



ISSUE PAPER: TRIBAL OPTIONS REGARDING THE EPA'S PLAN FOR INDIAN COUNTRY



FY2023

Tribal Pesticide Program Council

It is the intent of the TPPC to focus on pesticides and be as inclusive as possible for all tribes and tribal organizations that have pesticide issues and concerns.

The TPPC facilitates communications between tribes, tribal and intertribal organizations, tribal communities, and the U.S. Environmental Protection Agency (EPA) as well as other federal and state agencies on pesticides and pesticide-related issues.

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Issue Paper: Tribal Options Regarding the EPA’s Plan for Indian Country

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1.0 BACKGROUND

The United States Environmental Protection Agency (EPA) is implementing a federal pesticide applicator certification plan (EPA Plan) for those areas of Indian country not covered by any other EPA-approved certification plan.

This is in response to the 2017 rule change of 40 CFR Part 171, Docket: EPA-HQ-OPP-2011-0037, where the EPA Plan provides for the certification of applicators of restricted use pesticides (RUPs), requirements for use of RUPs by noncertified applicators under the supervision of a certified applicator, pesticide dealer reporting and recordkeeping, and enforcement.

The EPA has engaged tribes directly and through the Tribal Pesticide Program Council (TPPC) to inform, consult with, and solicit input regarding the implementation of this process (for additional background on the TPPC's engagement on this issue, see the attached comment letter the TPPC submitted to EPA on the original draft plan back in 2011). Recently, representatives from the EPA's Certification and Worker Protection Branch of the Office of Pesticide Programs/Pesticide Re-Evaluation Division presented on the Certification Rule Program Updates during a regularly scheduled TPPC meeting.

Four options exist which tribes may take as to how they wish to respond to the 2017 rule changes. They include:

- 1) Tribal Reliance on Certifications Issued by Specified Jurisdictions (Tribal – EPA Written Agreement)
- 2) Certifications Issued by a Tribe (Tribal Certifications)
- 3) EPA Plan for Indian Country
- 4) Opt-out of EPA Plan for Indian Country

This issue paper focuses primarily on concerns expressed by TPPC member tribe representatives, as the impact to non-represented tribes who may elect Option (4) are considered further.

2.0 OPTION (3): DEFAULT EPA PLAN FOR INDIAN COUNTRY

Although the original March 4, 2020, deadline for tribes to submit proposed modifications to existing Tribal Plans to comply with the new 2017 Rule changes has passed, the EPA continues to work to approve these submissions prior to November 4, 2023, at which time preexisting plans will expire. It has been reported to the TPPC, that (6) six Tribes from EPA Regions 5, 7, 8 and 10 submitted Certification & Training plans, while an additional tribe opted to allow the EPA to administer a Certification Plan. This leaves 567 federally recognized Indian tribes of the total 574, set to default to Option 3, the EPA Plan for Indian Country, on November 5, 2023, or until otherwise extended.

The details of Option 3, the EPA Plan for Indian Country will not be discussed in detail here as: 1) Solicitations for formal input have occurred, and 2) It remains in draft form as of the writing of this paper. The 2014 EPA Plan for Indian Country will be used as a benchmark reference when required.

3.0 OPTION (4): OPT-OUT OF EPA PLAN FOR INDIAN COUNTRY

Despite the implementation of the default EPA Plan for Indian Country after November 4, 2023, for those 567 tribes mentioned previously, it has been expressed by the EPA that a tribe may exercise Option 4 at any time to opt-out of the default EPA Plan.

Tribes who elect to opt-out of the EPA Plan by choosing Option 4 are effectively removing the mechanism which an applicator would use to obtain a federal RUP authorization to apply RUPs within the tribe's jurisdictional lands. With the mechanism absent, an applicator has no means to comply, thereby making applications of RUPs within the Tribe's jurisdiction, essentially illegal.

