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December 14, 2020

Mr. Daniel Hooper
Clean Air Markets Division
Office of Atmospheric Programs (Mail Code 6204M)
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460
Hooper.Daniel@epa.gov

Re: Revised Cross-State Air Pollution Rule Update for the 2008 Ozone
NAAQS; Docket ID No. EPA-HQ-OAR-2020-0272

Dear Mr. Hooper:

The National Tribal Air Association (NTAA) is pleased to submit these comments and recommendations regarding the U.S. Environmental Protection Agency's (EPA's) proposed Revised Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 86 Fed. Reg. 68964 (Oct. 30, 2020) (Proposed Revised CSAPR Update or Proposed Rule).

The NTAA is a member-based organization with 151 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 important to understand 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 Proposed Rule, in that it will help reduce the interstate transport of ozone emissions that contribute significantly to nonattainment, or interfere with maintenance, of the 2008 Ozone National Ambient Air Quality Standards (NAAQS). While the Proposed Rule is a step in the right direction, the EPA could and should be doing more to protect those downwind, including particularly susceptible Tribal communities in the Eastern United States, from harmful ozone air pollution. The NTAA also finds that the EPA has not met its obligations to meaningfully consult with Tribes on regulations that impact them and meaningfully consider the Proposed Rule's impacts.

I. Health and Environmental Impacts of Ozone

Ground-level ozone is not emitted directly into the air, but is a secondary air pollutant created by chemical reactions between oxides of nitrogen (NO_x), carbon monoxide (CO), methane (CH₄), and non-methane volatile organic compounds (VOCs) in sunlight. 85 Fed. Reg. at 68973-74. Emissions from electric utilities, industrial facilities, motor vehicles, gasoline vapors, and chemical solvents are some of the major anthropogenic sources of these ozone precursors. *Id.* at 68974. The potential for ground-level ozone formation increases with warmer temperatures and stagnant air. *Id.* Therefore, ozone levels are generally higher during the summer months. *Id.*

Exposure to ground-level ozone can harm the human respiratory system (the upper airways and lungs), aggravate asthma and other lung diseases, and cause premature death from respiratory and cardiovascular diseases. 85 Fed. Reg. at 68966, 68974.¹ Such effects can lead to increased visits to doctors, hospital admissions, and school absences, and may increase the risk of premature death from heart or lung disease.²

Indian Tribes and their members are disproportionately susceptible to the health effects of ground-level ozone.³ Exposure to ground-level ozone can adversely affect Tribal community members including children, Tribal elders, members with asthma, and others who gather and use plants of cultural significance. Studies show that Native Americans and Alaska Natives have a disproportionate incidence of asthma and are at risk from exposure to ozone. Specifically, American Indian and Alaska Native children are 60 percent more likely to have asthma as non-Hispanic white children.⁴

Ground-level ozone has also been shown to adversely impact the environment, which includes impacts to vegetation, ecosystems, and their associated services. Ground-level ozone causes visible foliar injury to plants and trees, decreased photosynthesis, changes in

¹ See also *Integrated Science Assessment (ISA) for Ozone and Related Photochemical Oxidants*, EPA/600/R-20/012, at ES-4 to ES-10 (Apr. 2020).

² *Ground-Level Ozone Pollution: Health Effects of Ozone Pollution*, EPA <https://www.epa.gov/ground-level-ozone-pollution/health-effects-ozone-pollution>.

³ *Status of Tribal Air Report*, NTAA, at 16-17 (June 2020), <https://7vv.611.myftpupload.com/wp-content/uploads/2020/06/2020-NTAA-Status-of-Tribal-Air-Report.pdf>; Wiecks, Joy, Dara Marks-Marino, Jaime Yazzie, *National Tribal Air Association's 2020 Update to: A White Paper Detailing the Connections Between Air Pollution, Tribes, and Public Health*, NTAA (Apr. 2020), <https://7vv.611.myftpupload.com/wp-content/uploads/2020/05/NTAAs-2020-White-Paper-Detailing-the-Science-and-Connections-Between-Air-Pollution-Tribes-and-Public-Health.pdf>; EPA, Tribal Air and Climate Resources, <https://www.epa.gov/tribal-air> (“Tribal citizens are often disproportionately affected by air pollution, while their governments play an increasingly valuable role in controlling and reducing pollution and its adverse health effects. Tribes are also particularly vulnerable to the impacts of climate change and are taking steps to prepare for and become more resilient to these changes.”).

