



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

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

December 18, 2021

MEMORANDUM

SUBJECT: Pilot to Improve Underground Storage Tank Compliance at Tribal Facilities

FROM: Lawrence E. Starfield
Acting Assistant Administrator

LAWRENCE STARFIELD Digitally signed by
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Date: 2021.12.18
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TO: Regional Administrators
Deputy Regional Administrators
Regional Enforcement and Compliance Assurance Division Directors
Regional Land, Chemicals and Redevelopment Division Directors
Regional Counsels

I. Introduction

I am pleased to announce a new pilot aimed at improving compliance at tribal underground storage tank facilities, which includes leaking underground storage tanks (LUSTs) at tribal facilities.¹ Despite years of providing compliance assistance to tribal UST facilities, the U.S. Environmental Protection Agency continues to uncover noncompliance at these facilities. The Pilot aims to improve compliance at tribal UST facilities through two key mechanisms: (1) ensuring tribal governments are provided with information on, and notice of, consultation opportunities related to announced inspections, compliance assistance, noncompliance, and enforcement responses; and (2) making it easier for regions to use expedited enforcement tools through advance concurrence from the Office of Enforcement and Compliance Assurance's (OECA) Assistant Administrator. As discussed below, EPA is responsible for directly implementing the UST program in Indian country.² The Pilot does not alter EPA's approach to taking enforcement against non-tribal UST facilities in Indian country.³

¹ The term "tribal UST facilities" refers to facilities with USTs that meet the definition of "tribal facility" in the *Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy* (Jan. 17, 2001) ([Tribal Enforcement Guidance](#)). That guidance defines the term "tribal facilities" to mean (1) facilities owned or managed by tribal governments, and (2) non-tribally-owned or managed facilities in which a tribal government has a substantial proprietary interest or over which a tribal government has control. *Tribal Enforcement Guidance* at 3.

² 18 U.S.C. § 1151 defines Indian country as "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

³ The term "non-tribal UST facility" or "non-tribal facility" refers to facilities that are not "tribal facilities" as discussed in footnote 1.

This Pilot was developed in coordination with EPA's regional offices, the Office of Underground Storage Tanks in the Office of Land and Emergency Management, the American Indian Environmental Office in the Office of International and Tribal Affairs, and the Office of General Counsel. In addition, OECA engaged in consultation and coordination with federally recognized Indian tribes consistent with the [EPA Policy on Consultation and Coordination with Indian Tribes](#) (May 4, 2011) (*Tribal Consultation Policy*). OECA considered all of the comments received and, as described below, made revisions to the Pilot in response to input received during the consultation period.

EPA directly implements the UST program under subtitle I of the Resource Conservation and Recovery Act (RCRA) in Indian country.⁴ As such, EPA provides compliance assistance, conducts inspections and, when appropriate, initiates enforcement, and oversees corrective action at UST facilities in Indian country. There are about 2,400 active USTs located in Indian country at roughly 900 facilities. Tribal governments own and/or operate many of these USTs while others are owned and/or operated by private parties or the federal government.

Over the last 30 years, EPA has identified hundreds of violations at USTs in Indian country, at both tribal and non-tribal facilities. EPA has routinely addressed these UST violations at non-tribal facilities with the full range of compliance assurance tools at its disposal, including compliance assistance and formal enforcement (*e.g.*, an administrative penalty order). On the other hand, EPA has routinely addressed violations at tribal UST facilities almost exclusively by providing additional compliance assistance to the tribal UST facilities.⁵

Although compliance assistance has often resulted in the correction of UST violations at tribal facilities, in many instances violations have lingered without correction or have been repeated. Notwithstanding these situations, EPA has rarely taken formal enforcement against a tribal UST facility.⁶ This Pilot aims to reduce these lingering or repeat violations by ensuring that EPA informs tribal leadership of any problems and how to fix them, and by facilitating the use of expedited enforcement tools, which have historically resulted in a quick return to compliance with UST requirements at non-tribal UST facilities. EPA has years of experience using these expedited enforcement tools generally, both at non-tribal UST facilities and under other programs, as a method to protect human health and the environment. These expedited tools result in a timelier return to compliance and lower penalty that is typically achieved through traditional enforcement. As such, this Pilot is an appropriate step to help ensure that the human health and environmental protections afforded by the UST requirements are realized in Indian country as much as they are outside Indian country.

II. Summary of the Tribal UST Pilot

Under this Pilot, tribal governments will be provided with timely information about UST compliance activities and the OECA Assistant Administrator is providing advance concurrence for certain enforcement actions. To ensure that the appropriate level of information is communicated, and that advance concurrence is appropriate, we have developed detailed Protocols for regions to follow, which

⁴ While other federal environmental statutes may provide treatment in a similar manner as a state (TAS) authority for eligible Indian tribes to implement federal environmental programs on their reservations, RCRA lacks such a provision.

