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December 20, 2017

U.S. Environmental Protection Agency  
EPA Docket Center (EPA/DC)  
Mail Code 28221T  
Attention Docket ID No. EPA-HQ-OAR-2017-0355  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

**Subject: National Tribal Air Association Comments on the Proposed  
Repeal of the Clean Power Plan, Docket ID No. EPA-HQ-OAR-2017-0355**

**Introduction**

The National Tribal Air Association (NTAA) is pleased to submit these comments regarding the U.S. Environmental Protection Agency's (EPA)'s Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48035 (October 16, 2017) (Proposed Repeal).

The NTAA is an autonomous organization with 125 principal member Tribes. The organization's mission is to advance air quality management policies and programs, consistent with the needs, interests, and unique legal status of Indian Tribes. As such, the NTAA uses its resources to support the efforts of all federally recognized Tribes in protecting and improving the air quality within their respective jurisdictions. Although the organization always seeks to represent consensus perspectives on any given issue, it is important to note that the views expressed by the NTAA may not be agreed upon by all Tribes. Further, it is also important that EPA understands 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 NTAA and several of its member Tribes submitted letters of support for the Clean Power Plan (CPP). As such, the NTAA must strongly oppose repeal of the CPP and, in particular, communicate our comments and recommendations regarding the benefits that would be lost upon repeal of the CPP; EPA's interpretation of the "best system of emission reductions" (BSER); the cost-benefit analyses conducted by EPA in support of the Proposed Repeal; and the absence of Tribal consultation by EPA regarding the Proposed Repeal. Given the Endangerment Finding and the known impacts of climate change on human health, biological resources, treaty resources, and subsistence resources for Tribal communities, the NTAA opposes the rescission of the CO<sub>2</sub> emission standards without a proposed replacement rule.



However, the NTAA prefaces its comments and recommendations by identifying the real effects of climate change on Indian Tribes caused by the emission of carbon dioxide (CO<sub>2</sub>) and other greenhouse gases (GHGs) into the atmosphere.

## **Indian Tribes and Climate Change**

### **General**

Electric generating units (EGUs) are the single largest source of CO<sub>2</sub> pollution in our nation, emitting approximately 2.3 billion tons annually which comprises 40% of the carbon pollution emitted in the U.S.<sup>1</sup> CO<sub>2</sub> pollution impacts human health and the environment in a number of ways. The impacts vary regionally and seasonally and may include longer, more intense and more frequent heat waves; more intense precipitation events and storm surges; and less precipitation and more prolonged drought. The negative health effects associated with climate change are especially damaging for vulnerable populations including the elderly, young children, and those individuals already in poor health.

Indian Tribes are not immune from the effects of climate change. Like the rest of the nation, its populations are suffering from the health effects of climate change. Further, Tribes are seeing the effects of climate change through increased storm surges, erosion, and flooding; prolonged droughts never seen in modern times; and increased fires and insect pest outbreaks in their forests. These are just a few snapshots of what is happening on and around the lands of the nation's 567 federally recognized Tribes.

Indian Tribes are also affected much differently than the rest of the nation as their cultures are highly integrated into the ecosystems of North America, and many Tribal economies are heavily dependent on the use of fish, wildlife, and native plants. Even where Tribal economies are integrated into the national economy, Tribal cultural identities continue to be deeply rooted in the natural environment. As climate change disrupts biological communities, the survival of some Tribes as distinct cultures may be at risk. The loss of traditional cultural practices, due to climate-driven die-off or range shift of culturally significant plant and animal species, may prove to be too much for some Tribal cultures to withstand on top of other external pressures that they face.

Climate-driven disruption of biological communities is also having a considerable effect on the treaty rights of Indian Tribes. Many such treaties preserve hunting, fishing, and gathering rights for Tribes on their lands and in the usual and accustomed areas. Some Tribes are finding that the animals and/or plants on which they depend for their cultural practices and identity have either migrated to lands not under their control or have disappeared altogether. How does one begin to value this type of loss for a Tribe? Further, CO<sub>2</sub> emitted today can remain in the atmosphere up to 100 years, meaning that the full impacts of these emissions on Tribes and their culture may not be seen until many years into the future.