3.1 Potential Advantages of Opting Out

It is anticipated that Tribes who opt out may do so for a couple of reasons:

- Opting out effectively bans the legal application of RUPs within the tribal jurisdiction. This could be viable for those tribes who otherwise lack Tribal legislative options to accomplish this.
- Opting out is a simple process. As conveyed by EPA representatives, only a letter from the Tribe's Executive Leadership is required. This may be advantageous to those tribes who lack resources to propose a Plan or implement the default EPA Plan.

3.2 Potential Disadvantages of Opting Out

Tribes who elect to opt-out of the EPA Plan may wish to evaluate the following:

- Although opting out of the EPA plan removes the mechanism for legal RUP applicator credentialing, illegal RUP applications may still occur.
- Opting out of the EPA Plan is specific to the application of RUPs and is not applicable to the application of general use pesticides, legal or otherwise.
- In the event the Tribe experiences a need to have RUPs applied, such as may be the case under an emergency public health declaration, the Tribe would have to express to the EPA their desire to opt back in, via letter. The tribe would then default back to the EPA Plan (Option 3) to credential RUP applicators. The time required to authorize an RUP applicator under such circumstances, may not be conducive for a quick emergency response.
- Tribes who lack the resources to implement the EPA Plan may also be lacking resources to monitor the opt-out option. In the event an illegal RUP application is conducted, due to no valid authorization under 40 CFR 171, resources would still be required from the tribe to monitor this activity and refer enforcement to the EPA.

- Without local tribal resources, the responsibility falls on the EPA, under direct implementation, to enforce this option on Tribal lands. The EPA's ability to enforce this may not be acceptable to Tribes.

4.0 AN ALTERNATIVE APPROACH TO THE EPA PLAN AND OPTING-OUT

An alternative approach exists for those Tribes who:

- 1) Lack the resources to pursue Option 1 or 2, and
- 2) Desire that no applications of RUPs take place within their jurisdictional lands.

This approach involves defaulting to Option 3, the EPA Plan. This approach would allow the mechanism to exist to certify applicators desiring to apply RUPs within the respective tribal lands. However, as presented by TPPC tribal representatives, it does **suggest** to the applicator that they are now authorized to conduct such activities (and others) carte blanche.

To counter this implied misunderstanding, a tribe could adopt tribal legislation to further restrict (or ban) the application of RUPs or general use pesticides within their lands while allowing for tribal emergency exemptions.

The TPPC believes this approach allows the Tribe to accomplish their goals while offering the most flexibility if unable to implement a full certification and training plan or even the EPA Plan on their own.

5.0 BUILDING ENFORCEMENT CAPACITY

This alternative approach positions the Tribe to exercise its sovereignty by enforcing its own tribal laws. **Regardless of whether an applicator receives an authorization under the EPA Plan, if Tribal laws state the desire to ban the application of RUPs within their jurisdiction, that will take precedence.** However, as with the adoption of any Tribal law, an entity within the Tribe would require the authority to monitor and enforce the law.

This monitoring and enforcement capacity investment would likely be required nonetheless, as the opt-out option would require Tribal resources to monitor for the potential illegal use of RUPs. Although bound by direct implementation responsibilities, the EPA's ability to respond to each tribes' claims of an applicator applying RUPs that is not directly associated with a claim of harm or exposure, when the Tribe has opted out, is limited at best. Therefore, a Tribe who identifies a monitoring and enforcement lead for this matter (Police, ranger, compliance officer, environmental inspector, etc.) could identify noncompliance of Tribal law and enforce accordingly.

In contrast, if the Tribe opts out of the EPA Plan under Option 4, the tribe would still be required to identify a monitoring lead, who would then refer alleged noncompliant 40 CFR 171 matters to the EPA for enforcement under the EPA Plan. This scenario relies heavily on the ability of the EPA to not only administer

but also enforce the EPA Plan under their Direct Implementation responsibilities. TPPC member representatives have expressed challenges with and have voiced the opinion that EPA’s ability in this arena is lacking, which the EPA has conceded is a matter of available resources.

