



July 21, 2023

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Honorable Administrator Michael S. Regan
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Re: National Tribal Air Association Comments on Revisions to EPA’s 2011 Policy on Consultation and Coordination with Indian Tribes & 2016 Guidance for Discussing Tribal Treaty Rights

Dear EPA Administrator Regan:

The National Tribal Air Association (NTAA) is pleased to submit comments regarding the U.S. Environmental Protection Agency’s (EPA’s) Revisions to the 2011 Policy on Consultation and Coordination with Indian Tribes (“Consultation Policy”) and to the 2016 Guidance for Discussing Tribal Treaty Rights (“Treaty Rights Guidance”).

The NTAA is a member-based organization with 156 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 American Indian Tribes and Alaskan Natives. 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 to understand that interactions with the organization do not substitute for Nation-to-Nation consultation, which can only be achieved through direct communications between the federal government and American Indian Tribal Governments and Alaskan Natives.**

The NTAA agrees with EPA’s recognition in the draft Consultation Policy and draft Treaty Rights Guidance that EPA must renew its commitment to Tribal sovereignty, Tribal self-governance, and a government-to-government relationship with Tribal nations. The NTAA appreciates EPA’s public outreach efforts and expressed desire to collect input from Tribes and Tribal representatives. The NTAA requests that these efforts not only continue, but that



they be expanded, particularly with respect to coordination and consultation with Indian Tribes. Each Tribe's unique circumstances must be evaluated. As EPA knows, public listening sessions and training webinars are helpful but not sufficient; EPA must consult directly with as many Tribes as possible on a government-to-government basis about the proposed revisions to EPA's Consultation Policy and related Treaty Rights Guidance.

Background

EPA's current efforts to revise its Consultation Policy and Treaty Rights Guidance provide EPA an opportunity to incorporate a stronger stance in support of Tribal sovereignty and Tribal self-determination. While NTAA is pleased that EPA is revising these documents, it also hopes that EPA understands this moment as an opportunity to reorient its relationship with Tribes, throughout EPA.

A key to EPA's reorientation is a commitment to capacity building for Tribal environmental programs, particularly in the air monitoring context. NTAA has heard from its member Tribes that meaningful consultation depends on the capacity of Tribal governments and Tribal environmental staff to respond to consultation requests and the capacity to develop and enforce their own policies and laws. The NTAA has consistently documented in its Status of Tribal Air Report that Tribal air programs are chronically underfunded. NTAA also meets with the National Tribal Caucus to offer input on the annual national air and climate change budget request to the EPA. EPA must commit to fully funding Tribal air programs as a critical step to improving government-to-government consultation with Tribes.

In addition, EPA should revise this draft Consultation Policy and Guidance to commit to the U.N. Declaration of the Rights of Indigenous Peoples (UNDRIP) Article about free, prior, and informed consent. UNDRIP holds that States "shall" consult in good faith with indigenous peoples and nations "to obtain their free, prior, and informed consent before adopting and implementing legislative or administrative measures that may affect them." UNDRIP Art. 19. NTAA appreciates that, in its revisions to the Consultation Policy, EPA now states that it "should strive for consensus or a mutually desired outcome to the extent practicable and permitted by law." Draft EPA Consultation Policy at § IV (Guiding Principles). The Consultation Policy should be strengthened to ensure that this commitment permeates the revised Consultation Policy. In practice, EPA must work with Tribes before coordination or consultation opportunities arise to ensure that EPA has educated itself on Tribal interests so that EPA can shape its policies to achieve consensus with Tribes.

Finally, EPA should revise this draft Policy and Guidance to include a commitment to better understanding the impacts of climate change on the exercise of Tribal treaty rights (and other Tribal rights), like EPA did in the multi-agency Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights, signed in 2021. There EPA and other federal agencies recognized the "need to consider and account for the effects of their actions on the habitats that support treaty-protected

rights, including how those habitats will be impacted by climate change.”¹ Climate-change related impacts to the exercise of Tribal treaty (and other Tribal rights) should be part of any consideration of impacts to Tribal interests and therefore should be explicitly mentioned in the draft Consultation Policy and Guidance.

