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May 18, 2015

U.S. Environmental Protection Agency

Attn: Charles Lee

Deputy Associate Assistant Administrator for Environmental Justice

Office of Environmental Justice (2201-A)

1200 Pennsylvania Avenue, NW Washington, DC 20460

Subject: NTAA Input on the Draft EJ 2020 Action Agenda Framework

Dear Mr. Lee:

The NTAA is a member-based organization with 94 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 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 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.

NTAA generally supports the EPA's recognition of environmental justice (EJ) concerns within Tribal communities as well as the imperative to ensure fair and equitable treatment and meaningful involvement of all peoples, particularly overburdened indigenous communities. Regarding the Draft EJ 2020 Action Agenda Framework, NTAA agrees with many of the assertions presented by EPA and the general need to develop clear EJ protocols. NTAA has provided comments below to address improvements to the framework to better protect and advance environmental justice for Tribes communities throughout the nation. NTAA respectfully encourages EPA to seriously consider and incorporate these several improvements prior to issuing the final Framework.

NTAA's comments are submitted in an effort to help EPA implement this important policy.

Specific Guidance for States on Incorporation of EJ Principles in Federal Programs

The Framework's focus is primarily on deepening the practice of EJ within the EPA programs and offices, and only one section of the Framework addresses EPA's efforts to have other governments follow the EJ principles. This is a shortcoming because the Framework does not recognize that most of the implementation of federal environmental laws is done by the States and by Tribes who have been granted "Treatment as a State" (TAS). We believe that those federal programs that EPA has approved for other governments to administer should be required to follow the same EJ principles that EPA would follow if EPA were to administer the program through direct implementation.

Section II.A is on the topic "Collaborate with states, Tribes, local governments and other co-regulators to share and develop environmental justice tools and practices." This section of the Framework expects that collaborating, engaging in joint learning, and sharing with states, Tribes, and local governments will enhance how those governments integrate EJ into how they administer their programs. We believe that EPA should take stronger steps to ensure that the federal programs it approves to be administered by the states and other government partners include clear requirements to meet the same goals and principles of EJ as EPA follows. By doing so, the agency can ensure that the Framework indeed meets the stated objective to "advance environmental justice through [EPA's] programs, policies, and activities."

It is clear that EPA is responsible for administering all of the federal environmental laws nationally unless a state or Tribe submits a program that meets the federal laws' requirements and EPA's standards and regulations or is more stringent. There are some federal programs that cannot be delegated to the states, such as setting the National Ambient Air Quality Standards (NAAQS) under the Clean Air Act (CAA), which are promulgated by EPA. The CAA requires states to designate air quality control regions and submit state implementation plans (SIPs) that are designed to meet or exceed all of the NAAQS and other air quality management requirements that EPA has promulgated.¹ If a state submits a SIP that is disapproved by EPA, then Section 110(c) of the CAA² requires EPA to establish a federal implementation program (FIP) to properly regulate air quality. The CAA similarly requires EPA to designate air quality areas if the state fails to submit an approvable plan,³ and for EPA to designate areas as attainment, nonattainment, or unclassifiable for ozone, carbon monoxide, and particulate matter (PM10) if the state fails to submit an approvable list.⁴

If EPA must directly implement these statutory requirements because the partner government fails to submit an approvable program, EPA will administer the program itself and follow the EJ principles that it has adopted in its EJ policies. For example, EPA must approve state programs to issue air quality permits to major stationary sources under Title V of the CAA.⁵ Issuing appropriate permits for the construction and operation of major stationary sources of air pollution is an integral

¹ In the case of Native American tribal lands and reservations, where SIPs do not have effect, EPA's regulations provide that EPA "Shall promulgate without unreasonable delay such [FIP] provisions as are necessary and appropriate to protect air quality." 40 CFR 49.11(a)

² 42 USC 7410(c)(1)

³ 42 USC 7407(d)(1)(B)(ii)

⁴ 42 USC 7407(d)(4)(A)(ii)

⁵ 42 USC 7661

step to attaining or maintaining the air quality goals of an area in which the source will be located and the air quality in downwind areas and emissions may disproportionately affect EJ populations near or downwind of the facility. EPA regulations at 40 CFR Part 70 describe all the requirements of a state program in order for EPA to approve the state's Title V permit program. If a state program or a Tribe with TAS has not been granted full approval of its program under 40 CFR 70.4, then EPA must directly implement Title V under 40 CFR Part 71.⁶ Again, if EPA must issue permits under 40 CFR Part 71, it will follow its EJ principles and policies.

