

Strategy For An EPA/Tribal Partnership
To Implement
Section 1529 Of The Energy Policy Act Of 2005

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Contents

Introduction	1
Underground Storage Tank Challenges In Indian Country	3
Goals And Objectives Of The Strategy	4
Objective 1: Strengthening Relationships, Communication, And Collaboration.....	5
Objective 2: Improving Information Sharing.....	5
Objective 3: Implementing New UST Provisions Of The Energy Policy Act.	6
Objective 4: Implementing UST Prevention Activities Through EPA and Tribal UST Programs	7
Objective 5: Implementing LUST Cleanup Activities Through EPA and Tribal LUST Programs	8
For More Information About The Tribal Strategy	10
Background About the Energy Policy Act of 2005	10
Appendix: List Of Related Executive Orders, Statutes, Documents, Policies, And Guidance	A-1

Introduction

In the United States there are over 560 separate, federally-recognized tribal governments, each with its own unique history, culture, and treaties. Of these tribes, approximately 175 have federally-regulated underground storage tanks (USTs) on their lands. This strategy was developed in coordination with Indian tribes, as required by Section 9013 (a) of the Solid Waste Disposal Act (SWDA), and recognizes the number and diversity of tribes and the need for flexibility in implementing the underground storage tank program to address unique tribal issues. This strategy therefore is intended to provide a basic framework that can be used as a foundation for discussing the unique underground storage tank program implementation issues of different tribal governments and provides a consistent method whereby the U.S. Environmental Protection Agency (EPA) and each tribe can continue to cooperatively work on these issues in the future.

EPA's Office of Underground Storage Tanks (OUST) is committed to protecting human health and the environment in Indian Country while supporting tribes' self-government, acting consistent with the federal trust responsibility, and strengthening the government-to-government relationships between tribes and EPA. For more than 20 years, EPA has been fulfilling these commitments by providing financial and technical assistance to tribal governments to prevent and clean up releases from underground storage tanks, supporting tribal governments in building capacity to improve their tribal underground storage tank programs, and directly implementing the underground storage tank program in Indian Country.

Since 1995, OUST has implemented several EPA policies, including Office of Solid Waste and Emergency Response (OSWER) Directive 9610.15A, *Interim Final National Policy Statement for Underground Storage Tank Program Implementation in Indian Country*, *Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy*, and, since 1990, OSWER Directive 9610.11, *UST/LUST Enforcement Procedures Guidance Manual*. These policy statements have provided OUST with a framework to implement the underground storage tank program in Indian Country and have helped EPA and some tribes build underground storage tank programs throughout Indian Country.

Tribes have also played a significant role in protecting human health and the environment by preventing and cleaning up releases from underground storage tanks. Some tribes have developed their own underground storage tank program authorities, while others are working toward development of their own programs. Some tribal underground storage tank programs are model programs that serve as excellent examples of how an underground storage tank program should be run. Many tribal members are well trained as underground storage tank inspectors and site managers of underground storage tank cleanups.

In the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999 (Public Law 105-276) Congress

authorized EPA to enter into assistance agreements with federally-recognized Indian tribes for development and implementation of programs to manage underground storage tanks. In the same law, Congress also authorized EPA to use leaking underground storage tank (LUST) Trust funds to enter into assistance agreements with federally-recognized tribes for leaking underground storage tank cleanups in accordance with SWDA, Section 9003(h)(7). These authorities have increased tribal opportunities for involvement in the underground storage tank program and provided funding and support for development of training programs, regulation development, and tribal underground storage tank staff.

The passage of the Energy Policy Act of 2005 gives EPA new tools that may provide greater opportunities for tribal involvement in the underground storage tank program. As a result of the Energy Policy Act of 2005, EPA, together with tribal representatives, has developed a new strategy to supplement the program's existing strategy. Section 1529 of the Energy Policy Act of 2005 amends the SWDA by establishing a new Section 9013 regarding underground storage tanks in Indian Country.

