

Chapter 4: Tribal Recommendations

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I. Introduction

Federally-recognized Indian tribes are unique sovereign nations. The federal government's legal and political relationship with tribes includes the Federal Trust responsibility that arises from Indian treaties, statutes, executive orders, judicial decisions, and the historical relations between the United States and Indian tribes. The trust responsibility requires the federal government to consider the best interests of the tribes, including protection of the tribal sovereignty of each tribal government, in its interaction with them and when taking actions that may affect them. Traditionally, tribal programs have been modeled after state programs, which do not necessarily take into account tribal needs and priorities. Thus, enhancing the role of tribes in Superfund should be addressed separately from states.

The goal of the Tribal Workgroup is to make recommendations on how to improve the involvement of tribes in the Superfund program. While the other three workgroups are addressing readiness, assistance, and agreements for states, the Tribal Workgroup is focused on these same issues from a tribal perspective. Because many tribes have very little, if any, involvement in Superfund, the recommendations in this chapter emphasize assistance to tribes in Superfund program development. Section II of this chapter addresses tribal readiness; Section III discusses EPA assistance to tribes; and Section IV contains EPA-tribal partnership agreements.

II. Readiness

While the Tribal Workgroup endorses the criteria developed by the Readiness Workgroup for assessing state and tribal Superfund capabilities, these criteria may not yet apply to all tribes. Tribes are following the same path as states in enhancing their role in Superfund, but tribes are at earlier stages, where capacity building is the highest priority.

Recommendations for Tribal Readiness

- ◆ Encourage tribes to build Superfund program capacity relevant to their individual needs and priorities.
- ◆ Use existing information to identify tribes with existing tribal capacity within each EPA region.

The focus for enhancing the tribal role in Superfund should emphasize assisting tribes in building capacity to a level where the readiness criteria will apply. Due to the current level of tribal Superfund readiness, tribes should be encouraged to develop their capacity in whichever program components are most relevant to their needs and priorities.

Until tribal capacity has been strengthened, each region should develop an understanding of the existing capabilities of the tribes in its region. A region may only need to review its files for previous assessments of tribes and update that information as necessary. This information should assist regions in identifying the various tribal issues and priorities.

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III. Assistance to Tribes

The capacity of tribes to implement the Superfund program varies greatly from tribe to tribe. The recommendations in this section detail the critical elements of assistance that EPA can offer. Some needs are similar to those of states, such as the need for a variety of flexible funding tools and increased access to federal technical resources. However, specific tribal needs depend on building a foundation of Superfund program knowledge and funding, and incorporating tribal perspectives into program elements.

Recommendations for EPA assistance to tribes are organized into four main topics: A) Funding; B) Training; C) Administrative/Infrastructure; and D) Technical.

A. Funding

Recommendations for Increasing Funds

- ◆ Increase funding for tribes in the form of specific tribal funding that is allocated separately from state funding.
- ◆ Develop and apply for a class deviation from the 10% Core funding cost-share on behalf of all tribes.

Tribes are only at the early stages of Superfund involvement, in part because past funding allocations have not been adequate to support tribal participation. Because of the critical differences in needs and capacity between states and tribes, tribes should receive specific funding that is allocated separately from states, with a separate prioritization scheme for distribution of funds to tribes.

Deviations from cost-share requirements are recommended for tribes because, unlike states, some tribes do not have continuous sources of revenue, such as a reliable economic base or tax structure. Without such revenue, it is essential that tribes be able to use federal funding to address their priorities.

B. Training

Recommendations for Improving Tribal Superfund Training

- ◆ Develop and provide a consolidated resource manual, *Tribal Superfund Orientation Manual*, to all tribes.
- ◆ Design a basic tribal Superfund curriculum specifically for tribes that includes courses, currently offered through regional offices and the CERCLA Training Center, modified to incorporate tribal perspectives.

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A critical component of building tribal capacity will be to offer training that is more readily accessible and applicable to tribes than what currently exists. To facilitate the educational outreach to tribes on both administrative and technical aspects of Superfund, it is necessary to develop and offer a consolidated resource manual, *Tribal Superfund Orientation Manual*. This one-stop resource for information would consist of several notebooks that include Superfund orientation materials, guidance documents, prototype documents already developed and used by tribes, and references. The materials would cover all phases of Superfund program elements, but would focus on areas of particular concern to tribes, and would present a tribal perspective on all issues. The notebooks would be accompanied by a training course to introduce tribes to the notebook contents.

