

Regional Haze Rule Severable Elements under Section 309

Introduction

This document has been designed by the National Tribal Environmental Council (NTEC), with support from the Tribal Caucus of the Western Regional Air Partnership, to provide guidance concerning severability of a regional haze tribal implementation plan under Section 309 of the Regional Haze Rule (RHR). The provisions under the RHR have been categorized as general provisions, programs, or program elements, as explained within the sections below. The goal of this document is to encourage tribes to submit tribal implementation plans (TIPs) by making such TIPs more feasible and less onerous. This goal can be accomplished by “severing” the RHR into individual programs in order to allow the TIP to be tailored to the needs and resources of a given tribe. This document is intended to help the reader make an initial assessment of how a Section 309 TIP might be applicable to a tribe’s situation. If it is determined that a TIP may be necessary or appropriate, the reader should refer to the *Section 309 Tribal Guidance Document* and the *Model Tribal Implementation Plan (TIP) Template for Section 309 of the Regional Haze Rule*, available at <http://www.wrapair.org/tribal/index.htm> to learn how to proceed forward on such a TIP. When reviewing this document, the reader should be aware that where the term “State” is used under the RHR, the term “Tribe” should replace it or be added in the case of a TIP, depending on the specific issue trying to be conveyed within the RHR.

General Provisions

General provisions are provisions that apply to all regional haze programs under Section 309, regardless of what strategies that the program covers, and whether it is a TIP or federal implementation plan (FIP). The following are a list of those general provisions under Section 309.

Section 309(a) – What is the purpose of this section?

This provision states that the purpose of the section is to establish "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

Section 309(b) – Definitions.

This provision sets out definitions for 16 Class I areas; Transport Region State; Commission Report; Fire; Milestone; Continuous decline in total mobile source emissions; and Base year. The relevancy of each definition depends upon the programs contained under a TIP.

Section 309(c) – Implementation Plan Schedule.

This provision states that if a Transport Region State elects to submit an implementation plan under this section, it must do so no later than December 31, 2003. Indian Tribes are not bound by this deadline and can therefore submit implementation plans after this date.

Section 309(d)(1) – Time period covered.

This provision states that the implementation plan submitted must be effective through December 31, 2018. If a tribe opts to submit a TIP up through this date, the general provision of a long-term strategy must be observed regardless of *when* the TIP is submitted. However, if the TIP is submitted close enough to December 31, 2018 that its end date might no longer be deemed long-term, the tribe and EPA should work together to define another time period to be covered by the TIP.

Section 309(d)(2) – Projection of Visibility Improvement

This provision requires that an implementation plan project the visibility improvement "expected through the year 2018 for the most impaired and least impaired days, based on the implementation of all measures as required in the Commission report and the provisions in this section." Although this subsection is not explicitly optional for tribes, it refers to "each of the 16 mandatory Class I areas located within the Transport Region State." By definition, there are no mandatory Class I areas on tribal lands as defined under the RHR. This general provision is therefore inapplicable to tribes.

Section 309(d)(10) – Periodic implementation plan revisions.

Section 309(d)(10)(i) and (ii)

Reports on reasonable progress and action taken upon evaluation of the implementation plan are general provisions that must be fulfilled in any Section 309 program in order to accomplish the goal of reasonable progress. In the case of a tribe, its TIP would need to address the 16 mandatory Class I areas outside its jurisdiction.

Section 309(e) – States electing not to implement the Commission recommendations.

This provision requires a state that opts not to submit an implementation plan under Section 309 to instead do one under Section 308. Because tribes are not required to submit a TIP of any kind, this provision does not add anything to the existing framework. Tribes therefore have the *option* of submitting a TIP either under Section 308 or 309.

Programs and Program Elements

The Tribal Authority Rule (TAR) states that "[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." *Tribal Authority Rule, 40 C.F.R. 49.7*. A "Clean Air Act program" is not defined under the RHR nor under the Clean Air Act. Subsequently, such a program under the RHR would be best defined as a set of elements that make up a strategy to address a contributing *source category* of regional haze.

