

Summary of Past Feedback from Tribes and Tribal Organizations on the 2013
*Indian Environmental General Assistance Program:
Guidance on the Award and Management of General Assistance Agreements for
Tribes and Intertribal Consortia*

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I. Purpose

As part of the 2018 General Assistance Program (GAP) Guidance Evaluation, EPA's American Indian Environmental Office (AIEO) prepared this summary of past feedback to acknowledge the concerns and issues raised by tribes, tribal representatives, and intertribal consortia who are affected by the 2013 GAP Guidance.

The 2018 GAP Guidance Evaluation is a process for AIEO to engage with tribes on how to improve the GAP Guidance¹ or its implementation to better achieve the goals of the program. The GAP Guidance describes how EPA administers the financial assistance program created by the GAP Act of 1992 (42 U.S.C. § 4368b).² Under the GAP statute, EPA provides GAP financial assistance through grants or cooperative agreements to tribal governments and intertribal consortia to assist tribes in planning, developing, and establishing the capacity to implement federal environmental programs administered by the EPA, and to assist in implementation of tribal solid and hazardous waste programs in accordance with applicable provisions of law.

Specifically, the purpose of this document is to support the first phase of the 2018 GAP Guidance Evaluation, which involves consultation with tribal governments as well as focused engagement with representatives from the NTC, RTOCs, and tribal partnership groups to seek additional input on how the 2013 GAP Guidance or its implementation can be improved. All feedback summarized in this document is already part of EPA's evaluation of the GAP Guidance.

The document provides a high-level summary of the predominate feedback provided to EPA by GAP recipients since the issuance of the 2013 GAP Guidance, organized by four topic areas in Part II below, and it does not reflect EPA's views regarding each point in the summary. This document draws upon comments, issues, and concerns shared with EPA through written and oral communication from tribal government representatives, including members of the National Tribal Caucus and Regional Tribal Operations Committees, and from intertribal consortia; however, it is not intended to be a *comprehensive* summary of past feedback. In compiling this summary, AIEO captured the original comments as we received them, with minimal editing for clarity, length, etc.

AIEO recognizes that this summary of past feedback does not fully reflect all the views from tribal representatives and consortia about the 2013 GAP Guidance. During the summer of 2018, we will be actively seeking additional input from tribes and consortia about how to improve the Guidance and its implementation. For information about how to provide additional input to AIEO on the 2013 GAP Guidance, please refer to Part III of this paper. EPA prepared the [Indian Environmental General Assistance Program Frequently Asked Questions](#) (November 2016) to provide additional clarification on implementation of the 2013 GAP Guidance. Some of the tribal concerns summarized below are relevant to the FAQs. These FAQs will also be the subject of further review and revision, including incorporation into the Guidance, where appropriate, during the 2018 GAP Guidance Evaluation.

¹ Guidance on the Award and Management of General Assistance Agreements for Tribes and Intertribal Consortia (May 2013), available at <https://www.epa.gov/tribal/2013-guidance-award-and-management-general-assistance-agreements-tribes-and-intertribal>.

² The purpose of GAP Act also includes "technical assistance from the [EPA] to Indian tribal governments and intertribal consortia in the development of multimedia programs to address environmental issues on Indian lands." However, the focus of the GAP Guidance is on GAP financial assistance, which is the focus of EPA's Evaluation.

II. Summary of Past Feedback on 2013 GAP Guidance

a. EPA-Tribal Environmental Plans (ETEPs)

CONTEXT

The 2013 GAP Guidance states:

Regions and tribes are expected to develop an ETEP that contains the following components: (1) identification of tribal environmental program priorities, including capacity building and program implementation goals; (2) identification of EPA program priorities and management requirements; (3) an inventory of regulated entities; and (4) identification of mutual roles and responsibilities. The purpose of the ETEP is to develop the complete picture of the particular environmental issues facing the tribe, establish a shared understanding of the issues the tribe will be working on, and a shared understanding of those issues that EPA will address consistent with its responsibility to protect human health and the environment. By having these elements of a plan in place, EPA should be able to ensure that GAP work plans are developed to support the long-term priorities and goals of the tribe and that funds are directed toward building environmental program capacities. EPA considers this jointly-developed plan an important component of effective GAP resource management.

