

To: Forum Co-Chairs, Staff, Contractors, and Others Responsible for WRAP Work Products

Fr: Bill Grantham, WRAP Co-Director

Date: September 3, 2002

Re: Proper consideration of tribes in WRAP Documents

Dear WRAP Participants and Contractors:

It has become apparent that in many draft WRAP work products, similar types of errors are made when referring to tribes. Typically, these are caused by an incomplete understanding of how tribes fit into the federal regulatory structure, rather than by any intent on the part of the drafters. In fact, in many cases it is the very attempt to be inclusive that leads to error. Specifically, by referring to tribes everywhere states are mentioned, implications are made that tribes are subject to the same requirements as states, which is not the case.

In addition, tribal representatives have raised concerns that the extent of endorsement from tribes in the region may be implicitly overstated in the WRAP's products. This memo attempts to provide some guidance to address both these concerns.

Below are model paragraphs on 1) the regulatory framework for tribes with respect to visibility plans, and 2) tribal participation in the WRAP. These should be incorporated, with appropriate modifications, in the introductory portion of any document which will be presented to the WRAP Board for approval as an official WRAP policy, report, recommendation, etc.

More importantly, these should provide guidance to the drafters of any documents, so that inaccuracies can be avoided from the outset. By becoming familiar with the regulatory framework for tribes, you can evaluate how and where tribes should be referenced in the context of the particular work product. Similarly, by understanding the inherent limitations on tribal participation in the WRAP, you will be in a better position to understand the input received from tribal representatives.

Of course, no standardized approach can meet all needs, so you are encouraged to consult with tribal participants of your forum, work group, task team, etc., as well as the tribal members of the IOC and TOC, and the support staff at NTEC. Thank you for your attention to this.

Model Paragraph on The Regulatory Framework for Tribal Visibility Implementation Plans

The Regional Haze Rule explicitly recognizes the authority of tribes to implement the provisions of the Rule, in accordance with principles of Federal Indian law, and as provided by the Clean Air Act §301(d) and the Tribal Authority Rule (TAR) (40 CFR §§49.1– .11). Those provisions create the following framework:

1. Absent special circumstances, reservation lands are not subject to state jurisdiction.
2. Federally recognized tribes may apply for and receive delegation¹ of federal authority to implement CAA programs, including visibility regulation, or "reasonably severable" elements of such programs (40 CFR §§49.3, 49.7). The mechanism for this delegation is a Tribal Implementation Plan (TIP). A reasonably severable element is one that is not integrally related to program elements that are not included in the plan submittal, and is consistent with applicable statutory and regulatory requirements.
3. The Regional Haze Rule expressly provides that tribal visibility programs are “not dependent on the strategies selected by the state or states in which the tribe is located” (64. Fed. Reg. 35756), and that the authority to implement §309 TIPs extends to all tribes within the GCVTC region (40 CFR §51.309(d)(12)).
4. The EPA has indicated that under the TAR tribes are not required to submit §309 TIPs by the end of 2003; rather they may choose to opt-in to §309 programs at a later date (67 Fed. Reg. 30439).
5. Where a tribe does not seek delegation through a TIP, EPA, as necessary and appropriate, will promulgate a Federal Implementation Plan (FIP) within reasonable timeframes to protect air quality in Indian country (40 CFR §49.11). EPA is committed to consulting with tribes on a government to government basis in developing tribe-specific or generally applicable TIPs where necessary (See, e.g., 63 Fed. Reg.7263-64).

It is our hope that the [finding and recommendations of this product] will prove useful to tribes, whether they choose to submit full or partial 308 or 309 TIPs, or work with EPA to develop FIPs. We realize that the amount of modification necessary will vary considerably from tribe to tribe. The authors have striven to ensure that all references to tribes in the document are consistent with

¹ Tribes also possess a more fundamental source of authority to regulate their environments, based on their inherent authority as sovereign nations, which predates the formation of the United States. However, in the context of air pollution regulation and visibility planning in particular, tribal authority will more likely be based on delegation of federal authority. [Note -- this footnote need not be included in the work product].

principles of tribal sovereignty and autonomy as reflected in the above framework. Any inconsistency with this framework is strictly inadvertent and not an attempt to impose requirements on tribes which are not present under existing law.

Model Paragraphs Regarding Tribal Participation in the WRAP

Tribes, along with states and federal agencies, are full partners in the WRAP, having equal representation on the WRAP Board as states. Whether Board members or not, it must be remembered that all tribes are governments, as distinguished from the “stakeholders” (private interest) which participate on Forums and Committees but are not eligible for the Board.

Despite this equality of representation on the Board, tribes are very differently situated than states. There are over four hundred federally recognized tribes in the WRAP region, including Alaska. The sheer number of tribes makes full participation impossible. Moreover, many tribes are faced with pressing environmental, economic, and social issues, and do not have the resources to participate in an effort such as the WRAP, however important its goals may be. These factors necessarily limit the level of tribal input into and endorsement of WRAP products.

The tribal participants in the WRAP, including Board members Forum and Committee members and co-chairs, make their best effort to ensure that WRAP products are in the best interest of the tribes, the environment, and the public. One interest is to ensure that WRAP policies, as implemented by states and tribes, will not constrain the future options of tribes who are not involved in the WRAP. With these considerations and limitations in mind, the tribal participants have joined the state, federal, and private stakeholder interests in approving this [product] as a consensus document.

[modify as appropriate with description of the extent of tribal involvement in developing the particular product].