UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF
CONGRESSIONAL AND
INTERGOVERNMENTAL
RELATIONS

The Honorable John Barrasso
Chairman
Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find the U.S. Environmental Protection Agency's responses to the Committee's questions for the record following the April 22, 2016, hearing titled "Examining EPA's Unacceptable Response to Indian Tribes."

I hope this information is helpful to you and the members of the Committee. If you have further questions, please contact me or your staff may contact Carolyn Levine in my office at Levine.Carolyn@epa.gov or (202) 564-1859.

Sincerely,

Nichole Distefano
Associate Administrator

Enclosure

U.S. Environmental Protection Agency
Responses to Questions for the Record
From the
U. S. Senate Committee on Indian Affairs
Oversight Field Hearing
April 22, 2016

Questions for the Record submitted by Senator Daines:

Question 1: In November 2009, President Obama issued a Presidential Memorandum on Executive Order 13175, requiring all federal agencies to engage in "regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications," and that federal agencies are "responsible for strengthening the government-to-government relationship between the United States and Indian Tribes." Yet, at this hearing we have heard firsthand from tribal leaders that tribes still feel absent of just that meaningful consultation. Does the EPA plan to improve the process by which it consults with tribes to fully comply with Executive Order 13175? If so, how? If not, why not?

Response: The EPA recognizes the importance of appropriate consultation with tribes, consistent with the federal government's trust responsibility to federally recognized tribes. In response to President Obama's November 2009 memorandum on tribal consultation, the EPA adopted a formal policy on government-to-government consultation and coordination with federally recognized tribes in 2011. EPA's Tribal Consultation Policy is available on EPA's website: https://www.epa.gov/tribal/epa-policy-consultation-and-coordination-indian-tribes. The EPA issued its Tribal Consultation Policy after extensive nationwide consultation with tribes. Under EPA's Tribal Consultation Policy, which implements both EPA's 1984 Indian Policy and Executive Order 13175, the agency recognizes its obligations to consult with federally recognized tribes to provide an opportunity for their meaningful input, and to consider their views prior to taking actions that may affect tribal interests. Since the issuance of its Tribal Consultation Policy, the agency has seen marked improvement in the frequency and quality of its consultation and coordination activities with tribal governments. Tribal consultation has improved both the efficiency and the effectiveness of the EPA's program delivery for tribes.

EPA's Tribal Consultation Policy defines consultation as a process of meaningful communication and coordination between the EPA and tribal officials prior to the EPA taking actions or implementing decisions that may affect tribal interests. It calls for the agency to follow up with tribes to explain how their consultation input was considered in the agency's final action. The agency continues to evaluate its Tribal Consultation Policy and has developed a mandatory training course for all EPA employees, 'Working Effectively with Tribal Governments", which includes a special emphasis on consultation.

Question 2: How would EPA have worked differently with the three impacted tribes in the wake of the Gold King Mine spill to ensure full consultation? What lessons did EPA learn from this catastrophe?

Response: While the EPA notified the Navajo Nation Environmental Protection Agency and the Navajo Nation Department of Justice of the August 5, 2015, release in an email sent the evening of August 6, 2015, the agency recognizes that more should have been done in alerting downstream tribal, state, and local governments. In order to improve response related notifications and communications between the EPA and our state, tribal and local partners, the agency issued guidance to EPA regions, working through the Regional Response Teams, which includes representatives from the EPA, other federal agencies and states, to strengthen their Regional Contingency Plans, particularly regarding the need to alert and coordinate with downstream responders. Following the release, the EPA invited tribal representatives to participate in Area and/or Incident Command efforts. The EPA recognizes that substantive, early coordination and cooperation with tribal, state, and local governments is an extremely important component of emergency response action.

Question 3: In the same way tribes are impacted by the Gold King Mine spill have expressed grave concerns about EPA's lack of consultation following the spill, other tribes have felt neglected in other EPA decision-making processes. For example, EPA has largely ignored the Clean Power Plan's significant economic impacts to the Crow tribe whose economy relies on coal production. What was EPA's process to evaluate the final rule's economic impact to the Crow tribe and what did EPA find?

Response: The EPA recognizes the importance of appropriate consultation with tribes in developing rules, consistent with the federal government's trust responsibility to federally recognized tribes. Under EPA's 2011 Tribal Consultation Policy, which implements both EPA's 1984 Indian Policy and Executive Order 13175, the agency recognizes its obligations to consult with federally recognized tribes to provide an opportunity for their meaningful input, and to consider their views prior to taking actions that may affect tribal interests. EPA's 2011 Tribal Consultation Policy also encourages tribal officials to request consultation at any time on EPA actions or decisions. As proposals and options are developed, consultation and coordination is continued, to ensure that the overall range of options and decisions is shared and deliberated by all concerned parties, including additions or amendments that may occur later in the process.

The final Clean Power Plan (CPP) was developed after extensive and vigorous outreach to tribal governments, as described in the preambles to the proposed carbon pollution emission guidelines for existing electric generating units (EGUs) and the supplemental proposed carbon pollution emission guidelines for existing EGUs in Indian Country and U.S. Territories. After issuing the supplemental proposal, the EPA held additional consultation with tribes, as described in the preamble for the final rule. To ensure that tribes had the opportunity to participate in the action development process, the EPA conducted outreach and information sharing on the content of the proposal with tribal environmental professionals through the monthly National Tribal Air Association (NTAA) calls and held an informational session at the National Tribal Forum (NTF) in Anacortes, Washington in May 2014. We also held five webinars open to tribal environmental professionals; 11 listening sessions held at all ten EPA regions and at EPA headquarters in

Washington D.C.; four two-day public hearings for the proposed guidelines and a public hearing for the supplemental proposal; and three informational meetings (via teleconference) targeted specifically to the tribal community.

