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National Tribal Environmental Council

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John Seitz
Director
Office of Air Quality Planning and Standards
Mail Drop 10U.S. Environmental Protection AgencyResearch Triangle Park, NC 27711

April 2, 2002

Re: Clean Air Act New Source Review Issues and Indian Tribes

Dear Mr. Seitz,

I am writing on behalf of a number of tribal environmental professionals. We are participants in an ad hoc work group on tribal issues related to designation and implementation under the National Ambient Air Quality Standards (NAAQs). We are continuing to work with OAQPS staff to explore a variety of related issues, in order to enhance the capacity of the tribes to give informed input on future rule makings and other processes. We intend to develop proposed strategies for approval by tribal governments. At this time, however, the tribal participants in the work group feel it is appropriate to bring certain issues to your attention. Specifically, we raise some important implications of the Clean Air Act New Source Review (NSR) program for tribes, and recommend some next steps for resolving these issues.

Most controversy surrounding NSR reform has centered around the provisions relating to modifications at existing sources. However, a completely different set of issues arises when NSR is applied in Indian Country. Upcoming rule making processes may provide an opportunity to address these issues. We stress at the outset that in responding to these concerns through regulatory action, EPA must fulfill its obligations regarding government-to-government consultation with all tribes.

Background

For the last 50 years America has seen an unprecedented surge in industrial growth, economic development, and urban expansion, while Indian lands remained, with a few exceptions, economically depressed. Attendant with the United States' growth has been a significant increase in air pollution which, though concentrated mostly in urban areas, is also transported to down-wind States and to Indian Country. This has resulted in air quality nonattainment area designations to down-wind Tribes. When EPA designates these nonattainment areas it can arrest economic growth. Thus, at a time when Tribes face the challenge of initiating economic development

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and locating new industry on their lands, they face restrictions placed on developing those resources that are critical to their survival.

It is therefore important to recognize that there are fundamental issues of fairness with respect to the implementation of the NAAQS in Indian country, which stem from the fact that the Clean Air Act as originally conceived did not envision a regulatory role for Indian tribes. Congress recognized and attempted to address this serious oversight in the 1990 Amendments. EPA did an excellent job in translating these amendments into the Tribal Authority Rule. However, not all the structural problems of the Act with respect to tribes are solved by the optional and modular approach to tribal implementation provided by the TAR.

One example of this is the NAAQS designation and implementation process. In response to EPA's efforts to make attainment designations under the proposed 8-hour ozone standards, tribes have raised several concerns:

- We have questioned the scientific validity of the guidance for making designations based on limited monitoring data, particularly the use of Consolidated Metropolitan Statistical Areas (CMSA) as default non-attainment area boundaries.
- We have questioned the appropriateness of a non-attainment designation for a tribal area where all or nearly all sources of air pollution are outside the tribes jurisdiction.
- We have also pointed out that including reservations within larger non-attainment areas whose boundaries are largely determined by states is inconsistent with EPA's obligation to protect tribal sovereignty.

Underlying these concerns is a fundamental interest in fairness. Tribes have very long traditions of environmental stewardship and recognize their responsibility to protect the health of their citizens. However, tribes also have the right to pursue industrial and economic development. While that development must comply with all current environmental standards, it should not be burdened with requirements that in effect subsidize existing non-tribal sources of pollution. Fully "developed" and industrialized non-tribal communities should not be able to pull the ladder up behind them and force adjacent tribal communities to bear an undue burden in achieving environmental progress.

We have established a group to make recommendations regarding the NAAQS designation process, and are continuing to work on those issues. The remainder of this letter addresses the equity issues with respect to implementation of the New Source Review program in particular. The discussion from here on concerns those

situations where a reservation has been designated as non-attainment for a pollutant.

Non-Attainment New Source Review

Under the non-attainment NSR program, new major sources locating in a non-attainment area are required to obtain emission reductions, often referred to as offsets, in the non-attainment area at least equal to the source's proposed emissions. This is a logical feature. It treats the non-attainment area as a coherent airshed suffering unhealthful air pollution, and it ensures that net emissions will not increase in the area as a result of new major construction or modifications to existing major sources.

However, when an Indian reservation is included in a larger non-attainment area, the implementation of this requirement often means that a new source wishing to locate on the reservation must obtain offsets from elsewhere in the non-attainment area. This is because there are not usually enough sources on the reservation to supply the needed emission reductions. As offsets are traded on an open market and have financial value, the source wishing to locate on the reservation will often need to "pay" sources in the urban area in order to construct.

