

Attachment F: Conceptual Proposal For Re-Allocation of the Tribal Set-Aside

The Annex provides that, upon the implementation of the trading program, 20,000 tons per year will be “established as a general tribal allocation,” to be distributed as determined by the tribes in the region. In order to insure that all tribes in the region have a fair and meaningful opportunity to take part in this determination, it must be done in the context of government-to-government consultation between EPA and the tribes, during the rule making process to amend Regional Haze Rule § 309. This Attachment describes the parameters governing the tribal re-allocation (distribution), and presents a preliminary conceptual proposal, in order to facilitate tribal comment.

This is not a consensus document. In general terms, the members and participants in the WRAP have agreed that the re-allocation of the tribal set-aside is a matter internal to the tribes. However, to the extent the methodology affects other aspects of the program, other members and participants reserve their right to comment.

I. Parameters and Principles Governing Re-Allocation Methodology

A. Provision for Late (Post 2003) Opt-in by Tribes

The re-allocation scheme should provide for the possibility that some tribes will opt to participate in the program after the 2003 deadline applicable to states for their SIPs.

1. Policy Rationale

Several factors point to the need to allow tribes to make the decision to participate in the program after the 2003 deadline applicable to states. The more than 200 tribes in the GCVTC region will face a formidable task in deciding whether to “opt in” to § 309 over the next three years. The “backstop” emission trading program described in the Annex is in many ways an innovative and even experimental program. The program marks the first time tribes will be integrated into a multi-state regional trading scheme, raising new issues regarding tribal sovereignty, federalism, and relationships to states. Additionally, a fundamental difference between it and existing emission trading programs is the concept that voluntary measures will initially be relied on to meet emissions goals, with the actual trading program serving as a contingency measure. By design, it is structured to minimize the likelihood of “triggering” the trading program until well after 2003. Because most tribes will likely not be affected until the actual trading program is triggered, the relevance of the program to a particular tribe may be hard to gauge in 2003.

To these complicating regulatory factors are added the inherent uncertainty of future trends in technology, energy use, and economic development, both within the region as a whole and on particular tribal lands. In this regard, tribes face a different situation than states. States comprise larger geographic areas, which lessens the need for accuracy in predicting exactly where economic development may occur – simplifying assumptions, averaging, and other “smoothing” functions can be used. Moreover, tribes will more often than states have a proprietary interest in development projects within their jurisdiction, and thus have more at stake in insuring that the regulatory strategy they employ is complementary to their development strategy.

Finally, tribes are faced with these decisions at a time when most tribes are in the early stages of establishing air programs through such activities as creating emissions inventories, implementing ambient monitoring programs, and adopting basic air quality codes. Tribal government resources are generally not available for dedication to the type of economic/air quality policy analysis required to assess prospectively the ultimate implications of the decision whether to opt into § 309.

Allowing tribes to opt into the program after 2003 will not compromise the environmental goals of the program. In fact, it would be environmentally beneficial to encourage the inclusion of new tribal sources in the program, in order to insure the integrity of the regional cap. If tribes lose the option of opting into the program after 2003, new sources on tribal lands would be regulated under § 308 of the haze rule. This means they would be subject to control requirements, but their emissions would not be mitigated by corresponding reductions elsewhere, as would occur under the trading program. (A different analysis may apply to tribes with existing sources. As noted below, EPA has the authority to utilize federal implementation where necessary to ensure reasonable progress with respect to such sources).

2. Legal Rationale

For the reasons explained below, allowing tribes to opt-in to the trading program after 2003 is consistent with the framework provided by the Clean Air Act and implementing regulations.

- a. Tribes are expressly exempt from visibility implementation deadlines under the Tribal Authority Rule.

The Tribal Authority Rule (TAR), 40 CFR § 49.1 – 49.11, delineates the CAA sections for which it is appropriate to treat tribes in the same manner as states. Under the general approach of the TAR, tribes which meet certain eligibility criteria may apply for and receive treatment in the same manner states for all CAA provisions except those specifically identified as inappropriate. Among provisions identified as inappropriate for tribes are “[s]pecific visibility implementation plan submittal deadlines established under 169A of the Act.” 40 CFR § 49.4(e).

