July 8, 2020

W. Scott Mason IV, Director
American Indian Environmental Office
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Transmitted via email to Mason.Walter@epa.gov

Re: EPA's Draft Guiding Principles for Consulting with Alaska Native Claims Settlement Act Corporations

Dear Director Mason:

On behalf of the National Tribal Water Council, I am pleased to submit these comments on EPA's proposed Guiding Principles for Consultation with Alaska Native Claims Settlement Act Corporations ("ANCSA"). We recognize and respect the important role of ANCSA Corporations in managing the property assets of tribal shareholders who are the citizens of Alaskan Tribes. We also support the inherent sovereignty of Alaska Native Tribes, which are not corporations but governments with inherent public trust responsibilities for protecting the health and welfare of their citizens. Thus, we urge the agency to craft consultation protocols for ANCSA Corporations that maintain and support EPA's long-standing commitment to tribal environmental self-determination and government-to-government partnerships with tribes.

Background

We understand EPA is legally required to consult with ANCSA Corporations as a result of consolidated appropriations acts Congress passed in 2004. That law directed federal agencies to "consult with Alaska Native Corporations on the same basis as Indian Tribes under Executive Order No. 13175." Consolidated Appropriations Act, 2004, Public Law 108-199, Div. H. § 161, 118 Stat. 3, 452 (2004) as amended by Consolidated Appropriations Act, 2005, Public Law. 108-447, Div. H., Title V. § 518, 118 Stat. 2809, 3267 (2004). In March 2019, the Government Accountability Office issued a report, *Tribal Consultation: Additional Federal Action Needed for Infrastructure Projects* (GAO-19-22), which recommended that EPA "develop a documented policy or clarify existing

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policy" to implement the statutory consultation requirement. EPA responded by proposing the Guiding Principles for Consultation with Alaska Native Claims Settlement Act Corporations (Dec. 19, 2019), and began consulting with tribal leaders on them. This comment letter is submitted as part of the Consultation Input Period on behalf of the member tribes of the National Tribal Water Council.

The National Tribal Water Council ("NTWC") was formed by EPA to provide EPA with technical input from Indian Country to strengthen EPA's coordination with tribes, and to allow EPA to better understand issues and challenges faced by tribal governments and Alaska Native Villages as they relate to EPA water programs and initiatives. Further, the NTWC advocates for the best interests of federally-recognized Indian and Alaska Native Tribes and tribally-authorized organizations in matters pertaining to water. The NTWC also advocates for the health and sustainability of clean and safe water, and for the productive use of water for the health and well-being of Indian Country.

Contextual Overview

The Alaska Native Claims Settlement Act required local Native communities and Native regional associations to incorporate under the State of Alaska's laws. So-called "village corporations," could be for profit or nonprofit, 43 U.S.C. § 1607(a), whereas "regional corporations" were required to be for profit, *id.* at § 1606(d). Thus, ANCSA Corporations are creatures of statute with no inherent powers or responsibilities for the general welfare of Alaska natives. Alaska's Corporations laws require corporate directors and officers perform their duties in good faith and with the level of care necessary to serve the best interests of the corporation. *See* AS 10.06.453(b), 483(e). Failure to exercise that fiduciary responsibility can subject directors and officers to shareholder lawsuits. Challenging economic times and meeting the desperate economic needs of their shareholders through dividends present the risk of bankruptcy despite best efforts. For these reasons, most ANCSA corporate attorneys limit corporate purposes to promoting the economic development of regional and village shareholders, and corporations and corporate directors and officers focus their attention on maximizing shareholder value. That economic focus then is not on Alaska natives but on shareholders. The Settlement Act did not restrict corporate share ownership to Alaska natives, and stock is increasingly owned by non-native spouses, their children and even by organizations like the Salvation Army.

In contrast, Alaska Native Tribes are composed entirely of Alaska Natives. To be enrolled in an Alaska Native Tribe, one must provide proof of Alaska Native blood. To serve on a Tribe's Council, one must be an Alaska Native. They are governments of the people and by the people. These tribal governments possess a public trust responsibility for the health and welfare of the tribal citizens. Economic development is typically an important aspect of tribal welfare, but tribal governments' public trust responsibilities are much broader. They deliver health care, child care, elder care, social services, allotment protections and numerous other governmental functions. Importantly, they are federally recognized, and the federal trust responsibility runs to them. Numerous federal statutes like the Alaska National Interest Lands Conservation Act, the Migratory Bird Treaty Act, and the Marine Mammal Protection Act manifest the federal trust responsibility by including subsistence protections for Alaska Natives. Environmental protection of ANCSA lands and other traditional Indigenous territories is critical for cultural preservation and survival.

