

National Tribal Caucus Transition Strategy



Prepared by the National Tribal Caucus
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Introduction

Federally recognized Tribal Nations engaged in environmental program design, implementation, and evaluation encounter significant barriers when executing Tribal goals and objectives for the protection of human health and the environment in Indian Country and Native Alaskan Villages (NAVs). Federal agencies; such as the United States Environmental Protection Agency's (EPA), were mandated by the 1983 Federal Indian Policy and charged with three primary tasks. These tasks are: 1) to promote equitable government-to-government relations between the federal government and Indian Tribes; 2) to encourage Tribal self-government; and 3) to support the development of Tribal economies¹. This Presidential action spurred EPA to develop and implement an internal standard for operations that supports the objective of the 1983 Federal Indian Policy by supporting the role of Tribal Governments in matters affecting Indian Country and NAVs through nine key principles (US EPA, 1984).

An effective Tribal environmental program provides tailored environmental education, specific media training for Tribal staff, active pollution prevention programs/activities and ultimately receiving Federal credentials in order to conduct compliance assistance/enforcement activities. These areas must be adequately funded in order for the program to be completely effective in meeting Tribal needs in a manner that supports the EPA Strategic Goals.

Tribal Nations and NAVs across the United States rely heavily on the natural environment for their homes, daily sustenance and cultural activities. This is their Traditional Lifeways. As a result, any adverse change to the quality and quantity of these resources can have life or death ramifications. In many areas of the country, climate change has negatively impacted these resources in ways ranging from low water levels causing wild rice harvest to be canceled in the Great Lakes Basin to severe erosion of coastal regions and changing caribou migrations in Alaska. The effects of climate change are being experienced by these Tribal Nations /Villages on a daily basis. Therefore, it is imperative that funding be allocated to Tribal Nations and NAVs to conduct science/research activities critical to their unique locations with consideration to normal daily activities.

¹ Advisory Committee on Tax Exempt and Government Entities (ACT); II. Tribal Advice and Guidance Policy; Raymond C. Etcitty, Project leader; June 9, 2004

American Indian Environmental Office (AIEO)

On July 12, 1994, Administrator Browner signed an Action Memorandum that outlined the following:

On February 17, 1994, the first meeting of the Tribal Operations Committee was convened. During the meeting, Administrator Browner authorized Senior Managers to work on ways to strengthen Tribal environmental programs.

Then, on May 26, 1994, Administrator Browner announced plans to form the new Office of Indian Affairs. The July 12 Memo went on to say “Although this Office will have the lead for coordinating certain activities, most of the responsibility for developing and implementing the Tribal environmental protection programs will remain with the Regions and Headquarters Program Offices”.

The American Indian Environmental Office (AIEO) was eventually formed within the Office of Water. Being within a single media program diminishes AIEO’s ability to provide effective guidance, advice and oversight across the agency that impact Tribes and NAVs. The immediate result is a diminishment in the necessity to deal with the Tribal Nations and Native Alaskan Villages.

It is our recommendation that Administrator Browner’s July 12, 1994 Action Memo be revisited and serious consideration be given to move AIEO to the Administrator’s Office with an Associate Administratorship.

Clean Air & Climate Change Priorities

- Bioaccumulated Toxins
- Air Toxics
- NAAQS
- Indoor Air
- Climate Change

The role of tribal governments in environmental protection is little understood by most Americans. Most citizens are aware that the federal government has assumed a critical role in the protection of the nation's environment, through such landmark legislation as the Clean Air Act, Clean Water Act, Endangered Species Act, and National Environmental Protection Act, and through the actions of the EPA and other federal agencies. There can be little doubt that most individuals – including many in the environmental professions – are largely if not completely unaware of actual and potential roles played by Tribal Nations/governments in this area.

Tribal Nations/governments possess a unique legal status in the American system of federalism. Tribal governments are third sovereigns, along with the individual states and the United States. The parameters of this sovereignty, as a matter of federal law, have been determined through the complex, vacillating, and often contradictory action of the three branches of the US Government. Fortunately, when it comes to protecting air quality, Congress has provided a clear authorization for tribes to regulate under the authority of the Clean Air Act.

The 1990 Amendments to the CAA, section 301(d) authorized EPA to treat Indian Tribes “as States” under the Act, and required EPA to issue a rule by June 15, 1992 specifying the provisions of the Act for which it was appropriate to treat tribes as states. The EPA complied with this requirement in February of 1998 by finalizing the “Tribal Authority Rule” (TAR). In essence, the TAR provides that tribes may be treated in a manner similar to states for virtually all provisions of the Act, but on an optional basis. Therefore, implementation deadlines and sanctions do not apply. Instead, Tribal Nations are authorized to obtain delegation of federal authority to implement CAA programs, or parts of programs, as appropriate to the priorities, goals and objectives of independent Tribal Nations/governments.