Section 9013(a) requires EPA, in coordination with Indian tribes, to develop and implement an underground storage tank program strategy in Indian Country and by August 8, 2007, to report to Congress on the status of implementation and enforcement of SWDA Subtitle I in Indian Country. Specifically, by August 8, 2006, SWDA Section 9013(a)(1) directs EPA to develop and implement, in coordination with Indian tribes, a strategy:

- “[G]iving priority to releases that present the greatest threat to human health or the environment, and taking necessary corrective action in response to releases from leaking underground storage tanks located wholly within the boundaries of an Indian reservation or any other area under the jurisdiction of an Indian tribe; and
- [T]o implement and enforce requirements concerning underground storage tanks located wholly within the boundaries of an Indian reservation or any other area under the jurisdiction of an Indian tribe.”

This strategy and OUST's existing strategy meet the requirements of SWDA, Section 9013(a). The new strategy presented here is the result of substantial involvement from representatives from 41 tribal nations, all EPA Regional offices with federally-recognized tribes, and EPA headquarters. The result is a strategy that specifically identifies key issues and actions for improving implementation of the underground storage tank program in Indian Country.

In particular, this strategy identifies additional steps that EPA and tribes can take to further the cleanup and compliance of underground storage tanks in Indian Country by strengthening relationships between EPA and tribes, by improving information sharing, and by building tribal capacity to improve the implementation of the

underground storage tank prevention and cleanup programs. In addition, this strategy provides an additional basis for a continuing dialogue between EPA and tribes to implement the objectives contained in this document and for tribes to provide input and recommendations to EPA through the continuation of work groups or other means. Following issuance of this strategy, EPA plans to continue to work with tribes to develop steps to implement the concepts presented here and to begin addressing questions that may still need to be answered.

This strategy, however, does not address other important issues, such as the absence of authority under SWDA to treat tribes as states, above-ground storage tanks, or issues regarding Indian Country jurisdictional boundaries, which can be better addressed through other forums. Rather, it provides a framework that can be used as a basis for continued discussion and for measuring progress in Indian Country. Moreover, this strategy, and the subsequent actions for implementing the strategy, should be viewed as living documents that are open to further refinement as priorities and circumstances change.

Underground Storage Tank Challenges In Indian Country

Underground storage tanks within Indian Country, representing less than 1% of the federally-regulated underground storage tanks nationally, are similar to those within states and include facilities ranging from small “mom and pop” gas stations to large ones owned by multi-national companies. Some of the tanks and facilities are tribally owned. At the end of fiscal year 2005, there were approximately 2,500 active federally-regulated underground storage tanks in Indian Country. Of the more than 560 federally-recognized tribes, approximately 175 tribes have federally-regulated underground storage tanks on their lands. Of the 175 tribes, about two-thirds have 10 or fewer active underground storage tanks; only 12 tribes have 50 or more underground storage tanks. The nature of tribal underground storage tank programs within Indian Country varies widely, with robust programs for a few tribes, emerging programs for some tribes, and no programs for other tribes. This diversity in tribal programs creates unique implementation challenges for both tribes and EPA.

In addition to the active underground storage tanks, about 5,300 substandard underground storage tanks in Indian Country have been closed. Since the inception of the program through September 2005, there have been an estimated 1,065 releases confirmed in Indian Country. Of the 1,065 confirmed releases, cleanups have been initiated at approximately 975 and completed for 675. Although cleanups have been initiated for the majority of the sites, there are approximately 400 (or 37% of all) releases in Indian Country for which cleanups have not yet been completed. Nationally, over 119,000 (26%) of cleanups remain to be completed.

There are many factors contributing to the cleanup challenges in Indian Country. Cleanups can be very expensive, averaging about \$125,000, and the liability for cleanups lies with the owner and operator. A release with significant groundwater contamination can cost more than \$1 million to clean up. Owners and operators in

Indian Country may find it difficult to initiate and complete cleanups. Additionally, for leaking underground storage tank sites outside of Indian Country, states typically rely on both LUST Trust funds and their own underground storage tank cleanup funds to finance cleanups. However, state underground storage tank cleanup funds are not always available for cleaning up leaking underground storage tank sites in Indian Country. Federal LUST Trust funds are available for leaking underground storage tank cleanups in Indian Country. In fact, since the early 1990s, EPA has been providing LUST Trust funds to tribes for leaking underground storage tank oversight and to help build leaking underground storage tank program capabilities; more recently, EPA has provided LUST Trust funds to a few tribes to conduct cleanups.