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<sup>1</sup> See "EDF Welcomes First National Carbon Pollution Standards for Power Plants," Environmental Defense Fund (September 30, 2013), at <http://www.edf.org/media/edf-welcomes-first-national-carbon-pollution-standards-power-plants> (last visited on December 10, 2017).



## **Regional**

In May 2014, the NTAA released the Status of Tribal Air Report that identifies regional impacts from climate change, impacts that the NTAA has highlighted to varying degrees in subsequent Status of Tribal Air Reports issued in 2015, 2016, and 2017:

Alaska: There is coastal erosion; melting permafrost threatens civil infrastructure in remote villages as well as food security as underground food cellars thaw; and Alaska Native Villages are unique because they face firsthand the effects of climate change, which has already resulted in the relocation of several villages away from eroding coastlines. A 2003 U.S. General Accountability Office study identified more than 200 Alaska Native Villages affected to some degree by flooding and erosion and 31 villages facing imminent threats that are compelling them to consider permanent relocation. The U.S. Army Corps of Engineers' March 2009 Alaska Baseline Erosion Assessment identified many villages threatened by erosion, but did not assess flooding impacts. At least 12 of the 31 threatened villages have decided to relocate—in part or entirely—or to explore relocation options (GAO, 2009).

Northwest: Changes in hydrology and water chemistry impact fisheries resources and shellfish (ocean acidification); and storm surges threaten coastal areas and Tribal lands along the coasts, which may result in the possible relocation of Indian Tribes.

Southwest: Increased aridity threatens vegetation that is critical for stabilizing sediments which can lead to greater more severe and frequent dust storms and dune mobilization. Higher temperatures and increased droughts will lead to more intense forest fires and reduced grazing potential.

Plains: There are spreads of pests that previously could not survive cooler climates, potential increases in weed species due to more CO<sub>2</sub> in the atmosphere, higher temperatures, and changes in precipitation and decreases in soil moisture and water availability. The region's main water supply, the Ogallala Aquifer, is also threatened. Without alternative resources and better water management practices, projected temperature increases, more frequent droughts, and higher rates of evaporation are likely to further stress the water supply.

Great Lakes: Heat waves are becoming more frequent, cold periods are becoming rarer, and snow and ice are arriving later in the Fall and melting earlier in the Spring. Ticks and mosquitoes will survive in greater numbers as winters become milder and will increase the risks of spreading diseases such as Lyme disease and West Nile virus.

Gulf Coast: Projected sea level rise, increased hurricane intensity, and associated storm surges may lead to further erosion, flooding, and property damage in the Southeast.

Northeast: Projected increases in heavy precipitation and likely sea level rise may lead to more frequent, damaging floods in this region. Large portions of the region may become unsuitable for growing some fruit varieties and some crops, such as cranberries, apples, blueberries, grain, and soybeans. Similarly, by the end of the century, only a small portion of the Northeast may be



suitable for maple syrup production. In contrast, the region could see a longer growing season for a number of other crops, which would provide potential benefits to society.

### **Reminder of CPP Benefits**

The urgency and need to address climate change and its impacts to Indian Tribes, and the nation as a whole, increases with each ton of CO<sub>2</sub> emitted into the atmosphere. Our nation and other parts of the international community were hit hard this year with multiple hurricanes and wildfires, all of which were intensified due to the changes in our climate system from an increase in the percentage of atmospheric carbon, methane, nitrous oxide, and other GHGs. These natural disasters cost our country billions of dollars, as well as the loss of lives and livelihoods. The CPP, the first and only federal rule to place limits on carbon pollution emitted from existing power plants in the U.S., will help to reduce such atmospheric emissions and the natural disasters whose causes are partially rooted in these emissions.