In addition to these general comments, NTAA offers the following specific comments on the Consultation Policy and the Treaty Rights Guidance.

Comments on the Consultation Policy

Definition of coordination and consultation

NTAA appreciates that EPA has now separately defined consultation from coordination. EPA should incorporate the following principles into its definition of consultation:

EPA should revise the Consultation Policy to state that “consultation” should involve the highest levels of EPA and the Tribe and, unless the Tribe agrees, involve the EPA decisionmaker. This idea is reflected in EPA Region 9’s 2018 Best Implementation Practices:

Tribes should be afforded the opportunity to provide “meaningful input” to the Agency. Ideally, this means that tribal input is provided directly to the intended decision-maker at the Agency (via meetings, phone calls, letters, or emails).²

EPA should ensure that it is conducting consultation in a respectful manner by holding government-to-government consultations in person and on Tribal land where possible. Virtual or off-site consultation is not sufficient.

Prior to any consultation, EPA must clearly explain the action or decision that is the subject of government-to-government consultation through clear materials and coordination conversations, including explaining both legal and technical aspects of the action or decision. This requirement could be stated more strongly in the Consultation Policy.

Consultation requires an actual back-and-forth conversation with the Tribe, where EPA staff and leadership are available to answer and respond to Tribal leadership’s questions and concerns. As EPA knows, consultation is not a one-sided presentation, from either the EPA or the Tribes. The Consultation Policy focuses on “meaningful consultation,” but then describes seeking “input” from Tribes. EPA should revise the Consultation Policy to state that the input phase involves EPA responding in real time to the Tribes’ concerns.

¹ See Memorandum of Understanding at <https://www.epa.gov/tribal/memorandum-understanding-regarding-interagency-coordination-and-collaboration-protection>.

² EPA Region 9 Best Practices for Tribal Consultation and Treaty Rights, Related to Consultation Policy V(C) at PDF page 17 (Sept. 2018), available at <https://www.epa.gov/tribal-pacific-sw/tribal-consultation-epas-pacific-southwest-region-9>.

As noted in the Background section, EPA should seek consensus as the goal for any consultation. This will require early notification about actions and decisions and early coordination when EPA is in the policymaking stage rather than once an action or decision has already been formally proposed. Well before any consultation, EPA staff and leadership must have a firm and up-to-date grasp of Tribal interests that may be affected by EPA policies and then seek to promote those interests while EPA actions, decisions, and other policies are in the development stage.

Meaningful consultation cannot involve after-the-fact notice of policies or produce policies that do not reflect the practical realities at Tribal environmental programs. For example, many Tribes learned of recent, important changes to the Quality Assurance (QA) guidance for air monitoring programs only after their monitoring programs were disapproved. The new QA guidance did not reflect the real-world structure of Tribal programs and was unworkable for smaller Tribes.

Guiding principles

In the guiding principles section, EPA should include a stronger statement supporting Tribes' inherent sovereignty and their ability to self-govern and to establish environmental policies and laws that apply within their jurisdiction, consistent with the federal trust responsibility.

EPA should also include in the guiding principles section the following statement from EPA's 1984 Policy that EPA will not only consider Tribal input, as stated in the current draft of the Consultation Policy but also, "[i]n keeping with that trust responsibility, the [EPA] will endeavor to protect the environmental interests of Indian Tribes." Indian Policy at § 5.

The Consultation Policy should include a statement recognizing that EPA's trust responsibility requires it to minimize impacts to Tribal interests. The Supreme Court recently renewed its commitment to federal trust principles and held the Federal Government has "'charged itself with moral obligations of the highest responsibility and trust' toward Indian tribes." *Haaland v. Brackeen*, No. 21-376, 2023 WL 4002951, at *10 (U.S. June 15, 2023) (citing and quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011)). As part of this trust responsibility and to show respect for Tribal sovereignty, if impacts to Tribal interests from EPA actions and decisions cannot be avoided, EPA should work with Tribes to minimize any impacts to Tribal interests.³

Notification

³ Federal trust principles are echoed in Executive Order 13175. See E.O. 13175 at § 3(b)(3), 65 Fed. Reg. 67249, 67250 (2000) ("in determining whether to establish Federal standards, [federal agencies must] consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes."); see *id.* at § 5(d) (encouraging federal agencies to use consensual mechanisms for developing regulations, including negotiated rulemaking processes).

