

US EPA ARCHIVE DOCUMENT



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

OFFICE OF  
SOLID WASTE AND EMERGENCY  
RESPONSE

**Response to Tribal Comments on the Consultation Draft of *The Environmental Protection Agency-Wide Plan to Provide Solid Waste Management Capacity Assistance to Tribes***

**Introduction**

This document contains the United States Environmental Protection Agency's (the EPA) responses to tribal comments received between July 23, 2012 and November 8, 2012, on *The Environmental Protection Agency-Wide Plan to Provide Solid Waste Management Capacity Assistance to Tribes* (the Plan).<sup>1</sup> The EPA received many comments asking for an extension to review the Plan because of the correlation between the *Indian Environmental General Assistance Program Guidance on the Award and Management of General Assistance Agreements for Tribes and Intertribal Consortia* (GAP Guidance)<sup>2</sup> and the Plan. Due to this correlation, the EPA considered solid waste-related comments made during the consultation period for the GAP Guidance which ended on February 22, 2013. As a result of the comments that the Office of Solid Waste and Emergency Response (OSWER) received, both verbally and in writing, the EPA has made numerous changes to the final Plan, issued on November 15, 2013. The final Plan is available on the following website:  
<http://www.epa.gov/epawaste/wyl/tribal/capacityassist.htm>.

Throughout the consultation and coordination process, the EPA and tribes used a variety of mechanisms to exchange ideas and suggestions for how to improve the Plan, including webinars, conference calls, and email exchanges, face-to-face meetings with tribal government staff and direct engagement with tribal government officials. The EPA received written comments from 19 tribal governments, four intertribal organizations, three Regional Tribal Operation Committees (RTOCs) and the state of Alaska. Comments ranged from general statements about the EPA's trust responsibility to tribes to descriptions of the issues tribes face when developing a sustainable waste management program. The EPA designed the final Plan to provide effective tribal solid waste management capacity assistance consistent with the EPA's authority and responsibility.

This document summarizes the common issues raised during the consultation period, as well as how the EPA has addressed them in the final Plan. Similar comments have been grouped and summarized for clarity and efficiency. One major issue raised during the consultation period was clarification on how GAP funds may be used to support solid and hazardous waste program implementation. The new GAP

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<sup>1</sup> This response to comment was prepared consistent with the procedures outlined in *EPA Policy on Consultation and Coordination with Indian Tribes* (<http://www.epa.gov/tp/pdf/cons-and-coord-with-indian-tribes-policy.pdf>) (May 4, 2011).

<sup>2</sup> The GAP Guidance is available at: <http://www.epa.gov/tp/GAP-guidance-final.pdf>

Guidance, which was issued on May 15, 2013, clarifies how 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 a cleanup, and other solid waste program implementation activities that can be funded 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 include 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.

If your tribe or tribal organization has additional questions about our responses to issues raised during the consultation and coordination process, please contact Michaelle Wilson at (703) 308-8790 to schedule additional opportunities for dialogue.

The EPA thanks all who made time to review the document and provide us with valuable input.

### **RESPONSE TO COMMENTS**

**Comment 1:**        **The EPA should focus on broadly addressing various components of capacity-building instead of focusing only on integrated waste management plans (IWMPs) to develop a sustainable tribal waste management program.**

**Response 1:**        While EPA’s main tribal solid waste priority is the promotion of sustainable tribal waste management programs through the development and implementation of IWMPs, the Plan identifies a variety of activities intended to promote this priority. The EPA supports the identification and assessment of open dumps as well as provides training, outreach and technical assistance to support tribes. The EPA is also organizing a national peer matching program to support collaborative program planning, implementation, and sustainability among tribes. These activities allow the Agency to effectively leverage limited resources. More details can be found in Section 4 of the Plan.

