



www.ntaatribalair.org
928.523.0526 office
928.523.1266 fax

National Tribal Air Association
P.O. Box 15004
Flagstaff, AZ 86011-5004

Executive Committee

Region 1

Bill Thompson
Chairperson
Penobscot Nation

Region 2

Angela Benedict-Dunn
Secretary
Saint Regis Mohawk Tribe

Region 4

Katie Tiger
Eastern Band of Cherokee Indians

Ralph McCullers
Poarch Creek Band of Indians

Region 5

Brandy Toft
Vice-Chairperson
Leech Lake Band of Ojibwe

Bryan Hoover
Lac Du Flambeau Tribe

Region 6

Ivy Smith
Delaware Nation of Oklahoma

Region 7

Joseph Painter
Winnebago Tribe of Nebraska

Matthew Malimanek
Santee Sioux Nation of Nebraska

Region 8

Randy Ashley
Confederated Salish & Kootenai
Tribes

Linda Weeks Reddoor
Fort Peck Assiniboine-Sioux Tribes

Region 9

Wilfred J. Nabahe
Colorado River Indian Tribe

Region 10

Kevin Greenleaf
Kootenai Tribe of Idaho

Twa-le Swan-Abrahamson
Spokane Tribe

Alaska

Rosalie Kalistook
Treasurer
Orutsararmuit Native Council

Sue Flensburg
Bristol Bay Native Association

March 18, 2015

Mark Vincent
Office of the Chief Financial Officer
U.S. Environmental Protection Agency

**Subject: Draft OAR National Program Manager Guidance
Publication Number 450-P-15-001
February 23, 2015**

Dear Mr. Vincent:

The National Tribal Air Association (NTAA) is pleased to submit these comments regarding the U.S. Environmental Protection Agency's (EPA's) Office of Air and Radiation National Program Manager Guidance (Guidance).

The NTAA is an autonomous organization with 93 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 approves generally of the Guidance. Further, the NTAA strongly commends EPA's inclusion of a Tribal Programs section in the Guidance, which, to us, shows that EPA recognizes the importance of Tribal air programs and the unique status Tribes share with EPA and the states as co-regulators of air quality. Nevertheless, the NTAA finds it necessary to provide EPA with its comments and recommendations regarding the state implementation plan (SIP) process for criteria air pollutants covered by the national ambient air quality standards (NAAQS) and other air pollutants, air quality issues in Alaska Native Villages, actualization of environmental justice for Indian Tribes, implementation of the U.N. Declaration on the Rights of Indigenous Peoples, and the measures and targets for Fiscal Year (FY) 2016.

SIP Process for Criteria Air Pollutants Covered by NAAQS and other Air Pollutants

A considerable part of the Guidance is devoted to the implementation SIPs for criteria pollutants covered under the NAAQS (*e.g.*, ozone, particulate matter, and sulfur dioxide) and other air pollutants such as those which contribute to regional haze and climate change. Importantly, neither the Guidance's general sections nor those sections focused on Indian Tribes provide any discussion about how EPA will help facilitate consultation between states and Tribes, or between EPA and Tribes, regarding the development and implementation of these SIPs. Such a discussion about consultation is particularly important for those Tribes that have treatment as a state (also known as "TAS") status and which may mandate consultation under the law, as well as other Tribes that might be simply in the trajectory of pollutants emitted from facilities located in contiguous or nearby states.

Recommendation:

The NTAA recommends that the Guidance identify how EPA plans to engage Indian Tribes in consultation with states and EPA regarding the development and implementation of SIPs that may impact such Tribes.

Air Quality Issues in Alaska Native Villages

The Guidance discusses how EPA will work with Tribes to undertake air quality activities in their respective communities. However, its reference to "Indian Country" throughout the document causes the NTAA to believe that EPA's obligation and commitment to working with Alaska Native Villages has not been fully addressed in the Guidance.

There are 566 federally recognized Tribes including 229 Alaskan Native Villages. However, most of these Villages are not considered Indian Country.¹ In *Alaska v. Native Village of Venetie Tribal Government*, the U.S. Supreme Court held that the Alaska Native Claims Settlement Act largely extinguished "Indian country" in Alaska.² Further, EPA doesn't consider Alaska Native Villages to be part of Indian Country.³

Each of the Guidance's three sections devoted to Tribes contain the phrase "Indian Country" in their titles: (1) Improving Outdoor Air Quality and Addressing Climate Change in Indian Country; (2) Improving Indoor Environments in Indian Country; and (3) Addressing Radiation Protection in Indian Country. Only once are Alaska Native Villages referenced in the Guidance, and only as part of the NTAA's mission statement.⁴ Arguably, Alaska Native Villages could be

¹ "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs." 80 Fed. Reg. 1942 (January 14, 2015).

² *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998). The Metlakatla Indian Community is the only Indian reservation in Alaska considered to be Indian Country.

³ "Definition of Indian Country" at <http://www2.epa.gov/pesticide-applicator-certification-indian-country/definition-indian-country> (last visited on March 15, 2015) (As EPA states, "land located in Alaska would not qualify as Indian country based solely on its association with, or ownership by, an Alaska Native Village. . . Because Alaska Native Villages also do not qualify as dependent Indian communities, they are generally not Indian country.").

⁴ OAR Guidance at 38. Also, in referencing the NTAA, the Guidance has failed to capitalize "Tribal." This error must be corrected.

covered under the Guidance based on the reference to Tribes which includes these Villages. However, based on the Guidance's multiple references to Indian Country and its failure to distinguish air quality issues specific to Alaska Native Villages that EPA should be addressing, NTAA is concerned that Alaska Native Villages have not been adequately addressed by EPA in the Guidance. Some of these issues are discussed in great length by the NTAA's 2014 "Status of Tribal Air Report."⁵

Recommendation:

The NTAA recommends that specific reference be made to Alaska Native Villages as Indian Tribes covered by the Guidance, and that the Guidance distinguish air issues unique to Alaska Native Villages for which EPA intends to undertake air quality activities.