Having thus defined "program" based on the language of the TAR and RHR, NTEC has categorized programs and the elements within these programs as severable or not severable. A program is always severable because programs (e.g., fire, stationary sources, etc.) are not integrally related to each other. Elements within the program may or may not be severable based on their relationship to non-severable elements. For example, under the pollution prevention program (e.g., Section 309(d)(8)), elements (ii), (v), and (vi) are severable, whereas elements (i), (iii), and (iv) are integrally related to each other. A tribe may therefore either do a pollution prevention program that includes all of elements (i), (iii), and (iv), plus any of the other elements, or a tribe may choose to do any combination of elements (ii),(v), and/or (vi).

In order to fulfill the purpose of the RHR, it is important that every state and tribe do its part. A tribal implementation plan, however, is optional for a tribe and its submission may be based on limited funding. Accordingly, allowing tribes to implement only those programs which are necessary or appropriate to address their contribution to regional haze will encourage such tribes to adopt TIPs. Because a partial TIP is a better contribution to the reasonable progress goals of the RHR than no TIP at all, every program under Section 309 should be severable. Thus, each tribe may choose those programs that are needed to address its contribution to regional haze. If a tribe opts, however, to create a particular program, some of the elements in the program may or may not be severable. The following is a list of programs and their respective elements:

Section 309(d)(3)

The treatment of Clean Air Corridors should be considered a Clean Air Act program under the RHR and therefore severable. This program consists of the following provisions: identification of clean air corridors; identification of growth patterns or specific growth sites that could cause or are causing significant emissions increases; identification of significant emissions growth that could begin, or is beginning, to impair the quality of air in the corridor from outside the corridor; an analysis of the effects of increased emissions if impairment is found; and a determination of any other clean air corridors. These are all non-severable elements because each of them is an integral part of the single concept of clean air corridors. For example, it would serve no purpose to identify a clean air corridor if there were no plans to track and react to emissions growth.

Section 309(d)(4)

Implementation of stationary source reductions should be considered a Clean Air Act program under the RHR and therefore severable. In the case that a tribe does not have any stationary sources on its lands, this program would not be applicable. If a tribe does opt, however, to develop a stationary source sulfur dioxide (SO₂) emissions reduction program, the following elements are classified as severable or non-severable:

Section 309(d)(4)(i) – Provisions for stationary source SO₂

An SO₂ cap on emissions is the central strategy of the Section 309 stationary source program intended to address regional haze. This specific element requires that a program addressing stationary source SO₂ emissions must contain declining quantitative emissions milestones for every year of the program through 2018. This is because for a program to be approved in lieu of BART, it must "be shown to provide for greater reasonable progress than would be achieved by application of BART." This element is not severable because it is integrally related to the Section 309 stationary source program. More specifically, without declining quantitative emissions milestones, SO₂ emissions from stationary sources would remain the same or even increase which would subsequently not be better than what would be achieved under BART.

Section 309(d)(4)(ii) – Documentation of emissions calculation methods for SO₂

This element states that "[t]he plan submission must include documentation of the specific methodology used to calculate SO₂ emissions during the base year for each emitting unit included in the program." Documentation of emissions calculation methods is not severable because it is integrally related to Section 309(d)(4)(i) which is not severable. It is subsequently and integrally related to subsection (d)(4)(i) because if base year emissions are not calculated in a scientifically sound way, the result may be an inaccurate base year calculation. Without an *accurate* base year calculation, the process of setting declining quantitative emissions milestones would be compromised since the standard setters would not be working with the true base year emissions. Documentation of the method by which the base year emissions are calculated helps to decrease the chance of an erroneous calculation.

Section 309(d)(4)(iii) – Monitoring, recordkeeping, and reporting of SO₂ emissions.

