



www.ntaatribalair.org
 928.523.0526 office
 928.523.1266 fax

National Tribal Air Association
 P.O. Box 15004
 Flagstaff, AZ 86011-5004

January 11, 2019

Executive Committee

Region 1

Jan Paul
 Penobscot Nation

Marvin Cling
 Passamaquoddy Tribe

Region 2

Angela Benedict
 Secretary
 Saint Regis Mohawk Tribe

Steven Smith
 Shinnecock Nation

Region 4

Scott Hansen
 Treasurer
 Catawba Indian Nation

Tiffany Lozada
 Poarch Band of Creek Indians

Region 5

Brandy Toft
 Vice-Chairperson
 Leech Lake Band of Ojibwe

Joy Wiecks
 Fond du Lac Band of Lake
 Superior Chippewa

Region 6

Craig Kreman
 Quapaw Tribe of Oklahoma

Cherylin Atcitty
 Taos Pueblo

Region 7

Billie Toledo
 Prairie Band Potawatomi Nation

Tanner Zach
 Santee Sioux Nation

Region 8

Randy Ashley
 Confederated Salish &
 Kootenai Tribes

Linda Weeks-Reddoor
 Fort Peck Assiniboine-Sioux
 Tribes

Region 9

Wilfred J. Nabahe
 Chairman
 Colorado River Indian Tribes

John C. Parada
 Augustine Band of Cahuilla
 Indians

Region 10

Maggie Sanders
 Nisqually Indian Tribe

Allie McLaughlin
 Quinault Indian Nation

Alaska

Mary Mullan
 Alaska Native Tribal Health
 Consortium

Ann Wyatt
 Klawock Cooperative
 Association

William Wehrum
 Assistant Administrator
 Office of Air and Radiation
 US Environmental Protection Agency
 Mail Code 6101A
 1200 Pennsylvania Avenue NW
 Washington, DC 20460

RE: Revised Policy on Exclusions from “Ambient Air”

Honorable Assistant Administrator Wehrum:

The National Tribal Air Association (NTAA) is pleased to submit these comments on EPA’s draft guidance titled “Revised Policy on Exclusion from Ambient Air.”

The NTAA is a member-based organization with 137 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 also 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.

EPA has recently announced that it plans to revisit its longstanding interpretation of “ambient air,” defined in 40 C.F.R. § 50.1(e) as “the atmosphere, external to buildings, to which the general public has access.” This regulatory definition, and EPA’s interpretation of the term, is of key importance in implementing the Clean Air Act (CAA) because the statute, while using the term “ambient air” as part of the foundations of U.S. air regulation, provides no definition for the term. The core purpose of the CAA is to prevent pollution of ambient air to protect the public health and welfare, and one of the fundamental strategies the Act uses to reach this goal is the mandate to achieve and maintain National Ambient Air Quality Standards (NAAQS). In turn, those ambient air standards dictate State and Tribal Implementation Plan provisions, and are implemented through most of the major programs under the Act. *See, e.g.,* 40 C.F.R. part 60 (New Source Performance Standards repeatedly use the term ambient air in setting limitations for all source categories); 40 C.F.R. part 51, subpart I (new source review and prevention of significant deterioration programs’ purpose is to attain and maintain the ambient air standards). Considering the fundamental importance of the term and the nearly forty years of consistent interpretation by EPA, we have a number of concerns regarding the agency’s proposed change in policy.

First, we wish to share certain substantive concerns, including the potential negative impacts to health and welfare that would result from this reinterpretation in and near



Indian Country. Second, we believe the process EPA has followed here is entirely insufficient to inform the agency and the public regarding this major change in policy and its detrimental impacts on the people and the environment. Based on these concerns, we oppose this revision to policy and ask that EPA retain its longstanding approach. In the alternative, should the agency choose to move forward, we ask that the agency perform the analysis needed to support its decision-making process, and postpone final action until EPA, the Tribes, and the public have the opportunity to consider fully the impacts of this action.

Substantive Policy Issues

The NTAA anticipates that this proposal would allow sources of air pollution to expand the amount of area around each source that is exempted from ambient air, thus limiting the detection of the sources' air pollution further and bypassing violations of the NAAQS that the source may have caused under the previous policy. We are concerned about the effect this potential increase in air pollution will have on the health and welfare of indigenous peoples throughout the United States. In addition, as discussed in greater depth regarding our procedural concerns, because no data is available to inform the effects we can expect here, this increase in pollution and the scale of its effects is currently unquantifiable.

We expect the removal of the fencing requirement from EPA's understanding of ambient air to have disproportionate impacts on Tribes. Native Americans use the land in traditional ways, including pastoralism, to a greater extent and with greater duration than the average American. Additionally, air quality impacts extend to hunting, fishing, and gathering rights of Tribes in Ceded Territories, lands that Tribes transferred to the federal government in exchange for off-reservation rights by a treaty agreement. We expect this proposed policy will negatively affect the treaty rights of Tribes to continue to sustain themselves by accessing resources on ceded lands across the United States. For many Tribes, traveling over land or pasturing herds across open land is a way of life, and we anticipate the greater exceptions for "ambient air" under this revised policy would cause Native Americans to experience greater exposure to pollution than most Americans.

We also question the necessity of this action. Reversing longstanding policy should only be done for good reason and after careful analysis, and in this instance there appears to be little important policy gain from the change, rather certain clear detriments. Removing the fencing requirement would eliminate the existing bright line rule, which is far easier to implement than the nebulous and *ad hoc* considerations EPA and industry will need to engage in under the revised policy. Fences are not only clear and simple markers of boundaries, but provide easily identifiable boundaries managed by a particular facility and they provide a common sense and easily verifiable border for determining what is and is not "ambient air."

