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Ms. Elizabeth Selbst
Air Quality Policy Division
Office of Air Quality Planning and Standards
Mail Code C539-01
Environmental Protection Agency
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Comments from the National Tribal Air Association on EPA's Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard; Docket ID No. EPA-HQ-OAR-2021-0668

Dear Ms. Selbst:

The National Tribal Air Association (NTAA) is pleased to submit these comments and recommendations regarding the U.S. Environmental Protection Agency's (EPA's) proposed Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard, 87 Fed. Reg. 20036 (April 6, 2022) (Proposed Rule).

The NTAA approves generally of the Proposed Rule, in that it will expand and strengthen the Cross-State Air Pollution Rule and help reduce the interstate transport of ozone emissions that contribute significantly to nonattainment, or interfere with maintenance, of the 2015 ozone national ambient air quality standards (NAAQS). The NTAA believes it is important to expand the number of covered states and covered units in order to protect the health of Tribal communities and the country generally. Although the NTAA believes the 2015 Ozone NAAQS is not sufficiently protective of human health and the environment,¹ the NTAA supports the Proposed Rule as essential to achieving the benefits of that standard.

The NTAA finds that the EPA has not met its obligations to meaningfully consult with Tribes on regulations that impact them and meaningfully consider the Proposed Rule's impacts. The NTAA is also concerned about the EPA's treatment of new units in Indian Country in the Proposed Rule and believes the EPA should do more to ensure that Tribal decisions are not constrained by neighboring state decisions.

I. Health and Environmental Impacts of Ozone

Ground-level ozone is not emitted directly into the air but is a secondary air pollutant created by chemical reactions between oxides of nitrogen (NO_x), carbon monoxide (CO), methane (CH₄), and non-methane volatile organic compounds

(VOCs) in sunlight. 87 Fed. Reg. at 20052. Emissions from electric utilities, industrial facilities, motor vehicles, gasoline vapors, and chemical solvents are some of the major anthropogenic sources of these ozone precursors. *Id.* The potential for ground-level ozone formation increases with warmer temperatures and stagnant air. *Id.* Therefore, ozone levels are generally higher during the summer months. *Id.*

Exposure to ground-level ozone can harm the human respiratory system (the upper airways and lungs), aggravate asthma and other lung diseases, and cause premature death from respiratory and cardiovascular diseases. 87 Fed. Reg. at 20039, 20054.¹ Such effects can lead to increased visits to doctors, hospital admissions, and school absences, and may increase the risk of premature death from heart or lung disease.²

Indian Tribes and their members are disproportionately susceptible to the health effects of ground-level ozone.³ Exposure to ground-level ozone can adversely affect Tribal community members including children, Tribal elders, members with asthma, and others who gather and use

¹ See, e.g., NTAA October 1, 2020 Comment Letter on Review of Ozone National Ambient Air Quality Standards, [https://secureservercdn.net/198.71.233.206/7vv.611.myftpupload.com/wp-content/uploads/2020/10/10.1.20-\[INSERT TRIBE'S NAME HERE\] -Letter-on-EPA-NAAQS-Ozone-Review.pdf](https://secureservercdn.net/198.71.233.206/7vv.611.myftpupload.com/wp-content/uploads/2020/10/10.1.20-[INSERT TRIBE'S NAME HERE] -Letter-on-EPA-NAAQS-Ozone-Review.pdf). The NTAA approves of EPA's reconsideration of the Agency's 2020 decision to retain the 2015 NAAQS and looks forward to working with the EPA to finalize a protective standard based on the best available science.

² See also *Integrated Science Assessment (ISA) for Ozone and Related Photochemical Oxidants*, EPA/600/R-20/012, at ES-4 to ES-10 (Apr. 2020).

³ *Ground-Level Ozone Pollution: Health Effects of Ozone Pollution*, EPA <https://www.epa.gov/ground-level-ozone-pollution/health-effects-ozone-pollution>.

⁴ *Status of Tribal Air Report*, National Tribal Air Association, at 16-17 (June 2020), <https://7vv.611.myftpupload.com/wp-content/uploads/2020/06/2020-NTAA-Status-of-Tribal-Air-Report.pdf>; Wiecks, Joy, Dara Marks-Marino, Jaime Yazzie, *National Tribal Air Association's 2020 Update to: A White Paper Detailing the Connections Between Air Pollution, Tribes, and Public Health*, National Tribal Air Association (Apr. 2020), <https://7vv.611.myftpupload.com/wp-content/uploads/2020/05/NTAA-2020-White-Paper-Detailing-the-Science-and-Connections-Between-Air-Pollution-Tribes-and-Public-Health.pdf>; EPA, Tribal Air and Climate Resources, <https://www.epa.gov/tribal-air> ("Tribal citizens are often disproportionately affected by air pollution, while their governments play an increasingly valuable role in controlling and reducing pollution and its adverse health effects. Tribes are also particularly vulnerable to the impacts of climate change and are taking steps to prepare for and become more resilient to these changes."); Indigenous People and Air Pollution in the United States, A Report from the National Tribal Air Association and Mom's Clean Air Force, <https://www.moms-clean-air-force.org/resources/indigenous-people-and-air-pollution/>; see also Maggie Li, et al., *Air Pollution in American Indian Versus Non-American Indian Communities, 2000–2018*, 112 *American Journal of Public Health* 615 (April 1, 2022), <https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2021.306650> (highlighting disparities in PM_{2.5} trends between American Indian and non-American Indian-populated counties over time, underscoring