Comments

The Consolidated Appropriations Acts' provision for ANCSA Corporation consultation was the result of a stand-alone legislative rider. The congressional mandate thus lacks the programmatic context that would normally offer guidance on implementation directions. It also lacks congressional committee reports, hearings, debates or any other reliable indications of legislative intent. EPA is left with the bare requirement that "all Federal agencies shall hereafter consult with Alaska Native corporations on the same basis as Indian tribes under Executive Order No. 13175." The directive appears clear but it is intrinsically ambiguous, leaving EPA interpretive discretion. As you know, the well settled judicial rule is that courts defer to an agency's reasonable interpretation of an ambiguous statute it is charged with implementing. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

First, note that Congress could have spoken clearly had it desired corporate consultation in exactly the same manner as tribal consultation. In multiple environmental statutes, Congress has directed EPA to "treat an Indian tribe *as a* State" or to "treat Indian Tribes *as* States." *See* the Clean Water Act, 33 U.S.C. § 1377(e), the Clean Air Act, 42 U.S.C. § 7601(d), and the Safe Drinking Water Act, 42 U.S.C. § 300j-11(a)(1) (emphases added). While tribes are not states, those clear directives for the exact same treatment as states made sense because tribes are governments with inherent sovereignty like states. Perhaps because ANCSA Corporations are not governments with inherent sovereignty, Congress did not say that "Federal agencies shall treat Alaska Native corporations *as* Indian tribes for purposes of Executive Order No. 13175." *Cf.* Backcountry Against Dumps v. EPA, 100 F.3d 147, 150 (D.C. Cir. 1996) ("We think it significant that when Congress wants to treat Indian tribes as states, it does so in clear and precise language"). Instead, Congress directed federal agencies to consult with ANCSA Corporations "on the same basis as tribes," implying something less than full tribal consultation was required.

Second, and more importantly, Executive Order 13175 (2000) was fundamentally premised on the federal government-to-government relationship with Tribes, tribal self-determination and the federal trust responsibility. EPA's Indian Policy (1984), which has guided the agency's Indian program for nearly four decades, is also built on these concepts. So too is EPA's Policy on Consultation and Coordination with Indian Tribes (May 4, 2011). There, EPA took "an *expansive* view of the need for [tribal] consultation *in line with the 1984 [Indian] Policy's directive to consider tribal interests* whenever EPA takes actions that 'may affect' tribal interests." P. 2 (emphasis added). Such an expansive approach is inapplicable to consultation with nongovernmental entities over whom EPA has no trust responsibility. As those concepts simply do not apply to nongovernmental corporate entities, corporate consultation cannot be exactly the same as tribal consultation.

1. **Tailor EPA's tribal consultation approaches more appropriately to corporate consultation**

The proposed Guiding Principles document borrows so heavily from EPA's Tribal Consultation Policy that it inappropriately creates very nearly the exact same consultation for ANCSA Corporations as for federally recognized tribes. EPA should revise the Guiding Principles to make the scope of ANCSA Corporation consultation appropriate to non-governmental corporate entities, consistent with the statutory directive.

a. Maintain recognition of the distinction between tribal governments and corporations and clarify trust responsibility

Appropriately, the proposed Guiding Principles do not directly link references from the Tribal Consultation Policy on the federal government-to-government relationship with Tribes or tribal self-determination to ANCSA Corporations. That deliberate omission should be maintained. In addition, the proposed Guiding Principles partially acknowledge the distinction between Alaska Native Tribes and ANCSA Corporations but require clarification on that point. Principle 3 notes that "EPA's practice is to consult with ANCSA Corporations while recognizing the important differences between the Federal government trust responsibility to the sovereign governments of Federally-recognized Indian Tribes and the Corporation entities created by ANCSA." P. 1. The phrasing of the sentence raises an inference that EPA believes there is a federal trust responsibility to ANCSA Corporations distinct from the trust responsibility to tribes. The sentence should be revised to make clear EPA is not (wrongly) implying there is a federal trust responsibility to ANCSA corporate entities.