⁵ EPA compliance assistance takes many forms, ranging from onsite assistance and training to explain and demonstrate to UST owners/operators what they need to do to come into compliance, to general assistance provided by EPA authorized inspectors during an inspection, to comprehensive written materials located on the EPA UST website, <https://www.epa.gov/ust>. In addition to the compliance assistance provided by EPA, as of October 13, 2018, all UST operators, including those in Indian country, have mandatory training requirements. 40 C.F.R. § 280.242.

⁶ An administrative penalty order or compliance order are examples of a formal enforcement action.

are attached to this memorandum. These Protocols set forth a process by which EPA will communicate and seek to cooperate with tribal governments to address noncompliance at tribal UST facilities.⁷ Although the Protocols provide for notice to the tribal government of consultation opportunities, the amount and type of information that may be disclosed in any communications will depend on whether the tribal government owns or operates an UST facility. The Protocol's communication framework with tribes is consistent with the Tribal Consultation Policy as implemented under OECA's [Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy](#) (Jan. 17, 2001) (*Tribal Enforcement Guidance*) and OECA's long-standing guidance on [Restrictions on Communicating with Outside Parties Regarding Enforcement Actions](#) (Mar. 8, 2006) (*Restrictions on Outside Parties Guidance*).⁸

First, the Pilot Protocols specify that EPA should periodically provide general information to the tribal government regarding EPA's plan to conduct announced UST inspections on the tribe's reservation.⁹ This communication will also provide general information about the importance of UST compliance, including why EPA inspects UST facilities and general UST compliance assistance information. Importantly, this correspondence will also explain the potential enforcement repercussions if EPA finds noncompliance, including how EPA is piloting a new approach that should result in a faster return to compliance for tribal UST facilities and may result in civil penalties or, in certain circumstances, delivery prohibitions. In addition to this general, periodic notice to the tribal government, EPA will send the tribal government a copy of the pre-inspection notice provided to the tribal UST facility.

Second, the Pilot Protocols provide that if EPA finds potential violations at a tribal UST facility, EPA will provide the UST operator with compliance assistance in the form of a notice about potential violations.¹⁰ This notice will: (i) detail the deficiencies found and identify available compliance assistance resources to assist the facility in addressing identified deficiencies; (ii) request that within a specified period of time, the facility operator (or UST owner, if appropriate) submit to EPA documentation of the actions taken to address the noted deficiencies; and (iii) advise the owner/operator of the UST facility that they may be subject to an enforcement action, including the assessment of civil penalties, if EPA makes a determination that there are UST violations at the facility. Importantly, EPA will share a copy of the notice with the tribal government, to ensure they are aware of potential problems at the tribal UST facility, and to convey an opportunity to consult with EPA. This notice is particularly important when the tribe owns or operates the UST facility and thus is responsible for ensuring the UST facility complies with the law.

Third, only if the tribal UST facility fails to remedy the problems identified in the notice in a timely manner following this compliance assistance effort, EPA may follow up by using an expedited enforcement tool currently available to address UST noncompliance – a [Field Citation](#)¹¹ or an [Expedited Settlement Agreement](#) (ESA).¹² These expedited enforcement tools are designed to facilitate a prompt

⁷ This Pilot addresses noncompliance with the UST program that does not pose an emergency or otherwise present imminent or substantial endangerment. In such exigent circumstances, consistent with EPA guidance, EPA may need to act to address the emergency without prior communication with the tribal government or compliance assistance.

⁸ The UST facility may be a tribal facility because the tribe has control over the facility, or a substantial proprietary or non-proprietary interest in the facility. See *Tribal Enforcement Guidance* at 3. In such cases, EPA's communications with the tribe regarding enforcement at facilities that are not tribally owned/operated should be consistent with the *Restrictions on Outside Parties Guidance*.

⁹ For the purposes of this Pilot, the term "reservation" refers to land described under the definition of "Indian country" at 18 U.S.C. §1151(a).

¹⁰ The actual name of this notice may vary among regions.

¹¹ <https://www.epa.gov/sites/production/files/2014-02/documents/d9610.16.pdf> and

<https://www.epa.gov/sites/production/files/2018-10/documents/final-interim-consolidated-ust-penalty-policy.pdf>

¹² <https://www.epa.gov/sites/production/files/2018-10/documents/final-interim-consolidated-ust-penalty-policy.pdf>

return to compliance while simultaneously reducing the transaction costs associated with more traditional enforcement. A Field Citation or ESA typically is a brief settlement agreement that the UST facility may accept, at the offered penalty amount, within a specific amount of time. If the UST facility rejects the Field Citation or ESA offer, then EPA may utilize more traditional administrative enforcement against the facility. Importantly, in response to comments received during tribal consultation and coordination on the Pilot, Field Citations and ESAs issued under the Pilot will initially provide tribal UST facilities twice as much time as originally proposed (*i.e.*, 60, versus 30, days) to respond to the Field Citation or ESA. This revision to the Pilot recognizes the unique aspects of tribal governments while also maintaining the goal of the Field Citation and ESA programs to incentivize a quick return to compliance. The longer period will also allow for more time to schedule any requested tribal consultation before the deadline in the Field Citation or ESA passes.

