

FINAL
EPA-TRIBAL PROTOCOL
Regional Haze TIP Development and Rulemaking Action
03/11/05

INTRODUCTION

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. The purpose of this protocol is to facilitate a collaborative EPA-tribal process of developing and reviewing Regional Haze (RH) Tribal Implementation Plans (TIPs). This protocol has been developed jointly by representatives of the Gila River Indian Community, the National Tribal Environmental Council (NTEC), and EPA.

GOALS & OBJECTIVES

EPA's goal is to assist participating tribes in developing approvable RH TIPs that meet federal requirements. Several important objectives support this goal. These objectives are to ensure that:

- TIPs are legally defensible, federally enforceable and environmentally beneficial;
- TIPs do not set a negative precedent in any area;
- TIPs ensure reasonable progress towards improving visibility in the 16 mandatory Class I areas on the Colorado Plateau;
- EPA regional offices are consistent in reviewing and acting on TIPs;
- Tribes identify early on where TIPs deviate from model rules and templates; and
- The TIP development and review process is an efficient use of tribal and EPA resources

BACKGROUND

The protocol is in response to requests from our tribal partners to ensure that the western regional EPA offices use a collaborative approach to assist western tribes in developing RH TIPs, and that EPA reviews and takes action on the TIPs in a timely manner. EPA has corresponded previously with the Western Regional Air Partnership (WRAP) and the Western States Air Resources Council (WESTAR) regarding a protocol and numerous regulatory questions. That correspondence ended in a request for an EPA protocol on how to address development, review and action on 309 SIPs. That protocol, dated 3/31/03, attempted to address tribal issues as well. It is included as Attachment 1. Western tribal representatives asked EPA to prepare a separate tribal protocol. This document fulfills that request.

EPA's RHR provides two paths to address RH. One is section 309, and is an option for nine states, and the 185 tribes¹ located within those states, to adopt RH strategies for the period from 2003 to 2018. The other is section 308, and requires states and tribes to develop long-term strategies up to and including the year 2064. These strategies must be shown to make reasonable

¹ According to the Federal Register (68 FR 68180, Friday, December 5, 2003), 185 federally recognized tribes were identified in the nine state western region of Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah, and Wyoming. 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 a TIP.

progress in improving visibility in Class I areas inside the state and in neighboring jurisdictions. 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.

The Clean Air Act (Section 301(d)) provides authority for tribes to implement CAA programs in the same manner as states. The Tribal Authority Rule or TAR (40 CFR sections 49.1-49.11) authorizes flexibility for tribes to develop programs or portions of programs tailored to their air quality priorities and specific schedules (i.e, a modular approach).

APPROACH

Productive and efficient collaboration on the RH TIPs requires commitments by EPA and tribes to share information, communicate issues, coordinate resolution of those issues, and focus on timeliness. Both tribal and EPA staff commit to calling or emailing their counterparts when they send TIP-related documents by regular mail. If necessary, EPA and tribes can commit to establishing regular meeting times.

EPA sent letters to all the tribes located in the WRAP region informing them of the 308 and 309 process and offering to assist them with their RH efforts. (A sample letter is included as Attachment 2). Four major sulfur dioxide (SO₂) sources operate on three reservations (APS Four Corners Power Plant and SRP Navajo Generating Station on the Navajo Reservation; Peak Sulfur Products Company on the Wind River Reservation; and Bonanza Power Plant on the Uintah and Ouray Reservation). EPA expects to focus initial discussions with these tribes and engage in a consultation process². Although a TIP should be considered as the first approach, depending on tribal requests, EPA could consult with a tribe or tribes to develop a Federal Implementation Plan (FIP) to provide for tribal participation in the RH program as appropriate or necessary.