Principle 3 includes a second distinction: "Consultations with ANCSA corporations will occur based on a "government-to-corporation" relationship, rather than a "government-to-government" relationship, to reflect the distinction between sovereign governments and corporate entities." This distinction is clearer and should be retained, but the nature of a "government-to-corporation" relationship should be clarified to confirm the resulting consultation approach is not the same as the approach appropriate to sovereign tribal governments. For example, the Tribal Consultation Policy's promise that "EPA ensures the close involvement of tribal governments and gives special consideration to their interests," p. 4, is not applicable to ANCSA Corporations. Thus, ANCSA corporate consultation should be limited to process only; there should be no substantive component as is appropriate for sovereign tribal governments.

b. Remove four-phase framework

The proposed Guiding Principles copy a significant amount of the Tribal Consultation Policy's four phases of consultation (Identification, Notification, Input and Follow-up). That extensive copy-and-paste approach is inconsistent with the more limited "government-to-corporation" relationship. We recommend removing the detailed four phases of consultation and stating simply that consultations with ANCSA corporations will occur based on a "government-to-corporation" relationship, which is the general approach taken by the U.S. Department of the Interior, *see* https://www.doi.gov/sites/doi.gov/files/migrated/tribes/upload/ANCSA-Supp-Policy-on-Consultation_FRcopy2-27-12.pdf, the Department of Commerce, *see* https://2010-2014.commerce.gov/sites/default/files/documents/2013/august/doc_final_policy_1.pdf, and the National Oceanic and Atmospheric Administration (NOAA), *see* https://www.legislative.noaa.gov/policybriefs/NOAA%20Tribal%20consultation%20handbook%20111213.pdf. Some of these policies include the additional comment that government-to-corporation consultations will occur "with appropriate adjustments" given the unique status, structure, and interests of Alaska Native Corporations. We believe that including this or a similar statement would give the agency appropriate flexibility without committing to a specific, detailed framework more appropriate to tribal governments. At the same time, the agency should explain that the only reason there is a government-to-corporation consultation at all is due to the fact that Alaska Native Corporations are intended to protect *tribal* resources.

c. Remove corporation-initiated consultation, and corporation-initiated coordination for matters outside consultation

In two places the proposed Guiding Principles borrow from the Tribal Consultation Policy opportunities for corporation-initiated engagement with EPA. Beyond the detailed consultation protocols proposed, the Identification phase states that "ANCSA corporation officials may request consultation" and that EPA's practice is to "honor all requests." P. 2. Guiding Principle 4 says ANCSA Corporations "are encouraged to affirmatively raise issues with EPA for appropriate coordination" outside of the scope of consultation. These expansive opportunities were originally designed to ensure that the Tribal Consultation Policy achieved its purpose of implementing EPA's Indian Policy's commitment of giving special consideration to sovereign tribal governments' interests. PP 3-4. As such, they are not appropriate for corporate consultation and should be removed from the proposed Guiding Principles for ANCSA Corporation consultation.

d. Link ANCSA Corporation consultation to corporate lands and natural resources

The trigger for corporate consultation under the proposed Guiding Principles is when a regulatory action "has a substantial direct effect on an ANCSA Corporation and imposes significant compliance costs." Presumably, the latter reference means compliance costs on an ANCSA corporation. Since significant compliance costs will always be a substantial direct effect, that reference is redundant and unnecessary. More importantly, the trigger is broader than needed to satisfy the statutory requirement. The Settlement Act created Alaska Native Corporations to own and manage the lands and natural resources of Alaska Native Tribes. That is the primary operation of ANCSA corporations. Hence, a reasonable interpretation of the Consolidated Appropriations Acts is that the consultation requirement was intended to protect and preserve those tribal property assets. The trigger under the Guiding Principles should be revised to link consultation specifically to cases where EPA's regulatory action would have a substantial direct effect on lands and/or natural resources owned by an ANCSA corporation.

e. Include as a guiding principle protection of human health and the environment

One concept not borrowed from the Tribal Consultation Policy is EPA's "fundamental objective" to protect human health and the environment. P. 3. That omission, combined with the proposed Guiding Principles' consultation trigger of "imposing significant compliance costs" on ANCSA Corporations, inappropriately suggests EPA's main consultation focus is on preserving corporate profit margins. If EPA rejects our Comment 2 below and elects to issue a separate ANCSA Corporation consultation policy, it must restate the overriding objective of protecting human health and the environment.