With respect to compliance, rates of underground storage tank operational compliance in Indian Country vary. Operational compliance is a measure of a facility's compliance based on having the equipment required by current underground storage tank regulations and performing the necessary operation and maintenance. In fiscal year 2005, approximately 58% of active tanks in Indian Country met leak prevention requirements; 53% met release detection standards; and 37% met all requirements. The national averages were 78%, 73%, and 66% respectively. There are many factors contributing to the lower compliance rates in Indian Country. In particular, some owners and operators in Indian Country operate small facilities that lack the resources to properly operate and maintain their underground storage tank systems. Additionally, owners and operators may lack the resources to obtain the needed training to ensure the underground storage tank systems are operated and maintained properly.

Goals And Objectives Of The Strategy

The primary goal of the tribal strategy is to improve human health and the environment in Indian Country by working with tribes: to clean up releases from underground storage tanks by giving priority to releases that present the greatest threat to human health and the environment; to implement and enforce underground storage tank leak prevention and detection requirements according to EPA's enforcement principles outlined in the guidance listed on page 1; and to meet the underground storage tank program's annual and long-term goals for cleanup and compliance. Subject to the availability of appropriated funds, EPA and tribes intend to work toward achieving these goals through five overarching objectives.

- Objective 1: Strengthening Relationships, Communication, And Collaboration
- Objective 2: Improving Information Sharing
- Objective 3: Implementing New UST Provisions Of The Energy Policy Act
- Objective 4: Implementing UST Prevention Activities Through EPA and Tribal UST Programs
- Objective 5: Implementing LUST Cleanup Activities Through EPA and Tribal LUST Programs

Objective 1: Strengthening Relationships, Communication, And Collaboration

In fulfilling EPA's commitment to protecting human health and the environment in Indian Country, consistent with the federal trust responsibility, a major emphasis of this strategy is to strengthen the relationship between EPA's Underground Storage Tank program and tribal governments. Improving our mutual understanding of EPA and tribal governments' responsibilities, needs, and constraints through more frequent and meaningful communication is a key ingredient for better program performance. To that end, this strategy includes the following actions that, as appropriate, EPA can use to strengthen relationships, communication, and collaboration with tribal governments:

- Consult with tribal governments during planning and decision-making if such decisions affect the lands and resources of tribes;
- Cooperate with affected tribes in assessing the impact of underground storage tank plans, projects, programs, and activities in Indian Country;
- Remove procedural impediments to work directly and effectively with tribal governments;
- Coordinate with other federal departments and encourage cooperation among tribes, states, and local governments to resolve environmental issues of mutual concern; and
- Continue to provide a forum for meeting at least annually, at a national level, to discuss key issues and proposed solutions and to increase awareness of EPA and tribal needs, priorities, and resources, including expanding the role of tribal governments at the underground storage tank national conference.

Objective 2: Improving Information Sharing

A key component in achieving the goals and objectives of this strategy is to assure that relevant information is shared between EPA and tribes. Information on the status of tank compliance and cleanups and the process for funding an underground storage tank program is essential in developing a successful program. To further information sharing, this strategy includes the following actions that EPA, as appropriate, can use to improve information sharing with tribal governments:

- Develop and implement a communication and outreach plan and an on-line website to provide tribes with information on EPA underground storage tank programs, including information on available funding and guidance on the process for competing for Comprehensive Environmental Response, Compensation, & Liability Act (CERCLA) 104(k) Brownfields grants and obtaining allocations under the Brownfields State and Tribal Response Program grants authorized by CERCLA 128 and which is consistent with all EPA policies

including, but not limited to, those governing competition for assistance agreements;

