

**FINAL
Tribal Guidance
for
Section 309 of the Regional Haze Rule**

A Product of the Tribal Implementation Plan Work Group

September 2004



WRAP Air Manager's Committee
www.wrapair.org

Tribal Guidance and Model TIP Author:

**Rosanne Sanchez
New Mexico Environment Department**

TIP Working Group:

Tribal Members:

**Farshid Farsi, Shoshone/Bannock Tribes
Christopher Lee, Navajo Nation
Lisa Riener, Quinault Nation**

EPA Members:

**Laurie Ostrand, EPA Region 8
Monica Morales, EPA Region 8
Laurel Dygowski, EPA Region 8
Doug McDaniel, EPA Region 9
Wienke Tax, EPA Region 9**

Other Members:

**Bob Gruenig, NTEC
Bill Grantham, NTEC**

Acknowledgements:

**Dan Blair and Janet Travis, Gila River Indian Community
Sara Laumann, EPA Region 8
Thomas Webb, EPA Region 9
Steve Body, EPA Region 10**

Tribal Guidance for Section 309 of the Regional Haze Rule

Table of Contents

| <u>Title</u> | <u>Page</u> |
|--|-------------|
| I. EXECUTIVE SUMMARY | 1 |
| II. BACKGROUND ON THE REGIONAL HAZE RULE | 3 |
| A. Introduction..... | 3 |
| B. 1977 Clean Air Act..... | 4 |
| C. Grand Canyon Visibility Transport Commission..... | 4 |
| D. Western Regional Air Partnership..... | 6 |
| E. What’s Different About This Implementation Plan? | 6 |
| F. Tribally Designated Class I Areas | 6 |
| G. Is This TIP Appropriate For My Tribe? | 6 |
| III. GENERAL DEFINITIONS | 8 |
| IV. THE ENVIRONMENTAL PROTECTION AGENCY’S RESPONSIBILITY TO TRIBES | 12 |
| V. THE ADVANTAGES AND DISADVANTAGES OF ADOPTING A REGIONAL HAZE TIP | 14 |
| A. Advantages..... | 14 |
| B. Disadvantages..... | 15 |
| VI. IMPLEMENTING A TRIBAL REGIONAL HAZE PROGRAM | 17 |
| A. Overview of the Tribal Authority Rule (TAR)..... | 17 |

Table of Contents

| <u>Title</u> | <u>Page</u> |
|---|-------------|
| B. Requirements for Tribal CAA Program Approval..... | 17 |
| 1. Tribal eligibility requirements §49.6 | 17 |
| 2. Funding availability | 18 |
| C. TIP Administrative Process | 18 |
| 1. Public Notice..... | 19 |
| 2. Public Hearing | 20 |
| 3. Other Consultation Requirements..... | 20 |
| 4. Tribal Adoption and Submittal of the 309 TIP | 20 |
| D. EPA TIP Review Process..... | 21 |
| 1. EPA Completeness Determination | 21 |
| 2. EPA Completeness Criteria | 21 |
| a. Administrative Materials | 21 |
| b. Technical Support..... | 22 |
| 3. EPA Action on the TIP | 22 |
| E. Tribal and Federal Implementation Plans | 22 |
| 1. How Might the EPA Approach Developing a FIP?..... | 23 |
| 2. How Does a FIP Compare to a TIP?..... | 23 |
| F. SO₂ Milestone and Backstop Trading Program and Tribal Set Asides..... | 24 |
| 1. Background..... | 24 |
| 2. What Happens to Stationary Sources if a Tribe Chooses to Opt-in to the Section 309 Program? | 25 |
| 3. What is the Tribal Set-Aside?..... | 25 |
| 4. How Many Allowances will Each Tribe Get from the Tribal Set-Aside?..... | 25 |
| VII. CONCLUSION | 27 |
| VIII. APPENDICES | 28 |
| Appendix A: EPA’s Indian Policy..... | 29 |
| Appendix B: Reaffirmation of EPA Indian Policy | 33 |
| Appendix C: EPA Completeness Criteria for the Regional Haze SIP..... | 34 |

Table of Contents

| <u>Title</u> | <u>Page</u> |
|--|-------------|
| Appendix D: Tribal TAS Examples | 37 |
| Appendix E: Tribal TIP Outreach Example | 39 |
| Appendix F: Example of a Tribal Situation Requiring a FIP | 43 |
| Appendix G: Request Letter for TAS and CAA Program Approval..... | 44 |
| Appendix H: Tribal Authority Rule (TAR) | 47 |
| Appendix I: List of Eligible Tribes..... | 51 |

I. EXECUTIVE SUMMARY

*The landscape is our church, a cathedral.
It is like a sacred building to us.
Zuni saying*

Traditionally, indigenous people have lived with and appreciated natural landscapes. Many tribes continue to participate in traditional cultural activities that may be associated with a sacred mountain, lake, or other place that holds significance to the tribe. Air pollutants, in the form of haze, now affect what once was a clear view of such landscapes. This visibility impairment is currently being addressed by the Regional Haze Rule (40 CFR 51.308 and 51.309).

A tribe that develops a Regional Haze (RH) Tribal Implementation Plan (TIP) will actively contribute to helping to reduce or eliminate haze in its airshed. The long-term benefits for any tribe could be essential to its continued health and cultural existence. A tribal haze plan could be an initial step toward a comprehensive tribal air pollution control program that would effectively address and meet air quality needs for tribal members now and in the future. These programs can also be an expression of a tribe's jurisdictional rights as a sovereign nation to control its airshed.

This document is intended for the 185 federally recognized tribes¹ located in the following nine state region: Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah, and Wyoming. It describes the Regional Haze Rule (RHR) and discusses in some detail the intricacies of adopting a TIP. This includes discussions on what it means if a tribe adopts an RH TIP, advantages and disadvantages of adopting such a TIP, relying on a Federal Implementation Plan (FIP) rather than a TIP, administrative requirements associated with any implementation plan, and applying for Clean Air Act (CAA) program approval as well as eligibility determinations under the Tribal Authority Rule or TAR (40 CFR 49.1-49.11).²

This guidance accompanies another document entitled “*Model TIP Template for Section 309 of the Regional Haze Rule.*” The 309 TIP Template is similar to the State Implementation Plan (SIP) template for regional haze, with additional information appropriate for tribes. The template is set up as a fill in the blank document, and each section that is adopted will need to be understood by the tribe. In addition, some sections will require additional work on behalf of the tribe such as the development of an Enhanced Smoke Management Plan and conducting an emissions inventory under the Fire Section, if the tribe chooses to adopt this portion.

Developing an RH TIP is optional for tribes. The TAR allows the EPA to treat tribes in the same manner as states for purposes of implementing CAA programs, while providing flexibility for tribes to develop programs tailored to their air quality priorities and under their own schedule. This flexibility means that regional haze strategies selected by tribes are independent of the strategies selected by the state or states in which the tribe is located.

¹ See Appendix I for a list of tribes.

² See Appendix H to view the TAR.

Implementing an RH TIP is a complex and highly technical undertaking. Accordingly, the Western Regional Air Partnership (WRAP) decided to create this document to support tribal governments choosing to develop an RH TIP under 51.309. We hope you find it helpful.

II. BACKGROUND ON THE REGIONAL HAZE RULE

A. Introduction

Regional haze (RH) is air pollution that is transported long distances and reduces visibility throughout the entire country. Over the years, this haze has reduced the visual range from 145 kilometers (90 miles) to 24-50 kilometers (15-31 miles) in the East, and from 225 kilometers (140 miles) to 56-145 kilometers (35-90 miles) in the West. The pollutants that create this haze are sulfates, nitrates, organic carbon, elemental carbon, and soil dust. Human-caused haze sources include industry, motor vehicles, agricultural and forestry burning, and windblown dust from roads and farming practices.

In 1999, the EPA issued regulations to address RH in 156 national parks and wilderness areas across the country. These regulations were published in the Federal Register on July 1, 1999 (64 FR 35714). The goal of the Regional Haze Rule (RHR) is to eliminate human-caused visibility impairment in national parks and wilderness areas across the country. It contains strategies to improve visibility over the next 60 years, and requires states to adopt implementation plans.

The EPA's RHR provides two paths to address RH. One is section 308, and requires states to develop long-term strategies out to the year 2064. These strategies must be shown to make "reasonable progress" in improving visibility in Class I areas inside the state and in neighboring jurisdictions. The other is section 309, and is an option for nine states: Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah, and Wyoming, and the 185 tribes³ located within those states, to adopt RH strategies for the period from 2003 to 2018. These strategies are based on recommendations from the Grand Canyon Visibility Transport Commission (GCVTC) for protecting the 16 Class I areas on the Colorado Plateau area.⁴ Adopting these strategies constitutes reasonable progress until 2018. These same strategies can also be used by the nine western states and 185 tribes to protect the other Class I areas within their own jurisdiction.⁵

Best Available Retrofit Technology (BART) is one of the main provisions in the RHR. It applies to certain industrial sources built between 1962 and 1977. Section 308 requires states to identify BART-eligible sources, estimate the expected visibility improvements, and determine BART for each eligible source. Section 309 provides an alternative method of satisfying the 308 BART requirement by setting voluntary sulfur dioxide (SO₂) emission reductions for BART sources, with a backstop market trading program if the SO₂ reduction milestones are not met. This alternative to BART, in section 309, is referred to as the Annex (40 CFR Part 51, *Revisions to*

³ See Appendix I for a list of tribes.

⁴ The 16 federal Class I areas are as follows:

Arches National Park, Black Canyon of the Gunnison Wilderness, Bryce Canyon National Park, Canyonlands National Park, Capital Reef National Park, Flat Tops Wilderness, Grand Canyon National Park, Maroon Bells Wilderness, Mesa Verde National Park, Mt. Baldy Wilderness, Petrified Forest National Park, San Pedro Parks Wilderness, Sycamore Canyon Wilderness, Weminuche Wilderness, West Elk Wilderness, Zion National Park.

⁵ No tribe has a mandatory Class I area under its jurisdiction.

Regional Haze Rule to Incorporate Sulfur Dioxide Milestones and Backstop Emissions Trading Program for Nine Western States and Eligible Indian Tribes Within that Geographic Area). SO₂ reductions in the Annex have been demonstrated to be “better than BART” because, in part, the Annex addresses all stationary sources that emit 100 tons/year of SO₂ and because more SO₂ emission reductions are expected from the Annex than from BART.

The early stages in the development of the RHR are described in the following sections beginning with the 1977 Clean Air Act Amendments, the Grand Canyon Visibility Transport Commission, and the Western Regional Air Partnership.

B. 1977 Clean Air Act

In 1977, Congress amended the CAA to include provisions to protect the scenic vistas of the nation’s national parks and wilderness areas. In these amendments, Congress declared as a national visibility goal:

The prevention of any future, and the remedying of any existing impairment of visibility in mandatory class I federal areas which impairment results from man-made air pollution.

To address this goal, the Environmental Protection Agency (EPA) developed regulations to reduce the impact of large industrial sources on nearby Class I areas. It was recognized at the time that RH, which comes from a wide variety of sources that may be located far from a Class I area, was also a part of the visibility problem. Monitoring networks and visibility models however, were not yet developed to the degree necessary to understand the causes of RH.

C. Grand Canyon Visibility Transport Commission

Amendments to the CAA in 1990 created the Grand Canyon Visibility Transport Commission (GCVTC). The Commission was given the charge to assess the currently available scientific information pertaining to adverse impacts on visibility from potential growth in the region, identify clean air corridors, and recommend long-range strategies for addressing RH. The GCVTC completed significant technical analyses and developed recommendations to improve visibility in the 16 mandatory federal Class I areas on the Colorado Plateau. The Commission found that visibility impairment on the Colorado Plateau was caused by a wide variety of sources and pollutants. A comprehensive strategy was needed to address all of the causes of RH. The GCVTC submitted these recommendations to the EPA in a report dated June 1996 for consideration in rule development. These recommendations are summarized as follows:

Air Pollution Prevention. Air pollution prevention and reduction of per capita pollution was a high priority for the Commission. The Commission recommended policies based on energy conservation, increased energy efficiency and promotion of the use of renewable resources for energy production.

Clean Air Corridors. Clean air corridors are key sources of clear air at Class I areas, and the Commission recommended careful tracking of emissions growth that may affect air quality in these corridors.

Stationary Sources. For stationary sources, the Commission recommended closely monitoring the impacts of current requirements under the Clean Air Act and ongoing source attribution studies. Regional targets for SO₂ emissions from stationary sources should be set, starting in 2000. If these targets are exceeded, this will trigger a regulatory program, probably including a regional cap and market-based trading.

Areas In And Near Parks. The Commission's research and modeling showed that a host of identified sources adjacent to parks and wilderness areas, including large urban areas, have significant visibility impacts. However, the Commission lacked sufficient data regarding the visibility impacts of emissions from some areas in and near parks and wilderness areas. In general, the models used by the Commission were not readily applicable to such areas. Pending further studies of these areas, the Commission recommended that local, state, tribal, federal, and private parties cooperatively develop strategies, expand data collection, and improve modeling for reducing or preventing visibility impairment in areas within and adjacent to parks and wilderness areas.

Mobile Sources. The Commission recognized that mobile source emissions are projected to decrease through about 2005 due to improved control technologies. The Commission recommended capping emissions at the lowest level achieved and establishing a regional emissions budget, and also endorsed national strategies aimed at further reducing tailpipe emissions, including the so-called 49-state low emission vehicle, or 49-state LEV.

Road Dust. The Commission's technical assessment indicated that road dust is a large contributor to visibility impairment on the Colorado Plateau. As such, it requires urgent attention. However, due to considerable skepticism regarding the modeled contribution of road dust to visibility impairment, the Commission recommended further study in order to resolve the uncertainties regarding both near-field and distant effects of road dust, prior to taking remedial action. Since this emissions source is potentially such a significant contributor, the Commission felt that it deserved high priority attention and, if warranted, additional emissions management actions.

Emissions from Mexico. Mexican sources are also shown to be significant contributors, particularly of SO₂ emissions. However, data gaps and jurisdictional issues made this a difficult issue for the Commission to address directly. The Commission recommendations called for continued bi-national collaboration to work on this problem, as well as additional efforts to complete emissions inventories and increase monitoring capacities. These matters should receive high priority for regional and national action.

Fire. The Commission recognized that fire plays a significant role in visibility on the Plateau. In fact, land managers propose aggressive prescribed fire programs aimed at correcting the buildup of biomass due to decades of fire suppression. Therefore, prescribed fire and wildfire levels are projected to increase significantly during the studied period. The Commission recommended the implementation of programs to minimize emissions and visibility impacts from prescribed fire, as well as to educate the public.

Future Regional Coordinating Entity. Finally, the Commission believed there was a need for an entity like the Commission to oversee, promote, and support many of the recommendations in their report. To support that entity, the Commission developed a set of recommendations addressing the future administrative, technical and funding needs of the Commission or a new regional entity. The Commission strongly urged the EPA and Congress to provide funding for these vital functions and give them a priority reflective of the national importance of the Class I areas on the Colorado Plateau.

