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October 14, 2020

Jeffrey Bossert Clark
Assistant Attorney General,
U.S. Department of Justice
Environment and Natural Resources Division
P.O. Box 7611
Washington, D.C. 20044-7611.

RE: Comments from the National Tribal Air Association on the Proposed Consent Decree Between the United States Environmental Protection Agency, the California Air Resources Board and Daimler-Chrysler to Settle Complaint for Civil Penalties and Injunctive Relief for Violations of the Clean Air Act, Civil Action No.: 1:20-cv-2564 (D. D.C).

On behalf of the National Tribal Air Association (“NTAA”), I am pleased to submit this comment letter on the Proposed Consent Decree, lodged with the United States District Court for the District of Columbia on September 14, 2020, to settle the Complaint filed concurrently with the Proposed Consent Decree alleging violations of the Clean Air Act. This comment letter is submitted pursuant to Paragraph 108 of the Proposed Consent Decree and 28 CFR 50.7.

The NTAA is a member-based organization with 151 principle 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 important to understand 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.

NTAA comments address three major aspects of the Proposed Consent Decree that are relevant for Tribes in Indian Country:

1. **EPA Consultation with Tribes on Eligible Mitigation Actions:** The United States, and the EPA, have a government to government relationship and trust responsibility to the 574 federally recognized tribes throughout the United States – including 106 tribes in the State of California. These political and legal relationships are grounded in treaties, statutes, executive orders, and federal law. Furthermore, the EPA, pursuant to EPA policies, and executive orders, has an obligation to consult with federally recognized tribes when its actions – including

enforcement actions – may substantially impact or implicate tribal governments, tribal communities, and tribal environmental resources.

However, contrary to these well-established policies, and in contradiction of the United States political and legal relationships with tribes, the EPA has failed entirely to consult directly with tribes about the Proposed Consent Decree. There has been no effort on the part of EPA to obtain information from tribes about the potential impacts of the Defendants' behavior on tribal communities and environmental resources. Nor has there been any effort to consult on potential enforcement actions, remedies, or mitigation alternatives.

EPA should conduct additional consultation and outreach for tribes to gather further input on how tribes and tribal communities may be impacted by the Defendants' behavior. Further, EPA should consult with tribes on potential remedies and mitigation alternatives that better serve to ameliorate those impacts in Indian Country.

Because of EPA's failure to consult with the federally recognized tribes – as required under executive orders and EPA policies - NTAA objects to the Proposed Consent Decree.

2. **Insufficient Remedies Mitigation:** According to the Complaint filed concurrently with the Consent Decree, the Defendants are alleged to have violated several provisions and regulations under the Clean Air Act. These violations carry with them penalties of between \$35,700 and \$45,268 per day, per vehicle. However, the Proposed Consent Decree is proposing to settle these claims for approximately \$3,750 per vehicle. In addition, the Proposed Consent Decree includes purported mitigation for excess NO_x emissions. This mitigation is limited to replacing or repowering 15 in-line haul locomotives that have Tier 0 or Tier 1 diesel engines.

NTAA objects to the proposed mitigation for several reasons, including:

- there appears to be no rational relationship between replacing locomotives and mitigating the excess NO_x emissions from over 200,000 diesel vehicles;
- the mitigation does not address excess emissions on Indian lands;
- EPA failed to consult with Indian tribes on potential mitigation strategies; and
- failure to include a tribal set-aside for mitigation projects.

The EPA has not provided any explanation or analysis of why replacing locomotives would be an appropriate mitigation measure. For example, there is no public information about how much NO_x will be reduced through this measure, how many locomotives would even qualify, and thus whether this mitigation will be effective and successful.


Because there has been no input from tribes, there is no information on whether there are any excess NO_x emissions on or near Indian lands that would warrant particular mitigation measures to address such impacts. Since there is no information about impacts

on or near Indian lands, tribes have not been able to propose – through consultation or otherwise – what particular mitigation measures might be most effective.

3. **Tribal Set-Aside:** Finally, without information about impacts on or near Indian lands, tribes are not able to determine if there should be a set-aside for tribes to address such impacts. For example, in the Volkswagen Settlement¹, tribes received a set aside of approximately 2% of the total mitigation award (consistent with estimates for tribal population as share of total US population). Thus, Tribes received over \$55 million in the VW settlement to use for mitigation projects on Indian lands. Notwithstanding the lack of information, tribes should receive a similar consideration in this Proposed Consent Decree. We recommend that tribes receive at least a \$15 million set aside from the United States penalty payment. Absent this set aside, we object to the Proposed Consent Decree.

In summary, NTAA submits these comments to the United States Department of Justice, in opposition to the Proposed Consent Decree. We oppose because the United States has failed to properly consult with Indian tribes, as required under federal policy and consistent with the government to government and trust relationship; to provide tribes with information about potential impacts on Indian lands; to identify mitigation measure that will address such impacts; and to set aside an appropriate amount for tribes to adopt mitigation measures for Indian lands. To respond to this letter, please direct all correspondence to NTAA Project Director, Andy Bessler at andy.bessler@nau.edu.

Sincerely,



Wilfred J. Nabahe
Chairman
NTAA Executive Committee

¹ We also note that the DOJ is now the subject of a lawsuit challenging its decision to end the 30 year practice of incorporating Supplemental Environmental Projects (SEPs). See, Conservation Legal Foundation v. Barr, Case 1:20-cv-11827 (D. Mass. 2020). SEPs have been a critical component of consent decrees and settlements to more fully, broadly and effectively mitigate harms beyond the typically insufficient statutory remedies.