6.0 DRAFT TRIBAL RESOLUTION STATEMENTS

To assist in supporting those tribes who desire to pursue this alternative approach, the TPPC has drafted a resolution statement that can be modified accordingly (attached to the end of this document, or click [here](#) for an editable version in Microsoft Word format).

7.0 REFERENCES

01/21/20 Draft Deliberative Document “DRAFT EPA Plan for the Federal Certification of Applicators of Restricted Use Pesticides within Indian Country”

OPP CWPB EPA Plan Updates 08-19-2022

[Place on tribal letterhead]

**RESOLUTION
OF THE
[TRIBE NAME HERE]**

Resolution No.: [NUMBER]

Date Approved: [DATE]

Subject: [DESCRIPTIVE TITLE OF RESOLUTION]

WHEREAS, the [TRIBE NAME HERE] is a federally recognized tribe and the [TRIBAL COUNCIL NAME HERE] is the governing body of the [TRIBE NAME HERE] under the authority of the [CONSTITUTION OR OTHER TRIBAL GOVERNING DOCUMENT]; and

WHEREAS, the [TRIBAL COUNCIL NAME HERE] is mandated by that [CONSTITUTION OR OTHER TRIBAL GOVERNING DOCUMENT] to preserve and protect the [TRIBE NAME HERE] culture and the sovereignty of the [TRIBE NAME HERE]; and

WHEREAS, the [NAME OF LAW OR TREATY THAT ESTABLISHED THE RESERVATION] established the [NAME OF RESERVATION] as a federal Indian reserve in [YEAR OF ESTABLISHMENT] and [NAME OF RESERVATION] contains approximately [NUMBER OF ACRES OR NUMBER OF SQUARE MILES] of land; and

WHEREAS, the health and safety of our tribal [MEMBERS OR CITIZENS] and their families and the quality of our air, soil, and water resources is an overriding imperative for the [TRIBAL COUNCIL NAME HERE] and the Tribe; and

WHEREAS, tribal members use the many animal, plant, and aquatic resources on the [NAME OF RESERVATION] for ceremonial, traditional, and subsistence purposes; and

WHEREAS, the use of restricted use pesticides, on lands contained within the exterior boundaries of [NAME OF RESERVATION] poses a potential increased risk to the health and safety of humans, the Reservation's air and water resources, and to the health and fecundity of the animal, plant, and aquatic species dependent on them; and

WHEREAS, under a 2014 program, the "Federal Certification of Applicators of Restricted Use Pesticides within Indian Country," the U.S. EPA would allow the use of restricted use pesticides on all tribal lands unless a tribe has its own plan in place to train and certify applicators or has opted out of the program entirely;

NOW THEREFORE BE IT RESOLVED that the [TRIBAL COUNCIL NAME HERE] hereby bans the use of any restricted use pesticide on lands contained within the exterior boundaries of [NAME OF RESERVATION]; and

THEREFORE BE IT FURTHER RESOLVED that this ban on restricted use pesticides may be temporarily lifted by action of the [TRIBAL COUNCIL NAME HERE] during a declared emergency and automatically reinstated after the declared emergency has ended.

CERTIFICATION

This is to certify that Resolution [NUMBER] was approved at a meeting of the [TRIBAL COUNCIL NAME HERE] on [DATE] at which a quorum was present, and that this Resolution was adopted by a vote of [NUMBERS FOR AND AGAINST RESOLUTION] with [NUMBER] abstentions.

Dated this [DATE] day of [MONTH], [YEAR]

[NAMES, TITLES, AND SIGNATURES HERE]



June 29, 2011

Attention: EPA-HQ-OPP-2011-0037
Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P)
Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460-0001

Subject: Comments on Federal Plan for Certification of Applicators of Restricted Use Pesticides Within Indian Country: Notice of Availability

The Tribal Pesticide Program Council (TPPC) is pleased to submit these comments and recommendations regarding the U.S. Environmental Protection Agency's (EPA's) proposed Federal Plan for Certification of Applicators of Restricted Use Pesticides Within Indian Country: Notice of Availability (hereinafter "C&T Plan").