EPA Commitment. To clarify federal requirements and ensure regional consistency, EPA will work collaboratively with tribes as they develop their TIPs, providing substantive comments as appropriate during the process. EPA will acknowledge receipt of the final TIP from a tribe in writing. EPA will strive to offer direction to the tribe; due to the lack of precedent and experience with TIPs, tribes must keep in mind that the EPA is encountering these issues under the RH program and the TAR for the first time. EPA regional offices will coordinate their review of the TIPs to ensure consistency. EPA will make every effort to streamline review and expedite rulemaking on final TIPs that conform to WRAP products. EPA's ability to streamline the review process depends on early identification of issues, and clear and timely communication of their resolution. At the same time, EPA must independently review the adequacy of TIPs in EPA's public rulemaking process and consider all comments on a plan in determining if the plan meets applicable requirements. EPA will continue to assist tribes in understanding the ramifications of participating in both the 308 and 309 process.

EPA Expectations: EPA asks that tribes indicate as early as possible if they would like to

² The consultation process between the EPA and tribes should be based on the "EPA Policy for the Administration of Environmental Programs on Indian Reservations November 8, 1984" (www.epa.gov/indian/1984.htm).

participate in the RH TIP process. In order to plan for review of the draft products as well as the final submittal, EPA would like to know each tribe's approximate schedule and specific needs for assistance. To ensure timely and consistent review of RH TIPs, EPA asks that tribes indicate as early as possible where a plan deviates from the WRAP's regional approach (e.g., as characterized in WRAP policy documents, model rules, and the SIP/TIP template).

Tribal Commitment: Tribes commit to working with EPA to reach agreement on how to best address issues. Tribes agree to contact EPA and ask for clarification if any of the Agency's comments are not understood. Tribes will work to accomplish any revisions to the TIP document that are necessary, including establishing specific timelines. If problems occur that would delay an established timeline, tribes agree to contact EPA and inform the Agency of a new timeframe.

Tribal Expectations: Tribes ask that EPA provide support to a tribe seeking to develop an implementation plan early on in the process. This includes providing suggestions on implementation plan development. Tribes request that EPA respond to a tribe in a timely manner, and where issues are particularly complex, that EPA keeps the tribe apprised of progress on a specific issue. Upon receiving a TIP, tribes ask that EPA inform the tribe in writing that the document has been received and is under review. Once a TIP is approved, tribes ask EPA to continue to offer support in implementing the plan. Tribes would like for EPA to work on providing training to the tribe directly or to help establish other ties that a tribe could benefit from such as working with a state.

PROCESS FOR REGIONAL CONSISTENCY

A major challenge for EPA, states and tribes is to ensure that separate RH TIPs result in a regional plan that will improve visibility at national parks and wilderness areas across the West. In particular, the western EPA offices must coordinate their efforts to consistently evaluate the RH TIPs in a regional context based on the goals and objectives stated above. To the extent possible, EPA will maintain consistency in staff assignments to assist with this review process.

Attachment 1.

EPA PROTOCOL REVIEW AND RULEMAKING ACTION ON 309 SIPs

March 2003
(Final Version: 3/31/03)

INTRODUCTION

The purpose of the protocol is to facilitate the process of developing the Section 309 Regional Haze State Implementation Plans (309 SIPs) due to EPA by December 2003. The protocol describes EPA's collaborative approach internally and with our state partners to review and take action on the 309 SIPs. EPA will make this draft version available for discussion and agreement during March 2003.

GOALS & OBJECTIVES

Our goal is to assist participating states in developing approvable 309 SIPs that meet all federal requirements within the statutory deadlines. A number of important objectives support this goal. These objectives are to ensure that:

- SIPs ensure reasonable progress to improve visibility in 16 class I areas on the Colorado Plateau;
- SIPs are legally defensible, federally enforceable and consistent with applicable legal requirements;
- SIPs do not set a negative precedent in any area;
- EPA regional offices are consistent in reviewing and acting on the SIPs;
- States identify early on where SIPs deviate from the model rules and templates;
- SIP development and review process is an efficient use of resources; and
- Tribes can participate in the 309 program.

