



**Region 10 Tribal Consortium
P.O. Box 689
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March 25, 2021

Michael Regan, Administrator
U.S. Environmental Protection Agency
Office of the Administrator, 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

JoAnn Chase, Director
American Indian Environmental Office
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U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Michelle Pirzadeh, Acting Regional Administrator
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 155
Seattle, WA 98101

RE: Region 10 Requests in New Administration

Dear Mr. Regan, Ms. Chase, and Ms. Pirzadeh:

This letter is sent on behalf of the Tribal Caucus members of EPA Region 10's Tribal Operations Committee ("RTOC"). This letter is not sent on behalf of EPA Region 10 or any employees of EPA, but solely tribal government representatives of the RTOC. This letter is regarding ways to move forward to address concerns of Tribes in Region 10 under your leadership with the new Biden-Harris Administration.

Over the past four years, the Trump Administration made many changes and consistently acted in a way that has negatively affected the environment, federal environmental policy, and government-to-government relationships with tribal nations. On behalf of the Tribes in EPA Region 10, we are hopeful that you and the other of the Biden Administration will be willing to recover and advance protections for the environment and relationships with tribal governments.

As you know, President Biden recently issued two actions to review the environmental rollbacks of the Trump Administration and to reaffirm the importance of government-to-government consultation. On January 20, 2021, President Biden issued the Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis. Section 1 of this order instructs agencies to immediately review actions taken by the Trump administration. On January 26, 2021, President Biden also issued the Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships. This memo instructs agencies to formulate plans to develop tribal consultation policies. This letter is intended to provide a list of initial actions that we suggest the EPA make to advance the goals outlined in those executive documents. These specific requests include ways to improve up meaningful tribal consultations, relationships with Tribes in Region 10, and specific environmental policy actions.

1. Strengthen Tribal Consultation Procedures.

According to Biden's Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, heads of agencies have been directed to develop procedures to properly conduct meaningful tribal consultations. As EPA proceeds with development of these procedures, the RTOC recommends that the following to improve EPA's process of government-to-government consultation:

- **Commit to obtain free, prior, and informed consent as part of the consultation process.**

For tribal peoples, obtaining free, prior, and informed consent is an indispensable part of the consultation process and an expression of their right to self-determination, applicable to all of the projects that affect them. In their view, the right to consultation also implies the right to veto. It follows then, that consultation processes would not be valid unless their real objective is to obtain consent and not merely "sharing information." This is particularly the case when a proposal involves any one of the following: (a) storage or disposal of hazardous materials on their lands; (b) large-scale development or investment plans that could have a major impact on tribal territories or resources; or (c) natural resource extraction projects that have significant social, cultural, and/or environmental impacts.

- **Invite tribal leaders to contribute to the formulation of the EPA tribal consultation plans.**

The RTOC requests that EPA directly communicate with Region 10 tribal leaders and the RTOC to discuss the formulation of its new consultation procedures to fully recognize and strengthen government-to-government communication. On February 11, 2021, the Department of the Interior announced a series of tribal consultation "sessions in March to hear Tribal leaders' suggestions for federal policy and departmental actions, including identifying additional best practices to improve consultation and fortify Interior's relationship with Tribal governments." We strongly believe the EPA should do the same.

- **To the extent possible, tribal consultations should be held in-person, include EPA decision-makers, and be conducted between a tribal government and EPA.**

Although we understand the current lack of in-person meetings due to COVID, currently “meaningful tribal consultations” have been construed by the agency to simply mean webinars or other virtual presentations that simply involve an EPA staff member giving a presentation to tribal leaders – often many representatives from Tribes across the Nation. Very often, these are conducted by EPA staff with no decision-making authority. These webinars are not a substitute for a meaningful consultation. Consultation, to be meaningful, needs to include EPA decision-makers, not just staff with no authority to change the outcome of a decision. Consultation also needs to be government-to-government – in other words, include a single interested tribal government and not a “cattle call” of all Tribes. Lastly, to the extent possible, these consultation sessions should be in-person and not over a conference call or webinar to better facilitate communication and understanding between the parties.