Further, the NTAA notes that should sources need an exception to the fencing requirement due to unusual circumstances, they may already receive one under EPA's existing interpretation. The agency has applied a rule of reason and, for example, granted exceptions where terrain makes fencing difficult but effectively excludes the general public. *See* EPA, AMBIENT AIR REVIEW TEAM OVERVIEW at 11, <http://www.cleanairinfo.com/regionalstatelocalmodelingworkshop/archive/2017/Presentations/2-6-2017-RSL-AART.pdf> (case study of Audubon Material (a.k.a. Central Plains Cement) ambient air analysis in which EPA determined terrain was sufficient to preclude access). EPA points out this flexibility in the revised policy's discussion of *REDOIL v. EPA*. 716 F.3d 1155 (9th Cir. 2012).



There, the agency was confronted with how to set ambient air boundaries for an offshore oil and gas drillship, and chose to use the Coast Guard's 500-meter effective safety zone around the ship at sea as a substitute for fencing, a common sense decision that was upheld by the Ninth Circuit. *Id.* at 1159, 1165. *REDOIL* demonstrates the flexibility to address unusual circumstances in EPA's existing understanding of "ambient air." While EPA uses *REDOIL* to support removing the fencing exception, the NTAA reads it as support for retaining the fencing requirement in addition to the existing flexibility EPA already applies. Fencing may not be practical over water; therefore, the necessity of an exception in that specific case does not justify altering the rule for every other instance.

In addition to the loss of a bright line rule and the accompanying implementation costs, we note that infrastructure costs may also follow on this policy change. If the agency or sources have set up monitoring equipment at the edge of the current ambient air for the source, that equipment, nationwide, must likely be moved and recalibrated. The NTAA requests an assessment of this matter and analysis of costs.

Procedural Concerns

Our substantive concerns here are aggravated by the lack of information and analysis available on this matter. EPA has released only a brief policy and legal document with no technical, staff-level analysis of its impacts on the environment or on the costs and benefits of this policy decision. While we acknowledge that this agency action is not a regulation, which would trigger sufficient environmental review and Executive Order 12866 costs and benefits analysis, this policy revision nevertheless will alter how air emissions and violations of the NAAQS are measured across the nation. We believe EPA's proposed revision amounts to a major agency action with a significant effect on the human environment, and therefore EPA should engage in some form of environmental analysis of the issue.

While 15 U.S.C. § 793(c) exempts actions taken under the CAA from National Environmental Policy Act (NEPA) analysis, Congress did so because the typical CAA action involves considerable environmental analysis mandated by the statute, and thus the functional equivalent of NEPA is achieved by the agency's work. There was no such analysis at all in this case; the agency is moving forward blindly, and the public, including the NTAA and its member Tribes, are almost completely uninformed about the implications of this action. At least some environmental analysis is called for here, and the agency should conduct this work to inform its decision and the public appropriately.

Also, considering the vast reach of the new policy, and the cost and benefit concerns we raise above, an analysis of the cost and benefits of this rule is necessary and we request that EPA perform that assessment.

Conclusion

EPA's current approach is not broken, and we see no justification for the agency to provide a fix. We believe that EPA's longstanding approach should be maintained, and we strongly oppose EPA's proposed policy change.



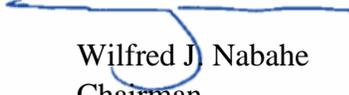
Fencing is a reliable, clear way to ensure that the ambient air exception applies reasonably to every site. The NTAA acknowledges that fencing was never a perfect solution to the question of how much atmosphere a source should be allowed to use to dilute its emissions, but it was a sensible solution to the issue. This proposed policy revision is seeking a solution without a problem. We therefore oppose EPA's proposed action and request that the agency maintain the longstanding interpretation without changes.

In the alternative, if EPA chooses to move forward with this policymaking process, we ask that the agency take a careful, measured look at the impacts of its decision and at what measures are consistent with the Act's language and purpose: to protect the public health and welfare by achieving and maintaining clean ambient air. To achieve this, the agency should perform the environmental analysis that would be required under the Clean Air Act for a rulemaking procedure, and the social costs and economic analysis that would be performed in a Regulatory Impact Analysis. This standard analytical approach to issues of national import is needed to address this significant policy change. The agency should then release this information in a second period of public review and comment to inform the agency, the NTAA, our member Tribes, and the general public regarding the impacts of this action.¹

In closing, the current interpretation of ambient air is based on a successful 40-year precedent and clear implementation, and we, therefore, vehemently oppose the finalization of this policy.

The NTAA appreciates this opportunity to comment on the draft "Revised Policy on Exclusion from Ambient Air." 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.

On Behalf of the NTAA Executive Committee,


Wilfred J. Nabahe
Chairman
National Tribal Air Association

Cc: [Ambient Air Guidance@epa.gov](mailto:AmbientAirGuidance@epa.gov)
Pat Childers, OAR
Laura McKelvey, OAQPS
Office of Information and Regulatory Affairs,
Office of Management and Budget (OMB)
Attn: Desk Officer for EPA,
725 17th St. NW, Washington, DC 20503

¹ We also note that the two key policy documents, which EPA relies on here, the 1980 letter from Administrator Costle and the 2007 Stephen Page memorandum, were not provided with the revised policy. While the NTAA obtained these documents and was able to review them to inform our comments, we request that EPA make these documents readily available to the general public in its second round of public review.