A significant degree of analysis was conducted by EPA in support of the CPP. EPA calculated that the CPP will prevent up to 90,000 childhood asthma attacks, 300,000 missed work and school days, 1,700 hospital admissions, up to 1,700 heart attacks, and 3,600 premature deaths annually by 2030.<sup>2</sup> Unfortunately, these tremendous health benefits of the CPP would not come to fruition if the Proposed Repeal was adopted. Further, the expected value of the public health and climate benefits generated by the CPP, which could help spark economic growth for the nation's economy, would evaporate. These benefits are worth an estimated \$34 billion to \$54 billion compared to \$8.4 billion in costs.<sup>3</sup> The CPP also incentivized major investments in energy efficiency and renewable energy, such as solar and wind power, which investments a number of Indian Tribes have made. The Proposed Repeal would likely stymie these investments. It is based on these public health and climate benefits, and the promotion of energy efficiency and renewable energy, that the NTAA recommends EPA forego a repeal of the CPP.

### **Interpretation of BSER**

The CPP seeks CO<sub>2</sub> emission reductions at individual EGUs and additional emission reductions by shifting the balance of coal-, gas-, and renewable-generated power across the electric grid.<sup>4</sup> However, the Proposed Repeal favors a BSER, or an “inside the fence line” approach, that focuses only on actions that reduce CO<sub>2</sub> emissions at individual EGUs.<sup>5</sup> In fact, EPA believes that these are the only actions legally authorized by the Clean Air Act (CAA). The NTAA firmly disagrees with this belief.

The “inside the fence line” approach places a substantial financial burden on individual EGUs to achieve a limited amount of CO<sub>2</sub> emission reductions. Further, such an approach ignores the realities of electricity generation in the 21<sup>st</sup> Century for which the CPP accounted. EGUs rarely act

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<sup>2</sup> “Fact Sheet: Clean Power Plan by the Numbers: Cutting Carbon Pollution from Power Plants” at [https://19january2017snapshot.epa.gov/cleanpowerplan/fact-sheet-clean-power-plan-numbers\\_.html#print](https://19january2017snapshot.epa.gov/cleanpowerplan/fact-sheet-clean-power-plan-numbers_.html#print) (last visited on December 10, 2017).

<sup>3</sup> *Id.*

<sup>4</sup> Proposed Repeal at 48037.

<sup>5</sup> *Id.*



in isolation. They are typically part of a larger power generation network or “system” that operates over vast geographical areas. It is also common for a company to own several EGUs whose operations are often interconnected by which power generation is shifted between the EGUs, anywhere from an hourly to yearly basis, to ensure the highest economic efficiency for the company in operating the EGUs. Fuel price changes can also influence the power generated or not generated by particular EGUs. The CPP adds another benefit by allowing EGUs to substitute energy generated by high-CO<sub>2</sub> emitting EGUs with energy generated by lower-emitting or zero-emitting CO<sub>2</sub> sources (*e.g.*, natural gas-fired plants and solar and wind generation).

The NTAA finds that EPA’s interpretation of BSER as an “inside the fence line” approach is antiquated and reminiscent of another EPA interpretation from which it wouldn’t budge, that being EPA’s lack of authority under the CAA to regulate GHGs. The U.S. Supreme Court forced EPA to change its interpretation on this issue and the NTAA expects the same if the meaning of BSER is ever litigated before the court. As such, the NTAA recommends that the “inside the fence line” approach under the Proposed Repeal be abandoned and that EPA interpret “system” under BSER as the larger electric power generation system that consists of an interconnected system of EGUs and other power sources as opposed to stand-alone EGUs.

### **Cost-Benefit Analyses**

The NTAA finds that EPA has taken a lot of liberty with its cost-benefit analyses under the Proposed Repeal to lower the cost savings of retaining the CPP, particularly with respect to the effect of GHG emissions on the global community and future generations, and the failure to sufficiently account for the emissions reductions of other co-pollutants.

### **Global Community**

The Proposed Repeal provides for a cost-benefit analysis that focuses on the domestic social cost of carbon only.<sup>6</sup> The NTAA considers this sleight of hand by EPA to be disingenuous in showing a lesser benefit for the CPP’s implementation than actually exists. Further, this approach flies in the face of reason as air pollution does not stop at our nation’s borders.

