



**CONFEDERATED TRIBES OF
COOS, LOWER UMPQUA AND SIUSLAW INDIANS
TRIBAL GOVERNMENT**

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August 15, 2018

Rebecca Roose, Senior Advisor
American Indian Environmental Office (MC 2690-R)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

SENT VIA EMAIL

RE: Comments on EPA's Evaluation of the 2013 Guidance on the Award and Management of General Assistance Agreements for Tribes and Intertribal Consortia

Dear Ms. Roose:

These comments are submitted on behalf of the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians ("Tribe") on EPA's Evaluation of the 2013 Guidance on the Award and Management of General Assistance Agreements for Tribes and Intertribal Consortia ("GAP Guidance") and its implementation to better integrate our Tribal environmental priorities. Procurement of this funding by the Tribe to supports the federal trust responsibility to protect human health and the environment on our sovereign lands. We thank you in advance for your consideration of these comments.

GAP funds serve an extremely important function for the Tribe's development of environmental capacity. This includes funding of salaries, contractual work, supplies, travel, and training for air quality, water quality, and resource protection capabilities, all actions identified in the Tribe's ETEP.

1. Consultation

First and foremost, despite any claims from your agency, we would like to emphasize that, webinars, consultation calls, presentations at conferences, and letters do not represent a government-to-government consultation. EPA officials must meet face-to-face with tribal elected officials to comply with their obligations to consult.

The intent of this GAP Guidance Evaluation is 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." According to the

EPA's Tribal Consultation and Coordination Policy §V(2), the mass emailing and initial phone calls communicating the request for comments is an appropriate method for notifying of identified activities appropriate for consultation.

Appropriate tribal consultation policy and protocol is the responsibility of EPA in trust to protect sovereign territory, as is their agreed and promised responsibility. It is not appropriate to consider telephone conference, such as the one held on July 26th, 2018, as consultation. On this call, tribal representatives brought forward concerns about EPA's lack of understanding of consultation, and neglect of appropriate consultation procedures. The EPA staff did not sufficiently address this concern and does not honor the Federal Government's responsibility to tribes.

Despite this lack of understanding on behalf of the EPA, we greatly encourage government-to-government consultation in cooperation of GAP implementation, as was the intent of the program. To that end, we request consultation with EPA on this evaluation process.

2. EPA should ensure that the GAP Guidance more closely meets Congress' Goal in Enacting GAP.

We agree with comments offered by other Tribes regarding the need for revisions to the GAP Guidance document that ensure that the GAP program meets the broad goals of Congress. The GAP Guidance presents roadblocks, instead of facilitating the accomplishment of Congress' goals.

In enacting the General Assistance Program, Congress intended funding to broadly assist tribes in "planning, developing, and establishing environmental protection programs." 42 U.S.C. § 4368b. The legislative history of the Act indicates intent on the part of Congress to allow for a flexible source of funding for tribal programs. For example, during its 1993 re-authorization, Senator John McCain, "Under the Act, EPA and the tribal governments have the flexibility to tailor grants to the specific needs of each tribal government."

Accordingly, any new Guidance should allow tribes to maintain an environmental presence rather than having to show measurable capacity building progress over time. The implementation of the GAP program needs to create a high level of flexibility for Tribes to develop environmental programs – this flexibility needs to provide clarification that development of programs is not solely for delegated EPA environmental programs, but programs that address environmental needs in a manner to each Tribe's unique legal and environmental needs. Moreover, there is a lack of funding administered towards other governmental departments assisting in grant applications or capacity building (e.g. administrative, legal, financial branches).

3. The GAP Guidance should be revised to Allow Implementation of Solid Waste Projects.

The GAP Guidance should be clarified to allow for the implementation of solid waste programs. The GAP Guidance has foreclosed the use of GAP funding for this activity, stating:

General costs of government services normally provided to the general public, such as fire and police, are unallowable. Under GAP, this restriction includes trash collection, transportation, backhaul, and disposal services which are generally outside the scope of programs administered by the EPA.¹

The request is well grounded in the GAP statute itself. 42 U.S.C. § 4368b(e) explicitly allows for solid waste program implementation, stating, “Purposes and programs authorized under this section shall include the development and implementation of solid and hazardous waste programs for Indian lands. ... Such programs and general assistance shall be carried out in accordance with the purposes and requirements of applicable provisions of law, including the Solid Waste Disposal Act (42 U.S.C. 6901 *et seq.*)”

4. Parameters Defining Restrictions

In terms of defined restrictions, we believe funding restrictions should be minimized and opportunities to use GAP funding be made broader. There is an unknowable variety of current and emerging environmental issues for which capacity building must always be creative. Putting detailed and explicit restrictions for unique Tribes with unique priorities that are attempting to assist in a variety of environmental protection projects is not only counterproductive, but incredibly burdensome. From our perspective, applications with any intent to contribute towards environmental protection and awareness is considered capacity building and maintenance.

For instance, we believe that items that disqualify proposed programs or capacity building “that are generally not administered by the EPA” be removed. As defined by 42 U.S.C. § 4368b, this should not be a restriction. The GAP Guidance must be designed to focus on Tribal priorities, not EPA’s priorities. It should not be assumed that Tribal environmental priorities are not necessarily EPA priorities.

We contest the interchangeable use of ‘implementation’ and ‘capacity building’. We recommend removing all restrictions on ‘implementation’ activities that should, according to the current Guidance document, fit the definition of ‘capacity building’, or otherwise strictly define how implementation is different than continued building on an established capacity.