This element states that "[t]he plan must include provisions requiring the monitoring, recordkeeping, and annual reporting of actual stationary source emissions within the State." Monitoring

and recordkeeping of SO₂ emissions by a tribe is integrally related to Section 309(d)(4)(i) because without these measures, it would be unknown if SO₂ emissions from stationary sources were declining. This element is not severable because reporting this information to the EPA Administrator is integral to the purpose of this SO₂ emissions program. More specifically, if all stationary source programs failed to report the results of their monitoring, the EPA would not know if reasonable progress goals were being met.

Section 309(d)(iv)-(v) – Criteria and Procedures for a Market Trading Program.

These elements mandate that the implementation plan include a market trading program which will compensate for any amount of SO₂ emitted above the milestones set in Section 309(d)(4)(i). The market trading program is therefore not severable and integrally related to (d)(4)(i) because without this element, SO₂ emissions above the milestone would not be offset and the declining cap required under subsection (d)(4)(i) would be unmet.

Section 309(d)(4)(vi) – Provision for the 2018 milestone.

This element states that “[u]nless and until a revised implementation plan is submitted in accordance with § 51.308(f) and approved by EPA, the implementation plan shall prohibit emissions from covered stationary sources in any year beginning in 2018 that exceed the year 2018 milestone.” This element is not severable and integrally related to Section 309(d)(4)(i) as it references the year after which SO₂ stationary source emissions may not exceed the 2018 milestone.

Section 309(d)(4)(vii) – Provisions for stationary source emissions of NO_x.

This element states that “[t]he implementation plan must contain any necessary long term strategies and BART requirements for stationary source PM and NO_x emissions.” With respect to BART, this element is not severable as it merely reiterates pre-existing requirements that all BART-eligible sources must be addressed for all pollutants either on a source-by-source basis or through an alternative program. With respect to long-term strategies, this element is severable to the extent that no PM and NO_x strategies may be necessary for a given source.

Section 309(d)(5) – Mobile Sources.

Mobile sources should be considered a Clean Air Act program under the RHR and therefore severable.

Section 309(d)(5)(i)(A) - Statewide inventories of onroad and nonroad mobile source emissions of VOC, NO_x, SO₂, PM_{2.5}, elemental carbon, and organic carbon for the years 2003, 2008, 2013, and 2018.

This element states that

The inventories must demonstrate a continuous decline in total mobile source emissions (onroad plus nonroad; tailpipe and evaporative) of VOC, NO_x, PM_{2.5}, elemental carbon, and organic carbon, evaluated separately. If the inventories show a continuous decline in total mobile source emissions of each of these pollutants over the period 2003-2018, no further action is required as part of this plan to address mobile source emissions of these pollutants. If the inventories do not show a continuous decline in mobile source emissions of one or more of these pollutants over the period 2003-2018, the plan submission must provide for an implementation plan revision by no later than December 31, 2008 containing any necessary long-term strategies to achieve a continuous decline in total mobile source emissions of the pollutant(s), to the extent practicable, considering economic and technological reasonableness and federal preemption of vehicle standards and fuel standards under title II of the CAA.

A continuous decline of emissions of VOC, NO_x, PM_{2.5}, elemental carbon, and organic carbon from mobile sources is part of the central strategy of this mobile sources program to address regional haze. This element is therefore not severable as it is integrally related to all elements of the mobile source program. As a practical matter, this element is also not severable because without the data, a tribe would not know by how much its mobile source emissions needed to be reduced.

Section 309(d)(5)(i)(B)

This element requires the submittal of a long-term strategy necessary to reduce SO₂ emissions from nonroad mobile sources consistent with reasonable progress by December 31, 2008. This element is not severable because, like VOC, NO_x, PM_{2.5}, elemental carbon, and organic carbon under Section 309(d)(5)(i)(A), the SO₂ emissions reductions from mobile sources is part of the central strategy of this program. Furthermore, since a TIP is optional, a tribe wanting to do a mobile sources program would probably need to work with the EPA to establish a new deadline if it feels that the deadline identified under this provision is unrealistic.