**Comment 2:**        **A stronger recycling component, including information on backhauling, should be included within the Plan.**

**Response 2:**        The EPA supports and encourages recycling and sustainable materials management. The EPA is organizing a national peer matching program which can be a productive, cost-effective, and culturally-appropriate method of providing technical assistance to tribes on a wide range of waste-related topics. Peer assistance may be requested for a variety of technical needs, including but not limited to, development of an IWMP; development of solid waste enforcement codes; construction and operation of a transfer station, recycling

facility, or landfill; developing best practices for pollution prevention; greening government/businesses; and increasing recycling rates. More information on the national peer matching program can be found in Section 4 of the Plan.

In addition, waste backhauling is a need for many Alaska Native Villages. The EPA (specifically OSWER, Region 10 and the Office of International and Tribal Affairs (OITA)) is working to bring together the various federal agencies to discuss Alaska-specific sustainability issues, including backhauling.

**Comment 3:** **The EPA should reaffirm its commitment to support the cleanup and closure of open dumps in Indian country, as well as reconsider eliminating the open dump performance measure.**

**Response 3:** The final Plan reaffirms the EPA's support for continued efforts to identify and assess open dumps, in cooperation with the Indian Health Service (IHS). Section 4.1 describes the EPA's support for the identification and assessment of open dumps. However, the EPA will discontinue the tribal open dump cleanup and closure performance measure in FY 2015, to focus on the EPA's main tribal solid waste priority, which is the promotion of sustainable tribal waste management programs through the development and implementation of IWMPs. The EPA will be developing potential new performance measure(s) to replace the open dump measure. Please see Comment 14 for more information on the development of new performance measure(s).

To maximize staff and financial resources, it is critical that the EPA prioritize the Agency resources on the waste-related activities that lead to the most significant environmental benefits. The development and implementation of IWMPs provides the framework for a tribal solid waste management program to effectively identify and plan for addressing solid waste priorities (e.g., assessment, cleanup and closure of open dumps), and institutionalizes practices and policies designed to prevent open dumps in the future. The Plan indicates that tribal decisions on cleanup of open dumps will be made within the context of IWMPs, and the GAP guidance articulates the conditions under which open dump cleanups may receive GAP funding. The complete description of solid and hazardous waste program capacity development and implementation actions which can be funded under GAP are available in the [GAP Guidance, Appendix I, Section E](#).<sup>3</sup>

**Comment 4:** **The EPA should provide flexibility in the development of integrated waste management plans (IWMPs).**

**Response 4:** Tribes have flexibility in the development of IWMPs, because the EPA does not approve IWMPs, and the decision to develop an IWMP lies with each tribe.

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<sup>3</sup> The GAP Guidance is available at: <http://www.epa.gov/tp/GAP-guidance-final.pdf>

However, the EPA has revised the Plan to reflect the idea that the appropriate level of detail in an IWMP for a particular tribe may vary, and recommends that Regions take this into account when deciding whether to include the IWMP in the performance measure. Section 3.1 of the Plan has been revised to state the following: “the EPA recognizes that the level of specificity in a tribe’s IWMP will vary, depending on the tribe’s needs; the EPA believes flexibility is appropriate in the development of an IWMP.”

**Comment 5: The Plan should address the uniqueness of Alaska. Alaska issues are not specifically mentioned within the Plan.**

**Response 5:** The EPA agrees that unique challenges exist in Alaska. The final plan provides flexibility to address site-specific issues within Alaska Native Villages. Currently, the EPA (specifically OSWER, Region 10 and OITA) is working to bring together the various federal agencies that play a role in Alaska to discuss Alaska-specific issues, which include the backhauling of waste. In the meantime, the EPA will continue to engage with Alaska Native Villages on solid waste issues.