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. GAP Guidance section 4.2, "Purpose and Format for ETEPs," p. 15 of 22.

PAST FEEDBACK ON ETEPS

- ETEPs are not a valuable tool for advancing environmental protection in tribal communities. The requirement to develop and implement an ETEP as a condition of the GAP grant is burdensome and unreasonable.
- ETEPs disrespect tribal sovereignty because they are used by EPA to tell a tribe what EPA wants the tribe to do rather than allowing tribes to define their own environmental program priorities.
- Joint EPA-tribal planning agreements negotiated between tribes and EPA can provide a framework to guide the Tribe-Agency relationship. However, the Agency must honor tribally defined priorities and interests and should provide each tribe sufficient flexibility in the definition of goals, pathways, and indicators of capacity.
- The GAP Guidance imposes significant and unnecessary administrative burdens on tribes and EPA staff, especially the ETEP requirement. Increasing administrative requirements without additional funding results in GAP dollars being diverted to completing additional administrative tasks instead of tribal capacity to protect human health and the environment. This violates the 1984 Indian Policy.
- ETEPs are not required by law, so they should not be a condition of the grant. EPA has chosen to apply the ETEP requirement in the GAP Guidance, which reflects EPA policy, not law- so tribes do not have to follow the ETEP requirement. Tribes should not have to comply with the additional burdens imposed by EPA's discretionary policy.

- To make the ETEP requirement easier to comply with, the GAP Guidance should provide a sample format or template for ETEPs.
- Intertribal consortia that receive GAP funding should be required to establish ETEPs.
- Some tribes are concerned about the ETEP being shared with outside parties. EPA should clarify whether it will release tribal program information contained in an ETEP with members of the public or other governmental agencies so that tribes can carefully consider what to include or exclude from their plan.

b. Emphasis on Capacity Development and Use of Pre-Determined Measurable Capacity Indicators

CONTEXT

The Indian Environmental General Assistance Program Act of 1992 states:

The purposes of this section are to . . . provide general assistance grants to Indian tribal governments and intertribal consortia to build capacity to administer environmental regulatory programs that may be delegated by the Environmental Protection Agency on Indian lands. 42 UCS 4638b section (b).

Any general assistance under this section shall be expended for the purpose of planning, developing, and establishing the capability to implement programs administered by the Environmental Protection Agency and specified in the assistance agreement. 42 UCS 4638b section (f).

The 2013 GAP Guidance states:

Tribal governments have tribe-specific priorities. Tribes will identify program areas to focus on with respect to building environmental protection program capacity. [...] 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.

Tribes that are not seeking TAS status may wish to establish other meaningful and important levels of environmental program capacity directly in support of the environmental statutes the EPA implements, or for tribal environmental protection programs that are consistent with EPA's programs. Seeking TAS status is not a requirement for receiving funding under this program.

...The indicators in Appendix I offer a non-exclusive menu of choices, organized by category of environmental program development; they need not all be selected.

Tribes and EPA will rely on the capacity indicators that have been identified in work plans and the long-term goals in ETEPs to assess and report on progress in the development of tribal environmental program capacities under the GAP program. GAP Guidance section 3.0, "Performance Reporting: Indicators of Tribal Environmental Program Capacity," p. 12 of 22.

