

Rebecca Roose, Senior Advisor

American Indian Environmental Office (MC 2690-R)

Us Environmental Protection Agency

1200 Pennsylvania Avenue, NW

Washington, DC 20460

**Re: Evaluating EPA’s 2013 Guidance on the Award and Management of General Assistance Agreements for Tribes and Intertribal Consortia**

Dear Ms. Roose:

The National Tribal Water Council (NTWC) appreciates the opportunity to provide comments and recommendations to improve the content and implementation of the U.S. Environmental Protection Agency (referred to herein as EPA or the Agency) 2013 General Assistance Program (GAP) Guidance document, referred to herein as the Guidance.

First, the NTWC presents general overarching comments relating to the Indian Environmental GAP Act of 1992 (GAP Act) and its interpretation by the EPA in recent years. Second, NTWC provides comments and recommendations for supporting greater flexibility on the part of EPA to implement a broad range of environmental programs including water programs. We believe this approach will increase EPA’s ability to track and demonstrate measurable environmental outcomes while addressing tribal environmental priorities and concerns. Third, NTWC provides comments within the framework of EPA’s GAP Guidance objectives. Although the NTWC usually provides comments and recommendations on water-specific issues and concerns, in this case, comments and recommendations regarding the GAP Guidance can be applied to other environmental media also, because they apply generally to tribal environmental program capacity-building issues and concerns.

1. **Flexibility under the GAP Act**

First, when construing the GAP Act, EPA should be attentive to this Administration’s top-level goals for EPA—cooperative federalism, delivering real results, and refocusing EPA on its basic statutory obligations.  All of these goals are furthered by strong tribal governments that can implement their own environmental programs, achieve results, and help EPA handle its statutory obligations by implementing environmental protection in Indian Country.  As a policy matter, a flexible interpretation of GAP supports these goals, while a more rigid interpretation encourages EPA overreach.  The “compelling results” that EPA seeks will only come from tribal programs that are appropriately funded.  *See* Indian Environmental General Assistance Program Guiding Principles, <https://www.epa.gov/sites/production/files/2017-10/documents/r10-fy19-gap-attachment-a-guiding-principles-memo-091917.pdf>.

Second, it appears that EPA has long interpreted the GAP Act in too narrow a manner.  The Act provides, in pertinent part:

(d) General assistance program

(1) The Administrator of the Environmental Protection Agency shall establish an Indian Environmental General Assistance Program that provides grants to eligible Indian tribal governments or intertribal consortia to *cover the costs of planning, developing, and establishing environmental protection programs* consistent with other applicable provisions of law providing for enforcement of such laws by Indian tribes on Indian lands.

(f) Expenditure of general assistance

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. Purposes and programs authorized under this section shall include the development and implementation of solid and hazardous waste programs for Indian lands.

For years, EPA has ignored the wording of section (d) (1), which would allow tribes to “establish” programs, in favor of a narrow interpretation focused on “capacity-building.”  The statute does not include the word “capacity,” but rather provides for “establishing” capability, which includes providing for implementation.  EPA has put too narrow a gloss on a statute that was intended to be flexible.

The Agency perceived a contrast between the wording that clearly allows for implementation of solid and hazardous waste programs in juxtaposition to all other environmental programs.  However, another interpretation is possible: Congress may have wanted to be especially clear that GAP is available for solid and hazardous waste programs, even though EPA is not normally a permitting, implementing, or clean-up authority for programs like tribal solid waste collection and management.  For instance, while EPA regularly handles clean water permitting on tribal land, the Agency does not handle the sort of waste management programs that cities and localities frequently handle.  Moreover, if Congress meant to establish a special rule for solid and hazardous waste programs, it likely would have done so in a separate paragraph or subparagraph.  Instead, Congress simply made sure that “solid and hazardous waste programs” were considered one of the “purposes and programs authorized under this section” by expressly mentioning them.

