



**EPA Region 10 Tribal Consortium (RTOC)
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November 12, 2021

Faisal Amin, Chief Financial Officer
Environmental Protection Agency
Office of the Chief Financial Office
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Sent via www.regulations.com

RE: Comments on the Draft FY 2022-2026 EPA Strategic Plan

Dear Mr. Amin:

Please find attached comments sent on behalf of the Tribal Caucus of the Region 10 Tribal Operations Committee (“RTOC”) on the Draft FY 2022-2026 EPA Strategic Plan (“Plan”). These comments are not sent on behalf of EPA Region 10 or any employees of EPA, but solely on behalf of the tribal government representatives of the RTOC.

The RTOC is concerned about the protection of the environment and its natural resources, including the land, water, and air that may impact the health of tribal members and supports environmental restoration and protection. During the Trump Administration, EPA 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. This Plan appears to be a leap forward to address climate, water, and other issues that were neglected during the last Plan.

Notwithstanding, the RTOC does have the following comments for improving the Plan to better address the needs of Tribes and their members.

1. Strengthen Tribal Consultation Procedures.

Cross-Agency Strategy 4 provides in part that EPA should, “Collaborate and engage effectively with Tribal nations in keeping with the Federal Government’s trust responsibilities.” We believe that additional actions are needed to meet that goal that should include the following:

- **Commit to obtaining 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 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 “share 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 the Plan contain a commitment for EPA to directly communicate with Region 10 tribal leaders on the development of how consultation will occur on various EPA proposal. For example, what consultation best practices should be incorporated in a proposal that impacts the entire Nation versus a single watershed. This approach is not without precedent. 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 the Interior’s relationship with Tribal governments.” We strongly believe the EPA should commit to do the same as an objective in the Plan.

- **To the extent possible, tribal consultations should be held in-person, including 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 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. The 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. Some of Tribes in Region 10 are managed by one Tribal Administrator alone, with monthly or even quarterly Tribal Council meetings. 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.

To get meaningful consultation, the timeframe needs to reflect the realities of overburdened Tribes.

Before COVID-19, Tribes were already overburdened. After COVID-19, Tribes are even more overburdened. To work towards a better relationship, Tribal input needs to be meaningful in order for the best solutions.

Tribes across the Nation are celebrating seeing requests for consultation because of President Biden’s commitment to strengthening the Nation-to-Nation relationship. However, with this massive influx in requests for consultation from every Federal Agency, in an already very overburdened atmosphere we are hearing that Tribes cannot keep up.

- **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.

- **EPA should utilize the NTC and RTOCs to develop consultation calendar, to develop plans for tribal outreach, and to develop appropriate time frames for consultation.**

The Plan should incorporate a strategy for utilizing the assistance of the National Tribal Caucus (“NTC”) and the Regional Tribal Operation Committees (“RTOCs”) to develop a consultation calendar that provides Tribes in advance with potential consultation opportunities that will occur during each Fiscal Year and utilizes the NTC and RTOCs to develop consultation strategies and appropriate time frames for consultation. In addition, the Plan should have a specific objective of conducting an annual Inter-RTOC/NTC conference where those organizations can network between themselves and EPA officials and discuss best practices in consultation and administering their responsibilities effectively and efficiently.

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

As part of meeting Cross-Agency Strategy 4, the RTOC believes that EPA should reaffirm the important principles outlined in its 1984 Indian Policy and amend/expand that policy to address the key 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. Require States to Update Water Quality Standards to Address Disproportionate Impacts of Pollution on Tribal People by Incorporating Tribal Fish and Shellfish Consumption Rates.

Goal 2 of the Plan calls for EPA to “take decisive action to advance environmental justice.” One concrete action EPA can take is to require States to address the disproportionate impacts of water pollution on Tribal people, who often eat greater amounts of fish and shellfish, by updating their fish consumption rates (“FCR”) and corresponding water quality standards for toxins . 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.

For example, 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).

This problem is not unique to Alaska. EPA should make this a specific objective under Goal 2. It is long past time that the FCRs be updated.