D. Western Regional Air Partnership

The Western Regional Air Partnership (WRAP) was established in 1997 as the successor organization to the GCVTC. The WRAP is charged with coordinating and overseeing the implementation of the Commission recommendations, as well as developing the technical and policy work that states and tribes in the West will need to implement the RHR. The WRAP is designed as a partner/stakeholder-based organization. States, tribes, federal agencies, environmental groups, and industry representatives work in a cooperative process to develop recommendations that meet the visibility goals in the most effective way. Since 2000, much of the work being conducted by the committees and forums of the WRAP have focused on identifying what information will be needed for section 309 SIPs and TIPs.

E. What's Different About This Implementation Plan?

The RH TIP protects visibility in the 16 Class I areas on the Colorado Plateau. Because most tribes continue to participate in traditional cultural activities, they may be affected by pollutants that impair the visibility of a sacred area. A tribe that wishes to develop an RH TIP will be actively contributing to keeping its area free of haze or be helping to reduce it. Although most tribes do not have major industries that emit pollution directly, they would be looking out for their future if they choose to venture into economic development. By having an RH TIP, businesses located or seeking to locate on tribal lands would have to follow the implementation plan and take appropriate measures to control emissions.

Most implementation plans are generally established to protect the National Ambient Air Quality Standards (NAAQS) for six common air pollutants. They are often referred to as “criteria pollutants,” and include carbon monoxide (CO), nitrogen dioxide (NO₂), sulfur dioxide (SO₂), lead (Pb), particulate matter (PM), and ozone (O₃).

F. Tribally Designated Class I Areas

It is important for tribes to understand that both tribes and states may designate additional areas as Class I areas (CAA section 162(a)) but the requirements of the visibility program (RHR) under section 169A of the CAA apply only to “mandatory Class I Federal areas,” and they do not directly address any additional areas.⁶ Tribes that have had their lands designated as Class I areas do not fall into the same category as the mandatory Class I areas that were originally designated by Congress. This should not, however, deter tribes from continuing to pursue the highest quality of air within their lands. This is especially important to do for those concerned with diminished visibility that may affect cultural activities.

G. Is This TIP Appropriate For My Tribe?

Prior to deciding if an RH TIP is needed by your tribe, an evaluation of those particular sections listed under 40 CFR 51.309 should be carefully reviewed. A decision as to whether each section

⁶ Taken from footnote 4 of the Federal Register/Vol.64, No. 126/Thursday, July 1, 1999/Rules and Regulations, p. 35715.

is either applicable or achievable must be considered. It is not recommended that a tribe decide to pursue a TIP before realizing the full commitment and obligations that must be fulfilled. If a tribe does not have the resources, but a strong desire to participate, it may contact its regional EPA office and ask that a FIP be developed for a particular section that is relevant to the tribe. The EPA, however, will determine in consultation with the tribe if FIP provisions are necessary or appropriate to protect air quality.

A tribe may also choose to develop a TIP solely under 40 CFR 51.309 (section 309) or 40 CFR 51.308 (section 308) or a combination of both. This guidance document does not go into detail regarding section 308 but plans are under way to begin looking at this option.

III. GENERAL DEFINITIONS

1. Air Managers Committee

(Formerly the Northern Air Managers Committee) was formed by the WRAP at the March 30-31, 1999 Annual Board Meeting. This Committee is made up of the state and tribal air managers, each representing the interests of state and tribal air caucuses. The Committee is expected to provide air managers with a forum for discussing WRAP related matters of concern to them. These matters may cover a spectrum of air quality issues. The Committee also provides a mechanism for communication and guidance to the technical and policy forums as to what air managers believe is needed to support their regional planning efforts.

2. Attainment Area

A geographic area in which levels of a criteria air pollutant meet the health-based primary standard (national ambient air quality standard, or NAAQS) for the pollutant. An area may have an acceptable level for one criteria air pollutant, but may have unacceptable levels for others. Thus, an area could be both attainment and nonattainment at the same time. Attainment areas are defined by using federal pollutant limits set by the EPA.

3. Class I Areas

Areas designated as mandatory Class I Federal areas are those national parks exceeding 6000 acres, national wilderness areas and national memorial parks exceeding 5000 acres, and all international parks which were in existence on August 7, 1977.

4. Clean Air Act (CAA) or the "Act"

The original Clean Air Act was passed in 1963, but our national air pollution control program is actually based on the 1970 version of the law. The 1990 Clean Air Act Amendments are the most far-reaching revisions of the 1970 law. The 1990 amendments are referred to as the 1990 Clean Air Act. In 1977, Congress amended the CAA to include provisions to protect the scenic vistas of the nation's national parks and wilderness areas. In these amendments, Congress declared as a national visibility goal:

The prevention of any future, and the remedying of any existing impairment of visibility in mandatory class I Federal areas which impairment results from man-made air pollution.

To address this goal, the Environmental Protection Agency (EPA) developed regulations to reduce the impact of large industrial sources on nearby Class I areas. It was recognized at the time that RH, which comes from a wide variety of sources that may be located far from a Class I area, was also a part of the visibility problem. Monitoring networks and visibility models however, were not yet developed to the degree necessary to understand the causes of RH.

5. Commission's Report

The 1996 report entitled, "Recommendations for Improving Western Vistas", contained over 70 specific recommendations by the Grand Canyon Visibility Transport Commission (GCVTC), including goals for renewable energy and pollution prevention, emission management strategies for stationary, mobile and "area" sources; and future administrative and technical needs. The report also recommended that a permanent successor to the GCVTC be established, in order to coordinate and facilitate the implementation of recommendations by the numerous governments involved.

6. Federal Land Manager

The Secretary of the department with authority over the Federal Class I area (or the Secretary's designee) or, with respect to Roosevelt-Campobello International Park, the Chairman of the Roosevelt-Campobello International Park Commission

7. Grand Canyon Visibility Transport Commission (GCVTC)

(The Commission) was created by the 1990 amendments to the Clean Air Act, with the purpose of recommending to the EPA various means of eliminating visibility impairment at the Grand Canyon National Park. The creation of the Commission was part of a package of amendments designed to assist the EPA in its efforts to achieve the mandate Congress had laid down in 1977: The elimination of all human-caused visibility impairment in national parks and wilderness areas. The commission, included four tribes, (Hopi Tribe, Hualapai Nation, Navajo Nation, and the Pueblo of Acoma), 8 western states (AZ, CA, CO, NM, NV, OR, UT, WY), four federal land management agencies (Bureau of Land Management, U.S. Fish and Wildlife Service, U.S. Forest Service, National Park Service), the Columbia River Inter-tribal Fish Commission, and the Environmental Protection Agency. The GCVTC issued its final report to EPA in June of 1996 (Commission's Report).

8. National Ambient Air Quality Standards (NAAQS) or Criteria Air Pollutants

National standards for pollutants considered harmful to public health and the environment. The Clean Air Act requires EPA to set NAAQS and establish two types of national air quality standards. Primary standards set limits to protect public health, including the health of "sensitive" populations such as asthmatics, children and the elderly. Secondary standards set limits to protect public welfare, including protection against decreased visibility, damage to animals, crops, vegetation and buildings. The EPA Office of Air Quality Planning and Standards (OAQPS) has set NAAQS for six principal pollutants, which are called "criteria pollutants: ozone, carbon monoxide, particulate matter, sulfur dioxide, lead, and nitrogen dioxide.

9. Nonattainment Area

A geographic area in which the level of a *criteria air pollutant* is higher than the level allowed by the federal standards. A single geographic area may have acceptable levels of one criteria air pollutant but unacceptable levels of one or more other criteria air pollutants; thus, an area can be both attainment and nonattainment at the same time.

10. Regional Haze (RH)

Visibility impairment that is caused by the emission of air pollutants from numerous sources located over a wide geographic area. Such sources include, but are not limited to, major and minor stationary sources, mobile sources, and area sources.

11. Regional Haze Rule (RHR)

In 1999, the Environmental Protection Agency (EPA) issued regulations to address regional haze in 156 national parks and wilderness areas across the country. The goal of the RHR is to eliminate human-caused visibility impairment in national parks and wilderness areas across the country. It contains strategies to improve visibility over the next 60 years, and requires states to adopt implementation plans. (See 64 FR 35714, July 1, 1999).

(Both Section 308 and 309 of the RHR are focused on States)

12. Section 309 or 51.309 (Optional for tribes)

Requirements related to the Grand Canyon Visibility Transport Commission.

This section establishes the requirements for the first regional haze implementation plans to address regional haze visibility impairment in the 16 Class I areas covered by the Grand Canyon Visibility Transport Commission Report. For the years 2003 to 2018, certain transport region states (Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah, and Wyoming) may choose to implement the Commission's recommendations within the framework of the national regional haze program and applicable requirements of the Act by complying with the provisions of this section, as supplemented by an approvable Annex to the Commission Report. (The Annex refers to the reduction of sulfur dioxide emissions of stationary sources for the reporting years 2003, 2008, 2013 and 2018). If a transport region state submits an implementation plan (309) which is approved by the EPA as meeting the requirements of this section, it will be deemed to comply with the requirements for reasonable progress for the period from approval of the plan (implementation plan) to 2018. For a complete listing of the requirements, refer to 40 CFR 51.309.

13. Section 308 or 51.308 (Optional for tribes)

Unlike Section 309, the state(s) under Section 308 have to research, gather data, and offer specific plans on how to address regional haze. This section establishes the requirements for implementation plans, plan revisions, and periodic progress reviews to address regional haze. There is one of two ways to approach this. One is to work with other states in a regional planning organization to address regional haze; or the second is for a state to work by itself. Due dates for the implementation plans are based on fine particulate (PM 2.5) designations. For a complete listing of the requirements, refer to 40 CFR 51.308.

14. Standing Committees

These committees include public stakeholder representatives as well as governmental representatives. Some of their functions include providing oversight and direction to the Forums which develop detailed technical and policy products for the WRAP; identifying new issues for resolution, facilitating internal and public communications and making recommendations to the WRAP.

15. State Implementation Plans (SIPs)

A detailed description of the programs a state will use to carry out its responsibilities under the Clean Air Act. SIPs are collections of the regulations used by a state to reduce air pollution. The Clean Air Act requires that the EPA act on each SIP. Members of the public are given opportunities to participate in review and approval of SIPs.

16. Stationary Source

Any building, structure, facility, or installation which emits or may emit any air pollutant.

17. Transport Region State/Tribe

One of the states or tribes that is included within the Transport Region addressed by the Grand Canyon Visibility Transport Commission (Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah, and Wyoming).

18. Tribal Implementation Plans (TIPs)

Tribes, like states, may develop and run air quality programs. TIPs are similar to SIPs, but are optional for tribes, are not subject to deadlines, and offer more flexibility. For Regional Haze TIPs, tribes may pick only those appropriate portions under Section 308 or 309 that they wish to implement.

19. Visibility impairment

Any humanly perceptible change in visibility (light extinction, visual range, contrast, coloration) from that which would have existed under natural conditions.

20. Western Regional Air Partnership (WRAP)

In 1997, the WRAP was formed as an innovative partnership between states, tribes and federal agencies to address air quality issues in the west. It may set precedent for the ways tribes and states collaborate and negotiate environmental policy. Thus its importance to tribal nations extends beyond western tribes, or those with pressing air quality issues. The WRAP is the successor organization to the Grand Canyon Visibility Transport Commission (Commission).

21. WRAP Forums

Mission-specific working bodies that include representation from local government and non sovereign “stakeholders” as a part of an organizational level that helps to address the numerous technical and policy issues associated with visibility improvement. These forums fall under the WRAP which has created an institutional structure made up of standing committees which have oversight over the forums. These forums help to address the numerous technical and policy issues associated with visibility improvement.

IV. THE ENVIRONMENTAL PROTECTION AGENCY'S RESPONSIBILITY TO TRIBES

This section reviews the EPA's committed responsibility to tribes and is meant to remind tribes of its policy regarding the protection of human health and the environment on tribal lands. The following document, *EPA Policy for the Administration of Environmental Programs on Indian Reservations November 8, 1984 (1983 President of the United States, Ronald W. Reagan)* may be viewed in Appendix A.

The following text is a quote from the introduction of the Executive Order.

Introduction:

The President published a Federal Indian Policy on January 24, 1983, supporting the primary role of Tribal Governments in matters affecting American Indian reservations. That policy stressed two related themes: (1) that the Federal Government will pursue the principle of Indian "self-government" and (2) that it will work directly with Tribal Governments on a "government-to-government" basis.

The Environmental Protection Agency (EPA) has previously issued general statements of policy which recognize the importance of Tribal Governments in regulatory activities that impact reservation environments. It is the purpose of this statement to consolidate and expand on existing EPA Indian Policy statements in a manner consistent with the overall Federal position in support of Tribal "self-government" and "government-to-governments" relations between federal and Tribal Governments. This statement sets forth the principles that will guide the Agency in dealing with Tribal Governments and in responding to the problems of environmental management on American Indian reservations in order to protect human health and the environment. The Policy is intended to provide guidance for EPA program managers in the conduct of the Agency's congressionally mandated responsibilities. As such, it applies to EPA only and does not articulate policy for other Agencies in the conduct of their respective responsibilities.

It is important to emphasize that the implementation of regulatory programs which will realize these principles on Indian Reservations cannot be accomplished immediately. Effective implementation will take careful and conscientious work by EPA, the Tribes and many others. In many cases, it will require changes in applicable statutory authorities and regulations. It will be necessary to proceed in a carefully phased way, to learn from successes and failures, and to gain experience. Nonetheless, by beginning work on the priority problems that exist now and continuing in the direction established under these principles, over time we can significantly enhance environmental quality on reservation lands.

Policy (summarization):

Special consideration for tribal interests in making policy will be given and the EPA will work directly with tribal governments on a one-to-one (government-to-government) basis to insure tribal government involvement. This effort will assist in the decision-making and management of environmental programs that affect tribal lands.

The EPA recognizes that tribal governments are sovereign nations that have the authority and responsibility for their lands and people. The EPA will encourage and assist tribes in taking on the regulatory responsibilities and program management for environmental programs. This will be done within the constraints of EPA's authority and resources. Such aid will include providing grants and other assistance to tribes in a similar manner as to state governments. Tribes are encouraged to take on those responsibilities that state governments have for non-tribal lands.

Tribes not wishing or able to take on such responsibilities at this time will rely on the EPA to retain responsibility for managing programs for tribal lands. Tribes, however, are encouraged to participate in policy-making. If a tribe is unable to participate, the EPA will make sure tribal concerns and interests are considered when any action or decision made by the agency may have an effect on tribal environments.

If a tribally-owned or -managed facility is not in compliance with federal environmental statutes, the EPA will work with the tribal leadership in developing a way to achieve compliance. This will be achieved by providing technical support and consultation. If a facility is owned or managed by private parties with no tribal interest or control involved, the EPA will work in cooperation with the affected tribal government, but will respond to the noncompliance as it would to a facility elsewhere in the country.

The goals of this policy will be incorporated into the EPA's planning and management activities including its budget, operating guidance, legislative initiatives, management accountability system, and ongoing policy and regulation development processes.