The broad effects of global climate change directly affect tribal lifeways, particularly as it relates to subsistence resources. Tribal Nations that rely heavily on subsistence resources have been addressing current impacts from climate change with non-USEPA funding, for those Tribal Nations any new funding from USEPA will help them participate in this important policy development.

The NTC recommends a five year incremental Clean Air Act (“CAA”) funding increase to \$30 million to meet existing national tribal air need in Indian Country (\$21.3M in 2010); \$4.5 million for Tribal Nations to implement permit programs under the recently enacted Tribal New Source Review, PSD, and Title V rules; and \$3 million dollars to enable Tribal Nations/governments to fully participate in the development and implementation of Climate Change programs, including grant assistance to conduct tribal greenhouse gas inventories or to participate in regional inventory efforts.

Information provided for the NTC by the NTAA Executive Committee

Safe and Clean Water

Overarching Themes

- Impacts of fiscal stagnancy or cuts in program funding, which result in layoffs and impair the ability of tribes to provide adequate environmental protection. Tribal Nations have to do more work with less money (and, as a result, have demonstrated resourcefulness and ability to accomplish more than anyone else with limited funding).
- The importance of at least maintaining the current funding levels for (holding harmless) all tribal environmental programs.
- Importance of increasing the ability to be flexible and creative in the use of existing funding to accomplish tribally-defined environmental protection needs.
- Make TAS meaningful by providing direct, targeted funding to Tribal Nations as is done for states under certain statutes.
- Ensuring tribal access to funds provided to states, given that tribal demographics are often included in state funding formulas, and particularly where states are not using their full allotments.

Ensure Every Tribal Home Has Sustainable Access to Safe Drinking Water and Basic Sanitation

This is a fundamental environmental and public health issue that requires ongoing attention. However, tribal communities continue to lag behind the rest of the nation in this area, with approximately 7% of tribal homes continuing to lack access to safe drinking water and basic sanitation, compared with non-tribal .5% national average.

Achievement of this goal requires that both physical infrastructure and operation and maintenance needs be addressed by all responsible federal agencies. These needs include:

- providing funding for physical infrastructure where none exists (e.g. 30% homes on Navajo Nation that lack piped water and sanitation)
- providing funding for system upgrades for systems in disrepair; and to address new regulations (e.g. arsenic rule)
- providing for community growth
- assisting the many small drinking water systems and individual wells (non-public water systems) that serve tribal communities

U.S. commitment at Johannesburg Summit to reduce by half, by 2015, the population lacking sustainable access to safe drinking water and basic sanitation, captured in EPA's strategic plan as a specific commitment in Indian country and NAVs, is one step toward the Congressional policy of ensuring all tribal homes have access as soon as possible.

EPA must continue to work with Indian Health Service and other federal agencies, supporting all the recommended strategies of the National Infrastructure Task Force Access Subgroup, to meet this goal.

These strategies include recognition that funding levels are currently inadequate to meet the goal and must be increased when the political climate is right.

In the meantime, other strategies can help address tribal needs:

- lift, or at least increase from 1.5% to at least 3.0%, the cap on CWA and SDWA tribal set asides for infrastructure funding
- provide increased flexibility in the use of existing funds, for both infrastructure and operations & maintenance
- PWSS funding should be available as grants to support tribal utility capacity development
- unused or underutilized infrastructure funding (for instance, to states) should be redirected to meet tribal needs

Every Tribe Must Know Its Water Resources Are Clean Enough to Support Community Needs and Habitats, and Must Have the Capacity to Protect Waters Against Degradation

Some issues to highlight include:

- Water is one of the most precious resources, needed to support human life, subsistence, cultural practices, and habitats.
- Tribal Nations rely on CWA 106, 319 and 104 funding to support their water programs. Levels of program funding must, at the very least, be maintained; however, as more Tribal Nations develop programs, increased funding is needed.
- Need and results can be demonstrated to justify funding increases in CWA programs across the board.
- Continuing to approve tribal water quality programs is critical to protecting the nation's waters. The processing of TAS applications for section 303 programs is improving, but still too cumbersome, and must be more streamlined.
- Tribal Nations with approved TAS for section 303 programs should be truly treated "as states," with direct, targeted, continuous funding at a predictable and appropriate level.

Additional funding to support tribal programs can be drawn from states that aren't using their allotments.

Indian General Assistance Program (GAP)

Tribal Nations and NAVs understand the necessity to protect and improve human health and the environment. Most rely heavily (oft times exclusively) on the GAP funding to bear their basic environmental program costs. GAP is the one EPA program that provides the resources, both financial and technical, to Tribal/Alaskan village governments for the core of an environmental program. This program is particularly critical to NAVs, as it is the sole source of funding available to address their basic environmental needs.

