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Transmitted via email to gude.karen@epa.gov

Re: EPA Consultation Tribal Comments

Dear Ms. Gude:

On behalf of the member tribes of the National Tribal Water Council, I am pleased to submit these comments responding to EPA's call for tribal input on improving the Agency's implementation of *Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*, following President Biden's January 26, 2021 Tribal Consultation memorandum.

Background

The National Tribal Water Council ("NTWC") was formed by EPA to provide EPA with technical input from Indian Country to strengthen EPA's coordination with tribes, and to allow EPA to better understand issues and challenges faced by tribal governments and Alaska Native Villages as they relate to EPA water programs and initiatives. Further, the NTWC advocates for the best interests of federally-recognized Indian and Alaska Native Tribes and tribally-authorized organizations in matters pertaining to water. The NTWC also advocates for the health and sustainability of clean and safe water, and for the productive use of water for the health and well-being of Indian Country.

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Comments

At the outset, we recognize and applaud EPA for its long-standing commitment to government-to-government partnerships with tribes and tribal environmental self-determination. EPA was the first federal agency to adopt a program-wide Indian Policy, and its actions continue to be guided by those foundational principles today. The Agency's 2011 Tribal Consultation Policy is clearly a reflection of the 1984 Indian Policy. Indeed, the Consultation Policy expressly says so, quoting Principle 5 of the Indian Policy that EPA "assure[s] that tribal concerns and interests are considered whenever EPA actions and/or decisions may affect tribes." Such consideration could only occur if the Agency engaged tribes, indicating EPA envisioned the importance of tribal consultation more than a decade before President Clinton issued his 1998 Executive Order 13084 and then his 2000 Executive Order 13175 Consultation and Coordination with Indian Tribal Governments.

Federal agency consultation with tribes has been endorsed by every President since Clinton, but efforts across the executive branch have not been consistent. In 2009, President Obama addressed that concern directing each federal department and agency to submit a plan for implementing Executive Order 13175. EPA 2011 Consultation Policy was a solid response. Arguably, however, other agencies' policies reflected more respectful and substantive approaches. President Biden's 2021 Memorandum calling again for agency consultation plans gives EPA the opportunity to improve its Consultation Policy and reestablish itself as the leader among federal agencies in its commitment to tribal self-determination.

1. Setting a Tone of Commitment and Context

It is important to remember that EPA's Tribal Consultation Policy has two primary audiences: tribal governments and EPA staff. Setting a clear tone of commitment to tribal environmental self-determination improves the likelihood that tribes will engage with EPA. That is also true with EPA staff: most are unfamiliar with the complexities of Federal Indian law and with the long history of EPA's Indian program. Providing context for EPA's commitment to tribes educates EPA staff and improves the likelihood they will genuinely engage with tribes. Also, Agency staff understand that their performance is evaluated against the priorities of their superiors and the Agency, so clarity in the Policy is critical to achieving its goals.

EPA's current Consultation Policy is not completely devoid of tone and context, but both could profitably be enhanced. For example, as noted above the Background section refers to the 1984 Indian Policy as the cornerstone of EPA's Indian program, and quotes Principle 5 on assuring that tribal concerns and interests are considered. (p.2) That commitment is directly relevant to consultation and thus appropriate to recognize expressly. But the Background ignores the concept animating Principle 5: the federal trust responsibility. The Policy's Guiding Principles says EPA recognizes the federal trust responsibility (p.3), but doesn't explain what that is or how it might relate to EPA's work. The National Environmental Justice Advisory Committee's *Guide on Consultation and Collaboration with Indian Tribal Governments and the Public Participation of Indigenous Groups and Tribal Members in Environmental Decision Making* (2000) provides some helpful explanation on key trust concepts endorsed by the United States Supreme Court like "moral obligations of the highest responsibility and trust," "the

strictest fiduciary standards," and "good faith and fairness." (p.8) The Guide correctly says "the trust obligation imposes an additional duty with which agencies must comply when exercising discretion in carrying out their statutory duties." We suggest EPA consider supplementing the Policy with similar explanations of the trust responsibility.

Tribal sovereignty is another complex term the Policy does not explain. On page 3, the Guiding Principles say EPA recognizes tribes are "sovereign entities" with primary authority over their lands and members.[1] It is possible that savvy EPA staff will realize that is why the Policy says on page 1 that the Agency consults on a government-to-government basis with tribes. In reality, most Americans do not learn in school the tribes are considered governments with sovereign powers. To make sure EPA staff do not treat tribes as public interest groups, some explanation is in order. Again, the NEJAC Guide offers a brief explanation of tribal inherent sovereignty and emphasizes why tribes are not and should not be treated as interest groups. (p.7) We suggest EPA consider supplementing the Policy with similar explanations of tribal sovereignty.