The NTAA is very concerned about Indigenous Peoples around the world and the air pollution to which they are exposed by the U.S. and other countries. This is why the NTAA supports the “Social Cost of Carbon” approach that EPA used for the CPP which accounts for damage to other countries caused by U.S. CO<sub>2</sub> emissions.<sup>7</sup> It is also an approach that the NTAA would expect EPA to support if it wishes other countries to account for the damage of their air pollutants to the U.S. As such, the NTAA recommends that EPA revise its cost-benefit analysis to also consider the social costs of carbon globally and to work with other countries, through the U.S. State Department and other appropriate governmental entities, to do the same.

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<sup>6</sup> Proposed Repeal at 48043.

<sup>7</sup> U.S. Environmental Protection Agency. “The Social Cost of Carbon: Estimating the Benefits of Reducing Greenhouse Gas Emissions” at [https://19january2017snapshot.epa.gov/climatechange/social-cost-carbon\\_.html](https://19january2017snapshot.epa.gov/climatechange/social-cost-carbon_.html) (last visited on December 10, 2017).





## **Future Generations**

The Proposed Repeal uses 3% and 7% discount rates to calculate the monetized forgone benefits, avoided compliance costs, and net benefits based on repeal of the CPP.<sup>8</sup> The NTAA finds these discount rates to be too high as a higher discount rate percentage translates to a lower value of damage inflicted on future generations. This will not be the case in reality.

Critical to calculating the social cost of carbon is discounting the future benefits and costs to reflect the time value of money (*i.e.*, today's dollar is worth more than tomorrow's dollar). A benefit or cost that occurs 30 years in the future will have a smaller present value than one occurring five years from now. The NTAA finds that lower discount rate percentages should be used as the impacts of climate change on future generations will compound. This is why the NTAA supports the 2.5% and 5% discount rates used for the CPP, and recommends that EPA continue to use these rates as well to clearly account for the effects carbon pollution will have on today's children, grandchildren, and generations to follow.

## **Co-Pollutant Benefits**

CO<sub>2</sub> emissions achieved under the CPP will also lead to emission reductions in fine particles (PM<sub>2.5</sub>), ozone, nitrogen dioxide, sulfur dioxide, and hazardous air pollutants. However, PM<sub>2.5</sub> is the primary co-pollutant addressed in the cost-benefit analyses conducted for the Proposed Repeal. The Regulatory Impact Analysis for the CPP Repeal indicates the following as to other items and co-pollutants and their relation to CO<sub>2</sub> emission reductions:

[O]ur estimates of the forgone benefits from reducing CO<sub>2</sub> emissions do not include important impacts like ocean acidification or potential tipping points in natural or managed ecosystems. Unquantified forgone benefits also include climate benefits from reducing emissions of non-CO<sub>2</sub> greenhouse gases and forgone co-benefits from reducing exposure to SO<sub>2</sub>, NO<sub>x</sub>, and hazardous air pollutants (e.g., mercury), as well as ecosystem effects and visibility impairment.<sup>9</sup>

The NTAA finds it egregious that EPA would propose a repeal of the CPP without assessing all of these items and pollutants. It is yet another reason that the NTAA cannot support the Proposed Repeal.

## **Tribal Consultation**

A unique government-to-government relationship exists between Indian Tribes and the federal government. This relationship is grounded in the U.S. Constitution, numerous treaties, statutes,

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<sup>8</sup> Proposed Repeal at 48043.

<sup>9</sup> U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Health and Environmental Impacts Division. "Regulatory Impact Analysis for the Review of the Clean Power Plan: Proposal" at 21, EPA-452/R-17-004 (October 2017).



federal case law, regulations, and executive orders (EOs). Consultation is a core element of this government-to-government relationship. However, EPA has chosen not to engage in government-to-government consultation with Tribes regarding the Proposed Repeal, finding that the “[CPP] does not have tribal implications as specified in Executive Order (EO) 13175”<sup>10</sup> We disagree wholly with this assertion by EPA. The Proposed Repeal would erase the health and environmental benefits achieved by EPA as identified in a 2015 CPP Regulatory Impact Analysis which also states:

Native American tribal communities possess unique vulnerabilities to climate change, particularly those impacted by degradation of natural and cultural resources within established reservation boundaries and threats to traditional subsistence lifestyles. Tribal communities whose health, economic well-being, and cultural traditions that depend upon the natural environment will likely be affected by the degradation of ecosystem goods and services associated with climate change.<sup>11</sup>

For this reason and EPA’s call for cooperative federalism with state and Tribal governments to address environmental problems collectively, EPA should have consulted with Indian Tribes in advance of issuance of the Proposed Repeal.