4. Increase Funding and Flexibility for Tribal Programs.

The RTOC believes that the Plan should include 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 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 the 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 participate 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

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

trying to maintain current programs and operations. We believe that a proportional increase is necessary to achieve the goals of those programs.

5. Set Stronger Climate Goals.

Objective 1.2 must include more robust goals to be met by September 30, 2026.

Climate change has disproportionate effects on the physical, mental, financial, and cultural wellbeing of Tribal Nations, who are traditionally underrepresented in the public process, typically have fewer resources for adapting to climate change; therefore, most vulnerable to displacement, adverse health effects, job loss, and other effects of climate change. Ensuring Tribes are a priority to stop the ship from moving backwards and start working towards solving the disproportionate crisis.

Specific Comments:

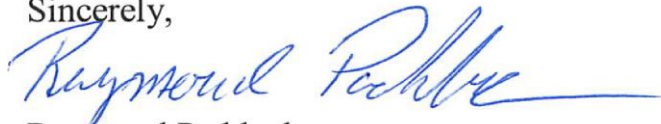
In addition to the comments above, the RTOC has the following specific comments:

- Objective 5.1 should be modified to provide a larger commitment to address Tribal water infrastructure. Tribal water infrastructure needs to be addressed individually to record annual infrastructure assistance to ensure the finance programs are leveraged similar to that of SCWRF, DWSRF, and WIFIA.
- Objective 5.2 (Protect and Restore Waterbodies and Watersheds) should include a strategy to finalize the development of core water quality standards applicable to Tribal waters. There are a number of Tribes that do not have water quality standards. The development of core water quality standards will ensure that there is not a regulatory morass in those areas and assist Tribes and EPA in implementing meaningful water quality programs.
- Objective 5.2 should also include a strategy to develop water quality standards for emerging pollutants of concern, include pharmaceuticals, PBDEs, and PFAS. These chemicals have significant impacts and are largely unregulated under the Clean Water Act. Action is needed to address the impacts of these chemicals.
- Objective 7.1 (Ensure Chemical and Pesticide Safety) should include a strategy to reexamine the current regulations for the inadvertent production of PCBs. PCB regulations exclude some manufacturing processes from regulation. See 40 C.F.R. § 761.1(f). These regulations allow PCB levels in some products as high as 50 million parts per million. In Region 10, many water bodies have water quality standards for PCBs in the part per quadrillion range. These lawful PCBs are contained in paints, pigments, and dyes that can easily end up in our waterway and in turn our fish and our bodies. This occurs through runoff (road paint and hydroseed have inadvertently produced PCBs) or through paper recycling (dyes and inks in paper which contain PCBs are discharged from paper mills that recycle). The National Congress of American Indians in 2014 urging EPA to “revise its rule so that the amount of PCBs authorized for commercial use is zero (0), and should seize every opportunity to reduce the use and production of toxics before they are released into the environment.” A copy of this resolution is available at

- <https://www.ncai.org/resources/resolutions/urging-the-u-s-environmental-protection-agency-to-prohibit-the-use-of-pcbs-in-new-products>. It is long since time that EPA take action to reduce PCBs in our environment.
- Footnote 91 on page 90 refers to “EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussion Tribal Treaty Rights.” This should reference EPA’s broader consultation policy – “EPA Policy on Consultation and Coordination with Tribes” available at <https://www.epa.gov/tribal/epa-policy-consultation-and-coordination-indian-tribes>.
 - Page 96 references stakeholders consulted for the development of questions regarding drinking water systems. No tribal entities are listed. EPA should include any tribal entities consulted in the list or commit to including tribal entities in any future discussions.

The RTOC appreciates your consideration of these comments and your action to protect the health of Native people in Region 10.

Sincerely,

A handwritten signature in blue ink that reads "Raymond Paddock". The signature is fluid and cursive, with a long horizontal stroke at the end.

Raymond Paddock

Region 10 RTOC, Tribal Caucus Co-chair