PAST FEEDBACK ON CAPACITY DEVELOPMENT AND CAPACITY INDICATORS

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- The GAP Guidance goes beyond what the EPA Office of Inspector General (OIG) recommended in their February 19, 2008 audit report, “EPA Framework for Developing Tribal Capacity Needed in the Indian General Assistance Program” (Report No. 08-P-0083).
 - The Guidance does not contain any provisions related to the deficiencies in EPA's tracking and reporting systems noted by OIG or how EPA proposes to address them, but instead focuses exclusively on tribal program requirements. The GAP Guidance shifted the burden for national program accountability from EPA to the grantees.
 - GAP should allow tribes to maintain an environmental presence rather than having to show measurable capacity building progress over time. By limiting the availability of GAP funding for ongoing community education and outreach activities and other recurring environmental program activities that are important to individual tribes, the GAP Guidance cuts off an important source of funding for tribes to maintain their environmental programs. The Guidance places too much emphasis on each tribe progressing towards end-goals and establishes too many limitations on activities deemed implementation.
 - Denial of GAP funding for recurring community education and outreach activities appears to be based on an assumption by EPA that once a set of written or visual aid materials has been developed, capacity in this area has been achieved. This reflects a fundamental misunderstanding regarding the importance of continuous outreach in tribal communities to garner and maintain support for and participation in environmental protection efforts.
 - GAP funding should support the recurring costs of maintaining core environmental program capacities (administrative, financial management, information management, environmental baseline needs assessment, public education/communication, legal, and technical/analytical).
 - GAP should fund recurring, repeat tasks, such as consultation, collaboration, document reviews, administration and oversight of non-GAP funded environmental programs, proposal writing etc. It is not clear how GAP will maintain tribal capacity; maintaining capacity should be a measurable goal, not just building capacity.
 - GAP Guidance should allow a tribe or intertribal consortia to host a community cleanup event as a stand-alone project (e.g., household hazardous waste, e-waste, or roadside litter pickups).
 - GAP funding needs to be available to rebuild lost capacity (i.e., due to staff turnover).
 - GAP funding should be for tribally-defined tasks to develop tribally-defined capacities to address tribal priority issues. By making the GAP Guidance focused on building tribal capacity to administer environmental protection programs that are consistent with the federal laws the EPA is charged with implementing, “consistent with Agency standards and regulations,” the GAP Guidance reduces tribal governments to an administrative arm of EPA.

- EPA should eliminate the need for applicants to assign EPA-defined, measurable capacity indicators to their proposed work, and the need for EPA to approve applicant proposed measurable indicators. The use of indicators has unjustly limited the scope of GAP-eligible activities and often involves months of negotiations and re-writes of a grantee's work plan.
- The Guidebook does not adequately address the needs of tribes that are not currently seeking to implement federally authorized regulatory and enforcement programs ("treatment in a manner similar to a state") or how these tribes will be affected once it is determined that "core program capacities" have been met.
- The Guidebook does not adequately address the needs of tribes that currently have limited potential for environmental regulatory jurisdiction- or how these tribes will be affected once it is determined that "core program capacities" have been met.
- The Indicators should be presented as one set of possible criteria or expanded to include a wide variety of actions that could be considered in evaluating the effectiveness of a program and in considering whether a tribal government is building capacity.
- EPA should transition GAP capacity indicators to outcome measures, such as "how many tons of waste was diverted from the landfill last year," to better demonstrate the pollution prevention benefits of GAP activities. Focusing GAP indicators on capacity pulls attention away from environmental outcomes that are important to tribes.
- The Guidance states that tribes can develop custom indicators but there is no evidence that a custom indicator has ever been approved by EPA.
- Establishing environmental protection program capacities should not be defined with specific timelines, and recipients should always be eligible to receive GAP assistance beyond any EPA established capacity development timeline.
- Once a GAP grantee has successfully established environmental protection program capacity, EPA provides inadequate support for program implementation, either using GAP or other EPA funds. GAP is a "bridge to nowhere" and – as a result – tribes are disincentivized to pursue program delegations from EPA.
- GAP funding needs to remain flexible enough for tribes to address emerging issues and opportunities (e.g., technology, new environmental risks).