2. Incorporate ANCSA Corporation consultation protocols into EPA's existing tribal consultation policy rather than issue as a separate policy

EPA's Tribal Consultation Policy applies to all federally recognized Tribes, including Alaska Native Tribes. Sec. III.A (definition of Indian Tribe). There is no separate consultation policy for a subset of Tribes. There is no separate consultation policy for Alaska Native Tribes. There is no need for a separate policy for ANCSA Corporations. Instead, EPA should amend its existing tribal consultation policy to address ANCSA Corporations so that all consultation protocols reside in one location. However, it must be emphasized and recognized that the government-to-corporation consultation does not carry the same weight as government-to-government consultation with tribes. The former does not hold the same trust obligation to tribal sovereignty.

The Department of Commerce and NOAA have taken this approach. Both have a general tribal consultation policy that includes a provision addressing consultation with ANCSA corporations. *See* Commerce Policy at sec. 8, available at https://2010-2014.commerce.gov/sites/default/files/documents/2013/august/doc_final_policy_1.pdf, and NOAA Policy at sec. VIII.E, available at https://www.legislative.noaa.gov/policybriefs/NOAA%20Tribal%20consultation%20handbook%20111213.pdf. Thus, they satisfy their legal obligations under the Consolidated Appropriations Acts without creating confusion or inadvertently implying that ANCSA Corporations interests are somehow superior to tribal interests. When the Department of the Interior proposed a separate ANCSA Corporations consultation policy similar to EPA's proposed guiding principles, two regional ANCSA Corporations and the Alaska Federation of Natives urged adoption of a single consultation policy. *See* comments of the Chugach Alaska Corporation, the Arctic Slope Regional Corporation and the AFN, available at https://www.doi.gov/Tribes/Tribal-Consultation-Policy.

EPA took a similar approach in addressing another agency-wide conceptual protocol in its Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples (2014). Rather than address Indian country environmental justice piecemeal, that Policy addressed in one place the critical EJ goal during federal direct implementation, tribal primacy *and* engagement with Indigenous grassroots organizations. So, too, EPA should not address piecemeal the important goal of meaningful consultation, but should include ANCSA Corporations in its 2011 Tribal Consultation Policy. We suggest adding to the 2011 Policy a new section (7) entitled "Consultation with Alaska Native Claims Settlement Act Corporations." This approach is consistent with the GAO's recommendation in its *Tribal Consultation* report that EPA "develop a documented policy *or clarify existing policy*" to implement the Consolidated Appropriations Acts' consultation requirement (emphasis added).

3. **Ensure express consideration of tribal interests implicated by ANCSA Corporation concerns**

ANCSA Corporations' ownership of significant Native property assets gives them resources to build technical capacity and obtain specialized outside expertise in ways that typically exceed the ability of Alaska Native Tribes. ANCSA Corporations are thus generally better positioned to assess EPA proposals and make substantive responses protective of their interests. That inadvertently presents the possibility that issues raised by ANCSA Corporations during consultation may seem weightier to the agency then those of Alaska Native Tribes. EPA should add explicit provisions for balancing the relevant concerns.

   a. **Provide for tribal input:** Upon completing an ANCSA Corporation consultation, EPA should draft a description of the substantive issues raised by ANCSA Corporations and provide it and the Corporation documents submitted to all Alaska Native Tribes whose interests are implicated. Further, EPA should provide an opportunity for tribal comments on those issues.

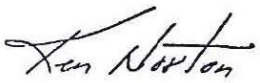
   b. **EPA analysis of tribal interests:** Upon completing an ANCSA Corporation consultation, EPA should complete a thorough evaluation of the extent to which concerns expressed by ANCSA Corporations differ substantively from concerns expressed by Alaska Native Tribes, and in deciding how to address those differences should give due consideration to the sovereignty and self-governance of federally-

recognized Indian Tribes. EPA's analysis and rationale for its final decisions should be communicated to Tribes as part of the final follow-up phase of consultation. This is consistent with the ANCSA Corporation consultation policies of DOI and NOAA.

Conclusion

ANCSA Corporations do good work for Alaska Natives and EPA has statutory duties to consult with them. ANCSA Corporations' primary focus on maximizing financial values in their management of Alaska Native property assets is, however, much narrower than Alaska Native Tribes' broad public trust responsibility for the health and welfare of Alaska Native citizens. To ensure meaningful consultation with Alaska Native Tribes, honor EPA's federal trust responsibility, and maintain its long-standing commitment to tribal environmental self-determination and government-to-government partnerships with Tribes, EPA must tailor ANCSA Corporations consultation judiciously as suggested above.

Sincerely,



Ken Norton, Chair
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Cc: Karen Gude, EPA Office of Water
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