So, EPA is ultimately responsible for how the federal environmental statutes and regulations are administered by the states, and in the absence of an approved state program, EPA will administer those environmental programs, following the principles of EJ that are part of EPA's policies and practices, in accordance with Executive Order 12898. From that perspective, it makes sense that the state programs administered on behalf of EPA should follow the same EJ principles that EPA would follow. A state that runs a federally approved program should have an EJ program (procedures and protocols) that meet the requirements of EPA's EJ policies, or adopt a process that meets the objectives of EPA's EJ policies. It is especially important, in light of the federal government's trust responsibility to Native American Tribes, that state programs incorporate the principles of the 2014 *EPA Policy on EJ for Working with Federally Recognized Tribes and Indigenous Peoples* when administering a federal statute with a program approved by EPA.

EPA already has regulations in place that govern public participation at 40 CFR Part 25 for certain programs, and which directs states, interstate, and sub-state agencies how to provide for public participation in the implementation of certain programs under the Resource Conservation and Recovery Act (RCRA), the Safe Drinking Water Act (SDWA), and the Clean Water Act (CWA). Yet the requirements that EPA has imposed under these regulations do not require the state agencies to provide for implementation of those programs in a manner that meets the principles of EPA's EJ policies or procedures. The CAA provides authorities where EPA could establish a requirement that a state applying for program approval must show it has a program that meets the EJ principles in EPA's EJ policies. For example, Sec. 110(a)(2) of the CAA,⁷ requires that an implementation plan can only be approved by EPA if the state shows that it adopted the requirements "after reasonable notice and public hearing." Another CAA authority, Sec. 165(a)(2)⁸ requires that a permit may not be issued by a state to major emitting sources until it has held a public hearing and provided for submission of written comments. EPA can establish requirements for applicants under these statutory authorities that would embody EPA's EJ principles.

The NTAA recommends that EPA make a commitment to evaluate all delegable federal programs for how those programs could be strengthened by requiring that a state or other government partner applying to administer the program must include a demonstration of how it will administer the program in a manner consistent with the principles of EJ that are articulated in EPA's EJ policies. One first step is that EPA can amend its public participation rules at 40 CFR Part 25 to provide that the special attention to Environmental Justice. For example, 40 CFR 25.4(2) directs state, interstate and sub-state agencies to identify segments of the public likely to be affected by agency decisions. It would be appropriate for EPA to also specifically identify environmental justice populations,

⁶ 40 CFR 71.4(a)

⁷ 42 USC 7410(a)(2)

⁸ 42 USC 7475 (a)(2)

such as Tribes and Indigenous Peoples. Another step that EPA can take for amending Part 25 would be to clearly direct that its requirements apply to many other federal programs which do not yet have EJ or public participation procedures that embody EJ principles.

Training for EPA Staff in Cultural Competency Principles

In order to meaningfully advance EJ in Tribal communities, EPA staff must fully understand the cultural dimensions of Tribal lifeways insofar as they relate to unique vulnerabilities and sources of resilience. Conversely, it is imperative that Tribal partners understand the procedures and workings of the EPA as it administers and oversees the implementation of federal environmental laws. The Framework notes that in 2014, EPA staff completed mandatory EJ training. NTAA applauds EPA for developing mandatory EJ trainings and would strongly encourage an extension of this training to encompass cross-cultural competency for EPA staff working with Tribal communities.

In 2013 the National Environmental Justice Advisory Council (NEJAC) submitted recommendations to EPA in response to the Working Draft of the “EPA Policy on Environmental Justice for Tribes and Indigenous Peoples”. Subsequently in 2014, EPA Administrator Gina McCarthy issued the finalized EPA “Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples”. The NEJAC recommendations had included an amendment to Principle 7⁹ which would serve to improve the Policy by promoting effective cross-cultural competency. NEJAC stated that “outreach and training of Tribes and indigenous stakeholders to enhance their understanding of EPA’s roles, responsibilities, and corporate culture is needed.” It is unclear whether the NEJAC recommendations ultimately informed the subsequent or final iterations of the Policy. Nonetheless, NTAA agrees that if Tribes are meant to fully and successfully participate in EPA processes related to environmental justice, they must be given an opportunity for training on EPA culture. In turn, EPA staff training in Tribal culture competence must be incentivized and encouraged. The benefits of effective cross-cultural competence training will rapidly become apparent as EPA staff and their Tribal counterparts are tasked complex issues that arise from the unique cultural practices and customs of tribes and the way that these practices may influence susceptibility to harm from environmental degradation (e.g. reliance on specific pollutant-sensitive plant species for traditional practices; consumption patterns of fish that are unsuitable for high rates of consumption due to contamination).

Cross-cultural competence should include guidance on fundamentals of identifying and interacting with Tribal communities (e.g. indigenous peoples from outside of the United States), and methods of identifying culturally relevant information when dealing with Tribes. NTAA recommends that EPA staff work with Tribal leaders to finalize what specific culturally-relevant material should be included within cultural competency trainings.