This exemption applies to the deadlines contained in the RHR sections 308 and 309. Although the Regional Haze Rule originated from a process prescribed in CAA § 169B, § 169B requires that EPA respond to reports from Visibility Transport Commissions by carrying out its regulatory duties under § 169A. See 42 U.S.C. § 7492(e). Therefore the deadlines in the RHR are established under § 169A of the Act and are not applicable to tribes under the TAR.

EPA recognized this in the preamble to the RHR: “Section 49.4(f) of the TAR provides that deadlines related to SIP submittals under section 169(B)(e)(2) do not apply to Tribes.” 64 Fed. Reg. 35714, 35759, July 1, 1999.

- b. Nothing in the structure or language of the TAR or RHR suggests that the RHR § 309 option would disappear for tribes upon the passing of the state-applicable deadline.

The provisions of the TAR firmly establish that the RHR implementation deadlines are not applicable to tribes. Nevertheless, an argument could be made that a tribes’ failure to submit a TIP by the state deadline of December 31, 2003 would preclude a tribe from submitting a § 309 TIP at a later date, even though the date is not a deadline in the sense that failure to meet it would invoke sanctions. Such a reading would be counter to the spirit of the TAR and the RHR.

The RHR itself is silent on this question. The only language addressing tribal implementation of § 309 is found in § 309(d)(12):

Tribal implementation. Consistent with 40 CFR Part 49, tribes within the Transport Region may implement the required visibility programs for the 16 Class I areas, in the same manner as States, regardless of whether such tribes have participated as members of a visibility transport commission.

One might argue that phrase “in the same manner as States” implies that the tribes are also subject to the same restrictions as states. However, the preamble discussion of this language makes it clear that the purpose of this language is to emphasize the tribes independence from states. In fact, the preamble erroneously states that this provision is not included in the final rule because it would be superfluous in light of the TAR:

The WGA called for EPA's final rule to permit tribes within the GCVTC Transport Region to implement visibility programs, or reasonably severable elements, in the same manner as States, regardless of whether such tribes have participated as members of a visibility transport GCVTC [sic]. The EPA has not included the WGA's recommended rule provision in today's action because the necessary authority for tribal organizations has already been provided in a previous EPA rulemaking .FN133 The EPA does, however, agree with the position expressed in the WGA recommendation. The EPA wishes to clarify that tribes may directly implement the requirements of this section of the regional haze rule in the same

manner as States. The Tribal Authority Rule provides for this, as discussed further in unit V of today's notice. The independence of tribes means that a tribal visibility program is not dependent on strategies selected by the State or States in which the tribe is located.

64 Fed. Reg. At 35756 (emphasis added). Section 309(d)(12) was in fact included in the final rule, notwithstanding the explanation in the preamble of why it was not. In any case, it is clear that EPA interpreted the language of § 309(d)(12) to be merely redundant to the provisions of the TAR, and not in any way limiting the options available to tribes under the TAR.

Moreover, elsewhere in the preamble, the non-applicability of visibility implementation plan deadlines to tribes is discussed at some length, concluding with the following paragraph:

In order to encourage tribes to develop self-sufficient programs, the TAR provides tribes with the flexibility of submitting programs as they are developed, rather than in accordance with statutory deadlines. *This means that tribes that choose to develop programs, where necessary may take additional time to submit implementation plans for regional haze over and above the deadlines in the TEA-21 legislation as codified in today's rule.* . . . We encourage tribes choosing to develop implementation plans to make every effort to submit by the deadlines to ensure that the plans are integrated with and coordinated with regional planning efforts. In the interim, EPA will work with the States and tribes to ensure that achievement of reasonable progress is not delayed.

64 Fed. Reg. 35714, 35759, July 1, 1999. (Emphasis added). Significantly, the discussion makes no distinction between development of tribal implementation plans under RHR §§ 308 and 309. Also significantly, nowhere in the quoted passage or the entire discussion of tribal implementation of the RHR is any mention made of consequences to tribes of failing to submit TIPs by the state deadlines. The integration and coordination of state and tribal planning efforts is cited as a positive incentive for early development of visibility TIPs, but nowhere is the possibility of any negative consequences discussed. If EPA had intended the state 309 deadline to serve as a cut off point for tribal implementation of § 309, it is reasonable to expect that it would have written such a provision into the rule that or at least discussed in the preamble the rationale for such an effect.

Taken together, EPA's assurances that tribes may choose between § 308 and §309 independently of state decisions, and that tribes "where necessary may take additional time to submit implementation plans," create a strong implication that tribes may submit implementation plans under § 309 after the *state* implementation plan deadline for that section.