Section 309(d)(5)(ii)

The reporting element of this mobile sources program is not severable as it is integrally related to Section 309(d)(5)(i)(A) because without this report, the EPA would not know if there was a continuous decline of the pollutants being tracked by this program.

Section 309(d)(6) – Programs Related to Fire.

This provision concerning fire should be considered a Clean Air Act program under the RHR and therefore severable.

Section 309(d)(6)(i)

This element states that a plan for a program related to fire must provide "[d]ocumentation that all Federal, State, and private *prescribed* fire programs within the State evaluate and address the degree of visibility impairment from smoke in their planning and application" (emphasis added). This element also requires that the plan must "include smoke management programs that include all necessary components including, but not limited to, actions to minimize emissions, evaluation of smoke dispersion, alternatives to fire, public notification, air quality monitoring, surveillance and enforcement, and program evaluation." This element is severable because it applies only to prescribed fires and a tribe might have issues related to other types of fire (e.g., wildfires) instead. Such a tribe might wish to implement other parts of this program such as an emissions inventory. Practically speaking, however, it seems unlikely that a tribe without a prescribed fire program would need to implement a fire program for regional haze purposes.

Section 309(d)(6)(ii)

This element requires an inventory along with tracking and reporting of VOC, NO_x, elemental and organic carbon, and fine particle emissions from fire. Regional efforts may be used to satisfy this requirement. Unlike Section 309(d)(6)(i), this element is not limited to prescribed fire, but applies to all types of fire, and is therefore severable because a tribe could track fire emissions whether or not it implements any of the control strategies contained in other parts of Section 309(d)(6). Information thus acquired may be useful to the regional effort, even though it does result in actual reductions of emissions from a tribe's land. It seems unlikely, however, that a tribe would adopt a TIP solely for emissions tracking purposes. A tribe that has fire emissions of a magnitude to justify tracking would probably also want to adopt strategies to reduce emissions.

Section 309(d)(6)(iii)

This element requires "[i]dentification and removal wherever feasible of any administrative barriers to the use of alternatives to burning in Federal, State, and private *prescribed* fire programs within the State" (emphasis added). This element is not severable as it is integrally related to Section 309(d)(6)(i) which also focuses on prescribed fire. Subparagraph (i) imposes conditions on prescribed fire programs, and subparagraph (iii) requires that alternative to prescribed fires be encouraged. A tribe that implements one must therefore implement the other.

Section 309(6)(iv)

This element requires that the plan provide for "[e]nhanced smoke management programs for fire that consider visibility effects, not only health and nuisance objectives, and that are based on the criteria of efficiency, economics, law, emission reduction opportunities, land management objectives, and reduction of visibility impact." This provision is severable as it is not dependent upon the emissions inventory or tracking as identified under Section 309(d)(6)(ii).

Section 309(d)(6)(v)

This element requires "[e]stablishment of annual emission goals for fire, excluding wildfire, that will minimize emission increases from fire to the maximum extent feasible and that are established in cooperation with States, tribes, Federal land management agencies, and private entities" (here is a special case where the term "tribe" does not need to replace "state" or be added). This element is not severable because it is integrally related to other elements of the fire program which covers nearly all types of fire. The rule identifies a suite of strategies applicable to the same types of fires, indicating that all are needed to adequately address fire emissions.

Section 309(d)(7) – Area sources of dust emissions from paved and unpaved roads.

This provision concerning dust emissions should be considered a Clean Air Act program under the RHR and therefore severable. The provision specifically states that

The plan must include an assessment of the impact of dust emissions from paved and unpaved roads on visibility conditions in the 16 Class I areas. If such dust emissions are determined to be a significant contributor to visibility impairment in the 16 Class I areas, the State must implement emissions management strategies to address the impact as necessary and appropriate.