The development of formalized cross-cultural competence training is especially important at this point in time, when EPA is grappling with high turnover of senior management and staff that

⁹ Principle 7 states that: “The EPA considers confidentiality concerns regarding information on sacred sites, cultural resources, and other traditional knowledge, as permitted by law. The EPA acknowledges that unique situations and relationships may exist in regard to sacred sites and cultural resources information for federally recognized tribes and indigenous peoples.

possess great institutional knowledge and may have already had longstanding relationships with Tribes in their respective regions. EPA regional staff, who interact most with Tribal communities, leadership, and staff would benefit tremendously from well-designed, required cultural competency training. Similarly, Tribal staff should be afforded the opportunity to participate in cross-cultural competence training so that they can better understand EPA workings and methods of navigating through complex Agency processes.

Agency-Wide Commitment to Considering Vulnerabilities/Disproportionate Impacts to Tribes, Native American and Alaska Natives During the Rulemaking Process

As the EJ 2020 Framework recognizes, it is very important to incorporate environmental justice into rulemaking. As described in the comments above, one important step is for those rules that govern what a state or government must include in a federal environmental program for EPA approval is to demonstrate its program meets the principles of EPA's EJ policies and guidance. A second important step is to ensure that EPA's rule writers and analysts fully consider the EJ principles while preparing EPA regulations that will be implemented by EPA itself.

We recognize that EPA has been in the process of preparing the *Technical Guidance for Assessing EJ in Regulatory Analyses* (Technical Guidance), with the most recent draft issued in 2013. This can be a very useful guide for EPA rule writers and analysts. However, a brief review of the draft Guidance finds that it could be updated to fully reflect the principles in EPA's EJ policies. For example, while the draft Guidance refers to Indian Tribes in various places, Section 3, Contributors and Drivers to Potential Environmental Justice Concerns, states "Minority, low-income and indigenous populations experience greater exposure and disease burdens that can increase their risk of adverse health effects from environmental stressors." Minority and Indigenous Populations are defined in Section 2.2 to include Native American and Native Alaskans among other types of indigenous peoples. However, Indian Tribes are not often specifically mentioned in the sections that follow. The Technical Guidance could be updated to specifically refer to the 2014 *EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples*, and ensure that the principles in that EJ policy are incorporated into the Guidance.

Section 3 of the draft Technical Guidance covers the reasons why EJ populations may be disproportionately susceptible to adverse health effect from exposures, and so the draft Technical Guidance guides EPA analysts to evaluate the potential health and environmental effects on EJ populations that could result from the regulations that are being prepared. However, our recent review of EPA's proposed rule to revise the ground-level ozone National Ambient Air Quality Standard (NAAQS)¹⁰ found that the analysts and rule writers had missed an important disproportionate impact to the health of Native Americans and Alaska Natives, perhaps because the analysts and rule writers did not have a final Technical Guidance to follow. Native Americans and Alaska Natives and their children, suffer from the lung disease of asthma at nearly twice the rate of the general U.S. population. The studies and analyses for the proposed rule identified that ozone affects a significant number of plant species that are important to Indian Tribes for traditional and subsistence purposes as well as many other trees and plant species. This information was used to support lowering the secondary NAAQS to better protect public welfare. However, the disproportionate effect of ground-level of ozone on the human health of Native Americans due to

¹⁰ 79 FR 75234-75411, Dec. 17, 2014

their higher incidence of asthma was not covered as an important consideration in proposing to revise the primary NAAQS. For this reason, the NTAA commented on the proposal and asserted that EPA should adopt the lowest standard reviewed on the proposed rule of 60 ppb, rather than adopt a standard in the 65-70 ppb range as proposed, in order to provide the greatest protection to the disproportionately affected Native populations. We noted in our comments that the final section of the Preamble to the proposed rule that addresses Executive Order 12898 writes that the proposed action “will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations because it does not affect the level of protection provided to human health.” Further on, the proposal writes that the revised ozone standard will increase public health protection, and cites the Regulatory Impact Analysis as the basis for that conclusion. While we concur with the science, which suggests that a lower standard will increase public health protection, we believe that a standard higher than 60 ppb will have a disproportionate impact on Native Americans and Alaska Natives and their children. We strongly encouraged EPA to adopt the lowest standard that was discussed in the proposal so as to best protect the Native American and Native Alaskans who have a higher incidence of asthma than the general population.

In summary on this point, we urge EPA to finalize the Technical Guidance quickly, incorporating the suggestions made above. We also urge that EPA ensure that its analysts and rule writers are fully trained in EPA’s EJ principles and the Technical Guidance, and learn all of the steps that are to be considered when evaluating the EJ implications of regulations that are being prepared.

Conclusion

The NTAA is pleased to provide the aforementioned comments regarding the U.S. Environmental Protection Agency’s (EPA)’s Draft *EJ 2020 Action Agenda Framework*. Please contact us if you have any questions or need clarification.

On Behalf of the NTAA Executive Committee,

A handwritten signature in black ink, appearing to read "Bill Thompson", is centered on the page.

Bill Thompson, Chairman, NTAA