Reaffirmation of EPA Indian Policy:

See Appendix B to view the memorandum.

V. THE ADVANTAGES AND DISADVANTAGES OF ADOPTING A REGIONAL HAZE TIP

Although a few tribes have submitted or are close to submitting a NAAQS-based TIP, no tribe has received program approval. With the promulgation of the RHR and the development of the 309 Model TIP Template, tribes will gain substantial assistance in developing an RH TIP. Prior to implementing an RH TIP, however, tribes will need to take additional steps, such as receiving Treatment in the same manner As States (TAS) status and TIP program approval (*see part VI.B Requirements for Tribal CAA Program Approval*).

A. Advantages

- Maintain good visibility = clean air
- Exercise sovereignty
- Enhance existing air program
- Begin an air program with this goal
- Open communication with existing sources
- TIP flexibility

If a tribe is currently experiencing good visibility, it is important that it is maintained. On the other hand, if a tribe is experiencing poor visibility, it may want to work at reducing the haze and improving air quality. The 309 RH TIP will help accomplish either of these goals. In addition to this, a tribe that is culturally tied to a landscape or region will continue to support the positive spiritual connections for its health and well-being.

Under the CAA, tribes with approved programs have jurisdiction over their entire reservations⁷ including fee lands. A tribe that chooses to adopt an RH TIP will be asserting its sovereignty as well as having a direct impact on its ambient air. By exercising this authority, a tribe is also likely to gain valuable experience that could lead to other tribal CAA programs.

By pursuing an RH TIP, a tribe with an existing air program could actively make a difference for its tribal members. This action would show a positive growth on the part of the program by taking on more responsibilities that could have a direct effect on all life.

If a tribe currently does not have an air quality program, this could be used as a future goal. It is important that there is a strong sense of direction for any program and this would be one a tribe could begin working toward. In addition, a tribe could use this time to begin educating itself, its community and others on the CAA. This would be helpful to the tribe when the time comes to adopt an RH TIP.

If a tribe currently has businesses on its land, this will be a way to open up a dialogue with those businesses. By doing this, a tribe will be able to learn more about the facilities' process and the facilities will learn more about the tribe's interest in maintaining ambient air quality.

⁷ The word reservations is being used as a general term, but also includes Pueblos, Rancherias, or others depending on how a particular tribe describes their lands.

Because of the Tribal Authority Rule (TAR), tribes have the flexibility to include in a TIP only those elements that address their specific air quality needs and that they have the capacity to manage (*see part VI. A. Overview of the Tribal Authority Rule*). Under this approach, the 309 Model TIP elements that the tribe adopts must be reasonably severable from those elements the tribe chooses not to adopt. “Reasonably severable” means that the elements selected for the 309 Model TIP are not integrally related to elements that are not included in the TIP, and are consistent with applicable CAA and regulatory requirements. Each individual tribe will have to discuss with the EPA as to why it believes a portion of its submitted TIP may be reasonably severable. The following list contains the 12 elements covered by section 309 of the RHR. Each element is described in more detail in the 309 Model TIP Template (a separate document).

1. Projection of Visibility Improvement
2. Clean Air Corridors
3. Stationary Sources
4. Mobile Sources
5. Fire Programs
6. Paved and Unpaved Road Dust
7. Pollution Prevention
8. Additional Recommendations
9. Periodic Implementation Plan Revisions
10. Tribal Planning and Coordination with States and Tribes
11. Geographic Enhancements
12. Reasonable Progress for Additional Class I Areas

B. Disadvantages

- Workload increase
- Need for more staff
- Complexity of an RH TIP
- Difficulty in obtaining funding

Because tribal environmental programs are generally small and have limited staff, tribes may find it difficult to develop and implement an RH TIP. The amount of work needed to adopt a plan will be time-consuming, especially at the beginning. Some of the time will be devoted to familiarizing oneself with the RHR, the Model Template, the Technical Support Documents (TSD), writing the TIP using the template, outreach, and conducting emission inventories. A tribe wanting to take on this project may want to consider having a committee to help so that not only one or two people will be working on the project. Once the plan is approved, it will then have to be implemented, which can be labor-intensive, depending on what portions are adopted from the rule. At this point, it is difficult to approximate the number of hours that would be needed. It is not recommended that staff, devoted to developing an RH TIP, work on other projects simultaneously.

Since staff may be limited, there is the potential need to hire additional personnel. This would mean finding someone qualified and providing the necessary salary, space and equipment needed. A strict devotion to the project will be necessary unless the staff member is highly

organized and experienced. It is likely that a historical overview will need to be provided to explain the reasons behind pursuing a TIP as well as those topics suggested in the previous paragraph.

The RH program, like other CAA programs, is complex. Depending on the sections a tribe chooses to adopt, it could lead to performing complex duties such as monitoring and modeling, which would be an additional cost. Currently, the WRAP has and will continue to offer general assistance regarding the technical work needed; however, if the WRAP does not have the resources to pay for this technical assistance, tribes as well as states will be expected to continue this type of work. It is not clear how the EPA might view this since most tribes do not have the resources to conduct these activities. In discussing a TIP with the EPA, a tribe will need to ask what it may be committing to in particular sections that require tracking of emissions.

Other obstacles that tribal environmental staff may encounter could be the difficulty in gaining support from tribal leaders and the community for an RH TIP. It may be perceived that visibility improvement is not as important, and not as worthy of the time and effort, as other programs related more directly to human health.

If a tribe does not have a reasonable plan in place for implementing all facets of the project, it could potentially be setting itself up for failure. For example, if a tribe were to experience a turnover in staff, the program might cease to operate. This obviously would cause a problem and the tribe would have to seek out someone who could continue with the process. The chances of starting where one stopped may not be realistic. Time would be needed for someone to become familiar with the process, goals, and needs of the tribe. This person would be starting over at the beginning. It is therefore important that more than one person is knowledgeable about what the TIP entails and the tribe's responsibilities under the implementation plan. If a tribe develops an RH TIP that is approved, the EPA expects the tribe will implement it. If a tribe fails to implement an approved regulation or program, however, the EPA may exercise its authority to enforce the 309 TIP. In addition, the EPA could withhold grant funds for failing to implement the approved program. It is therefore important that the tribe carries out its commitment to implement the 309 TIP.

In addition to some of the potential challenges mentioned above, a tribe might decide to develop an RH TIP but have difficulty obtaining funds to support its program. Currently, the EPA is experiencing a shortage of grant funds for supporting tribal air programs, so the EPA air grant funding may not be available and tribes may have to explore other potential funding sources.

VI. IMPLEMENTING A TRIBAL REGIONAL HAZE PROGRAM

Those federally recognized tribes (185)⁸ located in any of the following states are eligible to use the *Model TIP Template for Section 309 of the Regional Haze Rule*: Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah, and Wyoming. Prior to engaging in the process of a 309 RH TIP, there are a few considerations that a tribe should make. The following information is meant to serve as a guide to those tribes that are interested in developing an RH TIP. Tribes may adopt either a 308 or 309 RH TIP anytime prior to 2018 after which time they can only adopt a 308 RH TIP.

A. Overview of the Tribal Authority Rule (TAR)

The EPA promulgated the TAR on February 12, 1998 (40 CFR Part 49.1-49.11). In this rule, the EPA encourages the tribes that meet the eligibility criteria to apply for and receive authorization to conduct federally enforceable programs in the same manner as states for various sections of the CAA. Under the TAR, tribes are encouraged to pick and choose (modular approach) programs of the CAA that will best fit their needs. The TAR allows tribes to implement programs as they are developed, rather than in accordance with statutory deadlines. This independence means that RH strategies selected by tribes are not dependent upon the strategies selected by the state or states in which the tribe is located.

B. Requirements for Tribal CAA Program Approval

The TAR requires that the EPA determine whether a tribe is TAS-eligible for a specific CAA program before the EPA can approve the tribe's program (*40 CFR Part 49.1 Program overview*). Tribes must request an eligibility determination each time a new CAA program section is submitted to the EPA. In the case of the RHR, a tribe would request the eligibility determination for *Sections 110, Implementation Plans and 169A, Visibility protection for Federal Class I areas*.

If this is a tribe's first time requesting TAS, it will need to meet the following criteria listed below. For an example of what this request might look like, see Appendix C. If a tribe has previously achieved TAS for another CAA program or under another EPA-administered statute (e.g. the Clean Water Act), its application satisfies the first three requirements by referencing the previous program authorization.

1. Tribal Eligibility Requirements §49.6

- (a) The applicant is an Indian tribe recognized by the Secretary of the Interior;
- (b) The Indian tribe has a governing body carrying out substantial governmental duties and functions;

⁸ Those tribes that meet the criteria for "treatment in the same manner as a state," (42 U.S.C. 7601(d)(2) and 7602(r) and 40 CFR Part 49.6-.7) are the only tribes within the nine state region that can develop and submit an RH TIP.

- (c) The functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and
- (d) The Indian tribe is reasonably expected to be capable, in the EPA Regional Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the Clean Air Act and all applicable regulations.

Tribes may apply for eligibility at the same time they submit their TIP for approval or as a separate and prior action. Examples of the type of documents that are needed may be found in *Developing a Tribal Implementation Plan EPA 452/R-02-010 October 2002 Chapters 1, 5, and 6*. In addition, two tribal examples are provided in Appendix D of this document.

2. Funding Availability

According to the TAR section 49.7(4)(v), a tribe must describe its ability to administer any CAA program. This includes having adequate personnel and funding. A tribe may seek out funding under CAA section 103 or section 105 air grants;⁹ however, there is no guarantee that money will be available. Because most funding has already been allocated by October 1st of each year, it is recommended that a tribe talk with the EPA early in the process. Currently, the EPA reports a shortage of funds in the tribal air grant program. The EPA is also in the process of developing specific funding criteria for determining how funds are to be allocated among tribes. It is therefore beneficial if a tribe understands what these key requirements are and carefully plans out its project while seeking funds. It is suggested that a tribe contact its individual EPA regional office and seek guidance on funding availability. Because of the potential difficulties in obtaining the funds mentioned above, a tribes air program may wish to seek additional funding from the EPA's General Assistance Program (GAP), the Department of Energy (as have tribes in New Mexico), the tribe, or from a public or private source.

C. TIP Administrative Process

After the TIP is developed, the tribe will need to conduct public notice, public hearings, other consultation requirements and formal adoption. A quick overview of these requirements is listed below but more information may be found in *Chapter 6 TIP Adoption & Submission* from the EPA's guidance document, *Developing a Tribal Implementation Plan*.

Because Appendix V to 40 CFR Part 51--Criteria for Determining the Completeness of Plan Submissions will be used to evaluate the completeness of TIP submittals, it should be used as a reference by tribes developing RH TIPs.¹⁰

⁹ Section 103 air grants are for one time projects, while section 105 air grants support continuing programs and require a tribe to match a portion of the funds.

¹⁰ This document may be viewed in Appendix C.

1. Public Notice

According to the CAA, a tribe is required to provide public notice to affected parties and conduct public hearings prior to adopting the TIP. The specific requirements for public notices, as dictated by 40 CFR Part 51.102(d), are as follows:

1. Notice given to the public by prominent advertisement in the area affected announcing the date(s), time(s), and place(s) of such hearing(s);
2. Availability of each proposed plan or revision for public inspection in at least one location in each region to which it will apply, and the availability of each compliance schedule for public inspection in at least one location in the region in which the affected source is located;
3. Notification to the Administrator (through the appropriate Regional Office);
4. Notification to each local air pollution control agency which will be significantly impacted by such plan, schedule or revision;

Prior to announcing public notice, a tribe may want to communicate with potentially affected parties early in the process of developing its 309 TIP.¹¹ This is suggested because it will provide good communication with the tribe's surrounding community. Although a tribe does not need to seek approval from outside communities, the act of including them in the 309 process may gain the tribe positive support in its actions. By doing this, it may eliminate future confusion and opposition after public notice is given. A tribe will be taking a proactive approach by offering others background information as to why the tribe is seeking to implement an RH TIP. A tribe is not required to do this, however, but it may help avoid numerous questions and concerns from those who will be seeing the public notice announcing the TIP.

The development of a public outreach plan is something a tribe may want to consider. Researching the subject and finding other tribes who have gone through a similar process is helpful. A general plan including meeting dates, times, and locations is a good start, as well as a list of potential stakeholders and affected parties. Each meeting should have a specific agenda so that all aspects of the TIP are covered. Depending on the audience, the tribe should be prepared to answer questions of various degrees. It is important that the tribe be able to explain the RHR in layman's terms which may include explaining the science of visibility. A tribe may want to seek out assistance from other agencies (state, federal, WRAP Forums, etc.) as well to help with the process. Other examples that may help a tribe to get started may be found in *Table 6-1* in the EPA's guidance document, *Developing a Tribal Implementation Plan*.

In the case of an interstate region, notification must be provided to any other States included, in whole or in part, in the regions that are significantly impacted by such plan or schedule or revision. The tribe must also make the TIP available for review by having it accessible to the public, both on and off tribal lands. This is usually accomplished by advertising, with the

¹¹ Those affected parties may include nearby residents outside tribal boundaries, neighboring jurisdictions, and business owners and operators.

appropriate information included, in a newspaper of general circulation. This notice must be provided at least 30 days prior to the date of the hearing. Public notice in a newspaper can also be supplemented by posting information on a tribe's website, or another internet site for easy public access of TIPs and TIP related documents. In the case that this cannot be done, physical copies can be made available to a public library or at another agency or location where an individual could review it.

A tribal TIP outreach example may be found in Appendix E of this document.

2. *Public Hearing*

Thirty days or more after the public notice has been issued, a tribe must conduct a public hearing so that those interested can ask questions about the TIP and make comments. The public hearing is to be made to the tribal community as well as those affected parties interested in coming to the hearing. Written comments are normally accepted for those unable to attend the hearing. Depending on the complexity of the TIP, more than one public hearing may need to be scheduled. A tribe must prepare and retain, for inspection by the Administrator upon request, a record of each hearing. The record must contain, as a minimum, a list of witnesses together with the text of each presentation. Typically, a state conducting a public hearing will have a court reporter present to record all comments that are being made. Once this is complete, the transcripts must be notarized.

3. *Other Consultation Requirements*

According to section 121 of the CAA, consultation with other governmental entities (e.g., Federal Land Managers) may be necessary before adopting the 309 TIP. The tribe should contact its regional EPA contact and seek guidance.

4. *Tribal Adoption and Submittal of the 309 TIP*

After the tribe meets all necessary public notice, public hearing, and consultation requirements, the tribe's government must adopt the 309 TIP in a tribal code or regulation. Each tribe's laws and constitution may include specific procedural requirements. Once this is completed, the 309 TIP may be submitted to the appropriate regional EPA office for action. Usually, a cover letter explaining the submittal accompanies the documents. Even though the cover letter is addressed to the EPA Regional Administrator, the documents will reach the EPA contact faster if the contact person's name is also listed on the package. More reference may be found in *Chapter 6 TIP Adoption & Submission* from EPA's guidance document, *Developing a Tribal Implementation Plan*.