⁴ *Status of Tribal Air Report*, NTAA, at 16-17, 21, 26 (June 2020), <https://7vv.611.myftpupload.com/wp-content/uploads/2020/06/2020-NTAA-Status-of-Tribal-Air-Report.pdf>; U.S. Dept. of Health and Human Servs., *Asthma and American Indians/Alaska Natives*, <https://www.minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlID=30>.



reproduction, and loss in forest growth and in the biomass of trees.⁵ Further, ground-level ozone can make sensitive species more susceptible to certain diseases, insects, competition, harsh weather, and other pollutants, which, in turn, can have adverse impacts to ecosystems such as changes to habitat quality and water and nutrient cycles, and loss of species diversity.⁶ Some of these species include those on which Indian Tribes depend for subsistence, medicine, or other traditional practices that have existed since time immemorial. Many of these practices take place during the summer months, also the period during which ground-level ozone is most prominent.

The NTAA supports the Proposed Rule for the health and environmental benefits that it will provide based on an expected reduction in ground-level ozone, particularly for Tribal individuals that are disproportionately impacted by exposure to ozone partly due to the disproportionate incidence of asthma, hypertension, and diabetes in their communities.

II. The Proposed Rule Does Not Go Far Enough to Eliminate Harmful Interstate Ozone Pollution

Clean Air Act Section 110(a)(2)(D)(i)(I), also known as the “good neighbor provision,” requires states to prohibit emissions that will contribute significantly to nonattainment or interfere with maintenance in any other state with respect to any primary or secondary NAAQS. 42 U.S.C. § 7410(a)(2)(D)(i)(I). Although states have the principal responsibility to implement this provision, the Act also requires the EPA to fill a backstop role by issuing Federal Implementation Plans (FIPs) where states fail to submit good neighbor State Implementation Plans (SIPs) or the EPA disapproves a submitted good neighbor SIP.

In 2016, the EPA published the Cross State Air Pollution Rule Update, which finalized FIPs for 22 states that the EPA found failed to submit a complete good neighbor SIP (15 states) or for which the EPA issued a final rule disapproving their good neighbor SIP (7 states). Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74504 (Oct. 26, 2016). That Rule included new NO_x ozone season emission budgets for electric generating units to reduce interstate transport. These emission budgets took effect in 2017 to assist downwind states with attainment of the 2008 ozone NAAQS by the 2018 Moderate area attainment date. But the EPA acknowledged at the time that the Rule promulgated for 21 of the 22 states only partially addressed good neighbor obligations under the 2008 ozone NAAQS. Despite this, in 2018, the EPA published the CSAPR Close-Out, concluding that the CSAPR Update was a complete remedy based on air quality analysis of the year 2023. Determination Regarding Good

⁵ 85 Fed. Reg. at 68974; *Ground-Level Ozone Pollution: Ecosystem Effects of Ozone Pollution*, EPA <https://www.epa.gov/ground-level-ozone-pollution/ecosystem-effects-ozone-pollution>. Visible foliar injury is a visible bioindicator of ozone exposure in plant species, with the injury affecting the physical appearance of the plant.

⁶ *Ground-Level Ozone Pollution: Ecosystem Effects of Ozone Pollution*, EPA <https://www.epa.gov/ground-level-ozone-pollution/ecosystem-effects-ozone-pollution>; *Regulatory Impact Analysis of the Proposed Revisions to the National Ambient Air Quality Standards for Ground-Level Ozone*, EPA-452/P-14-006, chapter 6 (Nov. 2014), <https://www3.epa.gov/ttn/ecas/regdata/RIAs/20141125ria.pdf>.



Neighbor Obligations for the 2008 Ozone National Ambient Air Quality Standard, 83 Fed. Reg. 65878 (Dec. 21, 2018).

Both these actions have been found unlawful: the EPA has twice been admonished that it cannot continue to allow significant contributions to downwind air quality problems beyond the statutory dates by which downwind states must demonstrate their attainment of ozone air quality standards. *New York v. EPA*, 781 Fed. App'x 4, 7 (D.C. Cir. 2019); *Wisconsin v. EPA*, 938 F.3d 303, 318-20 (D.C. Cir. 2019). Under the Clean Air Act, the EPA must eliminate “significant contribution” entirely, not just partially.