The Consultation Policy should be revised to add more detail to the notification discussion to emphasize the need for early and thorough notification practices. In addition to notifying Tribes through their Tribal government, EPA must notify Tribal environmental staff and program leadership and ensure that they are copied on notifications to Tribal leadership. Tribal environmental programs employ many of the environmental experts at Tribes and Tribal environmental staff can help prepare their governments for consultation, but only if they are notified in time.⁴

In addition, EPA must emphasize the need for early notification because Tribal leadership have busy schedules and securing a slot on the Tribal Council or other Tribal governing body's calendar for government-to-government consultation (and any needed follow up) can take time.

Early notification is also important because, as noted above, it ensures that EPA notifies Tribes while EPA is still planning any action or decision, so Tribal consultation can meaningfully affect the course and outcome of EPA decision-making.

Input

The Consultation Policy could be strengthened by adding further instruction to EPA staff and leadership to incorporate Tribal views into any relevant EPA decision-making effort, to enhance Tribal capacity as part of the input phase, to require EPA to effectively prepare for any consultation, including by requiring EPA to explore the impact that climate change may have on Tribal interests and Treaty rights exercise, and to involve the EPA decisionmaker in any consultation.

Effective consultation requires EPA to provide sufficient information and background about EPA actions and decisions to ensure the EPA and Tribes do not speak past each other. In addition, NTAA has concerns with the Consultation Policy's use of input, a word that, when used in the context of the Consultation Policy, suggests EPA intends to receive Tribal information rather than meaningfully consider and incorporate Tribal interests in EPA's decision-making. Input can be incorporated or disregarded; in contrast, meaningful consultation means that Tribal views and information are incorporated into EPA's actions and decisions.

EPA must support Tribal capacity to ensure that Tribal environmental staff have the appropriate time, information, funding and training to consider and respond to consultation requests. When Tribal environmental programs are insufficiently trained or funded, they may not have the resources to consult with EPA. Enhancing Tribal capacity is part of EPA's (and the federal

⁴ Some federal agencies require non-governmental applicants to provide notice to Tribes that could be affected by federally regulated projects. *See, e.g.*, <https://www.fcc.gov/wireless/systems-utilities/tower-construction-notifications/tower-construction-notifications-0>. EPA could consider, requiring applicants seeking permits and other approvals from EPA to provide this additional notice to Tribes, in addition to the EPA Tribal Consultation Opportunities Tracking System (TCOTs) system and other notice from EPA.



government) mission, to fulfill its trust responsibility. Under Executive Order 13175, federal agencies like EPA shall:

- (1) encourage Indian tribes to develop their own policies to achieve program objectives;
- (2) where possible, defer to Indian tribes to establish standards.

E.O. 13175 at § 3(c)(1)-(2). Tribes are only able to develop their own policies and standards with sufficient time, support, and internal capacity. EPA benefits from Tribes having clear policies and standards so that EPA staff and leadership can easily understand Tribal interests during government-to-government consultation. In the same vein, EPA should encourage Tribes to develop their own consultation policies so that EPA and the Tribes have a clear understanding of each other's expectations and processes.

Likewise, EPA must enhance its consultation capacity and EPA staff should carefully prepare for any consultation and seek to educate themselves on Tribal interests and Tribal treaty rights even before a coordination or consultation opportunity arises. EPA Region 9's 2018 Best Implementation Practices states that EPA must be continually updating its information about Tribal Treaty rights. As part of updating its information about Tribal treaty rights impacts, EPA should seek to understand how Treaty rights are affected by existing state and non-Tribal policies and programs.

EPA similarly must seek to understand how Tribal rights are affected by the climate crises and how the ongoing process of climate change is likely to impact Tribal treaty or other rights in the future. EPA cannot assume that impacts are measured against a stable baseline, but rather must acknowledge that whatever impacts EPA decisions and actions have on Tribal treaty or other rights will be compounded by changes due to climate change.