D. EPA TIP Review Process

1. EPA Completeness Determination

Under the CAA, the EPA has 60 days to determine the completeness of a TIP (or SIP) submittal. If a submittal is incomplete, the EPA will return it and the tribe may resubmit it with the appropriate changes. If the EPA does not make a completeness or incompleteness finding within six months from the date the TIP was received, the TIP will automatically be deemed complete (CAA 110(k)(1)).

Completeness determinations are used to document, among other things, that states have met their SIP submittal deadlines. This does not apply to tribes because TIP submittals are optional and are not subject to submittal and implementation deadlines found in the Act (40 CFR 49.4(a)). For tribes, the completeness determination is important because it triggers the requirement that the EPA must act on the TIP submittal within 12 months.

It should be noted that what constitutes a complete submittal may be different for tribes than for states. Tribal CAA program submittals can comprise only partial elements of a program, as long as the elements are “reasonably severable” (40 CFR 49.7(c)). Nevertheless, tribal plan submittals will be reviewed by the EPA in accordance with applicable statutory and regulatory criteria in a manner similar to the way that the agency would review a similar state submittal (40 CFR 49.9(h)).

In developing a TIP, if a tribe determines that one of the program elements is inappropriate for its plan, it should be discussed with the tribe’s EPA Regional Office. If the EPA agrees that the requirement is reasonably severable, then it does not have to be addressed in the plan. It should be noted that the administrative criteria in Section 2.1 of Appendix V, especially those related to public process, would not generally be found by EPA to be reasonably severable.

2. EPA Completeness Criteria

The following summarizes what can be found in Appendix V to 40 CFR Part 51—Criteria for Determining the Completeness of Plan Submissions, which is also attached in Appendix C of this document. This summary is not meant to take the place of the completeness requirements and a tribe should review the Appendix for the complete list.

The following shall be included in plan submissions for review by the EPA:

a. Administrative Materials

- A letter from the tribe’s leadership requesting TIP approval
- Proof that the tribe in code or regulations has adopted the TIP
- Proof that the tribe has legal authority to adopt and implement the TIP
- A copy of the regulation or document submitted for approval and incorporation by reference into the plan, including changes made to the existing approved plan where applicable

- Proof that the procedures followed, in adopting and issuance of the TIP, conformed with the tribe's law and constitution
- Proof of public notice and the date of publication
- Certification that the public hearing was held in conjunction with what the public notice announced.
- Compilation of comments received and the responses given

b. Technical Support

In the case of the RH TIP, the WRAP's TSD supplies most of the technical support information for this plan. Tribes wishing to adopt the Clean Air Corridors, Stationary Sources, Mobile Sources, Fire, and Paved and Unpaved Road dust sections will be required to perform an additional emissions inventory. This action will allow tribes, along with the WRAP, to track increases or decreases of emissions in these areas using representative data. Currently, the TSD data is either county or regionally based with only a handful of tribal sources included. If by chance the WRAP is unable to provide technical information relating to the TIP, the burden to do this will fall on those participating tribes.

3. EPA Action on the TIP

Once the implementation plan has been deemed complete, the EPA has 12 months to act on it. If the plan meets all requirements, then the EPA will propose approval using a public "notice and comment" rulemaking process. The EPA publishes a Federal Register notice, and prepares a support document, which explains the EPA action in detail, and allows a specified public comment period, usually 30 to 90 days. After the comment period ends, the EPA must respond to the public's comments (if any were received) before it can finalize the program approval. In some cases, significant changes may be required before a program can receive final approval.

Since tribes are not required to submit a TIP, the EPA won't formally disapprove a TIP. Instead, the agency will send a letter to the tribe documenting the approval issues and work with the tribe to incorporate the necessary changes to make it an approvable TIP.

E. Tribal and Federal Implementation Plans

Tribes that choose not to develop a TIP may request a Federal Implementation Plan (FIP) from the EPA. A FIP, unlike a TIP, is a plan that the EPA administers. Under the TAR, the EPA is committed to promulgating FIPs as necessary or appropriate to protect air quality, and the EPA will be expected to develop FIPs as necessary to ensure that tribes have the opportunity to participate in the RH program. The EPA will make this determination in consultation with a tribe.

Aside from individual TIPs and FIPs, there may also be cases where tribal land air quality is managed through a combination of TIPs and FIPs. Such a partnership would allow a tribe to concentrate on specific areas of interest or need, while relying on the EPA to handle other necessary areas of air quality management (such as stationary sources).

Due to the flexibility allowed under the TAR, a tribe may revise a TIP and take on or give back programs based on changes in tribal need or capacity. This, however, will take additional work on the part of the tribe, as it must go through the process of seeking public comments, conducting public hearings, and receiving tribal and EPA approval. These four steps are common and must be followed with any implementation plan. Only those portions that are being revised will have to be put through this procedure.

A tribe wishing to give back a program or discontinue a program or a portion of a program, once it has been approved, should consult with its EPA Regional Office. Approved TIPs and SIPs may be revised, but the CAA does not allow for “backsliding,” or a reduction in the level of air pollution control. It is likely that the EPA will be required to continue to enforce an approved TIP, even if the tribe chooses not to.

This type of action, relinquishing part of a TIP, will appear as taking a step backward instead of forward. Therefore a tribe should be selective when choosing the portions of the implementation plan they wish to adopt.

For an example of a tribal situation where a FIP was developed see Appendix F of this document.

1. How Might the EPA Approach Developing a FIP?

Under the TAR the EPA is committed to promulgating "such federal implementation plan provisions as are necessary or appropriate to protect air quality," where a tribe does not submit a tribal implementation plan. TIPs are optional for tribes, and they are labor-intensive as well. It is therefore likely that some tribes who would like to participate in the section 309 program, or who have jurisdiction over sources that need to be covered by the program, will choose not to develop a TIP. In this case, the EPA would consult with the tribe to determine if a FIP is necessary or appropriate.

The EPA could develop FIP(s) in several different ways. It could develop one overall 309 FIP for the WRAP region, designed with a modular approach to allow tribes to opt into the FIP provisions appropriate for the sources within their jurisdiction. At first glance, this seems to be the most efficient approach, but the EPA could also develop region-specific, reservation-specific and even source-specific FIPs if necessary. Interested tribes are encouraged to discuss FIP development with their EPA Regional Offices.

2. How Does a FIP Compare to a TIP?

In comparison, would a FIP be as good as a TIP? This is a very good question and one that doesn't have an easy answer. Both a FIP and a TIP would meet the section 309 rule, but a TIP would be more specific to the individual tribe's interest and needs. Although the EPA has developed some FIPs for tribes, based on the NAAQS, the development of an RH TIP will be a new experience. The EPA has not yet been requested to do so.

The States of Arizona, Colorado, New Mexico, Utah and Wyoming chose to adopt section 309 and used the 309 SIP template to meet the December 31, 2003 RHR SIP deadline for submitting it to the EPA. Currently the EPA is reviewing these individual SIPs.

As tribes are aware, government agencies, such as the EPA, do not always know how to address certain issues in relation to tribal nations. This may be because the issue has not been dealt with before and there are numerous questions regarding interpretation of rules and regulations. Any decisions must be the carefully considered so that tribal interests are not compromised. Creating and implementing an RH FIP would be a new experience for the EPA and could take some time to actually develop.

Therefore, a tribe may be better off taking on the project itself, if possible. It may take time to get this done, but the end result would be that the tribe would be recognized as a regulatory agency playing on the same field with states and federal agencies. The more knowledge a tribe can get, the better off it will be. This decision must warrant careful consideration before any action is taken.

F. SO₂ Milestone and Backstop Trading Program and Tribal Set-Asides

1. Background

It may appear odd that we are choosing to discuss the SO₂ Milestone and Backstop Trading Program (trading program) when we have not discussed any of the other eleven sections listed in the section 309 rule. The reason for this is that tribes may be directly or indirectly affected by this program in the future. The program is discussed under the Stationary Sources section (309 TIP Template) and is based on those sources that emit 100 tons per year (tpy) or more of SO₂. This program is exclusive to the 309 option.

The trading program is set up to control SO₂ emissions from large stationary sources in the nine state western region. Sources include coal fired electric utilities, industrial boilers, copper smelters, refineries, and certain other industries. This program is one of the 12 sections listed in the RHR.

The program establishes a cap (i.e. the “milestones”) on total SO₂ emissions from all affected sources in the region of states and tribes that have chosen the 309 option. This cap will decline over time in order to achieve the visibility objectives. Initially, sources will be given the opportunity to “voluntarily” restrict their emissions below the cap. In the case where emissions do not decline as rapidly as the cap, and regional emissions exceed the cap, the trading program (also known as the “WEB Trading Program”) will be triggered. If the program is triggered, affected sources in the region will need to hold an “allowance”¹² for each ton of SO₂ that is emitted. The allocation¹³ of total allowances will be limited to the number of tons below the cap. The trading of these allowances will allow the cap to be achieved in a cost effective manner.

12 An allowance is the authorization to emit one ton of sulfur dioxide for one year, under certain conditions.

13 An allocation is the number of allowances a source can use.

Sources, which can reduce emissions cheaply, can sell their “excess” allowances to those sources which face high emission control costs.

2. What Happens to Stationary Sources if a Tribe Chooses to Opt-in to the Section 309 Program?

While any tribe in the nine state western region may choose to opt-in to the section 309 program, it may make sense to focus this discussion on tribes having existing sources that emit 100 tpy or more of SO₂. Most tribes do not have 100 tpy sources such as those listed above, and as of July 2003, only four such sources exist on tribal lands in the nine state western region.¹⁴ These tribes are not required to participate in the trading program but are allowed to if they so choose. If a tribe chooses to opt-in to the section 309 program, it could adopt a TIP for this particular section. When a tribe has opted into the section 309 program, stationary sources on tribal lands with emissions \geq 100 tons of SO₂ (“the affected stationary sources”) would be subject to this program and the emissions cap. While the affected stationary sources would be given allowances based on the regional allocation scheme, they need to hold sufficient allowances for their emissions. Any new sources \geq 100 tons of SO₂ are also subject to this program and the emissions cap. New sources would have access to allowances in the new source set-aside, subject to the distribution scheme for the new source set-aside. The new source set aside however, could run dry—then new sources would need to buy its needed allocations from the market.

3. What is the Tribal Set-Aside?

The trading program includes a tribal set-aside where 20,000 allowances per year have been “set-aside” for eligible tribes within the nine state western region. Regardless of whether a tribe has chosen to do a 309 TIP, allowances in the tribal set-aside are available to address equity issues and to prevent barriers to economic development. The tribal set-aside is available only if regional SO₂ emissions exceed the cap and the WEB Trading Program has been triggered. For each year the trading program is in effect, tribes would be allocated another 20,000 tons. Tribes with allowances have many options, including trading them on the open market, using them as incentives for economic development, or retiring them for the benefit of the environment.

The trading program’s long-term projections have only been planned out to 2018. At this time, another evaluation will have to be made.

4. How Many Allowances Will Each Tribe Get from the Tribal Set-Aside?

This question remains unanswered. There are numerous scenarios that can take place and affect the outcome. If the regional cap for SO₂ is triggered, there will need to be a plan on how to distribute the allowances in the tribal set-aside among the 185 tribes. Once the cap is exceeded, a decision regarding how this will happen will be needed. At that time, it will be important that all potentially affected tribes be heard regarding this issue. The consultation process with each

¹⁴ There are four 100-ton SO₂ sources on tribal lands in the WRAP region. Two are on the Navajo Reservation (APS Four Corners Power Plant and SRP Navajo Generating Station), both coal-fired power plants. One at Wind River, (Peak Sulfur Products Company) a sulfur plant. Another is at the Uintah and Ouray Reservation in Utah (Bonanza Power Plant) a coal fired power plant.

government leader will be essential in coming to a decision and will no doubt be a monumental task.

VII. CONCLUSION

The preceding information points out numerous facets associated with implementing a TIP. This guidance is meant to point out some of the issues that a tribe should consider before taking on this project. Although we strive to mention key issues that a tribe should take into consideration, it is possible that we inadvertently overlooked some. Even though tribes have a template to work from for their RH TIP, more work will be needed, beyond just filling in the blanks and developing emissions inventories. This project is by no means a small task to take on. Important considerations include having the funding capability and knowledgeable staff to implement such a program; the commitment to follow through on receiving TAS status and TIP program approval; the desire to exercise tribal sovereignty; the decision to participate in a market trading program; and the confidence to adopt and implement a program, the failure of which could have adverse consequences, such as a withholding of grant funding by the EPA.

Though these decisions warrant some thought, the impetus behind the work may well be worth the effort to keep sacred areas free from haze. How much are we willing to do to help keep the skies clear? Today's decision to get involved could prove to have a profound effect not only on tribal members and businesses, but also future economic development projects.

VIII. APPENDICES

Appendix A: EPA's Indian Policy

EPA Policy for the Administration of Environmental Programs on Indian Reservations November 8, 1984

Introduction:

The President published a Federal Indian Policy on January 24, 1983, supporting the primary role of Tribal Governments in matters affecting American Indian reservations. That policy stressed two related themes: (1) that the Federal Government will pursue the principle of Indian "self-government" and (2) that it will work directly with Tribal Governments on a "government-to-government" basis.

The Environmental Protection Agency (EPA) has previously issued general statements of policy which recognize the importance of Tribal Governments in regulatory activities that impact reservation environments. It is the purpose of this statement to consolidate and expand on existing EPA Indian Policy statements in a manner consistent with the overall Federal position in support of Tribal "self-government" and "government-to-governments" relations between federal and Tribal Governments. This statement sets forth the principles that will guide the Agency in dealing with Tribal Governments and in responding to the problems of environmental management on American Indian reservations in order to protect human health and the environment. The Policy is intended to provide guidance for EPA program managers in the conduct of the Agency's congressionally mandated responsibilities. As such, it applies to EPA only and does not articulate policy for other Agencies in the conduct of their respective responsibilities.

It is important to emphasize that the implementation of regulatory programs which will realize these principles on Indian Reservations cannot be accomplished immediately. Effective implementation will take careful and conscientious work by EPA, the Tribes and many others. In many cases, it will require changes in applicable statutory authorities and regulations. It will be necessary to proceed in a carefully phased way, to learn from successes and failures, and to gain experience. Nonetheless, by beginning work on the priority problems that exist now and continuing in the direction established under these principles, over time we can significantly enhance environmental quality on reservation lands.

Policy:

In carrying out our responsibilities on Indian reservations, the fundamental objective of the Environmental Protection Agency is to protect human health and the environment. The keynote of this effort will be to give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands. To meet this objective, the Agency will pursue the following principles:

1. THE AGENCY STANDS READY TO WORK DIRECTLY WITH INDIAN TRIBAL GOVERNMENTS ON A ONE-TO-ONE BASIS (THE "GOVERNMENT-TO-GOVERNMENT" RELATIONSHIP), RATHER THAN AS SUBDIVISIONS OF OTHER GOVERNMENTS.

EPA recognizes Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace. Accordingly, EPA will work directly with Tribal Governments as the independent authority for reservation affairs, and not as political subdivisions of States or other governmental units.