BACKGROUND

The protocol is in response to requests from our state partners to ensure the western regional offices use a consistent process to review and take action on the 309 SIPs. We currently anticipate receiving 309 SIPs from four western states in four different EPA regions. These states are New Mexico in Region 6, Utah in Region 8, Arizona in Region 9, and Oregon in Region 10. We believe the regional nature of the state plans as developed through the WRAP is conducive to a collaborative and streamlined review process. Lessons learned in the 309 process also should benefit our approach to reviewing the Section 308 SIPs in the future.

EPA has corresponded previously with the Western Regional Air Partnership (WRAP) and the Western States Air Resources Council (WESTAR) regarding a protocol and numerous regulatory questions. Correspondence includes a letter dated October 16, 2002, on the 309 SIP process from Ms. Bonnie Thie, Acting Air Director in Region 10, and to Ms. Lynn Terry,

President of WESTAR. Lydia Wegman, Director, Air Quality Strategies and Standards Division at EPA, has responded to regulatory questions in two letters dated June 7 and July 31, 2002, to Mr. Rick Sprott of Utah, and a letter dated July 31, 2002 to Ms. Sandra Ely of New Mexico. Another useful reference is Region 10's Final Report on the *State Implementation Plan Process Improvement Project*.

APPROACH

EPA Commitment: EPA will continue to work collaboratively with the WRAP, and individually with states, to develop the 309 SIPs. To clarify federal requirements, we are willing to review and comment on draft SIPs prior to the submittal deadline. The regional offices agree to coordinate their review of the 309 SIPs to ensure regional consistency in evaluating the plans before and after the SIPs are submitted. We will make every effort to streamline review and expedite rulemaking on final SIPs that conform to WRAP products. At the same time, we must independently review the adequacy of SIPs in EPA's public rulemaking process and consider all comments on a plan in determining if it meets applicable requirements. Our approach to regional consistency is explained more fully on the next page.

Our EPA 309 SIP Team consists of representatives from the four western regional offices as well as staff with policy, technical and legal expertise at our headquarters. We also are establishing a group of SIP experts to provide special assistance on planning issues. Ongoing EPA commitments to participating early and actively in the 309 SIP process include:

- WRAP Board Meetings;
- WRAP Committee, Forum and Work Group Meetings (including STIP II);
- WESTAR Council Meetings;
- WRAP and WESTAR Grant Funds and Grant Reviews;
- National Coordination for Regional Planning Organizations; and
- Regional Coordination for Tribes.

EPA Expectations: To ensure timely and consistent review of 309 SIPs, EPA asks that the states indicate as early as possible where a plan deviates from the WRAP's regional approach (e.g., as characterized in WRAP policy documents, the Model Rule, and SIP/TIP Template). In order to plan our review of draft products as well as the final submittal, we need to know each state's schedule and specific needs for assistance. Our ability to streamline the review process depends on early identification of issues, and clear and timely communication on their resolution. To this end, our most recent response to the list of 309 questions is adjoined to the protocol. Productive and efficient collaboration on the 309 SIPs requires commitments by EPA, states and tribes to coordinate and communicate effectively.

TRIBES

EPA will work with tribes to develop an *EPA Protocol for 309 Tribal Implementation Plans*. In the meantime, EPA will continue to assist tribes in understanding the ramifications of participating in the 308 and 309 programs. EPA sent letters to all the tribes located in the WRAP region informing them of the regional haze process, and offering assistance. Within the WRAP region, there are four existing major SO₂ sources on three reservations (APS Four Corners and APS Navajo Generating Station in the Navajo Nation; Koch Sulfur Products Company on the Wind River Reservation; and Bonanza Power plant on the Ute Indian Tribe of the Uintah and Ouray Reservation). EPA expects to hold discussions with these tribes and engage in the consultation process as appropriate. Depending on tribal requests, EPA could develop a Federal Implementation Plan (FIP) to provide for tribal participation in the 309 program.

