably miss the 30-day deadline; thirty days is simply not a sufficient amount of time for a tribe to receive notice, review the notice and send it through the proper tribal government channels, reach a decision on how to remedy the noncompliance, and take action.

3.5.2. The tribal leader indicated that unless EPA also plans to allocate additional support, funding, and staff to assist tribes in reviewing notices and achieving timely compliance, it is unlikely that the Pilot will have a significant impact on Tribal leadership or reduce noncompliance - even with the threat of a financial penalty. According to the tribal leader, thirty days also is an insufficient amount of time for EPA to provide the “compliance assistance” it plans to offer with the notice of noncompliance, or to conduct tribal consultation if the tribe makes such a request. In fact, the Pilot specifically notes that requesting tribal consultation does not stay the 30-day compliance deadline. The tribal leader stated that this approach undermines the government-to-government relationship between the tribe and the federal government.

*EPA appreciates the comments indicating the challenges that tribal governments may face regarding a 30-day deadline to return to compliance and meet other aspects of a Field Citation or ESA. Moreover, if a tribe requests EPA consultation, it may be difficult to schedule the consultation before the deadline in the Field Citation or ESA passes. Thus, for purposes of this Pilot only, Field Citations or ESAs may provide an initial period of up to 60 days for the tribal UST facility to respond. This is an additional 30 days, or twice as long, as Field Citations and ESAs provide outside the context of this Pilot. In addition, the tribal UST facility may request a 30-day extension (for a total of 90 days to respond). The region should condition the grant of a 30-day extension on the following: (1) the tribal UST facility files a formal request for the extension no later than 10 days before the expiration of the 60-day period, (2) the tribal UST facility demonstrates that there are factors beyond the control of the facility that necessitate an extension, and (3) the region believes that compliance will be achieved within the period of the extension. EPA believes that initially allowing up to 60 days for a tribal UST facility to comply with the terms of a Field Citation or ESA is the appropriate compromise which recognizes the unique aspects of tribal governments while also maintaining the goal of the Field Citation and ESA programs to incentivize a quick return to compliance to ensure protection of human health and the environment.*

*EPA is not extending the period for responding to a Notice of Intent to Prohibit Delivery (NIPD). An NIPD will generally initiate a 30-day period to address the underlying problem. However, the NIPD period may be up to 180 days for gasoline stations in rural remote areas. EPA's existing policy already addresses situations where prohibiting delivery to a UST could greatly impact the supply of fuel in a rural and remote area. Importantly, EPA rarely exercises its authority under the Delivery Prohibition Policy (see Section 3.6 below), and does so only when the situation is severe enough to necessitate considering prohibiting use of the UST. In such extreme circumstances, EPA believes it is appropriate to work closely with the tribal UST facility, as quickly as possible, to remedy any problems and ensure that the continued operate of the UST is safe.*

- 3.6. Delivery Prohibition: NIPD: One tribal commenter suggested that EPA clarify how often the Agency plans to use the Delivery Prohibition tool, so there is no confusion. One tribal leader suggested that EPA should do its own diligence regarding whether the remote and rural area aspect of the Delivery Prohibition Policy was relevant versus relying on tribes to provide that information.

*Delivery prohibition is typically a tool of last resort that EPA reserves for certain violations of federal UST regulations, emergency situations, or potential emergency situations. Violations addressed include those that pose a serious threat to human health, safety, or the environment, where an owner or operator lacks financial responsibility, and emergencies, such as an ongoing leak or evidence of a leak, or potential emergencies where the probability and potential extent of harm make it reasonably necessary to take immediate action to prevent, reduce, or mitigate the actual or potential damages to human health, safety, or the environment. EPA applies delivery prohibition on a tank-by-tank basis and not to an entire facility, unless appropriate under the circumstances. Since 2005, when EPA was authorized to prohibit delivery and developed the Delivery Prohibition Policy, the Agency has used the Policy fewer than two dozen times, nationwide. The one instance in Indian country when EPA issued a Notice of Intent to Prohibit Delivery, the facility returned to compliance quickly and EPA did not prohibit delivery.*

*If EPA plans a delivery prohibition in a rural and remote area, the Agency makes a determination of whether the UST is located in a rural and remote area. As part of the Pilot, EPA will seek additional and confirming information from the affected tribal government.*

- 3.7. Federal Facilities: Tribal leaders and tribal commenters indicated that federal facilities should be part of the Pilot because they should not receive less enforcement than other facilities.

*EPA is responsible for inspecting and ensuring compliance at federal facility USTs in Indian country. The term "tribal UST facilities" in this Pilot includes UST facilities owned and/or operated by the federal government in which the tribal government has a*

*substantial proprietary or non-proprietary interest or control. EPA expects federal facilities to comply with the UST requirements and will continue to inspect and take enforcement actions, including assessing penalties, against federal agencies for UST violations, when appropriate.*

#### **4. Additional Comments**

- 4.1. EPA Priorities: Several tribes questions EPA's priorities. They expressed concerns about other EPA actions (or inactions) unrelated to USTs over the past several years, and questioned why EPA was proposing this Pilot versus better addressing those issues. For example, one tribal commenter indicted that EPA should be focusing more on regulating and enforcing against the oil and gas sector, while another commenter expressed concern about a nearby mine.

*EPA appreciates the concerns about other, unrelated Agency efforts that were raised on consultation and coordination calls. However, the fact that there are other programs where tribal commenters believe EPA should be working more diligently does not mean that this Pilot should not move forward. EPA manages multiple priorities to fulfill its mission. Thus, the Pilot is consistent with our commitment to ensure compliance at UST facilities in Indian country because the potential consequences of leaks can result in contamination of surface or groundwater with potential threats to public health via drinking water, possible fire, or explosion.*

- 4.2. Responsibility for Cleanup in Area Formerly Containing USTs: One tribal leader expressed concern that this Pilot would result in the tribes being held responsible for any pollution at a site on its reservation where USTs were previously located. The tribal leader indicated the tribes had been trying for over two years to obtain information from EPA and the Department of the Interior (DOI) as to which agency will be taking responsibility for the federal clean-up efforts, and that the tribes are deeply concerned with the lack of remediation and federal response regarding this UST site.

*All owners and operators of USTs, including federal agency owners and operators, are responsible for compliance with the applicable federal environmental law and subject to enforcement for violations. A tribal government would not be held responsible for violations under the Pilot if they are not the owner or operator of the UST. EPA is responding separately directly to the tribal leader to discuss the site on its reservation where USTs were previously located to assist with answering questions related to those cleanup efforts.*