2. THE AGENCY WILL RECOGNIZE TRIBAL GOVERNMENTS AS THE PRIMARY PARTIES FOR SETTING STANDARDS, MAKING ENVIRONMENTAL POLICY DECISIONS AND MANAGING PROGRAMS FOR RESERVATIONS, CONSISTENT WITH AGENCY STANDARDS AND REGULATIONS.

In keeping with the principle of Indian self-government, the Agency will view Tribal Governments as the appropriate non-federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as EPA's deliberations and activities have traditionally involved the interests and/or participation of State Governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments.

3. THE AGENCY WILL TAKE AFFIRMATIVE STEPS TO ENCOURAGE AND ASSIST TRIBES IN ASSUMING REGULATORY AND PROGRAM MANAGEMENT RESPONSIBILITIES **FOR RESERVATION LANDS.**

The Agency will assist interested Tribal Governments in developing programs and in preparing to assume regulatory and program management responsibilities for reservation lands. Within the constraints of EPA's authority and resources, this aid will include providing grants and other assistance to Tribes, similar to what we provide State Governments. The Agency will encourage Tribes to assume delegable responsibilities, (i.e. responsibilities which the Agency has traditionally delegated to State Governments for non-reservation lands) under terms similar to those governing delegations to States.

Until Tribal Governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations (unless the State has an expressed grant of jurisdiction from Congress sufficient to support delegation to the State Government). Where EPA retains such responsibility, the Agency will encourage the Tribe to participate in policy-making and to assume appropriate lesser or partial roles in the management of reservation programs.

4. THE AGENCY WILL TAKE APPROPRIATE STEPS TO REMOVE EXISTING LEGAL AND PROCEDURAL IMPEDIMENTS TO WORKING DIRECTLY AND EFFECTIVELY WITH TRIBAL GOVERNMENTS ON RESERVATION PROGRAMS.

A number of serious constraints and uncertainties in the language of our statutes and regulations have limited our ability to work directly and effectively with Tribal Governments on reservation problems. As impediments in our procedures, regulations or statutes are identified which limit our ability to work e effectively with Tribes consistent with this Policy, we will seek to remove those impediments.

5. THE AGENCY, IN KEEPING WITH THE FEDERAL TRUST RESPONSIBILITY, WILL ASSURE THAT TRIBAL CONCERNS AND INTERESTS ARE CONSIDERED WHENEVER EPA'S ACTIONS AND/OR DECISIONS MAY AFFECT RESERVATION ENVIRONMENTS.

EPA recognizes that a trust responsibility derives from the historical relationship between the Federal Government and Indian Tribes as expressed in certain treaties and Federal Indian Law. In keeping with that trust responsibility, the Agency will endeavor to protect the environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations.

6. THE AGENCY WILL ENCOURAGE COOPERATION BETWEEN TRIBAL, STATE AND LOCAL GOVERNMENTS TO RESOLVE ENVIRONMENTAL PROBLEMS OF MUTUAL CONCERN.

Sound environmental planning and management require the cooperation and mutual consideration of neighboring governments, whether those governments be neighboring States, Tribes, or local units of government. Accordingly, EPA will encourage early communication and cooperation among Tribes, States and local Governments. This is not intended to lend Federal support to any one party to the jeopardy of the interests of the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals and neighbors often serves the best interests of both.

7. THE AGENCY WILL WORK WITH OTHER FEDERAL AGENCIES WHICH HAVE RELATED RESPONSIBILITIES ON INDIAN RESERVATION TO ENLIST THEIR INTEREST AND SUPPORT IN COOPERATIVE EFFORTS TO HELP TRIBES ASSUME ENVIRONMENTAL PROGRAM RESPONSIBILITIES FOR RESERVATIONS.

EPA will seek and promote cooperation between Federal agencies to protect human health and the environment on reservations. We will work with other agencies to clearly identify and delineate the roles, responsibilities and relationships of our respective organizations and to assist Tribes in developing and managing environmental programs for reservation lands.

8. THE AGENCY WILL STRIVE TO ASSURE COMPLIANCE WITH ENVIRONMENTAL STATUTES AND REGULATIONS ON INDIAN RESERVATIONS.

In those cases where facilities owned or managed by Tribal Governments are not in compliance with federal environmental statutes, EPA will work cooperatively with Tribal leadership to develop means to achieve compliance, providing technical support and consultation as necessary to enable Tribal facilities to comply. Because of the distinct status of Indian Tribes and the complex legal issues involved, direct EPA action through the judicial or administrative process will be considered where the Agency determines, in its judgment, that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion.

In those cases where reservation facilities are clearly owned or managed by private parties and there is no substantial Tribal interest or control involved, the Agency will endeavor to act in cooperation with the affected Tribal Government, but will otherwise respond to noncompliance by private parties on Indian reservations as the Agency would to noncompliance by the private sector elsewhere in the country. When the Tribe has a substantial proprietary interest in, or control over, the privately owned or managed facility, EPA will respond as described in the first paragraph above.

9. THE AGENCY WILL INCORPORATE THESE INDIAN POLICY GOALS INTO ITS PLANNING AND MANAGEMENT ACTIVITIES INCLUDING ITS BUDGET, OPERATING GUIDANCE, LEGISLATIVE INITIATIVES, MANAGEMENT ACCOUNTABILITY SYSTEM AND ONGOING POLICY AND REGULATION DEVELOPMENT PROCESSES.

It is a central purpose of this effort to ensure that the principles of this Policy are effectively institutionalized by incorporating them into the Agency's ongoing and long-term planning and management processes. Agency managers will include specific programmatic actions designed to resolve problems on Indian reservations in the Agency's existing fiscal year and long-term planning and management processes.

William D. Ruckelshaus

Appendix B: Reaffirmation of EPA Indian Policy

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

July 11, 2001

MEMORANDUM

SUBJECT: EPA Indian Policy

TO: All EPA Employees

In 1984, EPA became the first Federal agency to adopt a formal Indian Policy, when William D. Ruckelshaus pledged that the Agency would support the primary role of Tribal governments in matters affecting American Indian country.

The United States has a unique legal relationship with Tribal Governments based on the Constitution, treaties, statues [sic], Executive Orders, and court decisions. This relationship includes a recognition of the right of tribes as sovereign governments to self-determination, and an acknowledgment of the Federal government's trust responsibility to the Tribes.

I hereby reaffirm the Agency's commitment to this long-established policy and the principles therein that guide the Agency in building a stronger partnership with Tribal Governments to protect the human health and environment of Indian communities.

Christine Todd Whitman

Attachment (not included in this document)

Appendix C: EPA Completeness Criteria for the Regional Haze SIP

Appendix V to Part 51 -- Criteria for Determining the Completeness of Plan Submissions

1.0. Purpose

This appendix V sets forth the minimum criteria for determining whether a State implementation plan submitted for consideration by EPA is an official submission for purposes of review under §51.103.

1.1 The EPA shall return to the submitting official any plan or revision thereof which fails to meet the criteria set forth in this appendix V, and request corrective action, identifying the component(s) absent or insufficient to perform a review of the submitted plan.

1.2 The EPA shall inform the submitting official whether or not a plan submission meets the requirements of this appendix V within 60 days of EPA's receipt of the submittal, but no later than 6 months after the date by which the State was required to submit the plan or revision. If a completeness determination is not made by 6 months from receipt of a submittal, the submittal shall be deemed complete by operation of law on the date 6 months from receipt. A determination of completeness under this paragraph means that the submission is an official submission for purposes of §51.103.

2.0. Criteria

The following shall be included in plan submissions for review by EPA:

2.1. Administrative Materials

(a) A formal letter of submittal from the Governor or his designee, requesting EPA approval of the plan or revision thereof (hereafter "the plan").

(b) Evidence that the State has adopted the plan in the State code or body of regulations; or issued the permit, order, consent agreement (hereafter "document") in final form. That evidence shall include the date of adoption or final issuance as well as the effective date of the plan, if different from the adoption/issuance date.

(c) Evidence that the State has the necessary legal authority under State law to adopt and implement the plan.

(d) A copy of the actual regulation, or document submitted for approval and incorporation by reference into the plan, including indication of the changes made to the existing approved plan, where applicable. The submittal shall be a copy of the official State regulation /document signed, stamped, dated by the appropriate State official indicating that it is fully enforceable by the State. The effective date of the regulation/document shall, whenever possible, be indicated in the document itself.

(e) Evidence that the State followed all of the procedural requirements of the State's laws and constitution in conducting and completing the adoption/issuance of the plan.

(f) Evidence that public notice was given of the proposed change consistent with procedures approved by EPA, including the date of publication of such notice.

(g) Certification that public hearings(s) were held in accordance with the information provided in the public notice and the State's laws and constitution, if applicable.

(h) Compilation of public comments and the State's response thereto.

2.2. Technical Support

(a) Identification of all regulated pollutants affected by the plan.

(b) Identification of the locations of affected sources including the EPA attainment/nonattainment designation of the locations and the status of the attainment plan for the affected areas(s).

(c) Quantification of the changes in plan allowable emissions from the affected sources; estimates of changes in current actual emissions from affected sources or, where appropriate, quantification of changes in actual emissions from affected sources through calculations of the differences between certain baseline levels and allowable emissions anticipated as a result of the revision.

(d) The State's demonstration that the national ambient air quality standards, prevention of significant deterioration increments, reasonable further progress demonstration, and visibility, as applicable, are protected if the plan is approved and implemented. For all requests to redesignate an area to attainment for a national primary ambient air quality standard, under section 107 of the Act, a revision must be submitted to provide for the maintenance of the national primary ambient air quality standards for at least 10 years as required by section 175A of the Act.

(e) Modeling information required to support the proposed revision, including input data, output data, models used, justification of model selections, ambient monitoring data used, meteorological data used, justification for use of offsite data (where used), modes of models used, assumptions, and other information relevant to the determination of adequacy of the modeling analysis.

(f) Evidence, where necessary, that emission limitations are based on continuous emission reduction technology.

(g) Evidence that the plan contains emission limitations, work practice standards and recordkeeping/reporting requirements, where necessary, to ensure emission levels.

(h) Compliance/enforcement strategies, including how compliance will be determined in practice.

(i) Special economic and technological justifications required by any applicable EPA policies, or an explanation of why such justifications are not necessary.

2.3. Exceptions

2.3.1. The EPA, for the purposes of expediting the review of the plan, has adopted a procedure referred to as "parallel processing." Parallel processing allows a State to submit the plan prior to actual adoption by the State and provides an opportunity for the State to consider EPA comments prior to submission of a final plan for final review and action. Under these circumstances, the plan submitted will not be able to meet all of the requirements of paragraph 2.1 (all requirements of paragraph 2.2 will apply). As a result, the following exceptions apply to plans submitted explicitly for parallel processing:

(a) The letter required by paragraph 2.1(a) shall request that EPA propose approval of the proposed plan by parallel processing.

(b) In lieu of paragraph 2.1(b) the State shall submit a schedule for final adoption or issuance of the plan.

(c) In lieu of paragraph 2.1(d) the plan shall include a copy of the proposed/draft regulation or document, including indication of the proposed changes to be made to the existing approved plan, where applicable.

(d) The requirements of paragraphs 2.1(e)-2.1(h) shall not apply to plans submitted for parallel processing.

2.3.2. The exceptions granted in paragraph 2.3.1 shall apply only to EPA's determination of proposed action and all requirements of paragraph 2.1 shall be met prior to publication of EPA's final determination of plan approvability.

[55 FR 5830, Feb. 16, 1990, as amended at 56 FR 42219, Aug. 26, 1991; 56 FR 57288, Nov. 8, 1991]

Appendix D: Tribal TAS Examples

A. Gila River Indian Community

The Gila River Indian Community in Arizona applied for eligibility determination for Treatment in the same manner As a State (TAS) in 1998 under its water quality grant. The process took the tribe six months to complete. This included a 30-day review by EPA attorneys and a thirty-day review by affected governmental agencies. TAS approval for the GRIC air program was made by EPA on March 31, 1999. The TAS and CAA program approval template in Appendix C of this document is based off of the GRIC's request for TAS status for Section 105, Grants for Support of Air Pollution Planning and Control Programs. By applying for this, the GRIC agreed to match a portion of funds directly from the tribe. The example template has been modified to request sections 110 and 169A of the CAA and does not mention Section 105.

B. Shoshone-Bannock Tribes

In October 1999, the Shoshone-Bannock Tribes of Idaho submitted a TAS application to EPA, Region 10 to receive delegation for the following sections of the Clean Air Act:

105 Grants for Support of Air Pollution Planning and Control Programs,
106 Interstate Air Quality Agencies or Commissions,
107 (c)-(e) Air Quality Control Regions, and
505 Notification to Administrator and Contiguous States

The directive from the tribal leaders at that time was to test the waters and request on behalf of the tribes delegation for the non-controversial sections of the CAA. In their opinion sections of the CAA such as, Title I (Implementation), Title V Operating Permit, could have potentially encountered more opposition by the state and the industries, hence, requiring much longer time for approval (in the magnitude of three to five years). The following explains why these particular sections were chosen and how they affect the tribes.

Section 105 Grants for Support of Air Pollution Planning and Control Programs

The tribes sought delegation for this section to utilize funds in order to carry out programs and research to improve air quality.

Section 106 Interstate Air Quality Agencies or Commissions

The Shoshone-Bannock tribes sought authority that is afforded to states in this section. The tribes wanted to be eligible for recognition in interstate issues. Currently, the tribes are a member of the Western Regional Air Partnership (WRAP) Board of directors, an organization whose major function is interstate transport of air pollution. The tribes sought to be treated as a "State" under this section in order to assist in the development of implementation plans that conform to those adopted by interstate organizations such as the WRAP.

Section 107 Air Quality Control Regions

The tribes sought authority under Sections 107 (c) through (e). These sections, in general, provide that states have a role to play regarding designation and re-designation of areas within their jurisdiction. The Shoshone-Bannock tribes requested the same status as states with respect to participation in designations. For example, under Section 107 (d)(B)(ii), states are notified if the Administrator intends to make a modification of a designation, and provides an opportunity for the "State" to demonstrate why any proposed modification is inappropriate. The Shoshone-Bannock tribes sought the same role as states in these matters.

Section 107 is not listed based on the TAR. The TAR has a specific section which lists those parts of the CAA for which are inappropriate to treat tribes in the same manner as states and for tribes to seek delegation (see section 49.4).

Section 505 (a)(2) Transmission and Notice {Affected State status}

Section 505 (a)(2) is a sub-section of the Permitting section ("Title V") of the CAA. The Tribes, at this time, are not requesting full permitting authority. Section 505 (a)(2) is a "notification Provision," wherein "States" whose air quality may be affected by a proposed permit in a contiguous "state" is provided notification of the proposed permit, and an opportunity to comment on the permitting action. The Shoshone-Bannock tribes wanted to be treated as a "State" for the above referenced section, allowing the tribes to be notified by the State of Idaho, of proposed permitting actions if the Reservation air quality may be affected by the project.

The application was approved on June 23, 2000. It is evident that the approval process can be lengthy (in this case 8 months); therefore, it is strongly recommended that the tribal nation allow enough time for TAS approval. Individual tribes must also consider the time it takes for internal review of TAS documents.