Specifically, the agency sent out four letters in 2013 and 2014 to tribal leaders and offered consultation on the rule, prior to proposal and after the proposal, to ensure tribes had the opportunity to participate in the process. As further recognition of the importance of appropriate consultation with tribes in the development of the emission guidelines, we held face-to-face informational meetings and government-to-government consultations with tribes.

Prior to issuing the supplemental proposal, the EPA consulted with tribes on several occasions. The EPA held a consultation with the Ute Tribe, the Crow Nation, and the Mandan, Hidatsa, Arikara (MHA) Nation on July 18, 2014. On August 22, 2014, the EPA held a consultation with the Fort Mojave Tribe. On September 15, 2014, the EPA held a consultation with the Navajo Nation. The July 18, 2014 meeting included government- to-government consultation with four representatives of the Crow Indian Tribe. After issuing the supplemental proposal, the EPA held additional consultation with tribes. On November 18, 2014, the EPA held consultations with the following tribes: Fort McDowell Yavapai Nation, Fort Mojave Tribe, Hopi Tribe, Navajo Nation, and Ak-Chin Indian Community. The EPA held additional consultations with individual tribes on December 16, 2014, January 15, 2015, April 28, 2015, and July 14, 2015.

The Crow Nation submitted comments on the proposed Clean Power Plan on the topic of the CPP's potential effect on their economy. The EPA carefully considered and evaluated the issues raised. The EPA conducted an analysis of the cost, benefit and economic impacts of the CPP in the Regulatory Impact Analysis for the Carbon Pollution Emission Guidelines Supplemental Proposal and for the final emission guidelines in the Regulatory Impact Analysis for the Clean Power Plan Final Rule (RIA) for illustrative implementation scenarios. Though this modeling and analysis does not focus on individualized, indirect impacts outside the regulated sector, as described above, the EPA undertook robust consultation and outreach efforts and considered all input. The EPA notes that this rule does not regulate coal mines and does not directly impose specific requirements on EGUs located in states, U.S. territories, or areas of Indian country and does not impose specific requirements on tribal governments that have affected EGUs located in their area of Indian country. For areas of Indian country with affected EGUs, the rule establishes CO_2 emission performance goals that could be addressed through either tribal or federal plans.

Question 4: What assistance has EPA provided to impacted tribes since the Gold King Mine spill? Has EPA continuously consulted with the affected tribes since the spill to address remaining needs, primarily safety hazards due to water contamination?

Response: EPA Regions 6, 8 and 9 continue to work with state, tribal and local entities to gather additional documentation where needed to make final determinations regarding reimbursement for submitted response costs. As of June 1, 2016, the EPA has provided more than $1.5 million to states, tribes and local governments through removal cooperative agreements.

In response to dialogue with affected tribes and states, the EPA also allocated $2 million to help tribes and states monitor water quality conditions in the Animas and San Juan Rivers. Of the $2

million, the Navajo Nation was allocated $465,000, the Southern Ute Tribe $130,000 and Ute Mountain Ute Tribe $40,000. The agency has also conducted follow up monitoring at two sampling sites on the Southern Ute reservation and one sampling site on the Ute Mountain Ute reservation.

The EPA also provided additional resources including:

- More than 100 EPA staff from multiple regional offices deployed to Incident Command Posts in Farmington, New Mexico and Durango, CO as well as to the Navajo Nation Emergency Operations Center (EOC) in Window Rock, Arizona, as well as community involvement staff deployed to engage directly with Navajo communities impacted by the release;
- An On-Scene-Coordinator and Coast Guard personnel deployed to support the operations of the Navajo Nation EOC;
- Support to the Navajo Nation, including three native speakers;
- More than one million gallons of livestock and agricultural water, and nearly 8,500 bales of hay provided to Navajo communities along the San Juan River in conjunction with the Bureau of Indian Affairs; and
- Community involvement staff who attended meetings at the invitation of Chapter presidents and local officials, and shared critical information about emergency water and hay provisions and response activities with residents, reaching an estimated 1,100 community members at nine public meetings over ten days.

Question 5: Mr. Bates' testimony details how EPA has failed to provide the Navajo Nation the assurances that the tribe's livestock and agricultural products will be safe for sale and consumption. When will EPA provide those assurances?

Response: The San Juan River has historically received pollutants from a variety of sources, including abandoned mines. During the response to the Gold King Mine release, metal concentrations exceeded Navajo Nation's agricultural screening levels for short durations. Given the short duration of the exceedances, the EPA believes the San Juan River is safe for agriculture and irrigation. Historical data indicates the San Juan River surface water has previously exceeded Navajo Nation's agricultural screening levels. During the Gold King Mine response, the EPA consistently shared its analysis of the data with Navajo Nation government officials.

Through the proposed National Priorities List listing for the Bonita Peak Mining District, the EPA is taking an important step towards addressing ongoing pollution from abandoned mines in the San Juan River Basin. The EPA is also providing Clean Water Act funding to multiple jurisdictions, including $465,000 to Navajo Nation, to conduct additional monitoring and sampling in the watershed. In addition, the EPA is providing funding to support elements of a "preparedness plan" to inform a real time notification system in the event of any seasonal high-level flows associated with the many mine sites in the Upper Animas watershed.