EPA should consider drawing additional tone and context from two other important sources. Rather than simply refer to the 1984 Indian Policy, EPA should note in this Consultation Policy the core concepts of several Indian Policy Principles. In addition to the expanded Principle 5's trust responsibility discussed above, we suggest incorporating: Principle 1's commitment to government-to-government relationships; Principle 2's recognition of tribes as the primary parties for environmental policy-setting and program implementation; Principle 3's commitment to assist tribes in developing capacity to assume program responsibility, and encouraging lesser or partial roles for tribes during EPA direct implementation; and Principle 4's intention to remove impediments to working directly with tribes (which is directly relevant to improving EPA's current Consultation Policy).

The second important source of tone and context is the 2007 United Nations Declaration on the Rights of Indigenous Peoples. Regrettably, the United States did not initially endorse the Declaration. President Obama reversed course and announced U.S. support for the Declaration in January 2011. Curiously, EPA's Consultation Policy, issued five months later in May 2011, made no mention of the Declaration. Three years later, EPA did note the Declaration in its Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples (2014). That reference was bare and banal: it simply "recognize[d] the importance" of the Declaration and "the principles that are consistent with the mission and authorities of the

[1] The Guiding Principles say EPA recognizes "tribes as sovereign entities with primary authority and responsibility for each tribe's land and membership." This should be rewritten because it wrongly implies that tribal authority is limited to tribal lands and tribal citizens. While the Supreme Court's cases are not entirely clear on the subject, the Court has stated repeatedly that tribes have sovereignty over their territory—understood as Indian country, not just lands owned by the tribe—and over non-Indians in certain circumstances. *See* United States v. Wheeler, 435 U.S. 313 (1978); Montana v. United States, 450 U.S. 455 (1981). Additionally, EPA has interpreted both the Clean Air Act and the Clean Water Act as congressional delegations to tribes of jurisdiction over non-Indians throughout Indian reservations. *See* Arizona Public Service Company v. EPA, 211 F.3d 1280, 1288 (D.C. Cir. 2000), *cert. denied sub nom*, Michigan v. United States Environmental Protection Agency, 532 U.S. 970 (2001); Revised Interpretation of Clean Water Act Tribal Provision, 81 Fed. Reg. 30183 (May 16, 2016).

Agency" (p.2) without further elaboration. EPA should revise its Consultation Policy and go beyond the EJ Policy's basic statement to note expressly the United Nations Declaration Principles of relevance to EPA's programs including: Principle 3 self-determination right to pursue cultural development; Principle 4 right to self-government; Principle 11 right to practice cultural traditions and customs; Principle 25 right to maintain their distinctive spiritual relationship with lands and resources; and Principle 29 right to conservation and protection of the environment, and national programs assisting indigenous peoples in environmental conservation and protection.

At least two other Principles are relevant to Indian Country environmental protection, and raise an international law principle the United States should no longer ignore. Principle 29 says States (Nations) "shall" ensure that no storage or disposal of hazardous materials occurs on indigenous peoples' lands without their "free, prior and informed consent." Principle 32 similarly says States "shall" consult in good faith with indigenous peoples "to obtain their free and informed consent before approving projects that affect indigenous peoples' lands, particularly the development, utilization or exploitation of mineral, water or other resources. President Obama's 2011 Announcement unilaterally interpreted the Declaration's requirements of tribal consent as a "call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders" (p. 5). Tribal leaders and Indian law scholars have criticized that qualified support. It is inconsistent with President Obama's claim that "the United States is committed to serving as a model in the international community in promoting and protecting the collective rights of indigenous peoples" (p. 2). One could honestly wonder whether the original 143 countries who immediately endorsed the Declaration without qualification see the United States as a leader with its after the fact support that watered down national obligations to Indigenous peoples to aspirational goals. We urge EPA to correct this misstep and embrace the need for tribal consent for actions and projects that may adversely affect tribes' lands, waters and resources.