- c. Loss of the § 309 option upon failure to meet the 2003 deadline would effectively constitute a sanction to tribes and thus run counter to the spirit of the TAR.

In explaining the rationale for not subjecting tribes to SIP submittal deadlines, EPA in the preamble to the TAR noted among other things that:

[S]ince . . . tribal authority for establishing CAA programs was expressly addressed for the first time in the 1990 CAA Amendments, in comparison to states, tribes in general are in the early stages of developing air planning and implementation expertise. Accordingly, EPA determined that it would be infeasible and inappropriate to subject tribes to the mandatory submittal deadlines imposed by the Act on states, and to the related federal oversight mechanisms in the Act which are triggered when EPA makes a finding that states have failed to meet required deadlines or acts to disapprove a plan submittal.

63. Fed. Reg. at 7265. The federal oversight mechanism referred to is implementation of a federal implementation plan (FIP) pursuant to CAA § 110(c)(1). Id. (providing for FIPs within 2 years of state's failure to submit SIP or SIP revision) The preamble goes on to explain that §110(c)(1) is therefore among those listed in the TAR as inappropriate for application to tribes, although EPA retains its obligation to promulgate FIPs in Indian country as necessary and appropriate. Id.

Enforcement of a FIP against a state is commonly perceived as a sanction against the state, as it represents an assertion of federal supremacy over considerations of state sovereignty. Furthermore, CAA 110 provides for additional sanctions in the event of a state's failure to submit a complete and timely SIP, in the form of withheld highway funding and emission offset requirements. See 42 U.S.C. § 7410(m) and §7509.

EPA correctly determined that, given the relative inexperience of tribes in air regulation, and the recentness of Congressional authorization of tribal CAA implementation, it is inappropriate to subject tribes to deadlines and sanctions. For similar reasons, and for the reasons related to future uncertainty discussed in part I.A.1 above, tribes should not be punished for failure to meet the 2003 deadline by losing the option to implement § 309. Therefore, the methodology should accommodate post-2003 entry into the market by tribes.

B. Accommodation of the Multiple Purposes of the Tribal Set Aside

Tribal participants in the WRAP cited several potential uses for the tribal set aside, including retirement for the benefit of the environment, use to attract development, and sale for revenue. The allocation methodology should provide for all these needs to some degree. Naturally, there is a tension between these purposes, given the fact that there are many tribes who may have differing priorities. There are many ways of striking a balance between uses, of which the proposed methodology is but one. For example, the proposed methodology would utilize the allowances for revenue until needed for development (with individual tribes able to retire a portion at their discretion). An alternative method would be to effectively retire the allowances

until needed for development or sale. The former method is put forth here under the assumption that the monetary benefit to tribes outweighs the marginal environmental benefit of retiring this small portion of the total emissions.

C. Flexibility to Allow for Changes If the New Source Set Aside Is Exhausted or in Accordance with Market Prices.

The tribal set aside is designed to help insure equitable treatment for tribal economies and to prevent barriers to economic development. It is not the only source of allowances for tribes, as tribal sources also have access to allowances under the general existing and new source provisions. The new source set-aside is intended to be sufficient to cover all new sources in the region, whether they are tribal or non-tribal. The reallocation concept presented here is based on the assumption that the new source set aside is adequate. However, if for unanticipated reasons SO₂ new source growth exceeds projections, the use of the tribal set aside should be subject to change. Similarly, the methodology should be flexible to allow changes in strategy based upon the market price of credits. For example, if credits become very valuable, tribes who have retired allowances may wish to reconsider the option of selling. Provisions for flexibility must be consistent with the general allocation methodology of the program, which provides certainty in allocations for 5 year increments.

D. Maximization of Benefit to Tribes in the Aggregate.

The methodology should be structured so that the maximum benefit is gained from the allowances, and they are not so distributed as to be of no practical use to any one tribe. For this reason, a simple pro-rata distribution is not proposed. That would result in approximately 95 tons/year per tribe, not quite enough to construct a “major” source (100 tpy). It is felt that better use can be made of the allowances by pooling them and using the revenue for a common good, with the pool being dipped into as needed for individual tribal projects. Again, however, the calculus may change according to according to market prices for credits.