plants of cultural significance. Studies show that Native Americans and Alaska Natives have a disproportionate incidence of asthma and are at risk from exposure to ozone. Specifically, American Indian and Alaska Native children are 60 percent more likely to have asthma as non-Hispanic white children.⁴

Ground-level ozone has also been shown to adversely impact the environment, which includes impacts to vegetation, ecosystems, and their associated services. Ground-level ozone causes visible foliar injury to plants and trees, decreased photosynthesis, changes in reproduction, and loss in forest growth and in the biomass of trees.⁵ Further, ground-level ozone can make sensitive species more susceptible to certain diseases, insects, competition, harsh weather, and other pollutants, which, in turn, can have adverse impacts to ecosystems such as changes to habit quality and water and nutrient cycles, and loss of species diversity.⁶ Some of these species include those on which Indian Tribes depend for subsistence, medicine, or other traditional practices that have existed since time immemorial. Many of these practices take place during the summer months, also the period during which ground-level ozone is most prominent.

II. The NTAA Supports the Proposed Rule’s Straightening and Expansion of Interstate Transport Ozone Obligations

Clean Air Act Section 110(a)(2)(D)(i)(I), also known as the “good neighbor provision,” requires states to prohibit emissions that will contribute significantly to nonattainment or interfere with maintenance in any other state with respect to any primary or secondary NAAQS. 42 U.S.C. § 7410(a)(2)(D)(i)(I). Although states have the principal responsibility to implement this provision, the Act also requires the EPA to fill a backstop role by issuing Federal Implementation Plans (FIPs) where states fail to submit good neighbor State Implementation Plans (SIPs) or the EPA disapproves a submitted good neighbor SIP.

the need to strengthen air pollution regulations and prevention implementation in tribal territories and areas where American Indian populations live).

⁵ *Status of Tribal Air Report*, National Tribal Air Association, at 16-17, 21, 26 (June 2020), <https://7vv.611.myftpupload.com/wp-content/uploads/2020/06/2020-NTAA-Status-of-Tribal-Air-Report.pdf>; U.S. Dept. of Health and Human Servs., *Asthma and American Indians/Alaska Natives*, <https://www.minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlID=30>.

⁶ 85 Fed. Reg. at 68974; *Ground-Level Ozone Pollution: Ecosystem Effects of Ozone Pollution*, EPA <https://www.epa.gov/ground-level-ozone-pollution/ecosystem-effects-ozone-pollution>. Visible foliar injury is a visible bioindicator of ozone exposure in plant species, with the injury affecting the physical appearance of the plant.

⁷ *Ground-Level Ozone Pollution: Ecosystem Effects of Ozone Pollution*, EPA <https://www.epa.gov/ground-level-ozone-pollution/ecosystem-effects-ozone-pollution>; *Regulatory Impact Analysis of the Proposed Revisions to the National Ambient Air Quality Standards for Ground-Level Ozone*, EPA-452/P-14-006, chapter 6 (Nov. 2014), <https://www3.epa.gov/ttn/ecas/regdata/RIAs/20141125ria.pdf>.



First, the NTAA agrees with the Proposed Rule's finding that interstate transport from 26 upwind states is significantly contributing to downwind nonattainment or interfering with maintenance of the 2015 ozone NAAQS in other states. In particular importance to Tribes in western states, the NTAA agrees with the Proposed Rule's inclusion of additional states western states compared to prior rulemakings.

The NTAA agrees with the Proposed Rule that in the near-term, fossil fuel-fired electric generating units can and should do more to curb emissions, based on existing NO_x controls and operating changes. Not running already installed pollution controls to save money should not be an option available given the well-understood harms doing so causes. The NTAA also agrees with the Proposed Rule that for units that do not have sufficient controls should install them immediately or prepare to stop operating.

The NTAA agrees with the need for maximum daily emission rates for NO_x from large coal fired power plants to prevent plants from avoiding the use of the consistent use of protective pollution controls. The NTAA believes these should enter into force sooner than produced, in 2026, at the same time the emission controls would be required for plants that now lack controls. Once installed, large coal-fired power plants should not be operating without the important pollution control equipment.