2. Redefine the Policy's Goal

The current Policy states EPA's "ultimate" goal is "strengthening consultation, coordination and partnerships between tribal governments and EPA." (p. 2) We agree that is an important goal, but stronger consultation for its own sake is not the true objective. What EPA should seek, and what tribes desire, is for the Agency to genuinely consider expressed tribal concerns and interests and modify proposed actions to avoid or minimize adverse impacts. As stated on the very first page of EPA's Indian Policy, the "keynote" of EPA's mission to protect human health and the environment is "to give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands."[2] EPA's Consultation Policy should be designed to implement that goal. Effective consultation also requires tribal capacity, which implicates the Indian Policy goal of tribal environmental self-determination. That goal bears repeating in the Consultation Policy. An additional goal expressed by some federal agencies is obtaining information with potential to affect the agency's final decision.

[2] Consistent with the point made in footnote 1, this statement in EPA's Indian Policy should be interpreted to extend to all lands where tribes have jurisdiction, and the Consultation Policy should be extended accordingly.

3. Define Consultation

The current Policy does not define consultation but simply describes it as "a process of meaningful communication and coordination between EPA and tribal officials prior to EPA taking actions or implementing decisions that may affect tribes" (p. 1). Nowhere does the Policy attempt to explain what constitutes meaningful communication or coordination. That omission is very likely a reflection of the fact there is no universal definition of consultation. A definition is sorely needed, however; far too often, in our tribal members' experience, EPA's consultation process has become a mere check-the-box, with no genuine attempt at eliciting or considering tribal interests or views. In addition, without a definition the nature of the consultation is subject to the whims of individual EPA officials and staff, rather than being a coordinated agency policy.

The United States General Accounting Office 2019 survey of 21 federal agencies revealed a wide variety of consultation approaches with no clear ideal definition. Several substantive concepts merit close consideration for inclusion in EPA's revised Policy. The following references are to Appendix IV of the GAO Report Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects (2019).

Several agencies seek a substantive and meaningful dialogue with tribes. The Bureau of Land Management seeks mutual, open, and direct two-way communication in good faith. Multiple agencies seek a collaborative process. (The NEJAC also emphasizes collaborative consultation processes.) The Federal Highway Administration identifies a process of seeking, discussing, and considering the views of others. For many tribes, a meaningful consultation requires a face-to-face meeting with an individual tribe, and not a nationwide or even regional presentation provided to groups of tribes (and often simultaneously to members of the general public).

A more thoughtful and detailed definition of consultation is also important to distinguish it from the public participation process required under the Administrative Procedure Act and EPA's conforming regulations. Despite express claims to the contrary, as defined by EPA and other federal agencies tribal consultation appears little different than typical public participation: the agency gives tribes notice of a proposed action, and a time frame for comment; tribes send written comments; the agency considers the comments, and makes a decision; occasionally, the decision is communicated directly to those tribes who commented, although more commonly any discussion of the tribal comments occurs in the generic Response to Comments document issued with the final decision. The only consistent differences from typical public participation processes are timing—tribal consultation occurs first—and sometimes EPA provides opportunities for in-person communication. In the experience of our member tribes, those in-person opportunities typically consist of an informational presentation by EPA, followed by tribal reactions. Rarely if ever is there actual dialogue as there would be between parties in a negotiation or even a conversation.

A related and critical point: tribes have not received the historical support from EPA that states have. Tribes thus often lack the institutional capacity necessary for effectively engaging in technical consultations. It is incumbent upon a fiduciary discharging its moral obligation of engaging in good faith to assist the tribe in understanding the statutory, regulatory and technical

context as it applies to the proposed action. At the very least, that requires EPA to provide written materials in advance. It may also require a pre-meeting to explain the legal and technical aspects of the question and give the tribe time to formulate its input. Ideally, the informational presentation referenced above (which often consists of a presentation of PowerPoint slides) would occur in advance of the actual consultation. The subsequent consultation could then truly consist of an exchange of views and ideas.

Finally, consultation must be perceived as more than providing information to tribes. The Department of Agriculture's Consultation Policy explicitly recognizes that notices, technical communications and tribal outreach are all essential, but do not constitute government-to-government consultation. That is also true when EPA works through national organizations like the National Tribal Water Council. While providing information is critical, and engaging national organizations like the NTWC can efficiently give EPA feedback and advice, these activities do not and cannot substitute for meaningful engagement with tribal governments. Ironically, this was a critical mistake EPA made in developing its historic 1984 Indian policy: after rounds and rounds of comment by EPA divisions and regions, at the 11th hour EPA sent a near-final draft policy to one national tribal organization for comment. EPA should revise its Consultation Policy to note that providing tribes with notices, information, technical communications and undertaking tribal outreach are important relationship-and capacity-building activities, but the Policy should explicitly recognize that these activities do not constitute consultation.