The TPPC is an autonomous organization of the National Tribal Environmental Council with more than 40 member tribes and tribal organizations which are committed to advancing pesticide-related issues consistent with the needs, interests and unique legal status of Indian tribes. Although the organization always seeks to represent consensus perspectives on any given issue, it is important to note that the views expressed by the TPPC may not be agreed upon by all tribes. Furthermore, it is also important the EPA understands that interactions with the organization do not substitute for government-to-government consultation which can only be achieved through direct communication between the federal government and Indian tribes.

The TPPC would like to take this opportunity to provide our thoughts and recommendations on the C&T Plan for which EPA has specifically requested comments ("Notification to Tribes," "Private applicator certification," and "Option to not participate in the Plan"), and two other items that our Council consider important – Enforcement and Consultation.

Notification to Tribes

During past conversations with EPA staff about the C&T Plan, members of the TPPC have recommended inclusion of a notification provision that would require applicators to notify an Indian tribe prior to application of restricted use pesticides (RUPs) on its respective lands. The Agency is concerned that such an approach could impose an unreasonable burden on tribes, applicators and the EPA itself. The TPPC disagrees.

It is important for Indian tribes to know what, when and where pesticides are applied to their lands, not only for health-related purposes, but for the protection of cultural practices, many that have existed since time immemorial. A notification system would provide tribes with some ability to say no to, or closely monitor an RUP application, if the intended location was in or near a cultural site or tribal resource. Such is the case for the Gila River Indian Community which requires private and commercial applicators to provide the Tribe with prior notice of a pesticide application, using the State of Arizona's Department of Agriculture Form 1080. Tribal staff reviews the notice to determine if the proposed application may impact a sensitive area such as a water course, endangered species habitat, or residential housing that in the past, has expressed concerns with such applications. By allowing for a similar notification system under the C&T Plan, the EPA would be doing a lot to meet its trust responsibility to tribes.

Furthermore, the EPA and others would not be unduly burdened by a notification system as one already exists for soil fumigation. On May 6, 2011, the Agency's Director of the Pesticide Re-evaluation Division sent a letter to state and tribal lead agencies (SLAs), asking them if they want to opt in and be "notified *prior* to a soil fumigant application" (*italics added*). According to the EPA, this notification system will "assist state and tribal enforcement personnel in planning compliance assistance and assurance activities." Those answering in the affirmative will be listed on an EPA website, as well as their preference regarding the way that they would like to receive notification (see www.epa.gov/fumigantstatenotice). At a minimum, applicants must provide the following information to the SLAs:

- Location of the application blocks;
- Fumigant(s) applied including the EPA registration number(s);
- Applicator and property owner contact information; and
- Time period that the fumigant may occur.

The soil fumigant notification system supports tribal self-determination, allowing Indian tribes to decide themselves if they want to be notified prior to an application. The same should be true for the application of RUPs. The TPPC therefore recommends that *the EPA create an "opt-in" process for Indian tribes that want to be notified in advance of an RUP application on their land. Tribes would be expected to identify a contact person, to be posted on an Agency website, to whom advance notification of a pesticide application should be provided. Further, the EPA should use something similar to Form 1080 that is used to notify and provide information to the State of Arizona, and tribes within its boundaries (e.g., Cocopah Tribe, Gila River Indian Community, Quechan Tribe, and Salt River Pima-Maricopa Indian Community) about proposed pesticide applications. Both the EPA and TPPC could also help get the word out to tribes about the opt-in process as part of their outreach efforts.*

A notification system would not place an undue burden on an Indian tribe, and in fact, supports tribal self-determination. It would be strictly up to a tribe if it wanted to take on any additional responsibilities that occur as a result of being notified in advance of a pesticide application.