The NTAA approves of updating budgets to account for new retirements, new units, and changing operation. The NTAA believes the EPA should finalize provisions that ensure that backsliding could not take place and that these budgets would properly become smaller as these changes occur.

The NTAA supports EPA's decision to look beyond just the power sector, to additional controls on NO_x emissions from non-fossil fuel-fired electric generating units industrial sources— reciprocating internal combustion engines in Pipeline Transportation of Natural Gas; kilns in Cement and Cement Product Manufacturing; boilers and furnaces in Iron and Steel Mills and Ferroalloy Manufacturing; furnaces in Glass and Glass Product Manufacturing; and high-emitting, large boilers in Basic Chemical Manufacturing, Petroleum and Coal Products Manufacturing, and Pulp, Paper, and Paperboard Mills.⁷ The NTAA believes these additional industries are contributing to ozone harms in Tribal communities and supports the additional requirements on these industries in 23 states from the Proposed Rule.

As the Proposed Rule recognizes, the transportation sector plays a significant role in NO_x pollution and the NTAA urges the EPA to finalize strong standards and enforcement for that sector to enable attainment of the 2015 Ozone NAAQS and achieve the benefits of that standard.

⁸ The NTAA has previously advocated for this. See NTAA's December 14, 2020 Comment Letter, at 4, <https://secureservercdn.net/198.71.233.206/7vv.611.myftpupload.com/wp-content/uploads/2020/12/12-14-20-NTAA-Comment-Letter-on-CSAPR.pdf>.

The NTAA agrees with the EPA's decision for the Proposed Rule to be applicable in Indian country. In particular, the NTAA agrees with the need to avoid a situation that creates incentives to site ozone-precursor emitting facilities in Indian Country in order to avoid installing or operating pollution control equipment. However, the NTAA believes in this context, it is important to recognize that Indian Tribes are not and have not been contributing to ozone issues that they themselves and states are experiencing.

Moreover, the NTAA recommends that the EPA provide assistance to and work with Indian Tribes that express interest in administrating a tribal plan to implement the good neighbor provision. Even Tribes that do not currently have an effected source may still wish to administer such a plan.

In the year 2026, EPA projects that the Proposed Rule would prevent approximately 1,000 premature deaths, 2,400 hospital and emergency room visits, 1.3 million cases of asthma symptoms, and 470,000 school absence days.⁸ These health benefits are extremely important, beyond any dollar value that could be placed on them and are sufficient justification to finalize the Proposed Rule. The NTAA also believes these numbers under-count numerous other benefits from the Proposed Rule, including billions of dollars of climate benefits and environmental benefits. The NTAA supports the Proposed Rule for the health and environmental benefits that it will provide, particularly for Tribal individuals that are disproportionately impacted by exposure to ozone partly due to the disproportionate incidence of asthma, hypertension, and diabetes in their communities, and urges the EPA to finalize and implement the Proposed Rule in the strongest form that the science justifies.

III. The NTAA is Concerned About the Proposed Rule's New Source Set Asides

Indian Tribes are sovereign nations with inherent rights ensured by the U.S. Constitution, treaties, and legal precedent. These rights are separate from those enjoyed by states and should never be muddled by the federal government, let alone through an agency regulation.

In the Proposed Rule, the EPA proposes to combine the allowances for new units that previously were divided into two new-unit set-asides: one for new units under state authority and one for new units in Indian Country. 87 Fed. Reg. at 20126. The NTAA is concerned how this combination would impact Tribal decisions if a state does not replace EPA's default allocations with state-determined allocations, but goes ahead with permitting new units that use up the set-aside. At a minimum, the EPA should make certain that Indian Tribes decision-making will not be constrained by state decisions.

IV. The EPA Has Not Complied With Its Tribal Consultation Obligations

⁹ EPA's Proposed "Good Neighbor" Plan to Address Ozone Pollution – Overview, https://www.epa.gov/system/files/documents/2022-03/fact-sheet_2015-ozone-proposed-good-neighbor-rule.pdf.

The Proposed Rule states that it has Tribal implications. 87 Fed. Reg. at 20167. This is obvious given the Proposed Rule’s regulation of a power plant in Indian country, issuance of a federal implementation plan applicable to Indian country located with 26 upwind states, as well as Tribes’ vested interest in how the Proposed Rule would affect their communities’ air quality. Yet the EPA has not consulted with Indian Tribes on the Proposed Rule.