One of the most successful Solid Waste program is the Backhaul program, implemented through the Yukon River Inter Tribal Watershed Council. This program has provided process that can be implemented under GAP to on a regional and national scale for Tribal communities and NAVs to help address the solid waste removal issues on a regional and national scale.

In FY04, the enacted GAP funding level was \$62.5 million. Since then, reductions and rescissions have reduced the annual funding level to \$56.03 million in FY08. In order for \$110,000 to be allocated to each federally recognized Tribal Nations /NAV, \$62.9 million is needed. Therefore, it is imperative that the GAP funding levels be increased to no less than the FY04 enacted level in order to have a minimal environmental presence in Indian Country.

Since FY 2003, the IGAP has been subjected to two reviews under the Program Assessment Rating Tool (PART) by the Office of Management & Budget and an audit by the USEPA Office of Inspector General (OIG). The program received PART scores of “Adequate” in 2003 and improved to “Moderately Successful” in 2007. Additionally, the OIG completed an assessment of GAP Best Practices by Tribes across the country and reported favorably about the use of GAP funds to complete a wide variety of projects to meet their environmental needs. Finally, an evaluation of the GAP was conducted by Industrial Economics, Incorporated (IEI) for EPA’s Office of Environmental, Economics and Policy Innovation. Appendix A, Page 19-20 of the 2007 PART Report indicates:

“The results of this evaluation clearly establish that GAP has been effective in building the foundation of environmental capacity among tribes, defined as capability in one or more of the five indicator areas – technical, legal, enforcement, administrative, and communications. This capability, in turn, has allowed tribes to achieve an environmental presence, i.e., the ability to respond promptly and effectively to tribal environmental concerns as they arise, as the overarching indicator of environmental capacity.

*Recommendations for ways EPA can enhance GAP to further support tribes’ ability to establish and sustain their environmental program include: 1) **consider developing a mechanism to support tribal program implementation**; 2) consider working with tribes and regions to enhance administrative, legal, and enforcement capacity; 3) **raise awareness of innovative environmental policy approaches to complement traditional codes and standards**; 4) **acknowledge cross-cultural differences**, and continue working with tribes to maintain a respectful dialog; and 5) track progress toward achievement of the new 2006-2011 strategic goals and targets.*

The first PART recommendation suggests “developing a mechanism” for implementation as opposed to stating that a legislative process is required. This would agree with Section 502 (d)(1) of the Indian Environmental General Assistance Program Act of 1992 (as amended), which states:

*“The Administrator of the Environmental Protection Agency shall establish an Indian Environmental General Assistance Program that provides grants to eligible Indian tribal governments or intertribal consortia to cover the costs of planning, developing, and **establishing environmental protection programs**”*

This statute directed EPA to establish the GAP and provide Tribal Nations with funds to plan and develop environmental protection programs as well as to *establish* environmental protection programs.

Alternative Environmental Funding

- Improve environmental funding mechanisms to Tribal Nations
- Streamline granting process.
- Reduce administrative/financial burden(s).
- Remove legal/jurisdictional pitfalls.
- Expand the use of the Direct Implementation Tribal Cooperative Agreement ("DITCA") authority through dedicated funding.

Background

The general nature and geo-locational attributes of Tribal Nations illustrate the various infrastructure, legal, financial, political, and environmental hardships placed on Tribal governments. These attributes elevate the disproportionate effects of conditions to individuals in Indian Country and NAVs. Tribal culture, its history, legends, traditions and practices, is deeply rooted in the environment and its natural resources. Subsistence life ways such as hunting, fishing and gathering present unique challenges to tribal environmental programs. Tribal cultures are as many and varied as the environmental conditions in which they evolved. Environmental stewardship is the foundation of tribal cultural, economic and political survival. However, most Native American communities do not have a tax base from which to finance governmental programs. Further, funding mechanisms used by federal agencies to support State environmental programs' goals and objectives are not applicable to Tribal governments and do not meet the standard of care expected or authorized by the 1983 Federal Indian Policy.

Proposed Alternative

In order to move toward full realization of the goals and objectives outlined in the 1983 Federal Indian Policy, the National Tribal Caucus (NTC) of the National Tribal Operations Committee (NTOC) discusses alternate funding options below and makes a recommendation to the Agency. This recommendation seeks to reduce the burden of inequitable funding mechanisms and inefficient administrative, technical, legal, and accountability standards currently experienced by Tribal governments. This recommendation, using funding models currently executed by other federal agencies, as well as models currently in place or under consideration by the members of the Indian Program Policy Council (IPPC) of US EPA, seeks to improve environmental program funding in Indian Country and NAVs.