The development of the *Tribal Superfund Orientation Manual* will require the intensive involvement of tribal organizations or individual Tribes, and the training course to introduce the manual will be taught by a tribal representative. These materials and training will not replace training on specific Superfund topics, but will serve as a comprehensive reference tool that is readily available to tribal personnel. In addition to these materials, specific training courses that should comprise the basic tribal Superfund curriculum should be developed. Necessary courses may already be offered in regional offices or at the CERCLA Training Center. However, they will need to be modified to include tribal-specific concerns and perspectives. These courses are suggested in the section of this chapter where they are applicable, and a suggested list is included as Appendix C of this report.

C. Administrative/Infrastructure

1. Regulatory Capability

Recommendations for Improving Tribal Regulatory Capability

- ◆ Assist tribes in establishing codes and ordinances.
- ◆ Develop and regularly offer a course on regulation writing for tribes.

Not all tribes have in place the administrative processes to promulgate regulations. Tribal environmental agencies may not have the autonomy to develop administrative compliance or enforcement regulations. The federal regulations could be included in tribal codes and ordinances; however, many environmental regulations are lengthy and many tribes do not have the financial and personnel resources to develop and administer such complicated and cumbersome codes and ordinances. Assisting tribes in establishing codes and ordinances and training on regulatory issues will help them overcome these obstacles. One option would be to assist tribes in hiring consultants to develop codes and ordinances.

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Furthermore, tribes do not have criminal enforcement authority for violations committed by non-Indians on tribal land. For environmental crimes, enforcement of criminal violations would be the purview of federal authorities.

2. Program Management Capability

Recommendations for Improving Tribal Program Management Capability

- ◆ Streamline the issuance and administration of financial assistance.
- ◆ Develop and regularly offer training courses specifically for tribes in Contract Management; Grants/Cooperative Agreement Management; and Project Management.
- ◆ Assist tribes in obtaining access to technical resources.

In comparison to many states, tribes are at a distinct disadvantage in terms of administrative project management. This is partly due to the comparatively small number of tribal staff available to assume record-keeping, procurement, program management, and technical duties. Thus, it is difficult for many tribes to meet stringent, time-consuming, administrative requirements of Superfund. In addition to the small staff sizes, many tribal staff may not have vast experience working with federal contracts, CAs, grants, property management, and procurement. Consolidating administrative requirements as much as possible (e.g., procurement certification could be submitted once a year for multiple grants) and training tribal staff in Superfund administration and program management will help tribes meet the necessary requirements.

Tribes have limited financial resources to buy computers, access the Internet, and purchase the latest technologies available. Such resources are key to building capacity.

D. Technical

The program components identified in the readiness criteria and the *Model Agreement* were used as a basis for structuring these technical assistance recommendations. The definition for each program component is taken directly from those provided by the Readiness Workgroup. Because tribes are only beginning to assume Superfund program responsibilities, the focus of technical assistance is on capacity building for components in the initial stages of the program.

1. Site Identification, Screening, and Prioritization

The efforts under this program element are designed to enable tribes to identify, screen, and prioritize potentially contaminated sites using a system that conforms with the policies and requirements of the current Superfund program.

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Recommendations for Expanding Site Identification Capacity

- ◆ Assist tribes in developing tracking and notification systems for potentially contaminated sites and hazardous substance releases.
- ◆ Include tribes as partners in regional equipment-sharing arrangements and ensure that tribes know how to access and use the equipment. (Also see *Chapter 2: Assistance Recommendations*, Section B, Frequently Used Equipment, and Specialized or Infrequently Used Equipment.)
- ◆ Provide tribal access to CLP laboratories. (Also see *Chapter 2: Assistance Recommendations*, Section B, Contract Lab Program and Other Labs.)
- ◆ Modify and regularly offer courses to tribes, including: Site Screening, Preliminary Assessment/Site Investigation Training, 40-hour Health and Safety and 8-Hour Refresher, and Sample Taking.

Currently, little site discovery work occurs in Indian country, and therefore the universe of sites in these areas may be much greater than currently estimated. A more accurate accounting of sites that affect tribes is necessary. Mechanisms, similar to those employed by states, for the tracking and notification of potentially contaminated sites and hazardous substance releases would expand site discovery in Indian country. To further expand site identification capacity, tribes have a need to access federal resources. To ensure this access, it is necessary to provide information on what is available, how to access it, and how to use it.

Recommendations for Expanding Site Screening and Prioritization Capacity

- ◆ Develop a screening and prioritization process that includes tribal cultural values.
- ◆ Assist tribes in finding cleanup alternatives for sites that cannot be addressed under the Superfund program.
- ◆ Provide interested tribes with assistance to develop VCPs and Brownfields programs.
- ◆ Develop and regularly offer a tribal-specific course on the HRS.