Appendix E: Tribal TIP Outreach Example

A. Gila River Indian Community (GRIC)

The Gila River Indian Community (GRIC) is a good example to look at for a TIP outreach experience. Although the GRIC is not working on an RH TIP, some of its experiences may be useful for a tribe considering taking on a visibility TIP. The following depicts a great amount of support and commitment on behalf of its tribe and its Department of Environmental Quality (DEQ) staff. The same amount of work, however, may not be warranted for a tribe seeking to implement a visibility TIP. This may be dependent on your location and the parts of the RH plan that you wish to adopt. The information is meant to serve only as an example of its experience. Keep in mind that the GRIC's TIP is based on the National Ambient Air Quality Standards and not RH.

The GRIC is located in central Arizona and adjacent to Phoenix and consists of the Akimel O'odham (Pima) and Pee Posh (Maricopa) tribes and has a land base of 374,000 acres. The population is 15,500 on the reservation. For several years the GRIC has been working hard to develop a TIP and has been successful so far in the process, although the TIP has yet to be finalized. Why develop a TIP? GRIC has three industrial parks and 45 businesses and industries.

B. Tribal Outreach

In 1997, GRIC developed an air quality needs assessment for their tribe followed by an emissions inventory. Based on the results, GRIC decided to develop a Tribal Implementation Plan (TIP) similar to a State Implementation Plan (SIP). The CAA elements GRIC was proposing for inclusion in the TIP and why those elements were relevant to the Community were discussed in a Scoping Paper that was used as an outreach tool. Once this document was finished, the GRIC began its outreach process.

The first step in the outreach process, was to present the Scoping Document to the Natural Resources Standing Committee (NRC).¹ After the presentation, the NRC approved the Scoping Document and directed the staff to begin the outreach process with the Community as well as surrounding entities. It was important to stress to tribal decision-makers that air quality issues go beyond any jurisdictional boundaries making outreach with off-reservation entities an essential part of the process.

The GRIC's environmental staff took this paper to the seven districts within the reservation and explained the purpose and goals of the proposed TIP. The concept was stressed that this plan is based on the needs of the Community and comments and input was crucial for a truly meaningful plan. Hard copies of the Scoping Document were given to all the districts and handed out at all meetings. The document itself is thirteen pages long; a two-page executive summary was also drafted for quick review listing the main points of the larger document. This was an extremely helpful way to communicate important though somewhat tedious information in a quick format.

¹ The Natural Resource Standing committee is made up of five tribal council members and one community-at-large member, and is responsible for any environmental decisions for the GRIC.

Each presentation resulted in comments that the air quality staff recorded and later addressed in a follow-up comment/response document.

C. Surrounding Community Outreach

The next step for the air quality staff was to meet individually with the Arizona Department of Environmental Quality (ADEQ), Environmental Health Services of GRIC, all surrounding counties and tribes, as well as the city of Phoenix and Chandler (both cities border the reservation). The same process was kept and each one of these groups were met with and presented with the information. The comments gathered from these meetings resulted in more revisions to the Scoping document. The GRIC found the ADEQ was very supportive and offered help in the technical and policy arenas.

1. Industry

By following the outreach protocol that the GRIC has developed, all the industrial facilities that currently operate on tribal land were contacted. The GRIC sent out its Scoping Document to each individual facility. Once this was done, the tribe contacted each one and set up individual meetings to present the information. Comments once again were recorded and taken into consideration while revising this document.

2. Mailing Lists

Aside from the presentations made to the tribe, the surrounding communities, and industry the GRIC also has a mailing list of concerned citizens and groups who wish to be kept informed of its process. This list consists of approximately 150 stakeholders. It is crucial that the mailing list is updated often. This includes changing the names of elected officials in outside jurisdictions (which can change quite often).

D. Open House

After all the initial outreach was completed, the GRIC held an open house and had approximately 50 people attend. This included the tribal community, concerned citizens, representatives from industry, environmental groups, county representatives, regulatory agencies, etc. During this time, all comments were collected using several different formats. People with questions could ask them verbally, type them on laptop computers, or write them down on questionnaires provided by the DEQ. Once this was completed, revisions were made once more to the Scoping document and it was again presented to all 7 districts along with the comments and responses.

E. Tribal Review

The revised Scoping Document and comments and responses from the seven districts were taken back to the Committee and Council. The Council offered their support and gave the directive to continue on with the process. The document was approved by tribal resolution along with other measures that were adopted and would become the first part of the TIP to be submitted to the EPA for approval. Since then, the GRIC has gone through much of the same process with the second part of the TIP. Each time they seek comments from those surrounding parties that may

be affected. This method of inclusion has been successful for the tribe and many valuable comments have been gained.

F. Leadership Changes

It is very important to continue the outreach process with newly elected or appointed Leaders and Council members. New tribal representatives must be given background information on air quality. It is helpful to supply a list of acronyms that are used frequently and a glossary. The TIP documents don't mean a thing without a basic understanding of air quality concepts. For Gila River, it is especially important for the Standing Committee members to be well informed since it is their job to ask the tough, detailed questions before the issues go to the Council. One question that always comes up is, "how is the program funded and how will it be funded in the future?" Because of this question, the air program found it helpful to draft a document outlining this information so it can be given to new representatives. It is also recommended to keep copies of news clippings on air quality issues in your area for distribution to any interested parties. This makes those abstract and complicated air issues more localized and easier to comprehend when they're presented in a real-life situation.

G. Communication with the EPA

The GRIC has had some communication with the EPA as well as with the Office of Air Quality Planning and Standards (OAQPS) regarding their TIP. Some of the initial comments on the first part of their TIP were limited and included grammatical corrections. Since then, the GRIC has submitted the second portion of its TIP regarding permitting. Communication between the EPA and GRIC has been difficult to coordinate and has resulted in some delay. GRIC and EPA have worked out a set team of EPA experts in various fields so that the communication process will be smoother.

Note: In the case of the RH TIP, the EPA is in the process of developing a protocol² document for review and action on 309 TIPs, similar to one developed for states. This document will be developed in a way that both tribes and the EPA will agree on the most appropriate form of communication between the two. Prior to completion, it will be sent out to tribes for comment.

To date, the GRIC estimates that they have made well over 100 presentations. Tribes should remember, that the GRIC's stakeholder list is quite extensive due to the location of the reservation (near a large urban area). There are numerous air quality issues associated with a nonattainment area and the amount of industrial facilities located within the Community. The TIP that the GRIC is proposing is much more extensive than most tribes would need. The outreach process that the tribe has developed is working for them, although it involves a lot of work.

One of the most important aspects of the outreach process according to the GRIC is to keep a record of all meetings, comments and documents. This does not need to include actual meeting minutes (unless that is what you desire) but instead tracks your outreach activities. It will help to cover the information needed to move on to the next step.

² Referred to as the "EPA Protocol Review and Rulemaking Action on 309 SIPs."

The TIP process is long and involved, and it helps immensely to keep an organized list of who you talked to, when, and what you talked about. Also list the documents that are distributed as well as the questions asked. It is important to keep track of concerns people may have and answer questions in a timely manner – after all, that is the whole purpose of outreach. Effective communication is essential for a successful program. This informal record keeping process is separate from the formal public notice procedures that will need to be addressed (as required by the CAA) when your tribe is ready to formally submit your TIP to the EPA.

Obviously, the GRIC's efforts to obtain a NAAQS based TIP have been commendable. The road has been long for them and they continue to work on it diligently. How have they done it? According to GRIC, their motto is, "Patience and Perseverance".

Appendix F. Example of a Tribal Situation Requiring a FIP

A. Shoshone-Bannock Tribes

In 1991, a large source located on the Fort Hall Indian Reservation was making a significant contribution to PM₁₀ nonattainment in the area. The EPA's Region 10 worked with the Shoshone-Bannock tribal government to develop a FIP to help bring the area into attainment.

After the EPA carefully reviewed monitoring data submitted by the state of Idaho, they designated 261 square miles of Power and Bannock Counties as a nonattainment area (NAA) for PM₁₀.¹

The nonattainment area included both state land and land within the boundary of the Fort Hall Reservation, and sources in both jurisdictions were contributing to the problem. Idaho was required to draft a SIP for its portion of the nonattainment area. Although the tribal government had no obligation to meet a deadline, the tribes remained involved with the planning process to reduce the PM₁₀ concentration. The Idaho Department of Environmental Quality (DEQ) drafted and submitted its SIP to the EPA in May 1993 addressing the high PM₁₀ concentration on the state portions of the nonattainment area.

Because in 1993 the TAR had not even been proposed (the proposal was published in August 1994), the Shoshone-Bannock Tribes had no other alternative but to turn to the EPA for assistance. The EPA eventually in 1999 drafted a FIP for the reservation portion of the nonattainment area and promulgated it on August 23, 2000.

It should be noted that the FIP was issued seven years after the Idaho SIP. A great amount of red tape had to be cut through before having a FIP drafted to complete the planning for the multi-jurisdictional nonattainment scheme.

The FIP became a reality only when the community became involved. The tribal air quality program strategically planned for and carried out an effective method of outreach and education of the community members. The pressure from tribal membership and community members at large forced the EPA to carry out its trust responsibility and draft a FIP. Once the EPA became involved the process started flowing very smoothly, the consultation became more meaningful and the tribes and the EPA started co-managing the implementation of the recommended control strategies.

The EPA is committed to developing FIPs for Indian country, as necessary or appropriate to protect air quality, where tribes choose not to develop TIPs (40 CFR 49.11(a)). As this example demonstrates, if a tribe believes a FIP should be developed for its jurisdiction, it should encourage the EPA to live up to its responsibility and fulfill this commitment.

¹ PM₁₀ is particulate matter with an aerodynamic diameter equal to or less than 10 micrometers. Particulates are produced by many sources, including burning of diesel fuels by trucks and buses, incineration of garbage, mixing and application of fertilizers and pesticides, road construction, industrial processes such as steel making, mining operations, agricultural burning (field and slash burning), and operation of fireplaces and woodstoves.

Appendix G: Request Letter for TAS and CAA Program Approval

(Date)

(Name)

Regional Administrator

EPA Region (?)

(Address)

RE: Eligibility Determination and Clean Air Act Program approval for Sections 110, *Implementation Plans, and 169A Visibility protection for federal class I areas*, for the (name of tribe).¹

Dear Ms/Mr. (name):

The (name of tribe) is requesting an eligibility determination from the Environmental Protection Agency (EPA) Region (?) in order to adopt a 309 Regional Haze Tribal Implementation Plan (TIP).

The following are the criteria for eligibility under 40 CFR, Part 49, Section 49.7 Eligibility Requirements:

(Omit *bold italics* and replace with correct information)

(a)(1) Federal Recognition by the Secretary of Interior: Please refer to Attachment “A”, for the *Department of the Interior, Bureau of Indian Affairs, Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs; Notice (attach and highlight tribe)*.

(Or if the Tribe has previously been awarded TAS under a Water Quality Grant, then use the following example for (a)(1))

(a)(1) Federal Recognition by the Secretary of Interior: In accordance with 49 CFR, 49.7 (a)(8) please refer to Attachment “A”, Federal Register included in the **(Name of tribe)**'s **(insert date)** Request for Treatment as a State (copy attached) under a Federal 106 Water Quality Grant.²

(a)(2) Substantial Governmental Duties: Please refer to narrative statement

¹ According to §49.7(8)(b), a Tribe may simultaneously submit a request for an eligibility determination and a request for approval of a Clean Air Act program. According to §49.7(c), a request for Clean Air Act program approval must meet any applicable Clean Air Act statutory and regulatory requirements and may contain any reasonable portion of a Clean Air Act program to the extent not inconsistent with applicable statutory and regulatory requirements.

² According to §49.7(8), where the applicant has previously received authorization for a Clean Air Act program or for any other EPA –administered program, the applicant need only identify the prior authorization and provide the required information which has not been submitted in the previous application.

page(s) **(x-y describing this)** and Attachment “X”, Tribal Constitution **(or other title)**, Attachment(s) “X and “Y” **(other relevant documents)** or *if applicable, refer to your previous request for TAS under your water grant.*

Note: According to 40 CFR 49.7(a)(2) the narrative or descriptive statement should demonstrate that the applicant is currently carrying out substantial governmental duties and powers over a defined area. The statement should i) Describe the form of tribal government; ii) Describe the type of government functions currently performed by the tribal governing body such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population; taxation, and the exercise of the power of eminent domain; and iii) Identify the source of the tribal government’s authority to carry out the governmental functions currently being performed.

(a)(3) Jurisdictional Statement: Please refer to Attachment “X” for a descriptive statement (list a section, page number, or other applicable reference if necessary). *If applicable, refer to your previous request for TAS under your water grant.*

Note: According to 49.7 (3), a descriptive statement of the Indian Tribe's authority to regulate air quality. For applications covering areas within the exterior boundaries of the applicant's Reservation the statement must identify with clarity and precision the exterior boundaries of the reservation including, for example, a map and a legal description of the area. For Tribal applications covering areas outside the boundaries of the applicant's Reservation the statement should include:

- (i) A map or legal description of the area over which the application asserts authority.
- (ii) A statement by the applicant's legal counsel (or equivalent official) which describes the basis for the Tribe's assertion of authority (including the nature or subject matter of the asserted regulatory authority) which may include a copy of documents such as Tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions which support the Tribe's assertion of authority.

(a)(4) Statement of Capability of (*name of tribe*) to Manage a Clean Air Act Program. The (*name of tribe*) environment department has an/a **(exceptional, strong, active, etc)** history of effectively managing environmental programs and assistance grants provided by the EPA. The most recent being **(give example if applicable).**

In addition to quality management of the (*name of tribe's*) air program, the tribe also manages (list other successful programs, e.g. solid waste, water, etc.) **(if no air program currently exists, describe another program’s strength and/or why you believe you have the capability, for example).**

The **(name of tribe)** is confident in our ability to carry out all the necessary requirements to implement a high quality air program. We have demonstrated this by **(list examples of other successful programs, etc.)**.

Note: According to 49.7 (4), a narrative statement describing the capability of the applicant to effectively administer any Clean Air Act program for which the Tribe is seeking approval. The narrative statement must demonstrate the applicant's capability consistent with the applicable provisions of the Clean Air Act and implementing regulations and, if requested, may include:

(i) A description of the Indian Tribe's previous management experience which may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, et seq.), the Indian Mineral Development Act (25 U.S.C. 2101, et seq.), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a);

(ii) A list of existing environmental or public health programs administered by the Tribal governing body and a copy of related Tribal laws, policies, and regulations;

(iii) A description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the Tribal government;

(iv) A description of the existing, or proposed, agency of the Indian Tribe which will assume primary responsibility for administering a Clean Air Act program (including a description of the relationship between the existing or proposed agency and its regulated entities);

(v) A description of the technical and administrative capabilities of the staff to administer and manage an effective air quality program or a plan which proposes how the Tribe will acquire administrative and technical expertise. The plan should address how the Tribe will obtain the funds to acquire the administrative and technical expertise.

