



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

**Responses to Tribal Comments on the
November 16, 2012 Consultation Draft
“Indian Environmental General Assistance Program Guidance on the Award
and Management of General Assistance Agreements
for Tribes and Intertribal Consortia”**

May 15, 2013

INTRODUCTION

This document contains the United States Environmental Protection Agency’s (EPA) responses to comments received between November 16, 2012 and February 22, 2013, during the second round of consultation and coordination with tribal governments on EPA’s proposed new “Indian Environmental General Assistance Program Guidance on the Award and Management of General Assistance Agreements for Tribes and Intertribal Consortia” (GAP Guidance). As a result of the comments the Office of International and Tribal Affairs, EPA received verbally and in writing, we have made numerous changes to the final GAP Guidance, issued on May 15, 2013.

Throughout the consultation and coordination processes, EPA and tribes used a variety of mechanisms to exchange ideas and suggestions for how to improve the GAP Guidance, including webinars, conference calls, email exchanges, face-to-face meetings with tribal government staff, and direct engagement with tribal government officials. EPA received written comments from 23 tribes and 6 intertribal organizations. Comments ranged from general statements about the EPA’s trust responsibility to tribes to descriptions of the issues tribes face when developing their environmental programs, and specific editorial suggestions on how to improve the text in the proposed new GAP Guidance. The overwhelming message from tribes during this process was that GAP resources have enabled tribal governments to achieve significant progress in establishing their environmental programs and have facilitated productive, environmentally protective government-to-government partnerships for tribes and EPA. To sustain and build on this progress, tribes have requested that EPA maintain flexibility in how tribes may use GAP resources so that they can plan, develop, and establish multi-media environmental protection programs consistent with their own environmental priorities. EPA has structured the new GAP Guidance to provide flexibility within a consistent national framework for building and measuring tribal environmental program capacity under GAP and assuring continued improvement in the management of GAP resources.

This document summarizes the common issues raised during the consultation period and how we have addressed them in the final GAP Guidance. Similar comments have been grouped and summarized for clarity and efficiency. In addition to this summary document, individual response letters will be sent to those who submitted their comments in writing.

EPA thanks all who made time to review the document and provide us with very valuable input. The final GAP Guidance is a far better document as a result of the feedback and constructive suggestions we received.

If your tribe or tribal organization has additional questions about how we have responded to issues raised during the consultation and coordination processes, please contact EPA’s American Indian Environmental Office, within the Office of International and Tribal Affairs, to schedule additional opportunities for dialogue (202-564-0303).

SUMMARY OF MAJOR CHANGES

- **Integration of the Guidance and the Guidebook.** EPA initially released the proposed GAP Guidebook for consultation and coordination as a stand-alone document (August 2011 – January 2012). For the second round of consultation and coordination EPA presented a substantially revised Guidebook as an Appendix to a proposed new GAP Guidance (November 2012 – February 2013). The final GAP Guidance describes the overall approach for managing the GAP assistance agreement program and maintains a Guidebook, which provides details on tribal environmental protection program capacity indicators under GAP, as Appendix I.
- **Joint Planning Agreements.** There were many comments and questions related to the nature of joint planning documents and their relationship to Tribal Environmental Agreements (TEAs), grant workplans, and other existing EPA-tribal planning practices. The new GAP Guidance clarifies that regions and tribes are expected to develop EPA-Tribal Environmental Plans (ETEPs) that contain the following components: (1) tribal environmental program priorities, including long-range capacity building and program implementation goals; (2) EPA program management requirements; (3) inventories of regulated entities that may affect tribal interests; and (4) mutual roles and responsibilities. The approach provides tribes and regions flexibility in establishing this joint planning framework, including the use of TEAs and/or other existing documents. We eliminated requirements for high-level signatures on these joint planning documents and added flexibility to the timeline for establishing them.
- **Clarification that Tribes with Limited Environmental Program Jurisdiction Remain Eligible for GAP Funding.** Commenters indicated that earlier drafts created the impression that tribes in Alaska – and other tribes with challenging jurisdictional circumstances – would be adversely impacted. The new GAP Guidance clarifies that tribes with limited jurisdiction to implement regulatory programs continue to remain eligible for GAP funds. The indicators of tribal environmental protection program capacity contained in the new Guidance include a large number that are appropriate for tribes in Alaska and other tribes with unique circumstances.
- **Greater Detail on Programmatic Capacity Building and TAS.** To clarify the distinction between capacity building and program implementation, EPA removed descriptions of program implementation indicators and provided an expanded set of capacity indicators. These non-exclusive lists of tribal environmental protection program capacity indicators will