- **Require written responses to issues raised in tribal consultations.**

During tribal consultations, often issues or questions are raised that the Agency cannot immediately provide an answer to and there is currently no requirement for the Agency to follow-up. The norm for tribal consultations is a concern is left completely unanswered. Tribes would like to ensure that any meaningful or valid questions be addressed in a formal and public capacity. We suggest that all questions left unanswered be documented and addressed formally in writing to ensure accountability by the Agency. We would suggest that EPA look to the BLM Manual 1780 Tribal Relations § 1.6(D), which requires that BLM provide the Tribe a summary of how its input impacted the final decision -- “Department policy in 512 DM 5.5(D) requires bureaus to prepare a summary of the consultation activities upon completion of consultation for actions. Tribes that have participated in consultation must be notified of the basis for the BLM decision. The BLM must clearly explain how tribal input affected the final decision. While the BLM prefers that it address tribal concerns or resolve potential effects, however, this is not always possible. Where the BLM was not able to accommodate tribal desires, a clear explanation must be provided explaining why this was not possible.”

- **Increase flexibility of the length of comment periods for Tribes.**

In Region 10 especially, some Tribes do not have the same access to technology that can be expected from the general population in populated areas, particularly in rural Alaska. In certain cases, Tribes in extremely rural areas cannot reasonably be expected to adhere to the same timeframes for comment periods. In these cases, we suggest that certain allowances be made, especially for projects or actions that involve or affect land or native peoples in rural Alaska and others in the Pacific Northwest.

- **Tribal consultation should occur before any decisions by the Agency are acted upon, made permanent, or made final.**

There have been numerous times when tribal consultations are conducted, representatives of the Agency make it clear that a decision (or decisions) have already been made regarding the subject matter of the consultation during the meeting or presentations. In these instances, it becomes frustrating to those participating in those meetings that permanent action has already been completed before a meaningful discussion. Therefore, we would strongly recommend that tribal consultations be held before any action on projects be initiated.

2. Reaffirm and Update Principles of the 1984 EPA Indian Policy.

The RTOC believes that EPA should consider reaffirming the important principles outlined in its 1984 Indian Policy and amend/expand that policy to address the important role Alaska Native Villages play in the management and stewardship of resources in and around their communities. The nine policies set out in the Indian Policy by Administrator Ruckelshaus are just as important and relevant today as they were 37 years ago. These policies deserve to be updated and reaffirmed by the agency to set bedrock policy for the next 30 years to come.

3. Reverse Bad Trump Administration Environmental Action.

Under the Trump administration, there were several specific actions that was a rollback of environmental protections. The following is a list of specific requests of actions that we request that EPA prioritize the following actions:

- Reinstatement of the Clean Power Plan and revoke the "Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations," 84 Fed. Reg. 32520 (July 8, 2019).
- Reinstatement of Obama-era regulations for fuel efficiency standards and revoke "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks," 85 Fed. Reg. 24174 (April 30, 2020).
- Reinstatement and expansion of the jurisdiction of the Waters of the U.S. Rule and revoke "The Navigable Waters Protection Rule: Definition of 'Waters of the United States,'" 85 Fed. Reg. 22250 (April 21, 2020).
- Reinstatement of the Clean Water Act Section 401 regulations and revoke the "Clean Water Act Section 401 Certification Rule," 85 Fed. Reg. 42210 (July 13, 2020).
- Reincorporate Climate Change into the EPA Strategic Plan.