On November 6, 2000, U.S. President Bill Clinton issued EO 13175, “Consultation and Coordination with Indian Tribal Government.” A central tenet of EO 13175 is the need for federal agencies to engage in meaningful government-to-government consultation with Indian Tribes if any of their policy actions could have impacts to Tribal communities. Subsequently, on November 5, 2009, President Barack Obama issued a Presidential Memorandum on Tribal Consultation (Presidential Memorandum), committing to such consultation with Indian Tribes and directing each federal agency head to submit a “detailed plan of action the agency will take to implement the policies and directives” of EO 13175. EPA has adopted such a plan of action which Tribes expect to be followed, particularly when EPA takes a drastic action like repeal of the CPP.

The result of meaningful government-to-government consultation should be that substantive Tribal input has been considered and incorporated into any actions having Tribal implications. To be meaningful, and in the spirit of EO 13175, consultation by a federal agency with Indian Tribes should:

1. Provide clear guidance on how the federal agency intends to assure that government-to-government consultation with Tribes will result in meaningful dialogue rather than simply pro forma consultation.

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<sup>10</sup> Proposed Repeal at 48048.

<sup>11</sup>U.S. Environmental Protection Agency, Office of Air Quality Planning Standards, Health & Environmental Impacts Division, Air Economics Group. “Regulatory Impact Analysis for the Proposed Carbon Pollution Guidelines for Existing Power Plants and Emission Standards for Modified and Reconstructed Power Plants” at 7-19, EPA-452/R-14-002 (June 2014).



2. Assign to the federal action a Tribal liaison who has worked extensively with Tribes on similar issues.
3. Send a letter to Tribal chairpersons with copies provided to appropriate Tribal staff (*e.g.*, Tribal administrator, Tribal historic preservation officer, environmental and/or natural resources manager) that asks Tribes how they would like to be consulted regarding the federal action, and a request for the names and addresses of other persons who should be notified or consulted.
4. Provide assurances to Tribes that the most senior-level federal agency official will be engaged in government-to-government consultation regarding the federal action since Tribes will likely be represented by its highest-level officials such as Tribal chairpersons and/or council members.
5. Provide assurances to Tribes that communications and documents shared as part of government-to-government consultation shall remain confidential unless the parties involved agree to share any such communications or documents with outside parties.
6. Provide sufficient time to Tribes to review and provide comments regarding the federal action.

Further, the federal agency should engage in government-to-government consultation with individual Indian Tribes and not groups of Tribes which might occur as part of an outreach session at a conference or other similar gathering. Government-to-government consultation with individual Tribes is necessary and meaningful for a number of reasons. First, it provides for more candid conversations between the individual Tribe and the federal agency than what would occur otherwise during a group meeting. Second, each Tribe's circumstances are unique and must be treated as such by the federal agency. A group meeting of Tribes would only give short shrift to these circumstances. Third, most cultural resources information is protected from release under statutory exemptions to the Freedom of Information Act. Discussion of such information by an individual Tribe as part of a group meeting of Tribes risks its release to the general public and potentially endangers Tribal cultural sites and practices. Finally, the subject matter may be so unique that government-to-government consultation between individual Tribes and the federal agency provides the best opportunity for a resolution to the situation versus a group meeting of Tribes where any number of Tribal issues could be brought up with only a limited period of time to discuss them.

The NTAA is unaware of any of these steps being taken by EPA in advance of its issuance of the Proposed Repeal. As such, the NTAA recommends that EPA act quickly to overcome this oversight and engage in meaningful government-to-government consultation in accordance with EO 13175 regarding the Proposed Repeal.





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## **Conclusion**

In summary, the NTAA is pleased to provide the aforementioned comments and recommendations concerning the Proposed Repeal.

On Behalf of the NTAA Executive Committee,

Wilfred J. Nabahe

Chairman

National Tribal Air Association