**Comment 6: The Plan should clearly define “imminent and substantial health threat.”**

**Response 6:** The Plan no longer includes the phrase, “imminent and substantial health threat.” The phrase was included in the tribal consultation draft Plan<sup>4</sup> to describe a circumstance where EPA would consider funding a cleanup action where a tribe was not building a sustainable waste management program. The Plan now incorporates by reference GAP Guidance sections that expressly address waste cleanup questions. The GAP Guidance Appendix I, Section E.4 (d) (iii), “Cleanup and Closure Activities Where No Tribal Program is being Developed,” specifically states that where a tribe does not have an established program or is not substantially pursuing tangible elements, as described in the GAP Guidance, “EPA will not prioritize providing financial assistance, including GAP funds, for the cleanup or closure activities *unless* the open or unauthorized dump presents an imminent and substantial endangerment to human health or the environment.”<sup>5</sup> Where this standard is met, AIEO will as part of their approval process, consult with OSWER and OECA. This is consistent with the coordinated approach described in the Plan and will ensure proper EPA involvement and oversight of cleanups where there is an imminent and substantial endangerment to human health and the environment.<sup>6</sup>

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<sup>4</sup> The draft tribal consultation Plan is available at:  
<http://www.epa.gov/epawaste/wyl/tribal/pdf/txt/awptribalswmanagement.pdf>

<sup>5</sup> This standard is consistent with RCRA §7003 (42 U.S.C. § 6973) and is applied here as a matter of policy to guide the use of GAP resources for open dump cleanup and closure actions.

<sup>6</sup> The GAP Guidance is available at: <http://www.epa.gov/tp/GAP-guidance-final.pdf>

For more information on the use of Section 7003 of RCRA for imminent and substantial endangerment, please see the *Guidance on the Use of Section 7003 of RCRA, U.S. EPA Office of Enforcement and Compliance Assurance, October 1997* (<http://www2.epa.gov/sites/production/files/2013-10/documents/use-sec7003-mem.pdf>).

**Comment 7:** **The Plan should clarify whether the EPA defines Class I, Class II or Class III landfills, which are permitted under the Alaska Department of Environmental Conservation's solid waste program, as landfills or open dumps.**

**Response 7:** In 2000, the EPA fully approved the State of Alaska's Solid Waste Program, including its tiered structure for permitting Class I, II and III landfills. Therefore, the State of Alaska's permitted Class I, II and III landfills are not considered open dumps. As mentioned in Response 5, the EPA is working to bring together various federal agencies to discuss Alaska-specific issues.

**Comment 8:** **The EPA should clarify its authority to address open dump sites in Indian country as well as clarify what the EPA's and the Indian Health Services' (IHS) roles are within the Indian Lands Open Dump Cleanup Act of 1994.**

**Response 8:** The roles of the EPA and IHS are well defined in the Indian Lands Open Dump Cleanup Act of 1994, PL103-399 (The Act). The Act's purpose is to:

- Identify the location of open dumps on Indian lands and Alaska Native lands;
- Assess the relative health and environmental hazards posed by such dumps; and
- Provide financial and technical assistance to Indian tribal government or Alaska Native entity, either directly or by contract, to close such dumps in compliance with applicable Federal standards and regulations, or standards promulgated by an Indian tribal government or Alaska Native entity, if such standards are more stringent than the Federal standards.

The Act Section 4(a), Study and Inventory states: Not later than 12 months after the date of enactment of this Act, the [IHS] Director shall conduct a study and inventory of open dumps on Indian lands and Alaska Native lands. The inventory shall list the geographic location of all open dumps, an evaluation of the contents of each dump, and an assessment of the relative severity of the threat to public health and the environment posed by each dump. Such assessment shall be carried out cooperatively with the Administrator of the Environmental Protection Agency. The [IHS] Director shall obtain the concurrence of the Administrator in the determination of relative severity made by any such assessment.

As part of the EPA's goal of sustainable tribal waste management programs, the EPA will work with the IHS to focus on identifying and assessing open dumps posing the highest threat to human health and the environment. The Act states that EPA shall concur on the assessments of the relative severity of the threats to public health and environment posed by each open dump. Health threat assessment information will support decision-making on cleanup of open dumps within the context of IWMPs, and sustainable waste management programs.

**Comment 9:** **The EPA should authorize tribes to administer the EPA's regulatory program through Direct Implementation Tribal Cooperative Agreements or delegation agreements.**

**Response 9:** The EPA does not have the authority to authorize tribes to administer the EPA's regulatory program through Direct Implementation Tribal Cooperative Agreements or delegation agreements.