While the Proposed Rule is a step in the right direction, it still allows significant interstate contributions to unhealthy ozone levels to continue. In particular, the Proposed Rule does not force sufficient ozone reductions to meet Clean Air Act attainment requirements by the applicable deadlines. The proposed NO_x emissions budgets are still too high; electric generating units can and should do more to curb emissions in the near-term, based on existing NO_x controls and operating changes, such as requiring units not operate on high-ozone days. The EPA should also have already looked beyond just the power sector, to additional controls on NO_x emissions from industrial sources and the transportation sector. The Proposed Rule fails to consider and propose whether and how other emitting sources, including facilities such as petroleum refineries, cement plants, industrial boilers and combustion turbines, paper mills and steel plants, should become subject to new emission limits to mitigate interstate transport.

Additionally, while this Proposed Rule focuses on the 2008 Ozone NAAQS, the Proposed Rule’s failures will hinder compliance with the tighter 2015 Ozone NAAQS.

III. The EPA Has Not Complied With Its Tribal Consultation Obligations

The Proposed Rule states that it has Tribal implications: both if a new electric generating unit is built in Indian country in the Eastern United States and for Tribal air quality in the Eastern United States. 85 Fed. Reg. at 69036. Yet the EPA has not consulted with Indian Tribes on the Proposed Rule. Much of the consultation described in the Proposed Rule regards past iterations of the Rule, *id.*, which the NTAA previously commented was also insufficient.⁷ With respect to the current Proposed Rule, the EPA minimally states that:

EPA informed tribes of our development of this proposal through a National Tribal Air Association—EPA air policy conference call on June 25, 2020. EPA plans to further consult with tribal officials under the EPA Policy on Consultation and Coordination with Indian Tribes early in the process of developing this proposed regulation to solicit meaningful and timely input into its development. EPA will facilitate this consultation before finalizing this proposed rule.

85 Fed. Reg. at 69036. On its face, this is insufficient.

⁷ NTAA Comments on Proposed Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, (Jan. 20, 2016), <https://beta.regulations.gov/comment/EPA-HQ-OAR-2015-0500-0243>.



Executive Order 13175 explains: “The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions.” Consultation and Coordination With Indian Tribal Governments, § 2(a), 65 Fed. Reg. 67249 (Nov. 6, 2000). The Executive Order makes clear that consultation must occur during the development of the policies. *Id.* § 5(a). The EPA’s Policy on Consultation and Coordination With Indian Tribes explains: “Consultation is a process of meaningful communication and coordination between EPA and tribal officials *prior to* EPA taking actions or implementing decisions that may affect tribes.”⁸ The Policy continues:

Consultation should occur early enough to allow tribes the opportunity to provide meaningful input that can be considered prior to EPA deciding whether, how, or when to act on the matter under consideration. As proposals and options are developed, consultation and coordination should be continued, to ensure that the overall range of options and decisions is shared and deliberated by all concerned parties, including additions or amendments that occur later in the process.⁹

While the NTAA appreciates the EPA’s joining an NTAA conference call to discuss the development of the Proposed Rule, that does not satisfy the EPA’s consultations obligations. The conference call format does not allow for meaningful, iterative, back and forth discussion and joint process development. And, as explained above, the NTAA’s membership does not include all federally recognized Tribes, and 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.

Further, it is nonsensical for the EPA to state its intent to further consult with Tribal officials under the EPA’s Policy *early* in the process of developing this proposed regulation, when the Agency has *already* released the proposed regulation and still has not consulted. As NTAA explained in 2015, if the EPA knew that it was proceeding with development of the Proposed Rule, it should have initiated consultation with Tribes at that time. The EPA again has avoided its responsibilities and now makes a statement that it plans to consult with Tribes moving forward, after release of the Proposed Rule. This is completely unacceptable.

Given these continued violations, the NTAA again requests that the EPA:

1. Make a genuine effort to provide Tribes with any additional resources and assistance that they might require to engage in effective government-to-government consultation;
2. Ensure that government-to-government consultation meetings with Indian Tribes result in meaningful dialogue rather than simply pro forma consultation;

⁸ EPA Policy on Consultation and Coordination with Indian Tribes, at 1 (May 4, 2011), <https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf> (emphasis added).

⁹ *Id.* at 7.