EPA's current methods of screening and prioritizing Superfund sites are based on toxicological principles that do not account for tribal cultural values. The HRS is the mathematical scoring system used by EPA to assess the relative risks posed by sites in order to determine whether a site is eligible for

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placement on the NPL. The HRS evaluates the risks posed by groundwater migration, surface water migration, soil exposure, and air migration in terms of the likelihood of release, constituent characteristics, and target populations. The existing HRS does not appropriately reflect risk to tribes for two primary reasons. First, Indian country is often sparsely populated and does not constitute a large enough target population to qualify on the HRS. Second, tribes use natural resources for purposes that are not typical of other populations. Tribal culture and tradition may involve using natural resources for medicinal plants, subsistence living, and sacred ceremonies. Including tribal cultural values and natural resource uses in the HRS will encourage tribal involvement and capacity building in site screening and prioritization by making the process more relevant to tribal concerns.

While states may be able to refer sites not added to the NPL to other programs for evaluation, tribes experience obstacles when addressing sites that do not qualify for Superfund resources under current national screening and prioritization standards. In states, the responsibility for such sites that have been deemed “No Further Remedial Action Planned” (NFRAP) is often assumed by other state programs, such as VCPs and Brownfields. Without such programs, tribes have no alternatives for cleaning up sites that do not qualify for federal funding, and often the risks posed by these sites remain a threat to tribal communities. Unless such programs are in place, other mechanisms need to be created to ensure that tribal protection from hazardous waste releases is not neglected.

2. *Short-term Actions*

The efforts under this program component are designed to ensure that tribes have the ability to conduct short-term actions.

Recommendations for Building Short-term Action Capacity

- ◆ Improve tribal access to experts to assist in emergency situations or critical areas where a tribe has not yet developed expertise. (Also see *Chapter 2: Assistance Recommendations*, Section B, Expert Assistance)
- ◆ Improve funding and the ability for tribes to secure their own small, private contractors.

Until a tribe has developed its own in-house expertise, access to experts will be particularly important in time-critical situations. IPAs, EPA experts on a short-term basis (e.g., Emergency Response Team, EPA labs), and contractors are options available to fulfill this need. However, because many tribes are located in remote, rural areas, IPAs are often difficult to fill and can be very costly. Contractors may be more available to tribes, but may also be expensive. Because tribes may have limited legal resources, expert assistance with PRP searches, enforcement actions and negotiations is also extremely valuable.

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3. Long-term Actions

The efforts under this program component are designed to build tribal capacity to conduct technically complex, long-term remediation activities. The capacity to perform long-term actions is contingent upon strengthening tribal Superfund capabilities. In addition, incorporating tribal values in long-term actions may require modifications to the risk assessment process.

Recommendations for Building Long-term Action Capacity

- ◆ Assist tribes in developing the capability to select remedies.
- ◆ Ensure consultation and involvement with tribes throughout all long-term actions, including the risk assessment process that are conducted in Indian country or where tribes are affected by the action.
- ◆ Incorporate tribal concerns by integrating human health and ecological factors and cultural values in the risk assessment process and modify EPA guidance appropriately.
- ◆ Consider potential damage to tribal cultural resources resulting from any remedial action which may impact tribal lands.
- ◆ Support tribes' role as an Natural Resource Damage Assessment (NRDA) Trustee by promoting coordination with tribes on any remedial action which may impact tribal lands.
- ◆ Modify current courses to include tribal perspectives on risk assessment, eco-assessment, risk communication, data quality objectives, quality assurance management plans, and quality assurance project plans.

Human health and ecological risk assessments are conducted to assess the dangers that are posed to human and ecological populations if no remedial action were to occur. Similar to the HRS, the exposure pathways that are developed in risk assessments do not account for tribal traditions and cultural values. Typical risk assessment scenarios estimate the extent of exposure by assuming standard population characteristics that have been developed by EPA. These assumptions may not be accurate for tribal populations who use natural resources for subsistence fishing, farming, ranching, and gathering; medicine; and/or traditional ceremonies.

Current assumptions of safe risk levels and standards may also be inappropriate for tribes. Acceptable risk levels are determined by communities through the public discussion and political process. Each community has concerns that may differ from other communities. Tribal communities generally have some differences in concerns from those of states (e.g., tribes' culture and livelihood is inextricably linked with the land and its use for sustenance, religion, and other purposes). Some tribes may utilize the federal

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preliminary remedial guidelines for acceptable risk levels, while others may develop their own. Each tribe should be involved in and consulted on decisions regarding risk levels. During long-term actions, direct discussions with the tribe are necessary for tribal risk assessments.