Moreover, in many cases offsets are simply not available in some areas for some pollutants, reflecting the fact that there is no "room" for more pollution, and little opportunity for reductions from existing sources. Where a tribe is located in such a non-attainment area, efforts to overcome past discriminatory barriers to economic development may be thwarted by an inability to obtain offsets.

Given that the urban area in many cases has been transporting air pollution to the reservation, and considering the history of inequitable economic development, this requirement has the potential to impact tribes in a strikingly unfair manner.

To remedy this unfairness, while continuing to insure that progress is made towards attainment of the essential health and welfare standards of the NAAQS, we have identified several options which we believe warrant further investigation and regulatory development:

Options

Establish incentives which will result in the creation of a pool of offsets "earmarked" for tribes.

Typically, offsets are achieved by the financial incentive of a prospective source paying an existing source to install pollution control equipment or use other means

to reduce emissions. This may be accomplished in a one-on-one relationship between the sources, or may be facilitated to some extent by the state or local agency (e.g. by maintaining a list of potential offset sources or more systematically tracking and inventorying offsets).

In its regulatory oversight role, EPA is well-situated to create other forms of incentives for sources to find reductions, and for state and local agencies to facilitate the transfer of offsets to prospective tribal sources. For sources, such incentives might include compliance flexibility or public recognition to foster good-will towards the industry (e.g. Project XL or Energy Star). For state and local agencies, incentives may relate to SIP flexibility or timing, or other forms of regulatory flexibility.

We urge you to engage your staff in finding creative incentives towards this end, and to pursue appropriate rule making or guidance.

Establish a fund within EPA to provide offsets to tribal sources

If the above incentive based methods are determined to be infeasible, we urge EPA to explore funding mechanisms which could be utilized to provide tribes with a source of money to buy offset credits where necessary to construct sources on tribal land. Such mechanisms might include, but are not limited to, seeking a Congressional appropriation for the purpose, or utilizing monies obtained from enforcement actions. In order to insure that such funds are narrowly targeted to address the tribal equity issue, it may be appropriate to make the percentage of offset credits available proportional to the percentage ownership of the source by a tribe. For example, a source that is owned 60% by the tribe and 40% by non-tribal interests would receive funds to pay (at market value) for 60% of the offset credits needed to construct.

We urge you to develop such a proposal and, again, pursue appropriate regulatory action.

Utilize different offset ratios for portions of Non-Attainment Areas in Indian Country

Finally, another strategy that may warrant consideration is the use of different non-attainment classifications (marginal, moderate, severe, etc.) to obtain differing offset ratios for the tribal part of a non-attainment area, ideally to include the option of no offsets being required in some situations. This might be achieved by using a different design value for the tribal area, which may in turn be justified by the lack of monitoring data for the reservation(s). We are continuing to examine this area in order to make more specific recommendations. In the meantime, we request that

EPA's decision making on classifications under the 8 hour standard be informed by the tribal equity considerations noted in this letter.

Minor Source NSR Regulatory Gap

Beyond the impacts related to NAAQS designations, NSR affects tribes unfairly in other ways. For example, unlike PSD, non-attainment NSR is not a federal program that automatically applies in nonattainment areas in Indian country; the CAA requires states to develop it as part of their non-attainment SIPs. Because EPA has no non-attainment NSR program to implement in Indian country, in order to issue a non-attainment NSR permit EPA must promulgate a FIP, which usually takes a year. Alternatively, a Tribe could adopt a TIP, which also would likely take over a year for approval from EPA. Prospective sources are unlikely to wait a year for a permit to locate in Indian country when they can get the same permit from state authorities in a matter of weeks.

Furthermore, EPA doesn't have a minor NSR (i.e. synthetic minor) program, which is the mechanism states use to provide federally enforceable emission limits for otherwise major sources to help them avoid burdensome CAA major source permitting requirements. This is an essential mechanism for providing a level economic playing field, and without it sources are discouraged from locating in Indian country.

EPA has been remiss in not developing federal non-attainment NSR and minor NSR programs for Indian country. We urge EPA to fulfill its responsibility to protect tribal interests by promulgating these regulatory mechanisms essential for protecting tribal air quality and promoting economic development.

Thank you for your consideration of these issues. We look forward to your reply.

Sincerely,

Bill Grantham
Policy Analyst, National Tribal Environmental Council
(for the tribal participants in the Tribal Designations and Implementation Workgroup)

cc:

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