As a supplement to the notification system, *the EPA should make a database publicly available that lists applicators (with their contact information and current certifications) by*

State and EPA Region. This database could be maintained by the Agency's Regional Pesticide Program Offices. The database would provide Indian tribes with a better sense as to the applicators with federal certificates who might potentially apply pesticides on their lands.

Private Applicator Certification

According to the May 18, 2011 *Federal Register* notice concerning the C&T Plan, the EPA states that “for Federal certification plans, EPA must offer a no-test option for private applicators.” For this option, the Agency proposes that these applicators “submit documentation of physical attendance and completion of an EPA-approved training and self-study evaluation.” This is problematic for the TPPC.

The training that pesticide applicators receive (*e.g.*, EPA-approved training) does not require such applicators to demonstrate that they are competent to apply pesticides in Indian country. As part of its trust responsibility to tribes, the Agency must raise the bar on what it will approve for training purposes, namely a better overview on the various nuances of Indian country. At a minimum, ***EPA-approved training should include a discussion of tribal government, cultural practices, natural resources, examples of tribal regulations, information about the website containing tribes that want to be notified prior to a RUP pesticide application (see above), and other pertinent information such as how to obtain contact information for tribes within the EPA Region that the prospective applicators intend to apply pesticides.***

Option to Not Participate in the Plan

The EPA is not inclined to provide an opt-out approach for those Indian tribes wishing to prevent the application of RUPs on their lands. Perhaps the most prominent reason for the Agency's position is that an opt-out provision would place resource and implementation burdens on tribes, applicators and the EPA itself. The Agency's position wholly ignores past and current federal policy regarding tribal self-determination whose purpose is to provide tribes with the ability to control their own affairs and make decisions that affect their respective community members. There are tribes that do not want RUPs applied to their lands for very legitimate reasons such as the impacts of pesticides on cultural and natural resources, and the health of community members.

The EPA states in the *Federal Register* notice that Indian tribes not wanting RUPs to be applied to their lands have the option of “adopting additional restrictions on such applications through Tribal codes, laws, regulation or other applicable Tribal requirements.” To these tribes, the Plan is nothing more than an unfunded mandate, forcing them to expend valuable time and resources developing the legal tools to prohibit the application of RUPs on their lands. In a number of cases, tribes do not have the in-house expertise to develop these tools, hence they will likely have to enlist outside assistance at a substantial cost.

Based on the aforementioned information, the TPPC recommends that ***the EPA provides Indian tribes with an opt-out approach, understanding that this supports the principles of tribal self-determination.***

Enforcement

In the C&T Plan, the EPA states that it “will administer routine maintenance activities associated with implementation of this Plan and will conduct inspections and take enforcement actions as appropriate.” The TPPC is suspect of such a statement, understanding that the Agency is already stretched thin for the resources it requires to carry out its existing day-to-day responsibilities, let alone the additional responsibilities imposed by the C&T Plan.

The track record of the federal government (*e.g.*, Congress) to provide the EPA with the requisite resources to implement rules and regulations in Indian country, such as the Federal Air Rules on Reservations, is poor. The TPPC therefore believes that similar resources will not be forthcoming for enforcement and compliance assurance related to the C&T Plan. Continuing overtures by the President and Congress about the need to cut back federal funding to the Agency and other agencies should be interpreted that there will likely be a further reduction in EPA resources to implement the C&T Plan.

In light of the limited and dwindling resources available to the EPA, and in fulfillment of the federal government’s trust responsibility to Indian tribes, *the Agency should provide tribes and the TPPC with further detail on how it intends to implement the C&T Plan, particularly based on its statement that “EPA has adequate resources to implement the Plan in Indian country consistent with the requirements of FIFRA and the regulations in 40 CFR Part 171.”*

Consultation

In accordance with Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, the EPA is required to engage in “regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications.” In addition, EPA’s Indian Policy requires the Agency to fulfill its trust responsibility to Indian tribes and conduct tribal consultation on a government-to-government basis. It does not allow for the EPA to avoid honoring these commitments, simply by stating that it does not have the ability or resources to engage in such consultation.