The risk assessment process was developed to help EPA meet its Superfund mandate to protect human health and the environment from current and potential threats posed by hazardous substances. The process examines risks to human health and the environment separately; for many tribes, human health and the environment are inseparable. Risk assessments in Indian country should integrate human health, ecological, and cultural considerations and emphasize a comprehensive approach by allowing public participation in the decision-making process. Examples of tribes and references to unique tribal considerations could be incorporated into the guidance manuals.

In addition, the process needs to address the potential loss of use due to remedial activity. Risk assessments estimate the danger to current and future populations near the site posed by contaminants if no remedial activity is taken. The results of the risk assessment are used to help select the remedies for reducing site risks. However, the process of remediation itself can cause irreparable damage to historically sacred Indian sites or other cultural resources, and should be considered when selecting appropriate remedies for sites in Indian country.

4. Superfund Amendments and Reauthorization Act (SARA) Title III

Recommendations for Building Emergency Planning and Preparedness Capacity

- ◆ Assess existing emergency response infrastructure within tribal communities using existing regional information.
- ◆ Assist tribes in developing a Tribal Emergency Response Commission/Local Emergency Planning Committee (TERC/LEPC) structure and in applying for appropriate grants.
- ◆ Increase funding for Chemical Emergency Preparedness and Prevention Office (CEPPO) grants to tribes and support deviations and creative solutions from the 25% in-kind matching contribution.
- ◆ Regularly offer a basic tribal-specific SARA Title III course.

Emergency preparedness and prevention is of critical importance to tribes due to the increasing number of hazardous materials transported over Indian country. Thus, an assessment of existing tribal infrastructure would help identify the next steps for assisting tribes and determining effective methods for building emergency response and preparedness capabilities. CEPPO within EPA awards annual grants to states and tribes for the establishment of state or tribal Emergency Response Commissions and for training, technical assistance, and coordination with LEPCs. Tribes have received an average of \$150,000 annually

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since 1990. However, the 25% matching funds requirement for CEPPPO grants can be a barrier for tribes. CEPPPO has also made funds available to tribes through the General Assistance Program. Additional assistance, such as a tribal-specific course in SARA Title III, will be necessary to help tribes overcome obstacles to building their emergency response, preparedness, and prevention capabilities.

IV. Agreements

The Tribal Workgroup endorses the general *Model Agreement* developed by the Agreements Workgroup; however, other considerations and options that are unique to tribes could be applied to EPA-tribal relations. The two recommendation areas in this section address the critical components that are necessary for improving EPA-tribal partnerships. Section A addresses how EPA staff understanding of tribal governments can be improved. Section B promotes inter-agency coordination.

A. Understanding Tribal Governments

Recommendations for Increasing EPA Staff Understanding of Tribal Governments

- ◆ Offer a tribal cultural awareness and tribal-EPA government relations course to Superfund staff.
- ◆ Increase awareness of availability of information about tribal governments, treaties, and activities to Superfund staff.
- ◆ Revisit and frequently update any agreements that are established with tribes so as to reflect current tribal priorities.

A tribal cultural awareness course for Superfund staff would facilitate partnership and understanding between tribes and EPA Superfund staff. Tribal governments are sovereign nations that assert jurisdiction over their people and land. Many tribal governments combine aspects of their traditional styles and institutions with common western forms. The structures of tribal governments have developed in response to the same kinds of factors that affect the development of any government: population size, land base, and economic, cultural, and political considerations. Like other governments, tribes experience changing politics and priorities with changing administrations. Thus, any agreements that are established with tribes should be frequently revisited and updated.

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B. Inter-agency Coordination

Recommendation for Enhancing Inter-agency Coordination within Superfund

- ◆ Increase commitment and efforts, at all levels within EPA, to enhance communication and enact inter-agency agreements among federal agencies working with tribes.

Every federal department and agency is responsible for upholding the Federal Trust responsibility to the federally-recognized Indian tribes. Thus, inter-agency coordination is particularly important in relations between the federal government and tribes to ensure that the trust responsibility is fulfilled.

All of the federal agencies that are involved in protecting tribal environmental and cultural health need to develop inter-agency communication and coordination of their activities. An example of such inter-agency coordination is the EPA, Bureau of Indian Affairs, Department of Housing and Urban Development, and Indian Health Service Memorandum of Understanding signed in 1991. This agreement details the respective authorities and responsibilities of each agency and highlights areas of potential overlap. The MOU also establishes mechanisms for coordinating the priorities and actions of the individual agencies. While this agreement is a good starting point for developing inter-agency coordination, the signatory agencies need to increase their commitment to implementing this agreement.