Fourth and finally, when appropriate for certain violations,¹³ EPA may exercise its Delivery Prohibition authority. Consistent with [EPA's Policy on Underground Storage Tank Delivery Prohibition Policy](#) (Jun. 25, 2012) (*Delivery Prohibition Policy*),¹⁴ the Pilot Protocols provide for the issuance of a Notice of Intent to Prohibit Delivery (NIPD) to the tribal UST facility 30 days prior to any delivery prohibition.¹⁵ A copy of the NIPD, along with notice of an opportunity to consult, will also be provided to the tribal government under the Pilot Protocols. In addition, as appropriate, correspondence to the tribal government will also inform the tribal government of unique provisions applicable to an UST facility located in a rural and remote area.

III. The Pilot Is Consistent with EPA's 1984 Indian Policy and the Office of Enforcement and Compliance Assurance Tribal Enforcement Guidance

The [EPA Policy for the Administration of Environmental Programs on Indian Reservations](#) (Nov. 8, 1984) (*EPA Indian Policy*)¹⁶, articulates a broad set of principles that guide EPA's work in protecting human health and the environment in Indian country. Principle 8 of the *EPA Indian Policy* outlines a process for addressing noncompliance at tribal facilities and non-tribal facilities in Indian country. For non-tribal facilities, the *EPA Indian Policy* provides that EPA will generally respond to noncompliance in the same manner as it would toward such facilities outside Indian country. For tribal facilities, the *EPA Indian Policy* provides that EPA will work cooperatively with tribal leadership to facilitate compliance, and establishes three threshold criteria (see below) that should exist prior to EPA initiating most formal enforcement actions.¹⁷ In addition, the [EPA Indian Policy Implementation Guidance](#) (Nov. 8, 1984)¹⁸ calls for the OECA Assistant Administrator to concur on most civil administrative and judicial enforcement actions in consultation with the General Counsel and the Office of International and Tribal Affairs.¹⁹

¹³ EPA's Delivery Prohibition Policy states that it is generally appropriate to use the delivery prohibition for serious violations, for situations where the owner/operator does not meet financial responsibility requirements, in circumstances where the owner/operator has demonstrated recalcitrance, and emergency or potential emergency situations.

¹⁴ https://www.epa.gov/sites/production/files/2014-01/documents/ust_delv_proh_guid_6-25-12.pdf

¹⁵ The exception is an immediate delivery prohibition for emergency situations, which does not require prior notice. *Delivery Prohibition Policy* at 4-5.

¹⁶ <https://www.epa.gov/tribal/epa-policy-administration-environmental-programs-indian-reservations-1984-indian-policy>.

¹⁷ *EPA Indian Policy*, Principle 8, at 4.

¹⁸ <https://nepis.epa.gov/Exc/ZyPURL.cgi?Dockey=P100NEI6.txt>.

¹⁹ *EPA Indian Policy Implementation Guidance* at 4 (November 8, 1984).

The EPA enforcement program implements these principles through OECA's *Tribal Enforcement Guidance* and the [*Questions and Answers on the Tribal Enforcement Process*](#) (Apr. 17, 2007) (*2007 Tribal Enforcement Guidance Q&A*).²⁰

Under this Pilot, EPA plans to continue to work cooperatively with tribes to ensure a return to compliance when EPA finds noncompliance at a tribal UST facility. EPA cooperation begins with communicating with the tribal government before EPA initiates an inspection and continues through resolution of any noncompliance. These communications provide information about available compliance assistance, inspections, a notice about potential violations, and potential enforcement consequences of noncompliance. Finally, the communications include appropriate notices of an opportunity to consult with EPA. If, after compliance assistance and the final compliance plan in the form of the post-inspection notice, the tribal UST facility remains in noncompliance, EPA may then utilize available expedited enforcement tools that, among other things, may assess a reduced civil penalty. This communication, as described in more detail above, is consistent with the *Tribal Consultation Policy* as implemented by the *Tribal Enforcement Guidance*.

As noted above, the *EPA Indian Policy* provides that, before the agency takes an administrative or civil judicial enforcement action against a tribal facility, EPA should determine that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the federal government cannot utilize other alternatives to correct the problem in a timely fashion. As explained below, this Pilot meets these threshold criteria. Notably, the *Tribal Enforcement Guidance* is clear that EPA's consideration of these criteria "[is] not intended to, and should not, result in a lesser degree of human health and environmental protection in Indian country than elsewhere in the U.S."