facilitate joint planning processes, help identify appropriate capacity building activities for GAP funded work plans, and facilitate measuring progress in establishing tribal environmental protection program capacities over time. The new GAP Guidance also clarifies that some of the indicators may not be appropriate or applicable to each GAP recipient. The new GAP Guidance provides that where programmatically available, a tribe may use GAP funding to pursue “treatment in a manner similar to a state” (TAS) status for implementing particular regulatory programs if that is a goal for the tribal program. The new GAP Guidance also describes how tribes may use GAP funds to build capacities that enable a tribe to support EPA’s direct program implementation activities. In addition, the GAP Guidance clearly states that GAP funds may also be used to establish program capacity for tribes that are not seeking TAS status for a particular program; seeking TAS status is not a requirement for receiving funding under the GAP.

- **Solid and Hazardous Waste Implementation.** The new GAP Guidance clarifies that GAP funds may be used to support tribal solid and hazardous waste program implementation, including cleanup activities. It describes the capacity indicators that a tribe should establish prior to funding cleanup under the GAP, and other solid waste program implementation activities fundable under GAP. Consistent with the GAP statute, the implementation activities described in the new GAP Guidance are in accordance with the purposes and requirements of the Solid Waste Disposal Act. Allowable implementation activities are also consistent with 2 C.F.R. §225, Appendix B(19): “Cost Principles for State, Local, and Indian Tribal Governments” which prohibits funding general costs of government *services* normally provided to the general public. As a result, allowable implementation activities includes tribal waste management program administration and oversight, source separation projects, and compliance and enforcement programs but generally will not include trash collection, transportation, and disposal services, including backhauling.
- **Maintaining an “Environmental Presence.”** The new GAP Guidance acknowledges that tribes may need continued funding to sustain their programs after capacity has been established. However, the new GAP Guidance also clarifies that capacities should evolve as a tribal environmental protection program confronts ongoing and new challenges. EPA-Tribal Environmental Plans will be used to establish long-term program development goals and to demonstrate how GAP-funded assistance agreements expand, enhance, or evolve the recipient’s capacity over time, rather than simply maintaining a status quo from year to year.
- **Elimination of Suggested Capacity Building Timelines.** EPA removed specific references to suggested capacity building timelines. Prior drafts of the Guidebook provided general program capacity development timelines. For example, early versions of the document suggested that core program capacities could take five or more years to develop. As another example, an earlier version of the document contained “Tribal Capacity-Building Pathways” with activities organized by the first 1-2 years followed by activities typically conducted in a 2-5 year time frame. In the new GAP Guidance, references to timelines for building capacities were removed; the GAP Guidance contains a flexible approach to planning capacity building activities under the GAP.

RESPONSES TO TRIBAL COMMENTS

Comment 1: **EPA should allow tribes the flexibility to develop work plans and identify indicators of capacity to establish the best use of GAP funding to meet tribal environmental priorities and needs.**

Response 1: EPA agrees with this comment and has made a number of changes to the Guidance to reflect the flexibility tribes and intertribal consortia have to identify indicators of capacity that are best suited to address their specific priorities and needs. The Guidance also recognizes the wide variation among and between tribes as to what environmental issues are of greatest concern. For example, in Section 3, the GAP Guidance now states: “There is not just one pathway to follow for building environmental program capacity, and as such there are many indicators that can be used to assess and measure progress in the capacity building process... The indicators ...offer a non-exclusive menu of choices, organized by category of environmental program development; they need not all be selected. Other indicators of capacity may be identified in GAP assistance agreement work plans and in long-term planning agreements...reflecting the unique priorities and program development plans of a particular recipient.” In addition to preserving flexibility within this new framework, EPA remains committed to working with tribes to ensure that where GAP resources are used to build program capacity, we are using appropriate indicators to help measure and demonstrate progress over time.

Comment 2: **GAP work plans should not be linked to EPA's strategic goals, but highlight where EPA and a tribal government share priorities.**

Response 2: The GAP work plans can highlight where EPA and tribal governments share priorities. However we do not have discretion to deviate from EPA Order 5700.7, “Environmental Results under EPA Assistance,” which requires work plan activities in funded assistance agreements link to the Agency’s Strategic Plan. This Order applies to all grants provided by the Agency; EPA has made additional edits to the GAP Guidance to clarify this requirement. The Order is available online at: <http://www.epa.gov/ogd/grants/award/5700.7.pdf>

Comment 3: **The GAP Guidance should not be used to impose unnecessary limits on how tribes use GAP resources.**

Response 3: EPA’s goal is to strengthen and grow the GAP and, through this new Guidance, provide more clarity on how tribes can build environmental protection program capacity under the GAP by describing the many ways tribes can use the grant funds to support capacity building activities. EPA did not add unnecessary restrictions and we made a number of edits to clarify how the GAP statute and applicable grant regulations establish allowable and unallowable uses of GAP resources. The laws governing GAP do establish some limitations on the use of GAP funds. Section 1.4 of the GAP Guidance (“Allowable Activities and

Restrictions under GAP”) was edited to provide greater clarity and citations to specific statutes and regulations governing the restrictions were added. The new GAP Guidance also provides examples of a wide range of activities that the GAP can support.