PI 93-638

P.L. 93-638, the Indian Self-Determination Act (ISDA), authorizes Indian Tribes and organizations to contract and operate federal service programs within the Bureau of Indian Affairs and Indian Health Services with the flexibility of allocating funds based on Tribal priorities. The Act is a "commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy...." ISDA provides "Indian tribes with meaningful authority, control, funding, and discretion to plan, conduct, redesign, and administer programs, services, functions, and activities (or portions thereof) that meet the needs of the individual tribal communities." Programs typically funded under P.L. 93-638 range from social services to

facilities maintenance, transportation planning to job placement/training, and real estate to health education.

HUD's Block Grant

The Native American Housing Assistance and Self Determination Act of 1996 (NAHASDA) authorized direct block grants to tribal governments or tribally designated entities structured to provide flexibility in tribal planning, implementation, and administration of housing programs. NAHASDA eliminated nine of the 14 separate Native American housing assistance programs and replaced them with a single block grant. Funds can be used to develop new housing to meet shortages or to maintain existing units. Grants may also be used to provide housing services, administer units, or engage in crime prevention. In 2003, grants were available to approximately 575 Native American housing entities based on a noncompetitive allocation formula that considers population, housing need, and current assisted stock. (from *A Quiet Crisis, Federal Funding and Unmet Needs in Indian Country*, U.S. Commission on Civil Rights, 2003). HUD's approach was designed to address the unique concerns of Native American Tribes, provide programmatic flexibility and recognize the principle of Indian "self-determination" or "self-government." An EPA version of this model would replace all environmental assistance programs with a single block grant that supports capability and capacity development, program implementation and the administrative costs of a comprehensive environmental protection program that allocates funds based on tribal priorities.

EPA's Performance Partnership Grant (Ppg) Program

The Performance Partnership Grant (PPG) Program was a good first step toward establishing a more flexible funding mechanism that addresses administrative inefficiencies. When it works, this umbrella grant reduces the administrative burden of a managing a variety of separate environmental programs. PPGs also begin to incorporate the principle of Indian self-government described in EPA's Indian Policy. While making progress on all environmental programs included in a Performance Partnership Grant work plan, tribes can focus environmental protection funding where it is most needed. PPGs also provide an administrative basis for approaching environmental protection in more coordinated and multimedia way. A single, large budget can much more easily support integrated environmental management than can numerous, small, media-specific budgets where funding is tied to certain kinds of activities. However, Performance Partnership Grants fall short in several areas: (1) they do not encompass the universe of EPA grant programs, (2) they do not reduce the administrative burden effectively as a block grant (3) while PPG's reduce they do not eliminate financially and administratively burdensome cost share requirements, and (4) they do not address the jurisdictional pitfalls that exist under current grant authorities.

EPA'S Direct Implementation Tribal Cooperative Agreement (DITCA)

A second authority in which EPA provides funding to Tribes is through the Direct Implementation Tribal Cooperative Agreement ("DITCA") authority.

This tool provides a mechanism for Tribes to accomplish the statutory responsibilities assigned to the Agency. DITCAs enable Tribes to conduct environmental activities on the behalf of EPA on their lands. As such activities are undertaken under federal authority, they do not trigger jurisdictional entanglements. DITCAs also allow tribes the important step of exercising their programmatic capability that could ultimately lead to full tribal programmatic delegation. Because DITCAs fund the actual activity (i.e. inspections, compliance assistance, etc.), they

provide environmental results and meet strategic targets prized by both the Tribes and EPA. Thus, NTC, as it has in the past, requests that EPA provide permanent set-aside funding for DITCAs for Tribes and Native Alaskan Villages.

Finally, the appropriation language for DITCAs must be reauthorized annually. The NTC requests that the DITCA authority be made permanent.

Recommendation:

- The NTC recommends EPA address the priorities listed at the beginning of this document by evaluating the models described above to develop an alternative to the current federal authorization to operate a program method (also referred to as "treatment in a manner similar to states" or "TAS") and financially and administratively burdensome grant programs. No funding mechanism will succeed without adequate and consistent/reliable funding. As reported in "A Quiet Crisis, Federal Funding and Unmet Needs in Indian Country" in 2003, the U.S. Commission on Civil Rights found "evidence of a crisis in the persistence and growth of unmet needs" and concluded that "the conditions in Indian Country could be greatly relieved if the federal government honored its commitment to funding, paid greater attention to building basic infrastructure in Indian Country, and promoted self-determination among tribes." We support EPA's IPPC funding recommendation of \$500,000 per year per Tribe.