First, a "significant threat" to human health or the environment can include direct threats, such as those posed by a release from an UST, as well as indirect threats, such as threats to the integrity of the regulatory program and threats posed by the failure to monitor or maintain proper records, which in turn can increase the risk of a direct threat.²¹ Lingering and repeated violations present a real risk of worse situations developing in the future (*e.g.*, leaks and possible contamination), as well as being threats to the integrity of the UST program.

Second, the expedited enforcement actions covered by this Pilot can reasonably be expected to achieve results in a timely manner. A condition of a Field Citation or an ESA is that the facility must return to compliance quickly, within a specific timeframe. EPA has used both Field Citations and ESAs at non-tribal UST facilities (both inside and outside Indian country) very successfully for many years to achieve UST compliance much more quickly than could be secured with more traditional enforcement. While Notices of Intent to Prohibit Delivery are used rarely, they also require compliance within 30 days to avoid delivery being halted.

Finally, as noted above, EPA has provided compliance assistance to tribal UST facilities for many years, yet noncompliance continues to remain a concern. EPA developed this Pilot in part because it determined that alternatives to formal enforcement have not generally been successful in ensuring compliance with the UST regulations and protections to public health and the environment. An appropriate next step, therefore, is the use of expedited enforcement tools, which provide for reduced

²⁰ <https://www.epa.gov/enforcement/transmittal-questions-and-answers-tribal-enforcement-process-april-17-2007>.²¹ *Tribal Enforcement Guidance* at 6, and *2007 Tribal Enforcement Guidance Q&A* at Q22, p10.

²¹ *Tribal Enforcement Guidance* at 6, and *2007 Tribal Enforcement Guidance Q&A* at Q22, p10.

penalties in exchange for a prompt return to compliance. In certain limited situations, EPA may also use Notices of Intent to Prohibit Delivery and stop delivery under this Pilot.

IV. Concurrence and Conclusion

As noted above, the *Tribal Enforcement Guidance* calls for the concurrence of the OECA Assistant Administrator before a penalty or unilateral enforcement action may be initiated against a tribal facility. This memorandum constitutes my concurrence on the use of expedited enforcement tools to address violations of UST requirements at tribal UST facilities under this Pilot, and traditional administrative enforcement when those tools are used but not successful in returning the tribal UST facility to compliance in a timely manner.²² My concurrence is conditioned on the regions following the process outlined in the Protocols for the Tribal UST Compliance Pilot. I am providing my concurrence after consulting with the American Indian Environmental Office and the Office of the General Counsel.

The Pilot begins January 1, 2022.²³ Unless extended or otherwise modified, the Pilot will end December 31, 2024. After the Pilot has been implemented for 2.5 years, OECA, the Office of Underground Storage Tanks, and the Office of International and Tribal Affairs, working with the regions, will evaluate the Pilot and determine whether any adjustments should be made and whether the Pilot should transition to a permanent national program. To assist with this evaluation, each region will provide information specific to the Pilot as part of the annual survey that collects information generally on UST Field Citations, ESAs, and Delivery Prohibitions.

This memorandum, the Pilot Protocols and attachments, and other documents related to the Pilot are available on the internet at <https://www.epa.gov/enforcement/tribal-underground-storage-tank-compliance-pilot>.

Attachment: Protocols for the Tribal Underground Storage Tank Pilot with Attachments

cc: Jeffrey Prieto, General Counsel

Jane Nishida, Assistant Administrator for the Office of International and Tribal Affairs

Barry N. Breen, Acting Assistant Administrator for Office of Land and Emergency Management

Carlton Waterhouse, Deputy Assistant Administrator for Office of Land and Emergency Management

OECA Office Directors and Deputy Office Directors

²² For the duration of this Pilot, regions are not required to obtain case-by-case concurrence when using one or more of the following UST expedited enforcement tools at a tribal UST facility consistent with the attached Protocols: (1) a Field Citation; (2) an Expedited Settlement Agreement (ESA); (3) a Delivery Prohibition Action; and (4) filing of a non-expedited administrative enforcement action if a Field Citation or ESA is offered but is rejected or ignored. Regions must continue to obtain case-specific concurrence if using the above enforcement tools in a manner inconsistent with the Protocols. A region must also continue to seek case-specific concurrence when initiating other civil enforcement action against a tribal facility (e.g., referring an enforcement matter to the U.S. Department of Justice) to address UST violations.

²³ This document identifies internal Agency policies and procedures for EPA employees in coordinating Agency enforcement activities. This document does not change or substitute for any law, regulation, or any other legally binding requirement and is not legally enforceable. It does not create any judicially enforceable rights or obligations substantive or procedural in any person, and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. EPA may decide to follow the procedures and policies provided in this document or to act at variance with them based on its analysis of the specific facts presented.