II Proposed Conceptual Methodology

The conceptual framework put forth here for comment is quite simple. Essentially, it consists of the following: (1) Initially the allowances would be pooled and sold, with revenue used for the benefit of common tribal interests, (2) Individual tribes could draw from the pool for the purpose of (A) SO₂ emitting development projects, and (B) retirement of allowances for the environment. The allocation scheme would be subject to change at the 5 year check points built into the program, in response to changed conditions. These concepts are described in more detail below:

1. “Unclaimed” allowances administered as pool for shared revenue

This provision is intended to insure that the tribal allowance is used in a manner which will provide benefits to tribes, regardless of whether individual tribes have decided to apply for an allocation of allowances.

Upon the commencement of the trading program, those tribal allowances which have not been allocated to individual tribes according to the procedures below would be sold on the open market, at a fair market price. The proceeds would be transferred to a trustee, who would use the funds for a purpose determined after consultation with the tribes in the region.

The use to which funds are put should be logically grounded in the rationale for creating the set aside. For example, they could be used to fund tribal environmental programs, to partially compensate for the fact that the benefits of energy and industrial development have not been proportionally shared with tribes. This could be accomplished by using the monies to supply tribes with matching funds in order to meet federal grant requirements (e.g. under sections 103 or 105 of the CAA), to help tribes acquire monitoring or other equipment, or to assist tribes in establishing tribal, non-federal programs. Another promising idea which has been suggested is the establishment of a scholarship fund to encourage the development of tribal environmental professionals.

There are several fundamental issues to be resolved regarding the pooled approach, including: the mechanism by which tribal allocations would be sold on the market (e.g., by the program administrator) and the identity or method of selecting the trustee to administer revenues from sales.

2. Allowances distributed to individual tribes via application process

A primary purpose of the tribal set aside is to ensure that barriers to development on tribal land are not created, where such development is desired by tribes. Many tribal participants also insisted that tribes should be able to retire credits, at their discretion. In order to accomplish these objectives, there must be means for individual tribes to acquire a quantity of credits over which the tribe has sole control. A method for doing this is proposed below:

A. Retirement quota

Tribes would be able to apply for a quota of allowances for the express purpose of retiring them. The quota could be either a flat, pro rata amount for every federally recognized tribe in the region, (e.g., 20,000 tpy/211 tribes = 94.8 tpy/tribe), or it could be adjusted on a tribe-specific basis, such as tribal population. A flat amount would reflect the equality of all federally recognized tribes as sovereign domestic nations, while a population based allocation would perhaps better reflect the amount of development a tribe is willing to forego, by retiring the credits.

Some questions raised by this provision are whether tribes that retire credits should be

excluded from receiving benefits from the revenue generated by the sale of the remainder of credits, and whether, tribes who retire credits would be able to pursue SO₂ emitting development outside of the trading program? (E.g., under RHR § 308).

B. Formula for allowances to tribal projects

A central feature of the tribal allocation scheme is the methodology for allocating allowances to tribes for the purpose of energy or economic development, so tribal development can be included in the regional cap without creating an extra economic burden on tribes. This use is supplemental to the use of allowances from the new source set aside which is available for any new sources in the region, whether tribal or not.

Under this provision, at the time a proposed new major SO₂ source on tribal land applies for applicable permits (Prevention of Significant Deterioration, New Source Review, Title V, etc.), it would also apply for a share of the tribal allowances. These allowances would be in addition to the allowances the source would receive from the general new source provisions, and would comprise an additional percentage of credits needed to operate. For example, the source would receive 100% of credits needed to operate under applicable control requirements from the new source set aside, and an additional 10% (a purely hypothetical number) from the tribal set aside. The extra allowances could not be used to circumvent applicable control requirements or permit conditions. They could be banked according to the general banking provisions of the program to provide the source with additional flexibility, or sold, in effect creating a small economic subsidy to the source, in order to encourage its location on tribal land. (Of course, this provision would only be utilized when a tribe desired to attract development).

3. New distribution Methodology if new source set-aside exhausted

Under the WEB provisions, allowances would be allocated to sources for 5 year periods, in order to provide sufficient certainty for future planning. This periodic system of allocations affords an opportunity to change the tribal allocation scheme in response to changed conditions. Specifically, if the new source set aside is exhausted, use of the tribal set aside could be shifted from retirements or revenue towards tribal new source allocations, in order to ensure economic barriers are not created. By tying decisions to change the tribal methodology to the five year cycle, all parties would know how many tribal credits would be in play and how many will be retired for each five year period.