3. Send a letter to each Tribal chairperson with copies provided to appropriate staff (e.g., Tribal administrator, environmental manager) that asks each Indian Tribe how it would like to be consulted on the Proposed Rule. Providing copies to different individuals of authority within the Tribe will provide better assurances that the Tribe is clearly made aware of the Proposed Rule. Asking each Tribe about how it would like to be consulted respects its individual sovereignty and Tribal cultures, and helps to ensure that true government-to-government consultation occurs;
4. Provide assurances to Indian Tribes that the most senior-level EPA officials will be engaged in government-to-government consultation since they will likely be represented by their highest-level officials such as Tribal chairpersons and/or council members; and
5. Provide adequate time to Indian Tribes to review and provide comments concerning the Proposed Rule.

Additionally, the NTAA is disheartened by the EPA's failure to analyze Tribal impacts of the Proposed Rule. The United States has a trust responsibility to recognize and protect Tribal treaty rights, lands, assets, and resources. *See, e.g., Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (United States has a "moral obligation of the highest responsibility and trust"); American Indian Policy Review Commission (1973) (U.S. trust responsibilities include protection and proper management of Indian resources, properties, and assets). In its Indian Policy, the EPA recognizes the federal trust responsibility and states it will "give special consideration to Tribal interests in making Agency policy," including "in making decisions and managing environmental programs affecting reservation lands."¹⁰

As explained above, Tribal populations suffer disproportionately from health discrepancies that leave them more vulnerable to impacts from pollution. This was not acknowledged in the analysis for this rule. The EPA further ignored impacts to Tribal populations that have a subsistence lifestyle, where hunting, fishing, and gathering provide a greater proportion of the nutritional needs of these populations. Tribal and other minority populations bear a disproportionate amount of the burden of pollution from many industries. Not only did the EPA ignore these implications, but it has not offered Tribal consultation on this proposal, in direct disregard for Executive Order 13175.

A number of Tribes are located in nonattainment or maintenance areas for the 2008 8-hour Ozone NAAQS, and in areas that are or will likely be in nonattainment or maintenance areas for the 2015 standard. The EPA must consider and mitigate the impacts of upwind state ozone contributions to these Indian Tribes. It matters not if a Tribe has an implementation plan to regulate the ozone and meet the NAAQS. It only matters whether Tribes and their lands and resources are being protected or adversely impacted by upwind states, *i.e.*, are such states causing Tribal areas to exceed the Ozone NAAQS.

¹⁰ E. Scott Pruitt, *Reaffirmation of the U.S. Environmental Protection Agency's Indian Policy*, at 1, 3 (Oct. 11, 2017), https://www.epa.gov/sites/production/files/2018-03/documents/11oct17_epa_reaffirmation_pruitt.pdf.



IV. The Indian Country New Source Set Asides Should Not Revert to States

Indian Tribes are sovereign nations with inherent rights ensured by the U.S. Constitution, treaties, and legal precedent. These rights are separate from those enjoyed by states and should never be muddled by the federal government, let alone through an agency regulation. However, the NTAA finds that this has happened under the Proposed Rule, with the EPA carving out Indian Country new source set-asides from state NO_x ozone-season emissions budgets, and then allowing these set-asides to revert back to states if they go unused.

The NTAA recommends that the EPA establish a single new source set-aside for Indian Country (Indian Country Set-Aside) that would assume control over the existing Indian Country new source set-asides established for each state. This would provide a clear separation between state and Tribal jurisdictions under the CSAPR and would prevent these set-asides from reverting back to any state's new source set-aside if they go unused. The NTAA recommends further that the EPA either retire any unused set-asides contained in the Indian Country Set-Aside or, in government-to-government consultation with Indian Tribes, design a sale and distribution mechanism that would involve selling the unused set-asides to EGUs and distributing the sale proceeds through grants to Tribes for such purposes as assessing and/or mitigating the impacts of upwind state ozone contributions to such Tribes.

V. The Proposed Rule Has Concerning Unaddressed Environmental Justice Implications

The federal government recognizes that the burden of environmental impacts due to high levels of pollution often falls on communities of color, or communities that are socio-economically disadvantaged. For this reason, Executive Order 12898 was signed by President Clinton in 1994 to ensure that these communities do not experience a disproportionate amount of pollution. Executive Order 12898 mandates that: “[E]ach federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its program, policies, and activities on minority populations and low-income populations.”¹¹ In proposing this action, the EPA failed to look at the environmental justice implications of their proposed action pursuant to Executive Order 12898.