PROCESS FOR REGIONAL CONSISTENCY

A major challenge for EPA, states and tribes is to ensure that separate 309 SIPs result in a regional plan that will improve visibility at national parks and wilderness areas across the West. In particular, the western regional offices must coordinate their efforts to evaluate consistently the 309 SIPs in a regional context based on the goals and objectives stated above. Our efforts to achieve regional consistency during the drafting and after submittal are outlined below:

- *Establish 309 SIP Review Team:* EPA has established a group of SIP liaisons known as the 309 SIP Review Team to participate on the STIP II Work Group. We have one SIP liaison from each regional office: Joe Kordzi (Region 6), Laurie Ostrand (Region 8), Wienke Tax (Region 9), and Steve Body (Region 10). The 309 SIP Review Team will assist the work group and will accumulate knowledge and experience for our respective regional planning offices which will eventually review the state plans. Our existing EPA 309 SIP Team which consists of EPA members and contacts throughout our regional and national offices will provide policy and technical support to the 309 SIP Review Team.
- *Designate Regional Haze Rule Experts:* EPA is designating a group of internal consultants among regional office staff active in the WRAP who will have responsibility for specific sections of the rule. These individuals will research the rule requirements and WRAP products in their area of responsibility in order to coordinate the resolution of policy or technical issues within EPA.
- *Ensure Timely Legal Advice to Identify and Resolve Legal Issues:* We are establishing stronger links with our Office of General Counsel (OGC) and our four western Offices of Regional Counsel (ORCs) in order to identify and resolve legal issues as early as possible. EPA attorneys representing these offices will serve as official contacts for regional haze issues requiring legal opinions.
- *Support State and Tribal Coordination:* We encourage states (and tribes as appropriate) as they develop their plans to share information with other states to ensure regional

consistency. States have a greater accountability to each other in regional planning. Coordination already underway through STIP II as well as other WRAP and WESTAR groups will enhance EPA's efforts to streamline the rulemaking process.

- *Develop Procedures to Review Draft and Final 309 SIPs:* The 309 SIP Review Team which has representatives from the four western regional offices will provide guidance and consultation to the STIP II Work Group. The Team will regularly communicate internally to ensure, to the extent possible, that the regional review of draft and final 309 SIPs is conducted in a consistent manner. The Team will identify and work to resolve issues prior to a 309 SIP submittal. As part of the regulatory process, each 309 SIP will undergo a separate public review at the State and federal levels which will allow other States and EPA to provide additional comments on consistency. Decisions regarding the approval of individual 309 SIPs will reside with the appropriate EPA Regional Office in consultation with the Office of Air Quality Planning and Standards and OGC.

SCHEDULE

The tasks outlined below are specific to the 309 SIP review and approval process. In addition, EPA will continue its broader efforts through the WRAP and WESTAR as listed under *Approach*.

PHASE ONE: JANUARY - MARCH 2003

- Complete Protocol with state input
- Complete EPA response to WRAP questions
- Review and comment on 309 SIP Template of STIP II Work Group
- Review and comment on Technical Support Documentation

PHASE TWO: APRIL - DECEMBER 2003

- Identify potential issues regarding 309 SIPs
- Review and comment on draft 309 SIPs
- Hold internal meetings and calls to coordinate review
- Provide status reports to WRAP and WESTAR

PHASE THREE: BEGINNING JANUARY 2004

- Review official 309 SIP submittals
- Hold internal meetings and calls to coordinate review
- Provide status reports to WRAP and WESTAR
- Take action on 309 SIPs

Attachment 2.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

May 22, 2002

Dear Tribal Leader:

The purpose of this letter is to inform you of two upcoming U.S. Environmental Protection Agency (EPA) rulemakings regarding visibility impairment and regional haze and to discuss the potential implications of these rules for your tribe. We also invite you to submit comments on these rulemakings.