- Maintain an inventory of sites in Indian Country to help evaluate progress toward achieving the goals of this strategy. An inventory of underground storage tank sites is important for setting priorities for compliance and cleanup (e.g., by targeting facilities and releases in sensitive drinking water areas such as source water areas). For example, inventories can be used to track regular on-site inspections, implementation of closure requirements, and appropriate and timely responses to releases and suspected releases. The inventory also can be updated to reflect the installation of new tanks, the removal or closure of older tanks, the locations of previously unknown tanks, and data errors;
- Provide tribes with information from the federal facility and public record reports required by SWDA sections 9007(b) and 9002(d) on the status of compliance of government-owned tanks. These reports provide information on location, ownership, compliance record, and cleanup status, if applicable (among other items), and may provide a more complete picture of the universe of tank sites in Indian Country;
- To the extent consistent with Agency policies governing competition for assistance agreements, share information about available funding sources, the process for allocating these funds, and the process for competing for funds. Such information sharing may enable tribes to provide more input on tribal resource needs and potentially may assist tribes in acquiring more funds to implement their underground storage tank programs;
- Utilize national and regional tribal operations committees to disseminate information; and
- Conduct consultation with tribes on a government-to-government basis consistent with existing EPA policy.

Objective 3: Implementing New UST Provisions Of The Energy Policy Act

There are key provisions of the new Energy Policy Act that apply to states receiving federal funding but do not specify Indian Country. Nonetheless, EPA's goal is to implement the objectives of these provisions in Indian Country as an important step in achieving more consistent program results in release prevention and cleanup in Indian Country. Both EPA and tribes recognize the importance of having policies that can help to ensure parity in program implementation between states and in Indian Country.

Of particular importance are the Energy Policy Act provisions for leak prevention and detection. One of the key components of the Energy Policy Act, which will help ensure parity in program implementation, is to inspect all underground storage tanks. As discussed in Objective 4 of this strategy, EPA will work with tribes to inspect every

underground storage tank every three years. In addition, this strategy includes the goal of working with tribal governments to implement and enforce the underground storage tank program in Indian Country and the objectives of the other provisions of the Energy Policy Act, including fuel delivery prohibition, owner/operator training, and secondary containment of tank systems near drinking water supplies.

EPA has responsibility for direct implementation of the underground storage tank program in Indian Country and will work with tribal governments to explore appropriate tools to meet the objectives in this strategy.

Objective 4: Implementing UST Prevention Activities Through EPA and Tribal UST Programs

The Agency will continue its efforts to implement and enforce the underground storage tank program in Indian Country and assist tribal governments in building tribal capacity to implement and enforce their own underground storage tank programs. To accomplish this, consistent with EPA's Indian Policy, the Agency will continue to "take affirmative steps to encourage and assist tribes in assuming regulatory and program management responsibilities for reservation lands."

Some tribes already have developed and implemented their own underground storage tank programs. EPA and the tribes intend to continue to work together to encourage the development of tribal underground storage tank programs for tribes interested and capable of implementing a program. To that end, this strategy includes the following actions that EPA, as appropriate, can use to help tribes build tribal implementation and leak-prevention capacity by providing resources (consistent with approved Agency budgets), training, federal credentials, or instituting Direct Implementation Tribal Cooperative Agreements (DITCAs) to conduct inspections:

- Provide resources for building capacity and for implementing underground storage tank programs. Each year Congress appropriates grant funds for tribes to develop and implement programs to manage underground storage tanks. EPA has historically provided these funds directly to tribal governments to support prevention activities and to tribal consortia as a means to reach multiple tribes that may each only have a few underground storage tanks on their land. Tribes receiving these grants are able to hire staff or continue employing staff dedicated to the underground storage tank program. To the extent consistent with approved Agency budgets, EPA intends to continue to provide these funds to support these underground storage tank prevention activities;
- Provide training to enable interested and capable tribes to build capacity for developing and implementing their own underground storage tank programs. EPA and tribes intend to continue to work together to identify training needs and explore various approaches to providing training efficiently. Continuing education and training are important for keeping tribes up to date on the latest compliance measures required by the program, providing a forum for tribes to exchange

ideas and concerns, and identifying information gaps that a tribe may have when implementing an underground storage tank program. EPA and tribes intend to explore the use of in-person and web-based training and the use of tribal instructors as a means of providing underground storage tank inspector training, as well as advanced training in underground storage tank inspections, underground storage tank equipment standards, health and safety issues, and other subjects, as needed;