4. Create Substantive Standards for Consultation

Perhaps the best way to clearly distinguish tribal consultation from public participation processes is to design substantive standards ensuring that consultation is not simply another administrative process. Appendix V of the GAO Consultation Report indicates 11 federal agencies have consultation policies that seek consensus or agreement with their tribal partners. Some agencies qualify that goal. Phrases like where possible, or where feasible are not uncommon. And policies are not law. But the significance of there being 11 federal agencies with an express consultation goal of seeking tribal agreement with proposed federal actions cannot be overstated. EPA has long been a leader among federal agencies in its Indian programs and commitment to tribal environmental self-determination. Adopting consensus as a tribal consultation goal would place the Agency again at the forefront of those actively assisting tribes in achieving self-determination. (EPA's Consultation FAQs (#13) comments that consensus is not always achieved, implying that it is an unstated goal. EPA should make it an official goal.)

A different substantive standard that could be used in conjunction with consensus, or separately as a step short of consensus, is a commitment to minimize or mitigate adverse impacts on tribal interests. When EPA decides to act despite tribal concerns, it could and should use its discretion to protect tribal interests. Consultation then would focus on specific tribal interests and ways to minimize adverse impacts on them. In Canada, such mitigation is a constitutional duty referred to as accommodation. Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388. Accommodation means "taking steps to avoid irreparable harm or to minimize the effects of infringement of aboriginal rights. *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 18 (citing Roberts v. R.,

[2002] 4 S.C.R. 245, paras. 79, 81). As you know, the National Environmental Policy Act requires consideration of mitigation measures as part of environmental assessment and analysis. Identification and consideration of mitigation measures often leads to improvements in proposed actions. Similarly, consultation that identifies ways to minimize the adverse impacts of proposed actions on tribal interests offers potential opportunities both to have the benefits of the proposed action and to avoid or minimize its negative consequences on tribal rights and values.

Moreover, as EPA recognized in its 2016 Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights, a consultation must include consideration of tribal treaty rights, which are part of the "supreme law of the land" under the Constitution, Article VI, Clause 2. An update of EPA's Consultation Policy should incorporate tribal treaty rights as a subject of consultation, rather than addressing them in a separate EPA document.

EPA also should provide more discussion in its Policy of the procedures it will implement when a tribe initiates a request for consultation. The current policy provides only one sentence on the subject (on p. 4), stating that "EPA attempts to honor the tribal government's request with consideration of the nature of the activity, past consultation efforts, available resources, timing considerations, and all other relevant factors." Our member tribes expect that their requests for consultation will be honored, in keeping with the federal trust responsibility discussed above and the government-to-government relationship between the federal government and tribal sovereigns. The Policy should state that EPA will make every effort to do so, barring only certain enumerated exceptions such as timing issues due to court-ordered deadlines for rulemaking actions and similar specific and limited constraints.

5. The Timing of Consultation

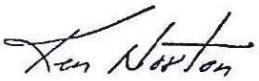
In theory and ideally, consultation occurs before the agency has determined it will take a particular action. In reality, it is a common tribal perception that agencies come to consultations with their decisions already made. Whether that perception is true or not is almost irrelevant. When tribes make extensive comments raising substantive concerns on proposed actions, and then learn that the final decision is exactly what was proposed, it is understandable they would believe that the consultation was pretextual. Detailed explanations addressing why particular tribal comments were not adopted satisfy administrative law requirements, but are perceived by tribes as post hoc rationalizations. The only way to assure tribes that the agency's intention in consulting is genuine is for the agency to consult during the planning phases and to modify its proposals by incorporating tribal comments. This of course must occur more than one time to develop the credibility agencies need to interact productively with tribes.

Conclusion

The final principle of EPA's Indian Policy is arguably the most important. It calls for institutionalizing the Policy principles across Agency programs and systems. EPA's Tribal Consultation Policy must also reach across program lines. The NEJAC Guide summarized the issue perfectly: EPA needs "to "[v]iew tribal consultation as an integral and essential element of the government-to-government relationship with tribal governments, and not simply as a

procedural requirement." (p.17) We are confident that EPA's four-plus decades of Indian programming will inform improvements making the Agency's Consultation Policy the archetypal federal policy.

Sincerely,



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