Comment 4: EPA should acknowledge that tribes and tribal organizations require resources to implement programs once they have established capacity under the GAP.

Response 4: EPA has consistently acknowledged the need for program-specific implementation funding in a wide range of venues. However, the GAP Guidance was developed to provide guidance on the use and management of the GAP resources, therefore, specific statements about appropriate funding levels for other grant programs administered by EPA is beyond the scope of the GAP Guidance and are not appropriate in this document. EPA will continue to work with tribes and tribal organizations to identify needed program implementation financial assistance.

Comment 5: EPA regions should be given more time and flexibility in developing and implementing EPA-Tribal Environmental Plans (ETEPs).

Response 5: EPA acknowledges that these Plans will take time to develop and should be tailored to each tribe. As such, we made a number of changes to Sections 4 and 5 of the GAP Guidance to provide flexibility on the format and level of detail contained in an ETEP as well as the schedule for establishing them. The new GAP Guidance contains an extended time line for tribes and EPA regional offices to establish an ETEP development schedule. For example, Section 4.2 of the GAP Guidance states: “The specific format and approach to developing ETEPs may vary from tribe to tribe and region to region. Maximum flexibility is provided as to how the ETEPs are developed... In recognition that there is great variation not only in the size of tribal governments, but also in the range of environmental issues and program capacities across the nation, it is expected that the length and level of detail for the ETEPs will also be greatly varied.” Similarly, Section 5 of the GAP Guidance now states: “For tribes that have not yet established a plan with EPA that satisfies the four components of an ETEP described in Section 4.3, GAP work plans should contain a component to develop one when it is consistent with the applicable regional schedule to do so...”

Comment 6: In developing ETEPs, EPA should allow tribes to use existing documents and supplement what is missing. In addition, tribes and EPA should have flexibility to revise ETEPs to account for unforeseen, outside factors.

Response 6: EPA agreed with this comment and made several changes to the GAP Guidance to provide this requested flexibility. Specifically, Section 4.1 of the GAP Guidance states: “EPA has developed this streamlined approach for a long-term planning tool that can be modified as needed. The ETEPs are intended to be living, usable documents for both tribes and EPA as environmental partners to use

in planning and guiding our work.” In Section 4.2 the Guidance now discusses examples of different ways an ETEP may be developed: “For example, a tribe and region may decide to develop a streamlined document that succinctly addresses the four components of an ETEP... [T]ribes and regions may update existing documents, to the extent they are useful and still relevant, to ensure they address the four ETEP components, and memorialize in a written memo or through specific correspondence, the shared understanding of how those documents comprise the ETEP (examples of some existing documents include Tribal Environmental Plans, Tribal Environmental Agreements (TEAs), Tribal Strategic Environmental Plans, etc.).”

EPA added text to acknowledge that unforeseen circumstances may impede a tribe’s ability to achieve program development goals outlined in ETEPs and assistance agreement work plans. Specifically, in Section 4.4 the GAP Guidance now states: “EPA acknowledges that various factors may impede a tribe’s progress toward establishing environmental protection program capacity indicators. These factors include staff turnover and adjustments in a tribe’s priorities based on unanticipated changing conditions, such as potential impacts to human health and the environment from unanticipated resource extraction projects, changes in land uses, proposed development projects with potential pollution sources, etc. Capacity development indicators and completion dates should be revised as appropriate when a tribe’s needs and priorities change.”

EPA’s goal is to use this framework to achieve program improvements and not create unnecessary process or burden. We believe the new GAP Guidance accomplishes this.

Comment 7: **The restrictions on the use of GAP funds needs to be clarified, especially regarding GIS surveys and natural resource assessments.**

Response 7: EPA agreed with this comment and made a number of changes to the restrictions section to add clarity. For example, the reference to GIS survey work in the restrictions section was removed; as previously written it caused confusion and did not accurately communicate the specific restriction. The new GAP Guidance explicitly identifies GIS equipment and activities to establish baseline environmental conditions as allowable costs. Appendix I of the GAP Guidance clarifies that GAP funds can be used to conduct an inventory of natural resources, establish natural resources protection policies/procedures, and to establish policies and procedures for coordinating tribal environmental protection program activities with a natural resource management program. EPA made other changes to the restrictions section to more clearly define activity categories that are outside the scope of GAP, including specific restrictions related to Natural Resource Damage Assessments; general costs of government services normally provided to the general public; and the repair, upgrade, and replacement of equipment costing more than \$5,000.