EPA Guidance explains that a regulatory action may involve a potential environmental justice concern if it could:

- Create new disproportionate impacts on minority populations, low-income populations, and/or indigenous peoples;
- Exacerbate existing disproportionate impacts on minority populations, low-income populations, and/or indigenous peoples; or

¹¹ Executive Order 12898 of Feb. 11, 1994, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (Feb. 16, 1994).



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- Present opportunities to address existing disproportionate impacts on minority populations, low-income populations, and/or indigenous peoples through the action under development.¹²

The Guidance explains that “some level of analysis is needed, be it qualitative, quantitative, or some combination of both.”¹³ Unfortunately, the Proposed Rule does not provide any environmental justice analysis.

The EPA’s Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples states: “This Policy provides early meaningful involvement opportunities for federally recognized tribes, indigenous peoples, and others living in Indian country, at all stages of Agency activity, including the development of public participation activities, the administrative review process, and any analysis conducted to evaluate environmental justice issues.”¹⁴ The EPA must analyze Tribal impacts, confer with Tribes on environmental justice issues, and pursue environmental justice through EPA’s Office of Environmental Justice. The Proposed Rule has failed to meet these responsibilities.

While environmental justice concerns may apply to many Tribal communities, there also needs to be recognition that Tribes are very distinct entities that preexist establishment of the United States. They possess authority that predates the U.S. Constitution regarding the governance of their own internal affairs. For these reasons, environmental justice is an important issue, but must never usurp Tribal sovereignty and self-determination. Further, environmental justice must never replace government-to-government consultation directly with Tribes. Any environmental justice actions must treat Tribes as sovereign nations with self-determination first and part of the environmental community second.

Not only is an environmental justice review required, it is a part of good government. Studies have shown that residents of environmental justice communities are more vulnerable to the impacts of pollution due to pre-existing health conditions that often are higher in these communities due to lack of access to adequate nutrition and health care. Doing the work of reaching out to these communities and taking a hard look at how environmental policies will impact their health is a much smarter approach than trying to address adverse health outcomes later on, along with the distrust that will have built up in the community as they have watched their health decline even further.

The Proposed Rule acknowledges that many environmental justice communities have voiced concerns about hot spots caused by emission trading programs, but believes that the

¹² EPA, *Guidance on Considering Environmental Justice During the Development of Regulatory Actions*, at 10 (May 2015), <https://www.epa.gov/sites/production/files/2015-06/documents/considering-ej-in-rulemaking-guide-final.pdf>.

¹³ *Id.* at 15.

¹⁴ EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples, at 2 (July 24, 2014), <https://www.epa.gov/sites/production/files/2017-10/documents/ej-indigenous-policy.pdf>.



Proposed Rule minimizes these concerns by utilizing the same 4-step framework used in previous iterations of the CSAPR.¹⁵ However, those earlier iterations also did not address environmental justice concerns or the issue of potential hot spots. As noted earlier, the EPA has not done its due diligence in conducting a full technical analysis for the Proposed Rule that considers the impacts of upwind state ozone contributions to downwind Indian Tribes. Absent such an analysis, how can the EPA claim that hot spots will not exist under the Proposed Rule, particularly in close proximity to Tribal lands? The NTAA finds that such a claim to be unsubstantiated.

The NTAA recommends that the EPA conduct a thorough environmental justice analysis of the Proposed Rule that assesses the impacts of upwind state ozone contributions to downwind Indian Tribes and makes it a required part of the planning process for state implementation plans. Further, the NTAA recommends that the EPA conduct a risk assessment that considers the cultural and subsistence lifestyles of such Tribes that could be impacted by upwind state ozone contributions.

VI. Conclusion

The NTAA appreciates this opportunity to comment on this Proposed Rule. The NTAA urges the EPA to fulfill its obligations towards Indian Tribes, Environmental Justice communities, and under the Clean Air Act, and then move forward with a more stringent update to Revised CSAPR Update. If you have any questions or require clarification from the NTAA please do not hesitate to contact the NTAA's Project Director Andy Bessler at 928-523-0526 or Andy.Bessler@nau.edu.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Wilfred J. Nabahe', is written over a horizontal blue line.

Wilfred J. Nabahe
Chairman,
NTAA Executive Committee

¹⁵ 85 Fed. Reg. at 69036.