Legislative history bears this out in that Congress seemed intent on the flexible use of GAP funds.  *See* S. REP. 104-338, S. Rep. No. 338, 104TH Cong., 2ND Sess. 1996, 1996 WL 427855 (Leg.Hist.), [P.L. 104-233](https://1.next.westlaw.com/Link/Document/FullText?findType=l&pubNum=1077005&cite=UUID(I47039AAB29-4F4EDB9A98E-FC4BD8EAF35)&originatingDoc=I2D6D7D70760311D9853B857AB0A39DA7&refType=SL&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)) (“The strength of the General Assistance Program (GAP) is the *flexibility* provided to Indian tribes to plan and develop a reservation specific approach to environmental protection, consistent with tribally-identified environmental priorities.”) (Emphasis added) 139 Cong. Rec. H8901-01, Congressional Record — House of Representatives(“The measure before us would continue the *multimedia grants* to Indian tribes so that the tribes will have the ***flexibility*** to assess tribal environmental priorities and allocate their limited funds accordingly.”) (Emphasis added).  Congress knew that GAP is an essential ingredient to tribal environmental programs and sought the most flexible implementation of the Act possible.

1. **General Comments**

NTWC strongly supports the broadest possible interpretation of the terms “capacity” and “establishment.”  In EPA’s 2013 GAP guidance, the Agency allows for “test-runs” of a program that could last up to four years, for outreach and compliance assistance programs, and for costs such as staff time managing and operating federal environmental protection programs.  All of these actions are “post-implementation” actions, and thus EPA has already shown that administration/implementation after planning for and developing a program is acceptable.  The Agency shouldn’t back away from this already-established position.

The NTWC recognizes and appreciates the Office of International and Tribal Affair’s (OITA) effort to provide a nationally consistent framework for the administration of the General Assistance Program. However, both GAP project officers and tribal grantees would benefit from clearer definitions and examples of what constitutes “capacity building,” and the GAP Guidance and its appendices should be revised to provide this clarity. Specifically, it’s important to note to the staff implementing the GAP Guidance that its provisions constitute guiding principles and should not be interpreted to limit how tribes use GAP funding to support environmental capacity-building activities, including implementation of media program functions.

The NTWC supports the use of GAP funds to serve as a source of **supplemental** funding for tribal water, air and other media-specific programs where funding is inadequate or unavailable through other programs. However, limited funding of the GAP, coupled with the need of tribes to address a variety of issues due to insufficient funding in other EPA programs (i.e., supplementation of air and water program funding and addressing solid and hazardous waste management needs) has resulted in less than adequate funding to support tribal core program needs. With reference to the illustration below, which is from EPA’s GAP web page, it is clear that GAP Appropriations have roughly leveled since 2004. Taking inflation into consideration, a GAP dollar awarded today has roughly half the purchasing power of a GAP dollar awarded in 2004.



Figure 1Annual GAP Appropriations: 1995-2017

1. **Comments on EPA’s GAP Guidance Objectives**

EPA’s objectives:

1. Provide for nationally consistent and informed award decision for all recipients of GAP funding;
2. Include a framework for planning and developing tribal environmental protection program capacity so that (a) GAP funds are directed toward tribal environmental regulatory program capacity development goals, consistent with EPA-administered programs, (b) EPA can track tribal capacity development over time and share with relevant decision makers;
3. Support tribes that wish to develop the capacity to assume the lead role for implementing EPA-authorized environmental regulatory programs (self-governance);
4. Guide use of GAP funds for tribal solid and hazardous waste program implementation, and;
5. Minimize administrative burdens for EPA project officers and for grantees wherever possible, without jeopardizing national program accountability and effective program management.

Comments and recommendations are made below in regards to EPA objectives listed above.

1. **Provide for nationally consistent and informed award decision for all recipients of GAP funding.**

**Recommendation: The revised Guidance should remove limitations on tribal use of GAP funding.**

In subsection 1.4 of the Guidance, EPA’s American Indian Environmental Office (AIEO) identifies general guidelines regarding eligible and ineligible activities and provides several pages of examples of allowable activities. Also, included in that subsection is a bulleted-list of restrictions on the use of GAP funding. Although some of those restrictions have a foundation in the GAP Act, many of them are unsupported and should be deleted.

Those restrictions which are valid are already contained in federal regulations, or based on EPA’s interpretations of those regulations. Others are described as representing “established Agency policy,” but without any reference to written authority, and they should be deleted for that reason. Some directly contradict existing authorities. Most appear to impose new limitations on tribal use of GAP funding, which should be the opposite of EPA’s goal.