Actualization of Environmental Justice for Tribes

The Guidance identifies two primary actions that EPA intends to take with respect to the advancement of environmental justice, both for air toxics program implementation:

1. Evaluate historic environmental justice trends to improve the implementation of meaningful involvement strategies for communities and regulated entities;⁶ and
2. Work with communities, particularly in urban areas and areas with disproportionate impacts or environmental justice concerns, to reduce air toxics from indoor and outdoor sources.⁷

The Guidance does not distinguish how environmental justice will be actualized for Indian Tribes, which are unlike other members of the environmental justice community. Tribes are sovereign nations with certain rights as set forth by the U.S. Constitution, treaties, and longstanding legal precedence. They exercise cultural and political self-determination and have rights to and management authority over Tribal lands and resources.

Executive Order (EO) 12898 establishes federal executive policy on environmental justice.⁸ Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies and activities on minority populations and low-income populations in the U.S.⁹ Section 6-606 provides that EO 12898 applies to Native American programs.¹⁰

Further, no other members of the environmental justice community besides Indian Tribes possess a government-to-government relationship with the United States. EO 13175 requires

⁵ See "National Tribal Air Association 2014 Status of Tribal Air Report" at <http://www4.nau.edu/itep/ntaa/resources/docs/NTAA-2014StatusTribalAirReport.pdf> (last visited on March 15, 2015).

⁶ OAR Guidance at 15.

⁷ *Id.* at 16.

⁸ "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." Executive Order No. 12898, (February 11, 1994) at

http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/FHLaws/EXO12898 (last visited on March 15, 2015).

⁹ *Id.*

¹⁰ *Id.*

consultation with Tribes on a "government-to-government" basis whenever the actions of federal agencies significantly or uniquely affect tribal interests.¹¹ Government-to-government consultation with individual Tribes is necessary for a number of reasons. First, it provides for more candid conversations between individual Tribes and the federal government than would occur otherwise in a group meeting involving other Tribes and members of the environmental justice community. Second, each Tribe's circumstances are unique and must be treated as such by the federal government. Group meetings 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 as part of a group meeting risks its release to the general public and potentially endangers Tribal cultural sites and practices.

Recommendation:

The NTAA recommends that the Guidance specify how EPA will work with Indian Tribes, as part of the environmental justice community, to implement meaningful involvement strategies to reduce air toxics from indoor and outdoor sources in and near Tribal communities. The uniqueness of Tribes and their practices must be accounted for by EPA, and this sub-group of the environmental justice community must not be lumped together with other sub-groups for efficiency's sake.

Implementation of the U.N. Declaration on the Rights of Indigenous Peoples

In December 2010, the Obama Administration signed the United Nations Declaration on the Rights of Indigenous Peoples (Declaration).¹² The Declaration sets out the individual and collective rights of Indigenous Peoples, many rights that the President has consistently supported such as the right of Tribal self-determination. In his statement supporting the Declaration, President Obama made several references to implementation to these rights in accordance with existing federal laws and priorities.¹³ The NTAA has heard that some federal entities are taking actions to implement the Declaration in their programs and policies. However, EPA seems to be silent on how it plans to implement the Declaration.

The Guidance does not reference the Declaration or its implementation. The NTAA finds this troubling, since so many of the Nation's Tribes spent considerable time and effort to help to bring to fruition the signing of the Declaration by the U.S., one of the last country's to do so. The EPA must not ignore its role and duty, as an important part of the federal government, to act on implementing the Declaration to the benefit of Tribes.

Recommendation:

The NTAA recommends that the Guidance include a discussion about how EPA plans to implement the Declaration with respect to its programs and policies focused on air quality.

¹¹ "Consultation and Coordination with Indian Tribal Governments." Executive Order No. 13175 (November 9, 2000).

¹² The United Nations Declaration on the Rights of Indigenous Peoples (*see* http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf).

¹³ *See* "Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples: Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples." <http://www.state.gov/documents/organization/153223.pdf>.

Measures and Targets for FY 2016

Appendix A of the Guidance provides a list of specific measures and associated targets to be met for FY 2016. The following measures are identified for Tribes:

1. Cumulative number of Tribes with approved eligibility determinations under the Tribal Authority Rule (TR01);
2. Cumulative number of Tribes with delegation of federal programs to address air quality conditions on Tribal lands (TR02);
3. Cumulative number of Tribes with approved TIPs to address air quality conditions on Tribal lands (TR03);
4. Number of Tribes conducting air quality monitoring activities (TR04);
5. Number of Tribes implementing voluntary or other non-regulatory programs (TR06); and
6. Number of Tribes that completed or updated an emission inventory during the fiscal year (TR08).

Absent for these measures are any targets for FY 2016, much unlike other measures included in Appendix A.

EPA should be striving for better air quality management for Indian Tribes. One way to do this is to establish targets that, if met, help measure improved performance and success among Tribes. The NTAA understands that targets for some of the measures may be inappropriate, but to exclude targets for all of the listed measures causes us to question why EPA has included such measures in the first place.

Recommendation:

The NTAA recommends that, before the listed targets in Appendix A of the Guidance are finalized, EPA conduct government-to-government consultation with Indian Tribes to determine whether any of the measures for Tribes for which there are no targets should indeed have targets.

Conclusion

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

On Behalf of the NTAA Executive Committee,



Bill Thompson, Chairman, NTAA

cc: Margaret Walters
Office of Air and Radiation