In addition we have included (environmental brochures, newsletters, news articles, etc.) which further supports our capabilities for your review.

If you have any questions concerning our requests, please contact (name), Director Environment Department at (#). We look forward to receiving approval so that we may continue to move forward in completing our Regional Haze TIP.

Sincerely,
(name of official)
(Title and name of tribe)

cc: (Environment Department Director)
(Tribal Council)
(Tribal Air planning committee, etc)

Appendix H: Tribal Authority Rule (TAR)

[Code of Federal Regulations]
[Title 40, Volume 1, Parts 1 to 49]
[Revised as of July 1, 1999]
From the U.S. Government
Printing Office via GPO Access
[CITE: 40CFR49.1]

[Page 635]

TITLE 40--PROTECTION OF
ENVIRONMENT
CHAPTER I--
ENVIRONMENTAL
PROTECTION AGENCY

**PART 49--TRIBAL CLEAN
AIR ACT AUTHORITY--Table
of Contents**

Sec. 49.1 Program overview.

(a) The regulations in this part identify those provisions of the Clean Air Act (Act) for which Indian tribes are or may be treated in the same manner as States. In general, these regulations authorize eligible tribes to have the same rights and responsibilities as States under the Clean Air Act and authorize EPA approval of tribal air quality programs meeting the applicable minimum requirements of the Act.

(b) Nothing in this part shall prevent an Indian tribe from establishing additional or more stringent air quality protection requirements not inconsistent with the Act.

Sec. 49.2 Definitions.

(a) Clean Air Act or Act means those statutory provisions in the United States Code at 42 U.S.C. 7401, et seq.

(b) Federal Indian Reservation, Indian Reservation or Reservation means all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

(c) Indian tribe or tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(d) Indian Tribe Consortium or Tribal Consortium means a group of two or more Indian tribes.

(e) State means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands.

Sec. 49.3 General Tribal Clean Air Act authority.

Tribes meeting the eligibility criteria of Sec. 49.6 shall be treated in the same manner as States with respect to all provisions of the Clean Air Act and implementing regulations, except for those provisions identified in Sec. 49.4 and the regulations that implement those provisions.

Sec. 49.4 Clean Air Act provisions for which it is not appropriate to treat tribes in the same manner as States.

Tribes will not be treated as States with respect to the following provisions of the Clean Air Act and any implementing regulations thereunder:

(a) Specific plan submittal and implementation deadlines for NAAQS-related requirements, including but not limited to such deadlines in sections 110(a)(1), 172(a)(2), 182, 187, 189, and 191 of the Act.

(b) The specific deadlines associated with the review and revision of implementation plans

related to major fuel burning sources in section 124 of the Act.

(c) The mandatory imposition of sanctions under section 179 of the Act because of a failure to submit an implementation plan or required plan element by a specific deadline, or the submittal of an incomplete or disapproved plan or element.

(d) The provisions of section 110(c)(1) of the Act.

(e) Specific visibility implementation plan submittal deadlines established under section 169A of the Act.

(f) Specific implementation plan submittal deadlines related to interstate commissions under sections 169B(e)(2), 184(b)(1) and (c)(5) of the Act. For eligible tribes participating as members of such commissions, the Administrator shall establish those submittal deadlines that are determined to be practicable or, as with other non-participating tribes in an affected transport region, provide for Federal implementation of necessary measures.

(g) Any provisions of the Act requiring as a condition of program approval the demonstration of criminal enforcement authority or any provisions of the Act providing for the delegation of such criminal enforcement authority. Tribes seeking approval of a Clean Air Act program requiring such demonstration may receive program approval if they meet the requirements of Sec. 49.8.

(h) The specific deadline for the submittal of operating permit programs in section 502(d)(1) of the Act.

(i) The mandatory imposition of sanctions under section 502(d)(2)(B) because of failure to submit an operating permit program or EPA disapproval of an operating permit program submittal in whole or part.

(j) The ``2 years after the date required for submission of such a program under paragraph (1)" provision in section 502(d)(3) of the Act.

(k) Section 502(g) of the Act, which authorizes a limited interim approval of an operating permit program that substantially meets the requirements of Title V, but is not fully approvable.

(l) The provisions of section 503(c) of the Act that direct permitting authorities to establish a phased schedule assuring that at least one-third of the permit applications submitted within the first full year after the effective date of an operating permit program (or a partial or interim program) will be acted on by the permitting authority over a period not to exceed three years after the effective date.

(m) The provisions of section 507(a) of the Act that specify a deadline for the submittal of plans for establishing a small business stationary source technical and environmental compliance assistance program.

(n) The provisions of section 507(e) of the Act that direct the establishment of a Compliance Advisory Panel.

(o) The provisions of section 304 of the Act that, read together with section 302(e) of the Act, authorize any person who provides the minimum required advance notice to bring certain civil actions in the Federal district courts against States in their capacity as States.

(p) The provisions of section 502(b)(6) of the Act that require that review of a final permit action under the Title V permitting program be ``judicial" and ``in State court," and the provisions of section 502(b)(7) of the Act that require that review of a failure on the part of the permitting authority to act on permit applications or renewals by the time periods specified in section 503 of the Act be ``judicial" and ``in State court."

(q) The provision of section 105(a)(1) that limits the maximum

Federal share for grants to pollution control agencies to three-fifths of the cost of implementing programs for the prevention and control of air pollution or implementation of national primary and secondary ambient air quality standards.

Sec. 49.5 Tribal requests for additional Clean Air Act provisions for which it is not appropriate to treat tribes in the same manner as States.

Any tribe may request that the Administrator specify additional provisions of the Clean Air Act for which it would be inappropriate to treat tribes in general in the same manner as States. Such request should clearly identify the provisions at issue and should be accompanied with a statement explaining why it is inappropriate to treat tribes in the same manner as States with respect to such provisions.

Sec. 49.6 Tribal eligibility requirements.

Sections 301(d)(2) and 302(r), 42 U.S.C. 7601(d)(2) and 7602(r), authorize the Administrator to treat an Indian tribe in the same manner as a State for the Clean Air Act provisions identified in Sec. 49.3 if the Indian tribe meets the following criteria:

(a) The applicant is an Indian tribe recognized by the Secretary of the Interior;

(b) The Indian tribe has a governing body carrying out substantial governmental duties and functions;

(c) The functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and

(d) The Indian tribe is reasonably expected to be capable, in the EPA Regional Administrator's judgment, of carrying out the functions to be

exercised in a manner consistent with the terms and purposes of the Clean Air Act and all applicable regulations.

Sec. 49.7 Request by an Indian tribe for eligibility determination and Clean Air Act program approval.

(a) An Indian tribe may apply to the EPA Regional Administrator for a determination that it meets the eligibility requirements of Sec. 49.6 for Clean Air Act program approval. The application shall concisely describe how the Indian tribe will meet each of the requirements of Sec. 49.6 and should include the following information:

(1) A statement that the applicant is an Indian tribe recognized by the Secretary of the Interior.

(2) A descriptive statement demonstrating that the applicant is currently carrying out substantial governmental duties and powers over a defined area. This statement should:

(i) Describe the form of the tribal government;

(ii) Describe the types of government functions currently performed by the tribal governing body such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population; taxation; and the exercise of the power of eminent domain; and

(iii) Identify the source of the tribal government's authority to carry out the governmental functions currently being performed.

(3) A descriptive statement of the Indian tribe's authority to regulate air quality. For applications covering areas within the exterior boundaries of the applicant's reservation the statement must identify with clarity and precision the exterior boundaries of the reservation including, for example, a map and a legal

description of the area. For tribal applications covering areas outside the boundaries of a reservation the statement should include:

(i) A map or legal description of the area over which the application asserts authority; and

(ii) A statement by the applicant's legal counsel (or equivalent official) that describes the basis for the tribe's assertion of authority (including the nature or subject matter of the asserted regulatory authority) which may include a copy of documents such as tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions that support the tribe's assertion of authority.

(4) A narrative statement describing the capability of the applicant to administer effectively any Clean Air Act program for which the tribe is seeking approval. The narrative statement must demonstrate the applicant's capability consistent with the applicable provisions of the Clean Air Act and implementing regulations and, if requested by the Regional Administrator, may include:

(i) A description of the Indian tribe's previous management experience which may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, et seq.), the Indian Mineral Development Act (25 U.S.C. 2101, et seq.), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C.2004a);

(ii) A list of existing environmental or public health programs administered by the tribal governing body and a copy of related tribal laws, policies, and regulations;

(iii) A description of the entity (or entities) that exercise the executive, legislative, and judicial functions of the tribal government;

(iv) A description of the existing, or proposed, agency of

the Indian tribe that will assume primary responsibility for administering a Clean Air Act program (including a description of the relationship between the existing or proposed agency and its regulated entities);

(v) A description of the technical and administrative capabilities of the staff to administer and manage an effective air quality program or a plan which proposes how the tribe will acquire administrative and technical expertise. The plan should address how the tribe will obtain the funds to acquire the administrative and technical expertise.

(5) A tribe that is a member of a tribal consortium may rely on the expertise and resources of the consortium in demonstrating under paragraph (a)(4) of this section that the tribe is reasonably expected to be capable of carrying out the functions to be exercised consistent with Sec. 49.6(d). A tribe relying on a consortium in this manner must provide reasonable assurances that the tribe has responsibility for carrying out necessary functions in the event the consortium fails to.

(6) Where applicable Clean Air Act or implementing regulatory requirements mandate criminal enforcement authority, an application submitted by an Indian tribe may be approved if it meets the requirements of Sec. 49.8.

(7) Additional information required by the EPA Regional Administrator which, in the judgment of the EPA Regional Administrator, is necessary to support an application.

(8) Where the applicant has previously received authorization for a Clean Air Act program or for any other EPA-administered program, the applicant need only identify the prior authorization and provide the required information which has not been submitted in the previous application.

(b) A tribe may simultaneously submit a request for an eligibility determination and a request for approval of a Clean Air Act program.

(c) A request for Clean Air Act program approval must meet any applicable Clean Air Act statutory and regulatory requirements. A program approval request may be comprised of only partial elements of a Clean Air Act program, provided that any such elements are reasonably severable, that is, not integrally related to program elements that are not included in the plan submittal, and are consistent with applicable statutory and regulatory requirements.

Sec. 49.8 Provisions for tribal criminal enforcement authority.

To the extent that an Indian tribe is precluded from asserting criminal enforcement authority, the Federal Government will exercise primary criminal enforcement responsibility. The tribe, with the EPA Region, shall develop a procedure by which the tribe will provide potential investigative leads to EPA and/or other appropriate Federal agencies, as agreed to by the parties, in an appropriate and timely manner. This procedure shall encompass all circumstances in which the tribe is incapable of exercising applicable enforcement requirements as provided in Sec. 49.7(a)(6). This agreement shall be incorporated into a Memorandum of Agreement with the EPA Region.

Sec. 49.9 EPA review of tribal Clean Air Act applications.

(a) The EPA Regional Administrator shall process a request of an Indian tribe submitted under Sec. 49.7 in a timely manner. The EPA Regional Administrator shall promptly notify the Indian tribe of receipt of the application.

(b) Within 30 days of receipt of an Indian tribe's initial, complete application, the EPA Regional Administrator shall notify all appropriate governmental entities.

(1) For tribal applications addressing air resources within the exterior boundaries of the reservation, EPA's notification of other governmental entities shall specify the geographic boundaries of the reservation.

(2) For tribal applications addressing non-reservation areas, EPA's notification of other governmental entities shall include the substance and bases of the tribe's jurisdictional assertions.

(c) The governmental entities shall have 30 days to provide written comments to EPA's Regional Administrator regarding any dispute concerning the boundary of the reservation. Where a tribe has asserted jurisdiction over non-reservation areas, appropriate governmental entities may request a single 30-day extension to the general 30-day comment period.

(d) In all cases, comments must be timely, limited to the scope of the tribe's jurisdictional assertion, and clearly explain the substance, bases, and extent of any objections. If a tribe's assertion is subject to a conflicting claim, the EPA Regional Administrator may request additional information from the tribe and may consult with the Department of the Interior.

(e) The EPA Regional Administrator shall decide the jurisdictional scope of the tribe's program. If a conflicting claim cannot be promptly resolved, the EPA Regional Administrator may approve that portion of an application addressing all undisputed areas.

(f) A determination by the EPA Regional Administrator concerning the boundaries of a reservation or tribal jurisdiction over non-reservation areas shall

apply to all future Clean Air Act applications from that tribe or tribal consortium and no further notice to governmental entities, as described in paragraph (b) of this section, shall be provided, unless the application presents different jurisdictional issues or significant new factual or legal information relevant to jurisdiction to the EPA Regional Administrator.

(g) If the EPA Regional Administrator determines that a tribe meets the requirements of Sec. 49.6 for purposes of a Clean Air Act provision, the Indian tribe is eligible to be treated in the same manner as a State with respect to that provision, to the extent that the provision is identified in Sec. 49.3. The eligibility will extend to all areas within the exterior boundaries of the tribe's reservation, as determined by the EPA Regional Administrator, and any other areas the EPA Regional Administrator has determined to be within the tribe's jurisdiction.

(h) Consistent with the exceptions listed in Sec. 49.4, a tribal application containing a Clean Air Act program submittal will be reviewed by EPA in accordance with applicable statutory and regulatory criteria in a manner similar to the way EPA would review a similar State submittal.

(i) The EPA Regional Administrator shall return an incomplete or disapproved application to the tribe with a summary of the deficiencies.

Sec. 49.10 EPA review of State Clean Air Act programs.

A State Clean Air Act program submittal shall not be disapproved because of failure to address air resources within the exterior boundaries of an Indian Reservation or other areas within the jurisdiction of an Indian tribe.

Sec. 49.11 Actions under section 301(d)(4) authority.

Notwithstanding any determination made on the basis of authorities granted the Administrator under any other provision of this section, the Administrator, pursuant to the discretionary authority explicitly granted to the Administrator under sections 301(a) and 301(d)(4):

(a) Shall promulgate without unreasonable delay such Federal implementation plan provisions as are necessary or appropriate to protect air quality, consistent with the provisions of sections 304(a) and 301(d)(4), if a tribe does not submit a tribal implementation plan meeting the completeness criteria of 40 CFR part 51, appendix V, or does not receive EPA approval of a submitted tribal implementation plan.

(b) May provide up to 95 percent of the cost of implementing programs for the prevention and control of air pollution or implementation of national primary and secondary ambient air quality standards. After two years from the date of each tribe's initial grant award, the maximum Federal share will be reduced to 90 percent, as long as the Regional Administrator determines that the tribe meets certain economic indicators that would provide an objective assessment of the tribe's ability to increase its share. The Regional Administrator may increase the maximum Federal share to 100 percent if the tribe can demonstrate in writing to the satisfaction of the Regional Administrator that fiscal circumstances within the tribe are constrained to such an extent that fulfilling the match would impose undue hardship.