Comment 8: **The statement, "EPA may prioritize award decisions in part based on the progress being made toward accomplishing the identified long-term goals" should account for unforeseen circumstances that may cause a tribe or intertribal consortia to miss work plan goals.**

Response 8: EPA agrees that ETEPs and assistance agreement work plans should be flexible so that work can be adjusted to account for unforeseen circumstances. EPA made several changes to reflect this concept (see example in Response 6 above). As circumstances change and milestones are impacted, EPA agrees that it will be important to make appropriate revisions in the work plans and ETEPs to reflect those changes and identify the new activities or actions that will be taken as a consequence of those changes. Such flexibility is critical to the success of the program and the overall framework.

Comment 9: **EPA should clarify if the long-term program development goals identified in the ETEPs need to be linked to the short-term capacity development milestones in each GAP work plan.**

Response 9: EPA made a number of changes to the GAP Guidance to clarify the relationship between long term goals in the ETEPs and capacity indicators contained in funded work plans. Specifically, Section 4.1 of the GAP Guidance states: "Through the development of these ETEPs, or strategic planning documents, and with *improved alignment of the specific activities in the GAP work plans with the long-term goals and priorities identified in those planning documents*, EPA and tribes will be better positioned to ensure that GAP is being used effectively to build tribal environmental program capacity." (emphasis added) In addition, Section 5 of the GAP Guidance states: "...work plans should be linked to the intermediate and long-term program development goals identified in an ETEP." By clearly linking the short term activities in a work plan to the long term goals in the ETEP, we are able to demonstrate progress over time in a streamlined way using a consistent framework across the nation.

Comment 10: **EPA should clarify if ETEPs are required for tribes that have already established significant environmental protection program capacity and confirm that GAP resources are a continuing programmatic need, even after capacity has been established.**

Response 10: EPA edited the GAP Guidance to clarify that EPA regional offices need to establish ETEPs with all tribes receiving GAP assistance agreements, including with tribes that have established significant program capacity. As explained in the Guidance, an ETEP is a joint planning tool that will help EPA and the tribe work together toward accomplishing the long-term goals identified in the Plans. A significant portion of the capacity building work performed by the tribe under the ETEP is likely to be funded by a GAP grant, therefore even where a tribe has significant program capacity, if it is seeking GAP resources to enhance those capacities, it will need to have an ETEP with EPA. The GAP Guidance states that

tribes may continue to receive GAP assistance even after they have established capacity, but that additional program development milestones need to be identified describing the work supported through GAP. Specifically, Section A.3 ("Capacity Development is a Continuing Programmatic Need") of Appendix I states: "Developing, establishing, and maintaining environmental program capacities is an on-going effort requiring capacities to evolve as the tribal environmental program itself expands and undertakes additional challenges. .. Tribes that have successfully developed capacity in a given area can continue to receive GAP funding to expand, enhance, or evolve their capacity." EPA has similarly modified other sections of the GAP Guidance to reinforce the continued availability of GAP funding for tribes with established capacity.

Comment 11: EPA needs to clarify the range of solid waste program implementation activities that are allowable under GAP. In addition, clarify whether solid waste collection, transportation, storage, and disposal services can be funded under GAP.

Response 11: EPA made a number of changes to Section E of Appendix I to clarify the allowable uses of GAP funds for solid waste program implementation. Specifically, we clarified that generally, GAP will not be used to pay for the services portion of a waste collection program. These services generally fall outside the scope of environmental protection programs administered or funded by EPA. However, GAP may continue to pay for the oversight and administration of those services because those activities are typically part of the government's role in assuring the services are being provided in a manner consistent with program requirements.

Section E of Appendix I also clarifies that the solid and hazardous waste program priority under GAP is the promotion of sustainable tribal waste management programs through the development and implementation of tribal Integrated Waste Management Plans. Finally, the new GAP Guidance clarifies that, once a tribe has established a waste management program, GAP funds may be used for the following implementation activities in order of priority: (a) program administration; (b) compliance and enforcement; (c) solid waste management, resource recovery, and resource conservation support; and (d) cleanup and closure. A detailed list of GAP-supported solid and hazardous waste implementation activities is now provided in Appendix I, Section E.4.