**Comment 10:** **The EPA should explain its role in addressing solid waste issues when a tribe lacks the capacity or ability to implement the requirements of the Plan on its own.**

**Response 10:** The EPA is focusing on a variety of activities to assist tribes with developing sustainable tribal waste management programs. Activities include funding the development and implementation of IWMPs; providing training, outreach and technical assistance; and coordinating a national peer matching program. More detailed information can be found in Section 2 and Section 4 of the Plan. The EPA will consider these activities as tribal capacity assistance.

Totally separate from the Plan, under RCRA Subtitle D generally, the EPA has promulgated regulations regarding solid waste disposal facilities, and those regulations apply to facilities in Indian country. The EPA also has the ability to issue site-specific rules for facilities in Indian country.

**Comment 11:** **The EPA should improve coordination with other federal agencies.**

**Response 11:** The EPA is committed to improving its coordination with other federal agencies and is an active member of the Infrastructure Task Force.<sup>7</sup> The Infrastructure Task Force (ITF) was established by a Memorandum of Understanding (MOU) in 2006, and a 2013 update added tribal solid waste management issues as an element which would be addressed by the ITF. The Department of Agriculture (USDA), Department of Health and Human Services (HHS), Department of Housing and Urban Development

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<sup>7</sup> Information related to the Infrastructure Task Force is available at: <http://www.epa.gov/tp/trprograms/infra-water.htm>

(HUD), Department of the Interior (DOI), and EPA are all signatories to the MOU. The goal of the ITF is to promote better coordination and communication within the federal government's efforts to deliver infrastructure services and financial assistance on tribal lands. EPA has initiated conversations with our federal partners to better address tribal solid waste issues collectively.

The EPA and IHS met to discuss the EPA solid waste program challenges and current and future collaboration opportunities between the agencies. The EPA and IHS will continue to work together to develop creative solutions to assist with addressing solid waste issues on tribal lands. In addition, the EPA is an active member of the White House Council on Native American Affairs and participates in the annual White House Tribal Nations Conference.

**Comment 12:** **The Plan should include a description of the implementation activities allowable under the EPA's grants programs. In addition, the Plan should clarify the implementation activities eligible for EPA funding once a tribe has developed an IWMP.**

**Response 12:** The EPA added information to Section 2.4 of the Plan describing entities eligible for financial assistance for the grant programs. For detailed information on a particular grant program, we added the web link to the Catalog of Federal Domestic Assistance (CFDA). The CFDA has specific information on what implementation activities are allowable under each grant program. In addition, the GAP Guidance contains a description of the solid and hazardous waste program capacity development and implementation actions which can be funded under GAP.

**Comment 13:** **The EPA should reestablish funding for the Tribal Solid Waste Management Assistance Project because it was a very effective way of addressing tribal solid waste issues at various levels of development.**

**Response 13:** Due to funding constraints, participating federal agencies are unable to provide funding for this grant program at this time. The EPA intends to continue to engage with tribal leadership on a regular basis regarding the budget.

**Comment 14:** **The Plan should include a description of participants and next steps for the performance measure workgroup described in the Plan.**

**Response 14:** The development and refinement of performance measures is an ongoing process that will extend beyond the issuance of the Plan and the EPA Strategic Plan. The EPA has created a national workgroup consisting of both headquarters (HQ) and regional staff and has convened workgroup meetings. The workgroup will obtain input from EPA management as well as tribes on potential new performance measures.



In addition, the EPA will develop a process for evaluating options for potential new performance measures through the national workgroup by December 2013. This will include developing a tribal consultation and coordination plan which will allow tribes the opportunity to provide meaningful input. For example, the EPA will engage with tribes through various venues (e.g., the National Tribal Operations Committee (NTOC), RTOCs, Institute for Tribal Environmental Professionals (ITEP), and other tribal consortia) as we work to develop measures that capture the breadth of solid waste activities that lead to sustainable tribal solid waste management programs. The national workgroup intends to develop and implement new performance measure(s) by October 2014.