Other examples where inter-agency coordination is necessary are the NRDA's administered by the Department of Interior and the federal facilities managed by Department of Defense or Department of Energy. EPA's role should be to coordinate and facilitate activities at these sites and promote tribal consultation and involvement. Inter-agency coordination and communication regarding NRDA sites and federal facility sites would enhance the protection of human health, the environment, and the culture of tribes impacted by these sites.

V. Tribal Workgroup's Four Priority Recommendations

- ◆ Increase funding for tribal Superfund programs and allocate this separately from state funding.
- ◆ Develop tribal-specific Superfund training and increase training efforts.
- ◆ Incorporate tribal cultural values into the Superfund program.
- ◆ Advocate inter-agency coordination among agencies with environmental federal Trust responsibilities.

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VI. Summary of Recommendations

- ✓ Indicates activities that EPA can conduct under the current Superfund program.
- ✚ Indicates activities that require policy changes.
- ☆ Indicates activities that require regulatory changes.
- Indicates activities that require statutory changes to the Superfund program.

Assessing Readiness	✓ Encourage tribes to build program capacity relevant to their individual needs and priorities.
	✓ Use existing information to identify tribes with existing tribal capacity within each EPA region.
Funding	✓ Increase funding for tribes in the form of specific tribal funding that is allocated separately from states.
	✓ Develop and apply for a class deviation from the 10% Core funding cost-share on behalf of tribes.
Training	✓ Develop and provide a consolidated resource manual, <i>Tribal Superfund Orientation Manual</i> , to all tribes.
	✓ Design a basic Superfund curriculum specifically for tribes.
Regulatory Capability	✓ Assist tribes in establishing codes and ordinances.
Program Management	✓ Streamline the issuance and administration of financial assistance.
	✓ Assist tribes in obtaining access to technical resources.
Site Identification Capacity	✓ Assist tribes in developing tracking and notification systems for potentially contaminated sites and hazardous substance releases.
	✓ Include tribes as partners in regional equipment-sharing arrangements and ensure that tribes know how to access and use the equipment.
	✓ Provide tribal access to CLP laboratories.
Site Screening and Prioritization Capacity	✓ Develop a screening and prioritization process that includes tribal cultural values.
	✓ Assist tribes in finding cleanup alternatives for sites that cannot be addressed under the Superfund program.
	✓ Provide interested tribes with assistance to develop VCPs and Brownfields programs.

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Short-term Action	✓ Improve tribal access to experts to assist in emergency situations or critical areas where a tribe has not yet developed expertise.
	✓ Improve funding and ability for tribes to secure their own small, private contractors.
Long-term Action	✓ Assist tribes in developing the capability to select remedies.
	✓ Ensure consultations and involvement with tribes throughout all long-term actions, including the risk assessment process, that are conducted in Indian country and in other areas where tribes are affected by the action.
	✓ Incorporate tribal concerns by integrating human health and ecological factors, and cultural values in the risk assessment process, and modify EPA guidance appropriately.
	✓ Consider potential damage to tribal cultural resources resulting from any remedial action which may impact tribal lands.
	✓ Support tribes' role as an NRDA Trustee by promoting coordination with tribes on any remedial action which may impact tribal lands.
Emergency Planning and Preparedness	✓ Assess existing emergency response infrastructure within tribal communities using existing regional information.
	✓ Assist tribes in developing a TERC/LEPC structure and applying for appropriate grants.
	✓ Increase funding for CEPPO grants to tribes and support deviations and creative solutions from the 25% in-kind matching contribution.
Understanding Tribal Governments	✓ Offer a tribal cultural awareness and tribal-EPA government relations course to Superfund staff.
	✓ Increase awareness of availability of information on tribal governments, treaties, and activities to Superfund staff.
	✓ Revisit and frequently update any agreements that are established with tribes.
Inter-agency Coordination	✓ Increase commitment and efforts, at all levels within EPA, to enhance communication and enact inter-agency agreements among federal agencies working with tribes.

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VII. Conclusion

The tribal Workgroup's recommendations describe the actions that should be taken by EPA to enhance the tribal role in Superfund. All of the recommendations can be implemented without a statutory or regulatory change, which means that EPA could take immediate actions toward initiating this proposal. When implementing these suggestions, regular consultation and collaboration with the tribes will be essential.

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