It is NTWC’s position that any attempt to require meaningless and burdensome restrictions on GAP funding is not appropriate, especially when such restrictions are included in a non-binding guidance document. For such restrictions to be required, they would need to be subject to formal rulemaking procedures. The imposition of restrictions will discourage the flexibility that tribes need in the use of GAP funds. The GAP Guidance revisions must provide clearer definitions of existing statutory language, regulations, policy, and guidance. Foremost, the Guidance must expressly allow maximum flexibility. Any proposed or existing provisions that vary from this approach should be removed or at least revised to incorporate specific situations rather than generalities, which could tend to be applied too broadly.

In addition, the following restrictions should be deleted from section 1.4, for the reasons explained below:

* Implementing environmental protection programs once established, except for solid and hazardous waste programs as discussed in Appendix I, Section E.
	+ As explained above, program implementation is allowed under the GAP Act.
* Conducting Natural Resource Damage Assessments (NRDA) are deemed to be part of program implementation under Agency policy and should not be funded under GAP.
	+ NRDAs are not part of any environmental program. They are a mechanism for evaluating liabilities. In fact, many of the individuals involved in conducting NRDAs come from natural resource rather than environmental programs.
* Repairing, upgrading and/or replacing facilities and equipment are typically considered to be implementation costs and are generally unallowable under the GAP, except for source separation facilities and equipment as discussed in Appendix I, Section E. Regional offices are to evaluate requests for GAP funds to repair, upgrade, or replace facilities and equipment on a case-by-case basis to determine whether they are restricted costs (implementation) or are allowable because they are necessary to plan, develop, or establish a tribal environmental protection program.
	+ Having appropriate facilities and equipment is an integral part of program capability. For example, EPA will not deem a water quality program capable unless it can perform monitoring.

**Recommendation: Revise Appendix IV “EPA Water Program Reference Table: Framework for Tribal Water Program Strategic Planning and Development.”**

In contrast with the GAP Guidance Appendix IV "EPA Water Program Reference Table - Framework for Tribal Water Program Strategic Planning and Development," the NTWC believes very strongly that implementation activities are GAP eligible and necessary to enhance tribal water program capacity under the program authorities of the Clean Water Act (CWA) and Safe Drinking Water Act (SDWA).

The NTWC recommends AIEO expand its view of what constitutes capacity building and narrow its determination of what is currently viewed as implementation. To do this will require a joint effort by tribes and the AIEO working together to re-define the line between capacity building and implementation.

For instance, the Reference Table in the 2013 GAP Guidance Appendix IV contains two categories. The left column lists Planning and Development activities considered under GAP Guidance as capacity building and fundable, while activities listed in the right column are considered implementation, and as such, are ineligible for GAP funding.

The NTWC believes the GAP Guidance Appendix IV Narrative and Reference Tables must be revised to clearly define which activities constitute program development eligible for funding as opposed to activities now considered as implementation and ineligible for funding within each particular water program area.

Specifically, we recommend planning and development activities listed in the left column be expanded to include a majority of the activities now identified as implementation in the right column. Ineligible water program activities should be kept to a minimum and meet the criteria of explicitly being restricted by CWA and SDWA provisional language. In cases where provisional language is not available, a clear explanation needs to be given as to why a specific water activity is ineligible for funding under GAP.

Although some effort has been made in the explanations offered within the reference tables to distinguish between program development and program implementation activities for a particular water area, these explanations are vague and ambiguous and often conflict with one another.

Below are examples of inconsistencies of interpreting eligible activities of the 2013 GAP Guidance:

**Example. 1**:  In the CWA Table under the Water Quality Standards section, the left column identifies, 'Conducting a survey to determine fish consumption rates for the purpose of setting or revising water quality criteria for human health effects from bio accumulative pollutants' as GAP eligible. In the same category, the right column identifies, 'Revising and/or submitting any necessary or new revised standards such as updating numeric criteria' is ineligible. Tribes view developing a support analysis for revising or updating standards in the same light as conducting fish consumption surveys.

**Example. 2**:  Developing and implementing a CWA Section 401 Certification Program is now prohibited under GAP. The NTWC disagrees. Developing procedures to establish a permitting framework for 401 certification activities should be included as capacity building.