A consultation approach gaining popularity within EPA is to have “consultation calls” with Indian tribes. The TPPC understands that the Agency’s American Indian Environmental Office and the Office of General Counsel agree that these calls meet the expectations of Executive Order 13175 and EPA’s Indian Policy. The Council disagrees, however, finding that such calls do not qualify as meaningful government-to-government consultation between the Agency and tribes. In fact, our Council feels fairly confident that most of the tribal participants on these calls are tribal staff with little to no involvement of tribal leaders. Furthermore, tribes participating in these calls are forced to share a discrete amount of time with EPA staff, as opposed to being granted the opportunity to speak with Agency officials one-on-one where they might be more forthcoming with information.

Many Indian tribes have their own protocols on how they want to be consulted regarding federal government actions – *i.e.*, there is not a one-size-fits-all approach to consultation. Some

tribes are fine with environmental staff members working with the EPA on the development of rules and other actions, whereas others would prefer that tribal leadership be involved. In other cases, consultation through a phone call is sufficient for some tribes, whereas others prefer face-to-face meetings, and often with the highest level officials from the Agency. The EPA must be sensitive to these protocols, and do everything in its power to honor them instead of responding that the Agency does not have the resources to meet tribal consultation preferences.

Indian tribes should be asked upfront on how they want to be consulted. A sister office of the Office of Chemical Safety and Pollution Prevention (OCSPP), namely the Office of Air and Radiation (OAR), did just that for the recently signed Federal Implementation Plan (FIP) titled the “Review of New Sources and Modifications in Indian Country.” In the earliest stages of the FIP’s development, OAR sent approximately 500 letters to tribal leaders that sought their recommendations on effective consultation and their involvement in developing the FIP. The Office received responses from 75 tribes, indicating the following:

- 69 tribes designated an environmental staff member to work with the Office in developing the FIP;
- Many tribal leaders asked that they be kept informed of the Office’s progress through e-mail, meetings with the EPA Regional Offices, newsletters and websites;
- 53 percent of the tribal leaders responding also requested direct phone calls or conference calls to discuss the FIP; and
- 16 percent of the tribal leaders requested face-to-face consultation, with a smaller number of these leaders wanting to meet with senior EPA staff.

Based on these responses from Indian tribes, OAR developed a consultation plan. The TPPC mentions the OAR experience to encourage OCSPP to follow the model for engaging in meaningful and effective consultation with Indian tribes.

With respect to the C&T Plan, the EPA sent an October 25, 2010 letter to Indian tribes regarding two consultation calls, one on November 29th and the other on December 13th. Nowhere in the letter were Indian tribes provided with additional opportunities to consult with the Agency. Instead, they were invited to submit questions in advance of the calls if they were unable to “participate in the consultation[s].”

There are Indian tribes who are very careful about their involvement in consultation calls. Because of internal protocols, they may avoid such calls altogether, or may require tribal leaders or staff to acquire certain approvals before they are allowed to participate in the calls. In the latter case, these approvals may never occur or may not be granted in time for the consultation calls. For the C&T Plan, a number of tribes could have been easily excluded from the consultation calls. What is also problematic is that the EPA offered additional consultation opportunities to those tribes participating *on the calls*. Hence, if the tribe was not on the consultation call, it was indirectly excluded from further consultation with the Agency.

The TPPC recommends that *the EPA conduct meaningful and effective consultation with the nation’s Indian tribes regarding the C&T Plan based on the aforementioned*

information. Our organization is also pleased to offer any assistance that it can provide the EPA in meeting its obligation of consultation to tribes.

Conclusion

In summary, the TPPC is pleased to provide the aforementioned comments and recommendations concerning the Plan. If you should have any questions or comments, please feel free to contact Bob Gruenig, TPPC Coordinator, via phone at (505) 242-2175 or via e-mail at bgruenig@ntec.org.

Respectfully submitted,

Fred E. Corey
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