Appendix I: List of Eligible Tribes

By using the Federal Register (68 FR 68180, Friday, December 5, 2003), 185 federally recognized tribes were identified in the nine state western regions.¹ Each tribe is numbered and listed by the state. Where tribes are listed under more than one state, they have been placed under a multi-state category. Shading indicates a name change or a question of whether or not one tribe with multiple bands or rancherias would be counted as one tribe or more. See number 88 for an example.

Disclaimer: Although the Federal Register was used to compile the list below and other input was sought, we are not sure that the list is entirely accurate. Please send any comments to Bob Gruenig, National Tribal Environmental Council at bgruenig@ntec.org

ARIZONA (17)

| | |
|-----|--|
| 1. | Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation Arizona |
| 2. | Cocopah Tribe of Arizona |
| 3. | Fort McDowell Yavapai Nation, Arizona (formerly the Fort McDowell Mohave-Apache Community of the Fort McDowell Indian Reservation) |
| 4. | Gila River Indian Community of the Gila River Indian Reservation, Arizona |
| 5. | Havasupai Tribe of the Havasupai Reservation, Arizona |
| 6. | Hopi Tribe of Arizona |
| 7. | Hualapai Indian Tribe of the Hualapai Indian Reservation, Arizona |
| 8. | Kaibab Band of Paiute Indians of the Kaibab Indian Reservation, Arizona |
| 9. | Pascua Yaqui Tribe of Arizona |
| 10. | Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona |
| 11. | San Carlos Apache Tribe of the San Carlos Reservation, Arizona |
| 12. | San Juan Southern Paiute Tribe of Arizona |
| 13. | Tohono O'odham Nation of Arizona |
| 14. | Tonto Apache Tribe of Arizona |
| 15. | White Mountain Apache Tribe of the Fort Apache Reservation, Arizona |
| 16. | Yavapai-Apache Nation of the Camp Verde Indian Reservation, Arizona |
| 17. | Yavapai-Prescott Tribe of the Yavapai Reservation, Arizona |

CALIFORNIA (104)

| | |
|-----|---|
| 18. | Agua Caliente Band of Cahuilla Indians of the Aqua Caliente Indian Reservation, California |
| 19. | Alturas Indian Rancheria, California |
| 20. | Augustine Band of Cahuilla Mission of the Augustine Reservation, California |
| 21. | Bear River Band of the Rohnerville Rancheria, California |
| 22. | Berry Creek Rancheria of Maidu Indians of California |
| 23. | Big Lagoon Rancheria, California |
| 24. | Big Pine Band of Owens Valley Paiute Shoshone Indians of the Big Pine Reservation, California |
| 25. | Big Sandy Rancheria of Mono Indians of California |
| 26. | Big Valley Band of Pomo Indians of the Big Valley Rancheria, California |
| 27. | Blue Lake Rancheria, California |
| 28. | Bridgeport Paiute Indian Colony of California |

¹ The nine states include: Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah and Wyoming.

| | |
|-----|---|
| 29. | Buena Vista Rancheria of Me-Wuk Indians of California |
| 30. | Cabazon Band of Mission Indians, California (previously listed as the Cabazon Band of Cahuilla Mission Indians of the Cabazon Reservation) |
| 31. | Cachil DeHe Band of Wintun Indians of Colusa Indian Community of the Colusa Rancheria, California |
| 32. | Cahuilla Band of Mission Indians of the Cahuilla Reservation, California |
| 33. | Cahto Indian Tribe of the Laytonville Rancheria, California |
| 34. | California Valley Miwok Tribe, California (formerly the Sheep Ranch Rancheria of Me-Wuk Indians of California) |
| 35. | Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, California |
| 36. | Capitan Grande Band of Diegueno Mission Indians of California |
| 37. | Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California |
| 38. | Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California |
| 39. | Cedarville Rancheria, California |
| 40. | Chemehuevi Indian Tribe of the Chemehuevi Reservation, California |
| 41. | Cher-Ae Heights Indian Community of the Trinidad Rancheria |
| 42. | Chicken Ranch Rancheria of Me-Wuk Indians, California |
| 43. | Cloverdale Rancheria of Pomo Indians of California |
| 44. | Cold Springs Rancheria of Mono Indians of California |
| 45. | Cortina Indian Rancheria of Wintun Indians of California |
| 46. | Coyote Valley Band of Pomo Indians of California |
| 47. | Death Valley Timbi-Sha Shoshone Band of California |
| 48. | Dry Creek Rancheria of Pomo Indians of California |
| 49. | Elem Indian Colony of Pomo Indians of the Sulphur Bank Rancheria, California |
| 50. | Elk Valley Rancheria, California |
| 51. | Enterprise Rancheria of Maidu Indians of California |
| 52. | Ewiiaapaayp Band of Kumeyaay Indians, California (formerly the Cuyapaipe Community of Diegueno Mission Indians of the Cuyapaipe Reservation) |
| 53. | Federated Indians of Graton Rancheria, California (formerly the Graton Rancheria) |
| 54. | Fort Bidwell Indian Community of the Fort Bidwell Reservation of California |
| 55. | Fort Independence Indian Community of Paiute Indians of the Fort Independence Reservation, California |
| 56. | Greenville Rancheria of Maidu Indians of California |
| 57. | Grindstone Indian Rancheria of Wintun-Wailaki Indians of California |
| 58. | Guidiville Rancheria of California |
| 59. | Hoop Valley Tribe, California |
| 60. | Hopland Band of Pomo Indians of the Hopland Rancheria, California |
| 61. | Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California |
| 62. | Ione Band of Miwok Indians |
| 63. | Jackson Rancheria of Me-Wuk Indians of California |
| 64. | Jamul Indian Village of California |
| 65. | Karuk Tribe of California |
| 66. | Kashia Band of Pomo Indians of the Stewarts Point Rancheria, California |
| 67. | La Jolla Band of Luiseno Mission Indians of the La Jolla Reservation, California |
| 68. | La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California |
| 69. | Lower Lake Rancheria, California |
| 70. | Los Coyotes Band of Cahuilla & Cupeno Indians of the Los Coyotes Reservation, California (formerly the Los Coyotes Band of Cahuilla Mission Indians of the Los Coyotes Reservation) |

| | |
|------|--|
| 71. | Lytton Rancheria of California |
| 72. | Manchester Band of Pomo Indians of the Manchester-Point Arena Rancheria, California |
| 73. | Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California |
| 74. | Mechoopda Indian Tribe of Chico Rancheria, California |
| 75. | Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, California |
| 76. | Middletown Rancheria of Pomo Indians of California |
| 77. | Mooretown Rancheria of Maidu Indians of California |
| 78. | Morongoband of Cahuilla Mission Indians of the Morongo Reservation, California |
| 79. | North Fork Rancheria of Mono Indians of California |
| 80. | Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, California |
| 81. | Paiute-Shoshone Indians of the Lone Pine Community of the Lone Pine Reservation, California |
| 82. | Pala Band of Luiseno Mission Indians of the Pala Reservation, California |
| 83. | Paskenta Band of Nomlaki Indians of California |
| 84. | Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, California |
| 85. | Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation, California |
| 86. | Picayune Rancheria of Chukchansi Indians of California |
| 87. | Pinoleville Rancheria of Pomo Indians of California |
| 88. | Pit River Tribe, California (includes XL Ranch, Big Bend, Likely, Lookout, Montgomery Creek and Roaring Creek Rancherias) |
| 89. | Potter Valley Rancheria of Pomo Indians of California |
| 90. | Quartz Valley Indian Community of the Quartz Valley Reservation of California |
| 91. | Ramona Band or Village of Cahuilla Mission Indians of California |
| 92. | Redding Rancheria, California |
| 93. | Redwood Valley Rancheria of Pomo Indians of California |
| 94. | Resighini Rancheria, California (formerly the Coast Indian Community of Yurok Indians of the Resighini Rancheria) |
| 95. | Rincon Band of Luiseno Mission Indians of the Rincon Reservation, California |
| 96. | Robinson Rancheria of Pomo Indians of California |
| 97. | Round Valley Indian Tribes of the Round Valley Reservation, California (formerly the Covelo Indian Community) |
| 98. | Rumsey Indian Rancheria of Wintun Indians of California |
| 99. | San Manuel Band of Serrano Mission Indians of the San Manuel Reservation, California |
| 100. | San Pasqual Band of Diegueno Mission Indians of California |
| 101. | Santa Rosa Indian Community of the Santa Rosa Rancheria, California |
| 102. | Santa Rosa Band of Cahuilla Mission Indians of the Santa Rosa Reservation, California |
| 103. | Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California |
| 104. | Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation, California |
| 105. | Scotts Valley Band of Pomo Indians of California |
| 106. | Sherwood Valley Rancheria of Pomo Indians of California |
| 107. | Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California |
| 108. | Smith River Rancheria, California |
| 109. | Soboba Band of Luiseno Indians, California (formerly the Soboba Band of Luiseno Mission Indians of the Soboba Reservation) |
| 110. | Susanville Indian Rancheria, California |
| 111. | Sycuan Band of Diegueno Mission Indians of California |
| 112. | Table Bluff Reservation—Wiyot Tribe, California |
| 113. | Table Mountain Rancheria of California |
| 114. | Torres-Martinez Band of Cahuilla Mission Indians of California |

| | |
|------|--|
| 115. | Tule River Indian Tribe of the Tule River Reservation, California |
| 116. | Tuolumne Band of Me-Wuk Indians of the Tuolumne Band Rancheria of California |
| 117. | Twenty-Nine Palms Band of Mission Indians of California |
| 118. | United Auburn Indian Community of the Auburn Rancheria of California |
| 119. | Upper Lake Band of Pomo Indians of Upper Lake Rancheria of California |
| 120. | Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation, California |
| 121. | Yurok Tribe of the Yurok Reservation, California |

COLORADO (1)

| | |
|------|---|
| 122. | Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado |
|------|---|

IDAHO (4)

| | |
|------|---|
| 123. | Coeur D'Alene Tribe of the Coeur D. Alene Reservation, Idaho |
| 124. | Kootenai Tribe of Idaho |
| 125. | Nez Perce Tribe of Idaho |
| 126. | Shoshone-Bannock Tribes of the Fort Hall Reservation of Idaho |

NEW MEXICO (21)

| | |
|------|--|
| 127. | Jicarilla Apache Nation, New Mexico (formerly the Jicarilla Apache Tribe of the Jicarilla Apache Indian Reservation) |
| 128. | Mescalero Apache Tribe of the Mescalero Reservation, New Mexico |
| 129. | Pueblo of Acoma, New Mexico |
| 130. | Pueblo of Cochiti, New Mexico |
| 131. | Pueblo of Jemez, New Mexico |
| 132. | Pueblo of Isleta, New Mexico |
| 133. | Pueblo of Laguna, New Mexico |
| 134. | Pueblo of Nambe, New Mexico |
| 135. | Pueblo of Picuris, New Mexico |
| 136. | Pueblo of Pojoaque, New Mexico |
| 137. | Pueblo of San Felipe, New Mexico |
| 138. | Pueblo of San Juan, New Mexico |
| 139. | Pueblo of San Ildefonso, New Mexico |
| 140. | Pueblo of Sandia, New Mexico |
| 141. | Pueblo of Santa Ana, New Mexico |
| 142. | Pueblo of Santa Clara, New Mexico |
| 143. | Pueblo of Santo Domingo, New Mexico |
| 144. | Pueblo of Taos, New Mexico |
| 145. | Pueblo of Tesuque, New Mexico |
| 146. | Pueblo of Zia, New Mexico |
| 147. | Zuni Tribe of the Zuni Reservation, New Mexico |

NEVADA (15)

| | |
|------|--|
| 148. | Duckwater Shoshone Tribe of the Duckwater Reservation, Nevada |
| 149. | Ely Shoshone Tribe of Nevada |
| 150. | Las Vegas Tribe of Paiute Indians of the Las Vegas Indian Colony, Nevada |
| 151. | Lovelock Paiute Tribe of the Lovelock Indian Colony, Nevada |
| 152. | Moapa Band of Paiute Indians of the Moapa River Indian Reservation, Nevada |
| 153. | Paiute-Shoshone Tribe of the Fallon Reservation and Colony, Nevada |

| | |
|------|---|
| 154. | Pyramid Lake Paiute Tribe of the Pyramid Lake Reservation, Nevada |
| 155. | Reno-Sparks Indian Colony, Nevada |
| 156. | Shoshone-Paiute Tribes of the Duck Valley Reservation, Nevada |
| 157. | Summit Lake Paiute Tribe of Nevada |
| 158. | Te-Moak Tribe of Western Shoshone Indians of Nevada (Four constituent bands: Battle Mountain Band; Elko Band; South Fork Band and Wells Band) |
| 159. | Walker River Paiute Tribe of the Walker River Reservation, Nevada |
| 160. | Winnemucca Indian Colony of Nevada |
| 161. | Yerington Paiute Tribe of the Yerington Colony & Campbell Ranch, Nevada |
| 162. | Yomba Shoshone Tribe of the Yomba Reservation, Nevada |

OREGON (9)

| | |
|------|---|
| 163. | Burns Paiute Tribe of the Burns Paiute Indian Colony of Oregon |
| 164. | Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians of Oregon |
| 165. | Confederated Tribes of the Grand Ronde Community of Oregon |
| 166. | Confederated Tribes of the Siletz Reservation, Oregon |
| 167. | Confederated Tribes of the Umatilla Reservation, Oregon |
| 168. | Confederated Tribes of the Warm Springs Reservation of Oregon |
| 169. | Coquille Tribe of Oregon |
| 170. | Cow Creek Band of Umpqua Indians of Oregon |
| 171. | Klamath Indian Tribe of Oregon |

UTAH (4)

| | |
|------|---|
| 172. | Northwestern Band of Shoshoni Nation of Utah (Washakie) |
| 173. | Paiute Indian Tribe of Utah (Cedar City Band of Paiutes, Kanosh Band of Paiutes, Koosharem Band of Paiutes, Indian Peaks Band of Paiutes, and Shivwits Band of Paiutes) |
| 174. | Skull Valley Band of Goshute Indians of Utah |
| 175. | Ute Indian Tribe of the Uintah & Ouray Reservation, Utah |

WYOMING (2)

| | |
|------|---|
| 176. | Arapahoe Tribe of the Wind River Reservation, Wyoming |
| 177. | Shoshone Tribe of the Wind River Reservation, Wyoming |

MULTI-STATE TRIBES (8)

| | | |
|------|------------------------------|--|
| 178. | Arizona and California | Colorado River Indian Tribes of the Colorado River Indian Reservation |
| 179. | Arizona, New Mexico & Utah | Navajo Nation |
| 180. | California and Arizona | Quechan Tribe of the Fort Yuma Indian Reservation |
| 181. | Arizona, California & Nevada | Fort Mojave Indian Tribe |
| 182. | Colorado, New Mexico & Utah | Ute Mountain Tribe of the Ute Mountain Reservation |
| 183. | Nevada & California | Washoe Tribe of Nevada & California (Carson Colony, Dresslerville Colony, Woodfords Community, & Washoe Ranches) |
| 184. | Nevada & Oregon | Fort McDermitt Paiute and Shoshone Tribes of the Fort McDermitt Indian Reservation |
| 185. | Nevada & Utah | Confederated Tribes of the Goshute Reservation |