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July 28, 2016

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**Subject: EJ Action Agenda: Environmental Justice Strategic Plan  
2016-2020**

### **Introduction**

The National Tribal Air Association (NTAA) is pleased to submit these comments regarding the U.S. Environmental Protection Agency's (EPA)'s proposed EJ Action Agenda: Environmental Justice Strategic Plan 2016-2020 (Action Agenda).

The NTAA is an autonomous organization with 111 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 Action Agenda. However, the NTAA finds it necessary to provide its comments and recommendations on the need to account for Tribal sovereignty and self-determination when addressing environmental justice (EJ) issues; the publication of enforcement actions; and the omission of Indian Tribes under Goal II of the Action Agenda as co-regulators alongside states and local governments.

### **Tribal Sovereignty and Self-Determination**

Executive Order 13175, which guides EPA with respect to government-to-government consultation with Indian Tribes, provides that "Indian tribes exercise inherent sovereign powers over their members" and that the federal government recognizes the "right of Indian tribes to self-government and supports tribal sovereignty and self-determination."<sup>1</sup> Further, EPA's "Policy on Consultation and Coordination with Indian Tribes" provides that:

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)-(c), Executive Order 13175, Consultation and Coordination with Indian Tribal Governments" (July 23, 2016) at <https://www.gpo.gov/fdsys/pkg/WCPD-2000-11-13/pdf/WCPD-2000-11-13-Pg2806-2.pdf>

EPA recognizes and works directly with federally recognized tribes as sovereign entities with primary authority and responsibility for each tribe's land and membership, and not as political subdivisions of states or other governmental units.<sup>2</sup>

Indian Tribes preexist establishment of the United States. They possess authority that predates the U.S. Constitution regarding the governance of their own internal affairs. Tribes consider EJ to be an important issue, but it must not usurp Tribal sovereignty and self-determination.

The NTAA reminds EPA that EJ must never take the place of government-to-government consultation with Indian Tribes and that, for any actions EPA takes with respect to the Action Agenda, it must treat Tribes as sovereign nations with self-determination first and part of the EJ community second.

### **Publication of Enforcement Actions**

Goal I of the Action Agenda provides that EPA shall increase enforcement actions that benefit overburdened communities.<sup>3</sup> Enforcement actions are a powerful deterrent but they need to be communicated to the regulated community in order to be effective. However, most enforcement actions go unnoticed unless the violation is of a substantial magnitude. Increasing the publicity of enforcement actions will help deter future violators and protect the health and environment of the EJ community from harmful exposure to pollutants.

The NTAA recommends that EPA work closely with the EJ community to issue more press releases about enforcement actions in the EJ community.

### **Omission of Indian Tribes under Goal II of the Action Agenda as Co-Regulators**

In July 2014, EPA finalized its "Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples" (Policy) which affirms EPA's commitment to provide Federally Recognized Tribes and Indigenous Peoples in all areas of the U.S. and its territories and possessions with fair treatment and meaningful involvement in EPA decisions that may affect the health or environment of such Tribes and Indigenous Peoples.<sup>4</sup> The terms "Federally Recognized Tribe" and "Indigenous Peoples," used throughout the Action Agenda, are defined under the Policy as follows:

#### Federally Recognized Tribe

Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1944, 25 U.S.C.479a. The elected officials for the federally recognized tribe and the government structure they administer are referred to as the federally recognized tribal government.<sup>5</sup>

#### Indigenous Peoples

State-recognized tribes; indigenous and tribal community-based organizations; individual members of federally recognized tribes, including those living on a different reservation or living outside Indian country; individual members of state-recognized tribes; Native Hawaiians; Native Pacific Islanders; and individual Native Americans.<sup>6</sup>

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<sup>2</sup> "EPA Policy on Consultation and Coordination with Indian Tribes" at 3 (May 4, 2011).

<sup>3</sup> Action Agenda at 15.

<sup>4</sup> Policy at 1.

<sup>5</sup> *Id.* at 5.

<sup>6</sup> *Id.*

A primary distinction between the two terms is that a Federally Recognized Tribe or Tribe can be a co-regulator under the Clean Air Act, Clean Water Act, and other federal environmental laws, but Indigenous Peoples cannot. Unfortunately, the terms Tribes and Indigenous Peoples are often used synonymously under Goal II of the Action Agenda without acknowledging this distinction.

Goal I of the Action Agenda goes to great lengths to acknowledge Indian Tribes as co-regulators along with states and local governments regarding matters involving permitting and compliance and enforcement. The same is not true under Goal II of the Action Agenda whose purpose is to “work with partners to expand our positive impact within overburdened communities.” The focus areas for Goal II are (1) States and Local Governments, (2) Federal Agencies, (3) Community-Based Work, and (4) Tribes and Indigenous Peoples.<sup>7</sup> On their faces, these focus areas appear to be reasonable and even admirable in that EPA pays specific attention to Tribes and Indigenous Peoples. However, the strategies under the Action Agenda pursued for States and Local Governments and Tribes and Indigenous Peoples are enough to cause the NTAA concern about how EPA views Tribes in particular with respect to EJ.

Goal II treats States and Local Governments as co-regulators with EPA engaging them in the following strategies, each with sub-strategies of their own:

1. Work with co-regulators to reduce adverse impacts and promote meaningful involvement in overburdened communities through our regulatory work;
2. Support peer-to-peer learning to identify best practices on how to address environmental justice concerns;
3. Foster cross-program discussion, planning, and actions to build program capacity; and
4. Work with co-regulators to establish shared program expectations and performance criteria and hold ourselves accountable to drive improvement where needed.<sup>8</sup>

Goal II doesn't specifically treat Indian Tribes as co-regulators which is difficult to do when mentioned in the same sentence with Indigenous Peoples. The strategies that EPA plans to pursue with Tribes and Indigenous Peoples, each with sub-strategies of their own, include:

1. Strengthen consideration of tribes' and indigenous peoples' issues, their involvement in EPA's decision-making processes, and responsiveness to their concerns when EPA directly implements federal environmental programs;
2. Help tribes build capacity and promote tribal action on environmental justice;
3. Reduce disproportionate impacts, improve engagement, promote meaningful involvement, and improve responsiveness to the environmental justice concerns of indigenous peoples; and
4. Promote intergovernmental coordination and collaboration to address environmental justice concerns in Indian country and in areas of interest to tribes and indigenous peoples throughout the United States.<sup>9</sup>

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<sup>7</sup> Action Agenda at 3.

<sup>8</sup> *Id.* at 22-24.

Absent in any of the strategies for Indian Tribes and Indigenous Peoples is reference to Tribes as co-regulators. This is unacceptable.

The NTAA recommends that EPA make modifications to Goal II of the Action Agenda, in consultation with Indian Tribes, that acknowledge Tribes as co-regulators and commit EPA to work with such Tribes, as co-regulators, regarding strategies and sub-strategies similar to the ones in which EPA will be engaging States and Local Governments as co-regulators. In making such modifications, the NTAA also recommends that EPA maintain its existing section on Tribes and Indigenous Peoples since their issues are unique from other members of the EJ community.

### **Conclusion**

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

On Behalf of the NTAA Executive Committee,

A handwritten signature in black ink, appearing to read "Bill Thompson", is positioned above the printed name of the signatory.

Bill Thompson, Chairman, NTAA

cc: Dona Harris  
Office of International and Tribal Affairs  
U.S. Environmental Protection Agency

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<sup>9</sup> *Id.* at 34-35.