Executive Order 13175 explains: “The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions.” Consultation and Coordination With Indian Tribal Governments, § 2(a), 65 Fed. Reg. 67249 (Nov. 6, 2000). The Executive Order makes clear that consultation must occur during the development of the policies. *Id.* § 5(a). The EPA’s Policy on Consultation and Coordination With Indian Tribes explains: “Consultation is a process of meaningful communication and coordination between EPA and tribal officials *prior to* EPA taking actions or implementing decisions that may affect tribes.”⁹ The Policy continues:

Consultation should occur early enough to allow tribes the opportunity to provide meaningful input that can be considered prior to EPA deciding whether, how, or when to act on the matter under consideration. As proposals and options are developed, consultation and coordination should be continued, to ensure that the overall range of options and decisions is shared and deliberated by all concerned parties, including additions or amendments that occur later in the process.¹⁰

In its section on Consultation and Coordination with Indian Tribal Governments, the Proposed rule describes an environmental justice webinar EPA hosted. The NTAA supports EPA’s efforts at evaluating and achieving environmental justice. Not only is an environmental justice review required, but it is also a part of good government. Studies have shown that residents of environmental justice communities are more vulnerable to the impacts of pollution due to pre-existing health conditions that often are higher in these communities due to lack of access to adequate nutrition and health care. Doing the work of reaching out to these communities and taking a hard look at how environmental policies will impact their health is a much smarter approach than trying to address adverse health outcomes later on, along with the distrust that will have built up in the community as they have watched their health decline even further. The NTAA believes EPA needs to do more in this context than hosting a webinar.

¹⁰ EPA Policy on Consultation and Coordination with Indian Tribes, at 1 (May 4, 2011), <https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf> (emphasis added).

¹¹ *Id.* at 7.

¹² See, e.g., NTAA December 14, 2020 Comment Letter, <https://secureservercdn.net/198.71.233.206/7vv.611.myftpupload.com/wp-content/uploads/2020/12/12-14-20-NTAA-Comment-Letter-on-CSAPR.pdf>



That said, while environmental justice concerns may apply to many Tribal communities, there also needs to be recognition that Tribes are very distinct entities that preexist establishment of the United States. They possess authority that predates the U.S. Constitution regarding the governance of their own internal affairs. For these reasons, environmental justice is an important issue, but must never usurp Tribal sovereignty and self-determination. Further, environmental justice must never replace government-to-government consultation directly with Tribes. Any environmental justice actions must treat Tribes as sovereign nations with self-determination first and part of the environmental justice community second.

While it is a good step that EPA hosted an environmental justice webinar that was attended by federally recognized Tribes, that is a far cry from the government-to-government consultation required during the development of the Proposed Rule. The Proposed Rule's statement that EPA plans to further consult with tribal officials early in the process of developing this proposed regulation is nonsensical; EPA has already developed and released this proposed regulation without this consultation. It is difficult to solicit meaningful and timely input in the proposed rule's development when it has already been developed. As the National Tribal Air Association (NTAA) has repeatedly explained in comments on the series of Ozone Cross State Air Pollution rulemakings¹², if the EPA knew that it was proceeding with development of the Proposed Rule, it should have initiated consultation with Tribes at that time. The EPA again has avoided its responsibilities and now makes a statement that it plans to consult with Tribes moving forward, after release of the Proposed Rule. It is frustrating that EPA continues to play games with its consultation obligations and ignore its consultation obligations by repeating a throwaway line after developing rules.

Given these continued violations, the NTAA again requests that the EPA:

1. Make a genuine effort to provide Tribes with any additional resources and assistance that they might require to engage in effective government-to-government consultation.
2. Ensure that government-to-government consultation meetings with Indian Tribes result in meaningful dialogue rather than simply pro forma consultation.
3. Send a letter to each Tribal chairperson with copies provided to appropriate staff (*e.g.*, Tribal administrator, environmental manager) that asks each Indian Tribe how it would like to be consulted on the Proposed Rule. Providing copies to different individuals of authority within the Tribe will provide better assurances that the Tribe is clearly made aware of the Proposed Rule. Asking each Tribe about how it would like to be consulted respects its individual sovereignty and Tribal cultures and helps to ensure that true government-to-government consultation occurs.
4. Provide assurances to Indian Tribes that the most senior-level EPA officials will be engaged in government-to-government consultation since they will likely be represented by their highest-level officials such as Tribal chairpersons and/or council members; and
5. Provide adequate time to Indian Tribes to review and provide comments concerning the Proposed Rule.



V. Conclusion

The NTAA urges the EPA to fulfill its obligations towards Indian Tribes, Environmental Justice communities, and under the Clean Air Act, and move forward with a stringent final rule that provides important health and environmental benefits. The NTAA appreciates this opportunity to comment on this Proposed Rule and looks forward to further work with EPA on this important issue. If you have any questions or seek clarification from the NTAA, please do not hesitate to contact NTAA's Director Andy Bessler at 928-523-0526 or andy.bessler@nau.edu.

On Behalf of the NTAA Executive Committee,
Syndi Smallwood
NTAA Chairwoman
National Tribal Air Association's
Executive Committee