This element is the only such element in Section 309 for a dust emissions program. Therefore, if a tribe opts to establish a dust emissions program, this element would not be severable as it is integral to the sole element of such a program.

Section 309(d)(8) – Pollution Prevention.

Pollution prevention should be considered a Clean Air Act program under the RHR and therefore severable.

Section 309(d)(8)(i)

The central strategy of the pollution prevention program is to conserve energy, and explore and implement renewable forms of energy. A summary of pollution prevention and renewable energy programs already in place within the tribe's jurisdiction is integral to this strategy and therefore not severable because without a base knowledge of what already exists, the anticipated contribution of these programs to the Commission's renewable energy goals could not be accurately assessed.

Section 309(d)(8)(ii)

This element requires an incentive program for efforts achieving early compliance or going beyond such compliance. This element is severable as it is not integrally related to any non-severable element of a pollution prevention program because although a pollution prevention plan may benefit from those who go above and beyond, it is not dependent on it.

Section 309(d)(8)(iii)

This element requires "[p]rograms to preserve and expand energy conservation efforts." This element is not severable because energy conservation is one of the central strategies of a pollution prevent program under Section 309.

Section 309(d)(8)(iv)

This element requires "[t]he identification of specific areas where renewable energy has the potential to supply power where it is now lacking and where renewable energy is most cost-effective." This element is the other central strategy of a pollution prevention program – i.e., renewable energy. This provision is therefore not severable.

Section 309(d)(8)(v)

This element requires "[p]rojections of the short- and long-term emissions reductions, visibility improvements, cost savings, and secondary benefits associated with the renewable energy goals,

energy efficiency and pollution prevention activities". This element is severable as it is not integrally related to any other non-severable element because with conservation efforts and renewable energy in place, the goal of the program is fulfilled. These additional projections are unnecessary for a successful pollution prevention program.

Section 309(d)(8)(vi)

This element requires a description of the programs relied upon by the tribe to contribute to the Commission's renewable energy goal and a periodic report of any progress made over the course of the plan. This is a severable element as neither of these administrative tasks is integral to any non-severable element because even without them, the central strategies of renewable energy and energy conservation can still function.

Section 309(d)(9) – Implementation of additional recommendations.

This provision concerning implementation of additional recommendations should be considered a Clean Air Act program under the RHR and therefore severable. The provision specifically states

The plan must provide for implementation of all other recommendations in the Commission report that can be practicably included as enforceable emission limits, schedules of compliance, or other enforceable measures (including economic incentives) to make reasonable progress toward remedying existing and preventing future regional haze in the 16 Class I areas.

As is stated in the regional haze implementation plan for Arizona,

Some of the Commission's recommendations ask the EPA to take specific **actions** or institute particular **programs**, in cooperation with the tribes, states and federal agencies as implementing bodies. Other recommendations provide a range of potential policy or strategy **options for consideration** by the EPA and implementing entities. As the EPA develops policies and takes actions based on this report, this distinction between "actions" and "options" should be maintained with diligence. That is, recommendations intended as policy options should not become mandated actions or regulatory programs. [**BOLD** emphasis in original]¹

This provision is therefore severable, allowing a tribe to incorporate additional options.

¹ *Regional Haze State Implementation Plan for the State of Arizona* (viewed April 10, 2006) available at <http://www.azdeq.gov/environ/air/haze/download/2sip.pdf>.

Section 309(d)(11) – State planning and interstate coordination.

The provision should be considered a Clean Air Act program under the RHR as it is a standalone activity. This element also states that “[i]n complying with the requirements of this section, States *may* include emission reductions strategies that are based on coordinated implementation with other States” (emphasis added). By its own language, this element makes state planning and interstate coordination optional.²

Section 309(d)(12) – Tribal Implementation.