- Enable interested and capable tribes to conduct inspections and compliance assistance. By August 8, 2007, EPA will work with tribes to conduct on-site compliance inspections of all underground storage tanks that have not undergone an inspection since December 22, 1998, including inspections for temporarily closed facilities. After completion of these inspections, EPA and tribes, as appropriate, will conduct on-site inspections once every three years to determine compliance. As the implementing authority, EPA enforces underground storage tank requirements in Indian Country, as necessary and appropriate.
- Several tribes have well-trained and experienced underground storage tank inspectors and can assist EPA's Regions in conducting inspections every three years in Indian Country. SWDA enables EPA to authorize tribal government representatives to conduct inspections on behalf of EPA. Authorizing tribal inspectors can increase the geographic coverage and frequency of EPA inspections in Indian Country—thus helping to ensure that inspections are conducted every three years—and simultaneously increase the capabilities of tribal inspectors to conduct inspections under tribal law. After assessing where and when such authorizations are appropriate, EPA can work with tribes to enter into a written agreement on inspections and provide federal credentials to qualified tribal inspectors. DITCAs can serve as the written agreement as well as outline other areas for tribes to assist EPA in other compliance assurance activities. DITCAs and inspector credentials should be used, where appropriate, and can be beneficial to both EPA and tribes.

Objective 5: Implementing LUST Cleanup Activities Through EPA and Tribal LUST Programs

EPA's strategic plan establishes an annual goal of 30 Indian Country leaking underground storage tank cleanups per year. Although almost two-thirds of all underground storage tank releases in Indian Country have been cleaned up, 390 cleanups remain. To meet EPA's annual goal and keep on making progress on cleanups, EPA will continue to give cleanup priority to those releases presenting the greatest threat to human health or the environment. EPA also intends to work with tribes to help them build their capacity to identify and address these high-priority leaking underground storage tank sites. To that end, this strategy includes the following actions that EPA, as appropriate, can use to help build tribal capacity to implement leaking underground storage tank cleanup activities. Capacity building can be accomplished by

clarifying the corrective action processes, providing adequate involvement to make sure site cleanups move forward expeditiously, and providing an opportunity for tribes to compete for grants (through the Brownfields competitive grant selection process) for cleaning up contamination at abandoned brownfield sites with underground storage tanks, and by providing resources for corrective action.

- Each year, EPA allocates part of its LUST Trust Fund appropriation for tribes to assess and clean up underground storage tanks in Indian Country. EPA has successfully used these funds to initiate and clean up two-thirds of all leaking underground storage tank releases in Indian Country. To the extent consistent with approved Agency budgets, EPA intends to continue to provide these funds to support leaking underground storage tank cleanup activities.
- Implement corrective action plans that clarify the cleanup process and provide the opportunity for meaningful involvement. EPA and tribes may generally accomplish this in part through the following actions:
 - Working with interested and capable tribes to effectively develop, adopt, and administer tribal codes and cleanup standards and explore “site-specific” EPA rulemaking;
 - Finalizing EPA’s cleanup guidance for Indian Country, which includes a process for taking unique exposure patterns associated with tribal traditions and cultural practices into account;
 - Reviewing the corrective action process to identify ways to make it more streamlined and to expedite cleanups (such as multi-site approaches and pay for performance cleanups);
 - Encouraging cooperation between tribes and states to address underground storage tank sites adjacent to Indian Country;
 - Promoting more DITCAs for cleanup to enable tribes to assist EPA in conducting corrective action; and
 - Sharing current and relevant information with tribes.
- Each year, EPA provides Brownfields grants for petroleum sites (such as Brownfields assessment, cleanup, and revolving loan fund grants) to states and tribes based on a competitive grant proposal process. EPA will continue to inform tribes of Brownfields meetings and the process for applying for Brownfields grants.