c. Allowable Waste Program Implementation Activities

CONTEXT

The 2013 GAP Guidance states:

Under RCRA, EPA implementation activities include: (1) issuing permits to hazardous waste treatment, storage, and disposal facilities; (2) issuing RCRA identification numbers to facilities that handle (generate, store, treat, transport, etc.) hazardous waste; (3) conducting compliance assurance (including inspections) and enforcement at facilities subject to the hazardous waste or UST requirements; (4) accepting required notifications from regulated UST owner/operators; (5)

directing corrective action activities at facilities subject to the hazardous waste or UST requirements; and (6) exercising enforcement options as necessary under RCRA, including: RCRA § 700344 (which allows EPA to respond to conditions at non-hazardous waste facilities which may present an imminent and substantial endangerment to health or the environment) or § 4005(c)(2). GAP Guidance Appendix I, section E.1, "EPA's Solid Waste, Hazardous Waste, and Underground Storage Tank Programs," p. 25 of 42.

In general, GAP funding should be used to build the applicable tribal environmental program capacities; once capacity is established, tribes may seek funding to support more complex program development and implementation while continuing to use GAP resources for ongoing capacity building activities. EPA's main tribal solid waste priority is the promotion of sustainable tribal waste management programs through the development and implementation of Integrated Waste Management Plans (IWMPs). EPA will focus GAP funding on this priority. GAP Guidance Appendix I, section E.2, "Program Capacity Building: Planning, Developing, and Establishing Tribal Waste Management and Underground Storage Tank Program Capacity," p. 27 of 42.

Once a tribe has established a waste management program that is generally consistent with the applicable indicators described above, 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. GAP Guidance Appendix I, section E.3, "Program Implementation: Tribal Waste Management and UST Program Implementation," p. 29 of 42.

PAST FEEDBACK ON WASTE PROGRAM IMPLEMENTATION

- Tribal solid and hazardous waste programs should not be defined by the purposes and requirements found in the Solid Waste Disposal Act (aka the Resource Conservation and Recovery Act).
- Tribes must be able to continue using GAP to support Tribally-defined Solid and Hazardous Waste implementation activities. Tribes are independent and have their own ways of doing things- regulatory approaches are not always the most effective.
- The need for flexibility in funding solid waste management particularly exists in Alaska, where isolated Native Villages have few options. GAP funds often subsidize basic solid waste management services and very often the best environmental option is the backhaul of solid waste for recycling or disposal at a larger facility. However, the Guidance has foreclosed the use of GAP funding for these activities.
- The changes to GAP Guidance, which limit the flexibility and implementation for solid waste, will set back the very work and capacity the GAP program has partnered with tribes to build over the years. Additionally, many tribal lands are in rural or remote areas where recycling and proper household hazardous waste disposal options should not be considered "basic government function" and thus unallowable under GAP.
- Tribes should be allowed to use GAP funds to conduct waste cleanup activities without restrictions.