The revised Consultation Policy states that "EPA should be represented by the Headquarters Office Director or Regional Division level of management, or higher," Draft Consultation Policy at § (V)(A)(2), but the draft Policy should be revised to clarify that EPA intends to send an EPA official with decision-making authority over the action or decision at issue, rather than just a representative from upper-level EPA management. If this is not possible, EPA must clarify the relationship between the EPA representative at the consultation and the person with decision-making authority and explain why that person with authority is not available to attend the government-to-government consultation in a timely manner prior to the consultation meeting.

Follow-up Phase

In the follow-up phase, EPA should not only explain how Tribal input was considered in the EPA action or decision, but should explain how the input affected the action or decision. And, as noted above in the discussion on the guiding principles section, EPA must protect and minimize impacts to Tribes' interests, not just receive and consider Tribal input.

Consultation Review Process

The Consultation Policy currently limits EPA to reviewing disputes over procedural concerns with the government-to-government consultation process. During the consultation review process, EPA must also consider concerns with the substance of the consultation process and whether EPA failed to protect Tribal rights and interests.

Comments on the Treaty Rights Guidance

NTAA incorporates by reference its statements above about the need for EPA to use the Guidance to announce EPA's renewed commitment to a partnership approach to working with Tribes based on a deep respect for Tribal sovereignty, a commitment to Tribal environmental program capacity building, and a promise to adhere to the UNDRIP policy of free, prior, and informed consent.

We also offer the following specific comments about the Guidance:

- In general, the draft Guidance should clearly distinguish between the coordination phase and the government-to-government consultation phase. NTAA recommends that EPA edit the Guidance to specify which parts of the Guidance apply to these different phases. In general, EPA should gather as much information as possible during the coordination phase or as part of its general understanding about Tribal treaty and other Tribal rights to ensure that any government-to-government consultation is productive. Consultation should be a time for productive discussions, not a time for EPA learning.
- The Guidance should explicitly incorporate by reference the Consultation Policy as revised.
- On page 2 (of the clean copy of the revised Guidance), regarding the Guidance section "Determining When to Ask About Tribal Rights During Tribal Consultation," the Guidance should instruct EPA staff that when EPA "inquire[s] early about tribal rights," it must reach out to the appropriate Tribal environmental staff and leadership as well as Tribal leadership, for the reasons explained above in NTAA's comments about the Consultation Policy.
- NTAA appreciates that EPA specifically addressed the need to avoid resource degradation that could affect an explicit Treaty right to hunt, fish, or other rights, as well as to protect access to exercise of Tribal treaty rights. Draft Guidance at p. 3. As part of this commitment, EPA should also seek to understand the impact of climate change on Tribal treaty rights exercise and access and factor climate change into its commitment to avoiding resource degradation.
- The Guidance should clarify whether the questions posed in the Treaty Rights Guidance (pp. 3-4) should be asked during coordination, consultation, or both.
- As part of its outreach to Tribes, EPA should endeavor to provide a detailed map showing the anticipated impacts of the EPA proposed action or decision to help Tribes clearly understand the likely impacts of the action or decision at issue.



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- NTAA appreciates the commitment in the Consultation Guidance to internal EPA staff training (Draft Guidance, p. 4), but requests that the training referenced in the document be broken down into specific steps, to ensure that this training is more likely to occur and more likely to be a reoccurring event throughout EPA, as part of its ongoing commitment to supporting Tribal sovereignty.
 - Similarly, EPA should include a stronger commitment to EPA staff training on Tribal sovereignty, the federal trust responsibility, and Tribal self-determination. This training must emphasize the need for Tribal capacity building and the importance of supporting all Tribal environmental programs, including supporting Tribal environmental staff who work at smaller, less funded programs.

Conclusion

The NTAA appreciates the opportunity to submit this comment letter and looks forward to further work with EPA on these important issues. If you have any questions or require clarification from NTAA, please do not hesitate to contact NTAA's Program Manager, Carolyn Kelly, at carolyn.kelly@nau.edu.

Respectfully,

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