**Example. 3**:  In 2006, the Hoopa Valley Tribe (HVT) was approved to use GAP funding to conduct a nutrient analysis for a portion of the Klamath River under its jurisdiction. This analysis was justified for building the tribe's capacity to support its role in managing water quality with state and federal entities responsible for implementing clean water strategies in the Klamath Basin.

However, in 2014, the HVT made a similar request to use GAP funding to conduct a comparable nutrient analysis for recreational uses of Trinity River waters within the reservation. This request was forwarded to AIEO where it was reviewed and denied. Denial was based on GAP Guidance's water metrics, stating water quality analysis constitutes implementation activities and is ineligible.

**Example. 4**:  From 2000-2008, the HVT was allowed to conduct educational outreach to elementary and high school classes within the Hoopa school district. During the schools' annual Fish Fair, HVT’s Tribal Environmental Protection Agency presented a program to educate K-12 classes about potential health threats of cyanotoxins to humans and the importance of avoiding recreational activities in areas of the river where cyanotoxins occur. TEPA believes informing this subpopulation who frequently swim, bath, boat, and fish in our streams and river is crucial to protecting the health of our young citizens.

After implementation of EPA’s 2013 GAP Guidance, this annual activity is now ineligible for funding. EPA regional and headquarters GAP coordinators have stated tribes are relegated to only one educational outreach effort per topic, regardless of whether the annual audience and evolving scientific criteria changes with each year's presentation. Although the HVT has been conducting cyanobacteria educational outreach for four (4) years to different ages of school children, EPA denied the activities as ineligible for GAP funding.

The GAP Guidance tables are now being used by AIEO and regional GAP coordinators as a definitive list of what constitutes capacity building, even though they did not go through a rulemaking. The NTWC views this policy as arbitrary, and inconsistent with the purpose of GAP. Capacity building is now limited to a scaled down list of tasks and indicators which can only be used once in the life of a tribe's environmental program.

EPA’s policy defeats tribal efforts to educate and protect successive generations of their communities according to the needs of their people; needs based upon a changing environment and new scientific data related to climate change. These ongoing efforts are also needed to safeguard the water quality of our streams and rivers.

NTWC Recommendations:

* Take matters into tribal hands through tribal leadership conversations and congressional committees;
* Make substantial changes to Appendix IV “Narrative” and “Reference Table;”
* Establish a unified and clear understanding of capacity building vs. implementation;
* Reinstate GAP Guidance language that allows for “develop/implement operation and maintenance program for tribal water supply systems, including oversight, design standards, ordinance and establishing utility organizations” as allowable activities;
* Develop straight forward criteria on how definitions will be used by AIEO and GAP project officers;
* Provide training to all regional GAP coordinators/project officers to ensure consistent interpretation on how capacity building and implementation will be defined;
* Ensure that EPA and AIEO supports tribal environmental programs and adequately fund tribal program funding needs, and not limit tribal capacity.

1. **Include a framework for planning and developing tribal environmental protection program capacity so that (a) GAP funds are directed toward tribal environmental regulatory program capacity development goals, consistent with EPA-administered programs, (b) EPA can track tribal capacity development over time and share with relevant decision makers.**

EPA is becoming more prescriptive and restrictive about how GAP funding is used rather than becoming more flexible and thus supporting principles of self-governance. Again, the NTWC believes that EPA should provide maximum flexibility in the way tribes approach the environment and its protection. GAP needs to enable tribes to implement successful tribal-specific environmental programs that allow for adaptive response to a changing environment and community needs.

Tribes should be afforded the use of GAP funds to provide supplemental funding for media-specific activities where other program funding is not available or is inadequate to address programmatic priorities.

1. **Support tribes that wish to develop the capacity to assume the lead role for implementing EPA-authorized environmental regulatory programs (self-governance).**

**Recommendation: The NTWC supports EPA’s objective for tribes to assume the implementation of EPA-authorized environmental regulatory programs.**

The NTWC strongly emphasizes that federally-approved Water Quality Standards (WQS) as well as tribally-adopted standards will likely have little effect unless tribal programs are able to implement them. Thus, any discussion of capacity should include specific components of implementation, including a tribe’s ability to utilize GAP funds to conduct WQS analysis, water quality monitoring device maintenance, and the ability to install, operate and maintain appropriate water quality monitoring stations, or provide monitoring capabilities, as needed.