On July 1, 1999, EPA published the Regional Haze Rule, which codified the requirements of Section 169A of the Clean Air Act (CAA). Regional haze is visibility impairment caused by cumulative air pollutant emissions from many sources over a wide geographic area. The Regional Haze Rule requires State Implementation Plans for protection of scenic areas known in the CAA as "Class I areas", including large national parks, such as the Grand Canyon, Yellowstone, and Yosemite. Under the Clean Air Act, tribes have the option to develop Tribal Implementation Plans to address regional haze and other regulated pollutants. Consequently, tribes are important co-regulators for this program.

We currently have two rulemaking efforts underway to amend the Regional Haze Rule to provide more detail on certain provisions.

The first proposal, published in the Federal Register on July 20, 2001 (66 FR 38108), relates to best available retrofit technology (BART). The Regional Haze Rule requires some sources (i.e., electric utilities or sources with industrial boilers) emitting visibility impairing pollutants (i.e., nitrogen oxides, sulfates, or sulfur dioxide) over a threshold amount to install BART controls. The sources must have been built between 1962 and 1977 to be subject to these provisions. This rulemaking is intended to clarify the BART requirements under the Regional Haze Rule. If your tribe has sources that might be impacted by this rulemaking, EPA would be interested in hearing from you about any concerns that your tribe might have.

The second proposal was published in the Federal Register on May 6, 2002 (67 FR 30418), and is described in more detail in the enclosed fact sheet. The Regional Haze Rule contains provisions that recognize the efforts of the Grand Canyon Visibility Transport Commission (GCVTC) and the Western Regional Air Partnership (WRAP), and offer some western states and tribes the option to achieve visibility improvement goals using the strategy developed by the GCVTC. Part of this strategy, a specific program for stationary source sulfur dioxide emissions, required the WRAP to submit further program details to EPA, and for EPA to write amendments to the rule to incorporate these details. This rule contains recommendations for implementation of regional emission reduction milestones of sulfur dioxide, a key precursor to the formation of fine particles and regional haze, for the period from 2003 to 2018. The EPA proposes to achieve these emission reductions using a declining cap that reduces the total amount

of emissions from all subject sources.

Tribes have the option of participating in the sulfur dioxide “cap and trade” program, and in other elements of the GCVTC approach. Tribes that wish to do so are not bound by the deadline of December 31, 2003 which applies to states. However, EPA strongly encourages tribes who wish to participate in the program to make every effort to submit their Tribal Implementation Plans by that date. The WRAP is developing a number of products to assist states and tribes in formulating their implementation plans, and EPA will help interested tribes assess their options and develop a Tribal Implementation Plan if appropriate.

We anticipate that these rules will be of interest primarily to tribes which have on their land sources of sulfur dioxide emitting more than 100 tons per year, which we do not believe to be the case with your tribe. However, there is one aspect of the rule for which we encourage comments from tribes, whether or not they believe they will be participating in the program. That is, the provision of a tribal “set aside” of 20,000 tons per year.

There will be a public hearing on these rules in Phoenix on June 4, 2002. The public hearing will be held at the offices of the Arizona Department of Environmental Quality, 3033 North Central Avenue, Phoenix, Arizona in Rooms 1709 and 1710 from 2 PM - 6 PM. EPA will also be accepting written comments on this proposal until July 5, 2002.

For more information on these rules and the regional haze program, please see the EPA website at <http://www.epa.gov/air/visibility/>, or contact Tim Smith of EPA’s Office of Air Quality Planning and Standards at (919) 541-4718 (email: smith.tim@epa.gov). EPA staff will attend the National Tribal Conference on Environmental Management in Reno, Nevada, on June 4 through 7 to present additional information on these rules and to seek tribal comment. Tribal participation in the development of these proposals and in the WRAP has been facilitated by the National Tribal Environmental Council (NTEC); for information on tribal participation and potential impacts to tribes please call Bill Grantham of NTEC at (505) 242-2175.

Sincerely yours,

Jack P. Broadbent
Air Division Director

cc: Tribal Environmental Directors

attachment