d. GENERAL/MISCELLANEOUSPAST FEEDBACK ON GENERAL OR MISCELLANEOUS TOPICS

- EPA did not follow its consultation policy when developing the 2013 GAP Guidance. Tribes were not involved in the process until after the guidance had been developed and tribes were not given the opportunity to consult on all aspects of the final guidance, such as some of the “Restrictions” laid out in Part 1.
- By describing “restrictions” on the use of GAP funds, the GAP Guidance goes beyond recommendations contained in the 2008 EPA Office of the Inspector General GAP audit report; the GAP Guidance should not make activities previously funded under GAP unallowable.
- The Guidance violates principles of the 1984 “EPA Policy on the Administration of Environmental Programs on Indian Reservations,” such as the principles related to the removal of “existing legal and procedural impediments to working directly and effectively with tribal governments on reservation programs.”
- The language in the Guidance should be clearer and easier to digest. It is difficult to navigate such a large document and understand how to apply it.
- Tribes are being held to GAP Guidance requirements as binding legal requirements even though the Guidance includes provisions that extend beyond the statute and implementing regulations.
- There remain inconsistent interpretations of allowable and unallowable activities under GAP between project officers and from region-to-region. EPA should provide training for EPA project officers and tribes to improve consistency.
- The Guidance should use the term “federally recognized tribal governments” rather than “Indian country” to be fully inclusive of current GAP recipients and to ensure that Alaska Native Villages are adequately and fully considered.
- The Guidance should include a new section that provides a capacity building framework for “projects and issues unrelated to EPA authorities and programs.”
- GAP funds should address tribal environmental priorities without the stipulation of targeting funding to support the objectives of EPA’s statutory and regulatory programs. The Guidance should include flexibility to allow tribes to address their own priorities outside the context of statutes administered by EPA.
- The Guidance includes a requirement that the Director of the American Indian Environmental Office sign off on some activities. This is overly burdensome and unnecessarily extends the grant approval process.
- The language in the GAP Guidance regarding intertribal consortia eligibility is unclear and overly burdensome.

- The GAP guidance requirements related to mandated planning documents and reporting are to the detriment of successes on the ground. Tribes have demonstrated years of fully functioning management systems.
- GAP Guidance requirements relating to planning, measures, and accountability amplify existing concerns regarding administrative burdens and less flexibility. In short, more mandated planning documents and reporting to the detriment of successes on the ground.
- Administrative burden of applying for and administering GAP funds under the 2013 Guidance are disproportionate to the amount of funding in any individual grant or cooperative agreement.
- Tribes should be afforded the flexibility to administratively organize however they choose and still receive GAP funding as long as: 1) they meet the minimum requirements of law to receive GAP funding; 2) there is a discernible structure to the organizational scheme; 3) they allow for accountability; and 4) they delineate funding and spending so that GAP funds can be tracked.
- EPA should eliminate the need for grantees to use GAP Online for GAP funds that are not administered through Performance Partnership Grants, noting that GAP Online can add administrative burden for grantees.
- Tribes should be allowed to use GAP funds for implementation of EPA-delegated programs.

III. Overview of 2018 GAP Guidance Evaluation

EPA's Office of International and Tribal Affairs (OITA) is coordinating with EPA Regions and the National Tribal Caucus to gather input about how to improve the 2013 GAP Guidance and/or its implementation to better achieve the goals of the program and support tribal governments in the development of tribal environmental programs. OITA's objectives for the GAP Guidance are to:

1. Ensure consistent funding decisions for all grantees.
2. Provide a framework for planning and building environmental program capacity so that the capacity building progress and achievements of grantees can be tracked and shared with relevant decision makers.
3. Support tribes in assuming responsibility of EPA programs through capacity development (self-governance).
4. Guide use of GAP funds for solid and hazardous waste program implementation.
5. Minimize administrative burden for project officers and grantees in developing and negotiating work plans.

All past feedback summarized in this document will be considered by EPA throughout the Evaluation.

To *supplement* past feedback, the first phase of the Evaluation is focused on gathering input from tribes, intertribal consortia, tribal partnership groups (e.g., National Tribal Caucus, National Tribal Water Council, etc.), EPA staff (e.g., GAP project officers) and others with direct experience using the 2013 GAP

Guidance. We are interested in hearing the full range of tribal perspectives on how the Guidance helps or hinders the achievement of desired environmental protection outcomes. We also look forward to gathering suggestions for how the Guidance might be improved, drawing on specific examples of what's working and what's not working for grantees.

For more information about the GAP Guidance Evaluation, please feel free to contact Rebecca Roose, AIEO Senior Advisor, at roose.rebecca@epa.gov.

For information about OITA's consultation with tribal governments during the input phase, please visit EPA's Tribal Consultation Opportunities page at <https://tcots.epa.gov/>. The timeframe for this consultation and coordination period is June 1 – August 31, 2018.