This approach isconsistent with Principles 2 and 3 of EPA’s 1984 Indian Policy that recognize tribes as the primary parties for setting standards, making environmental policy decisions and managing programs to protect the reservation environment and that commit EPA to encourage and assist tribes in assuming regulatory and program management responsibilities.

1. **Guide use of GAP funds for tribal solid and hazardous waste program implementation.**

The GAP statute explicitly authorizes the use of GAP funds to implement tribal solid and hazardous waste programs, for which there is currently little or no funding from other sources.

For tribes in Alaska, solid waste and recycling efforts have been vital in keeping rural villages environmentally safe; unfortunately, after a year the programs are told to cease. NTWC again recommends flexibility and case-by-case approach to allow the most benefit to tribes and their environmental protection needs and capacity.

1. **Minimize administrative burdens for EPA project officers and for grantees wherever possible, without jeopardizing national program accountability and effective program management**

**Recommendation: NTWC opposes the expectation of a transition away from GAP to reliance on media-specific funding.**

The NTWC is concerned that as AIEO began internal discussions with other EPA media programs on the use of GAP funding supplementing short-falls in media-specific funds, it also was initiating a transition for tribes to seek media-specific funding rather than GAP funding.

Such a policy assumes that once a tribe achieves a certain level of capacity, then the tribe may choose to seek media-specific funding for “more complex program development” and implementation. This premise is unrealistic for many tribes. EPA would need to assure availability of media-specific funding for this expectation to be realistic.

As stated previously, the NTWC believes that tribes should be afforded the use of GAP funds to provide supplemental funding for media-specific activities where other program funding is not available or inadequate to address environmental priorities.

**Recommendation: NTWC supports an option to submit GAP grant work plans and applications other than through grants.gov.**

For several tribes in Alaska, a number of their grant applications were reviewed by EPA tribal coordinators and approved.  When the time came to submit their applications through [grants.gov](http://grants.gov), the applications in several cases were not transmitted due to a number of factors, mainly the lack of sophistication of applications and data entry capabilities in rural Alaska.  For example, NTWC member Eric Morrison from Salamatof Tribe, was told that his tribe wrote one of the best applications, but had difficulty in submitting the application because [grants.gov](http://grants.gov) would not accept several parts of the grant.  He was able to later submit it, but at the same time, the EPA coordinator instructed him not to send it through [grants.gov](http://grants.gov), but submit it directly to the coordinator.  Later, he was told that because of his late submittal, his tribal application would be placed on a waitlist to see if there was available funds left over after initial awards.  Mr. Morrison does not know how many tribes were waitlisted, but stated he is aware that of the nine (9) submittals from tribes, at least four (4) had difficulty submitting their completed applications through [grants.gov](http://grants.gov).

Lastly, in discussions to prepare this letter, there was considerable anecdotal evidence presented that underscores the fact that there are GAP program criteria that have uncertain interpretations, and thus result in grant applications that are unsuccessful or that are disallowed. We ask that EPA hold a conference call with tribal representatives to specifically discuss the administrative burdens and uncertainties in interpretation of GAP grant criteria, and that a set of changes be articulated by the group and implemented by EPA.

**Conclusion**

The NTWC believes the above-mentioned recommendations will assist EPA in achieving a nationally consistent capacity development framework for both EPA and tribes. As was stated previously, the strength of the GAP Program is the *flexibility* provided to Indian tribes to plan and develop a reservation specific approach to environmental protection, consistent with tribally-identified environmental priorities.

We appreciate your attention to these comments, and look forward to receiving an updated draft of the GAP Guidance that addresses the issues we have raised. In the meantime, please feel free to contact me at kenpnorton@gmail.com, (530) 625-5515, if you have any questions or require additional information.

Sincerely,



Ken Norton

Chairman

Cc: Jane Nishida, Principal Deputy Assistant Administrator, OITA

 Felicia Wright, Acting Director, AIEO

 Karen Gude, Tribal Program Coordinator, OW