For More Information About The Tribal Strategy

Visit the EPA Office of Underground Storage Tanks web site at www.epa.gov/oust or call 703-603-9900.

Background About The Energy Policy Act Of 2005

On August 8, 2005, President Bush signed the Energy Policy Act of 2005. Title XV, Subtitle B of this act (entitled the Underground Storage Tank Compliance Act) contains amendments to Subtitle I of the Solid Waste Disposal Act – the original legislation that created the underground storage tank (UST) program. This new law significantly affects federal and state underground storage tank programs, will require major changes to the programs, and is aimed at reducing underground storage tank releases to our environment.

The underground storage tank provisions of the Energy Policy Act focus on preventing releases. Among other things, the Act expands eligible uses of the Leaking Underground Storage Tank (LUST) Trust Fund and includes provisions regarding inspections, operator training, delivery prohibition, secondary containment and financial responsibility, and cleanup of releases that contain oxygenated fuel additives.

Some of these provisions require implementation by August 2006; others will require implementation in subsequent years. To implement the new law, EPA and states will work closely with tribes, other federal agencies, tank owners and operators, and other stakeholders to bring about the mandated changes affecting underground storage tank facilities.

To see the full text of this new legislation and for more information about EPA's work to implement the underground storage tank provisions of the law, see: http://www.epa.gov/oust/fedlaws/nrg05_01.htm

Appendix: List of Related Executive Orders, Statutes, Documents, Policies, and Guidance

Statutes

- 42 U.S.C. § 6991I, Resource Conservation and Recovery Act, Section 9013, Tanks on Tribal Lands

Regulations

- 40 CFR Part 280, Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks
- 40 CFR Part 281.12(a)(2), Approval of State Underground Storage Tank Programs—Scope

Presidential Documents

- George W. Bush's Indian Policy -- *Memorandum for the Heads of Executive Departments and Agencies, Government-to-Government Relationship with Tribal Governments* (<http://www.epa.gov/indian/pdfs/president-bush-indian.pdf>)
- Executive Order 13175 -- Consultation and Coordination with Indian Tribal Governments (<http://www.epa.gov/fedrgstr/eo/eo13175.htm>)

EPA Policies and Initiatives

- The 1984 EPA Indian Policy (<http://www.epa.gov/indian/1984.htm>)
- Reaffirmation Memorandum of the 1984 EPA Indian Policy (<http://www.epa.gov/indian/pdfs/reaffirmation-indian-policy.pdf>)
- *Interim Final National Policy Statement for Underground Storage Tank Program Implementation in Indian Country* (OSWER Directive 9610.15A) (<http://www.epa.gov/oust/directiv/d961015a.htm>), October 23, 1995

EPA Guidance

- *Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy*, (<http://www.epa.gov/compliance/resources/policies/state/84indianpolicy.pdf>), January 17, 2001
- *Guidance for Issuing Federal EPA Inspector Credentials to Authorize Employees of State/Tribal Governments to Conduct Inspections on Behalf of EPA* (<http://www.epa.gov/compliance/resources/policies/monitoring/inspection/statetribalcredentials.pdf>), September 30, 2004
- *Process for Requesting EPA Credentials for State/Tribal Inspectors Conducting Inspections on EPA's Behalf*, Memorandum from Michael S. Alushin, Director,

Compliance Assessment and Media Programs Division, Office of Enforcement and Compliance Assurance, August 5, 2005

- *Use of the LUST Trust Fund for UST Release Sites in Indian Country*, Memorandum from Cliff Rothenstein, Director, Office of Underground Storage Tanks, and Susan Bromm, Director, Office of Site Remediation Enforcement, February 24, 2005
- *UST/LUST Enforcement Procedures Guidance Manual*, OSWER Directive 9610.11, May 1990