This provision concerning tribal implementation should be considered a Clean Air Act program under the RHR and therefore severable. This provision states that "tribes within the Transport Region may implement the required visibility programs for the 16 Class I areas, in the same manner as States, regardless of whether such tribes have participated as members of a visibility transport commission." This element is therefore severable as tribes *may* take action.

Section 309(g) – Additional Class I Areas

This provision should be considered a Clean Air Act program under the RHR and therefore severable.

Section 309(g)(1)

This element requires a “demonstration of expected visibility conditions for the most impaired and least impaired days at the additional mandatory Class I Federal area(s) based on emissions projections from the long-term strategies in the implementation plan. This demonstration may be based on assessments conducted by the States and/or a regional planning body." This element is integral to Section 309(g)(3) and therefore not a severable element because knowledge of the expected visibility on most and least impaired days in the mandatory Class I is necessary to set reasonable progress goals. It is necessary because without this base information, a tribe would be unable to assess what deviation from this impairment would satisfy reasonable progress goals.

Section 309(g)(2)

This element requires "[p]rovisions establishing reasonable progress goals and implementing any additional measures necessary to demonstrate reasonable progress for the additional mandatory Federal Class I areas. These provisions must comply with the provisions of § 51.308(d)(1) through (4)." This element is not severable because reasonable progress goals are the central strategy of such a program, and without them, the program would

² "States *may* include emission reductions strategies that are based on coordinated implementation with other States." *Emphasis added.*

not exist.

Section 309(g)(2)(i) and (iii)

These elements are severable because their language makes them optional.

Subsection (g)(2)(i) states "[i]n developing long-term strategies pursuant to § 51.308(d)(3), the State *may* build upon the strategies implemented under paragraph (d) of this section, and take full credit for the visibility improvement achieved through these strategies." (emphasis added)

Subsection (g)(2)(iii) states that

The Transport Region State *may* consider whether any strategies necessary to achieve the reasonable progress goals required by paragraph (g)(2) of this section are incompatible with the strategies implemented under paragraph (d) of this section to the extent the State adequately demonstrates that the incompatibility is related to the costs of the compliance, the time necessary for compliance, the energy and non air quality environmental impacts of compliance, or the remaining useful life of any existing source subject to such requirements. (emphasis added)

Section 309(g)(2)(ii)

This element states that

The requirement under § 51.308(e) related to Best Available Retrofit Technology for regional haze is deemed to be satisfied for pollutants addressed by the milestones and backstop trading program if, in establishing the emission reductions milestones under paragraph (d)(4) of this section, it is shown that greater reasonable progress will be achieved for these additional Class I areas than would be achieved through the application of source-specific BART emission limitations under § 51.308(e)(1).

This element is not severable as it is integrally related to Section 309(g)(2) with respect to reasonable progress.

Conclusion

The aforementioned discussion provides insights and recommendations as to those provisions, programs and elements that are likely severable and not severable under Section 309 of the Regional Haze Rule (RHR). As such, NTEC would hope that a tribe would utilize this document as a reference to develop its own implementation plan specific to the tribe's needs and circumstances. A tribe, however, should be in close communication with the Agency before it commits significant resources toward a tribal-specific implementation plan.

Sources

Regional Haze Regulations, 40 C.F.R. Part 51 (July 1, 1999) (see http://www.epa.gov/ttncaaa1/t1/fr_notices/rhfedreg.pdf). .

Revisions to the Regional Haze Rule To Correct Mobile Source Provisions in Optional Program for Nine Western States and Eligible Indian Tribes Within That Geographic Area, 40 C.F.R. Part 51 (July 3, 2003) (see <http://www.epa.gov/fedrgstr/EPA-AIR/2003/July/Day-03/a16922.htm>).

Regional Haze Regulations; Revisions to Provisions Governing Alternative to Source-Specific Best Available Retrofit Technology (BART) Determinations (October 13, 2006) (see <http://www.epa.gov/fedrgstr/EPA-AIR/2006/October/Day-13/a8630.htm>).