- Require additional financial assurance for mining activities by updating the "Financial Responsibility Requirements Under CERCLA Section 108(b) for Classes of Facilities in the Hardrock Mining Industry," 83 Fed. Reg. 7556 (February 21, 2018).
 - Reinstate human health water quality criteria applicable to waters in the State of Washington by revoking the actions in the "Withdrawal of Certain Federal Water Quality Criteria Applicable to Washington," 85 Fed. Reg. 28494 (May 13, 2020).
 - Reinstate the 2014 Proposed Determination Pursuant to Section 404c of the Clean Water Act for Pebble Deposit Area, Southwest Alaska.
- 4. Require Alaska to Update Water Quality Standards to Incorporate Tribal Fish and Shellfish Consumption Rates.**

Unlike Oregon, Washington, and Idaho, Alaska has yet to update its fish consumption rates ("FCR") and corresponding water quality standards for toxics. While there are many contributions to the State's water quality decisions, the FCR is one of the ones with the most potential variability and greatest possible impact on water quality standards. Unfortunately, Alaska's ambient water quality criteria for the protection of human health are based on the lowest FCR allowed by EPA, 6.5 grams/person/day (an amount roughly the size of a small strawberry). That underestimation is compounded in Alaska Native communities, which consume the highest amount of fish per capita in the Nation. Alaska's water quality standards will not protect Alaska Native and rural residents from unsafe exposure to pollutants, nor will they protect the ecosystems that support our customary and traditional hunting and fishing resources. According to regional nonprofit Southeast Alaska Conservation Council ("SEACC"), the average Alaskan eats between 175 and 250 grams of fish/day, this does not consider the increased amounts by Alaska Natives.

A March 19, 2019 EPA-funded study, Alaska Statewide and Regional Estimates of Consumption Rates in Rural Communities for Salmon, Halibut, Herring, Non-Marine fish, and Marine Invertebrates, found that Alaska fish and shellfish consumption is significant:

After applying the statistical weighting, the statewide mean consumers only use rate in rural communities is 149 grams per day, and the per capita mean rate (consumers and non-consumers combined) is 141 grams per day. The consumers only 90th percentile rate is 308 grams per day, and the per capita 90th percentile rate is 302 grams per day. The six regions varied widely in their use rates. For example, the Western region had the highest means and 90th percentiles, exceeding those of the Southcentral region, which had rates that were 68% to 80% lower than corresponding Western rates. The consumers only mean varied from 113 to 190 grams per day across regions (per capita range: 105–183 grams per day). The regional variation in 90th percentile consumers only rates was 217–379 grams per day (per capita range: 209–376 grams per day).

The difference between the current approved rate of 6.5 grams per day and actual consumption is significant. It is long past time that the FCR in Alaska be updated.

5. Increase Funding and Flexibility for Tribal Programs.

The RTOC believes that EPA should take actions to increase funding and increase the flexibility in the use of existing EPA funding. Specifically, we support and recommend the National Tribal Caucus Budget Priority Guidance Fiscal Year 2022 document, which “respectfully urges EPA to increase tribal program funding to achieve parity with states.”¹

In addition, the RTOC urges that EPA revoke the 2013 Guidance on the Award and Management of General Assistance Agreements for Tribes and Intertribal Consortia (“GAP Guidance”) and develop new a new guidance that maximizes the opportunity and flexibility for the use of GAP funding with the minimum of procedural tasks (which divert from important environmental work). Use of GAP funding should be afforded to maximum amount of flexibility allowed under the statutory authority with the minimum amount of reporting consistent with the statutory mandate. This should include allowing Tribes to use GAP funds to participation in consultation-related activities and to prepare comments on actions impacting tribal resources.

Further, we request that all current GAP and other renewing grant funding be reassessed to adjust for inflation within the United States economy. For example, current funding allocated for the Swinomish Tribe in Washington state has not increased funding since 2001. Current inflation rates show that costs have increased approximately 48% from 2001 to the year 2020. This has led to a large number of increasingly large budget deficiencies within tribes who may be simply trying to maintain current programs and operations. We believe that a proportional increase is necessary to achieve the goals of those programs.

On behalf of the Tribes in Region 10, we look forward to working together with EPA to address the harm of the past administration and to strengthen the relationship between Tribes and EPA.

Sincerely,



Raymond Paddock
RTOC Co-Chair

¹ Available at http://region10rtoc.net/wp-content/uploads/2020/11/NTC-FY22-Budget-Recommendations_08262020.pdf.