The GAP Guidance should not make activities previously funded under GAP unallowable. For instance, as a previous commenter noted:

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.

To augment this point, we strongly request to remove the item disallowing costs for repairing, upgrading, and replacing facilities and equipment. That is capacity building, and maintaining

¹ Guidance at 7.

established resources is part of planning, development, and establishment of capacity. We believe that this is directly contradicted in Section 3 of the GAP Guidance, where it states:

...EPA acknowledges that developing, establishing, and maintaining environmental protection program capacity is a continuing programmatic need. Tribes may need to re-establish capacities due to staff turnover, land acquisition, or other changing circumstances and may need to revise projected program development goals. GAP resources provide a significant foundation for maintain tribal environmental program capacities over time and tribes can continue to receive GAP funding to expand, enhance, or evolve their capacity in light of specific tribal needs.

Another significant challenge is how funding is not consistent for maintaining capacity or recuperating lost capacity. GAP helps the Tribe address its mission for us, but without consistent funding, we are held back from accomplishing goals over the long term.

Overall, we agree with the previous suggestion:

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.

5. EPA Subjectivity and Negligence

As grant recipients, we believe that the EPA has not upheld many of the good-intentioned stipulations already outlined in the 2013 Guidance document. Our experience in acquiring this funding is that the GAP Program has evolved to reflect the agenda of the Federal Government, and applications are subjectively denied or restricted. The purpose of this funding is to assist Tribes in environmental protection of Indian lands, either in self-sufficiency or in cooperation with the EPA. This needs to be based on their identified priorities – not EPA's.

Section A(4) of the GAP Guidance states that the GAP funding should “ultimately” be for Tribes to participate as EPA's regulating body or delegated authority. However, according to 42 U.S.C. § 4368b, the purpose of the GAP funding is to assist the Tribes in building regulatory programs that *may* fall under EPA delegation. The primary purpose of the GAP statute is to assist Tribes in addressing “environmental issues on Indian lands,” not regulate environmental issues as deemed appropriate by the EPA, and functioning under EPA authority.

In order to ascertain Tribal priorities, government-to-government consultation would be required, as stated in the 2013 GAP Guidance. In formal consultation with our Tribal Council and/or delegated representatives, our respective agencies would discuss both EPA and Tribal priorities for capacity building, and maintaining that capacity for the long-term.

As another Tribe commented, our consultation would determine “Tribally defined tasks to develop tribally defined capacities to address Tribal priority issues.” We feel that only in this

way can the EPA effectively and purposefully revise/restructure the GAP Guidance to become applicable to all interested applicants. At the least, insight into Tribal needs and priorities can be found in the considerable number of EPA Tribal Environmental Plans (ETEPs) that have been successfully developed.

In consultation, it is the EPA's duty to respect our sovereign rights and work in cooperative agreement to regulate environmental protection. We are willing to cooperate with the EPA, not function under their authority. We recommend omitting this language where it occurs throughout the document.

One of our main complaints are in regards to the inflexibility of categories Tribes can apply for, which is immediately derived from the EPA's lack of understanding what Tribal priorities are.

Much if not most pollution releases originate off of tribal lands, where tribes end up responding to the actions of others rather than directly regulating pollution sources. In these cases, the development of tribal regulatory programs may not result in the type of pollution management necessary to protect tribal health and the environment. Rather, the capacity to develop and maintain relationships with federal, state, and local agencies that have jurisdiction on facilities off of tribal lands, coupled with the capacity to review and respond to environmental reviews and proposed permitting of such facilities may be most effective.

Moreover, we believe that the EPA has subjectively graded Tribal applications and denied funding based on arbitrary factors unregulated by the GAP Guidance or the law, itself. Fitting into the 'cookie cutter' of how Tribal lands should be managed is not effective, as it promotes successful funds acquisition to a lower percentage of Tribal governments.

For instance, building capacity may not be the best practice when a more cost effective method can be used when utilizing already established facilities through another entity. Or, where personnel or equipment resources cannot be financially maintained for longevity, outsourcing and subcontracting must be used. In lieu of specific capacity building where deemed unreasonable for environmental protection, subsidized funding should be made available for best practices.

A suggestion towards improving upon the blanket grading matrix might involve consultation with Tribes in order to develop grading matrices specific to that Tribal community. By providing a customized matrix, each Tribe is competing to rules mutually established by the EPA and that Tribal government. This might result in providing "... each tribe sufficient flexibility in the definition of goals, pathways, and indicators of capacity," as another commenter adequately contributed.

We refuse to accept biased restrictions on what constitutes blanket best practices for all Tribes, as Tribes have different management practices based on their ecological zone and current capacity/resources.

We would appreciate your full consideration of our comments and request the opportunity to consult with EPA on proposed revisions that impact the federal trust responsibilities to the Tribe.

We expect EPA to demonstrate commitment to our concerns and support Tribal efforts towards establishing self-sufficiency, protection, and resilience for our communities and lands.

We appreciate your consideration of these comments. If you have any questions about these comments, please feel free to contact Margaret Corvi, our Culture and Natural Resource Director, at (541) 997-6685.

Sincerely,

A handwritten signature in black ink, appearing to read 'Alexis Barry', with a stylized flourish at the end.

Alexis Barry
Executive Director
The Confederated Tribes of Coos,
Lower Umpqua, and Siuslaw Indians