



WRAP

TRIBAL NEWS

December 2006

Court Decides Case Concerning 2005 Regional Haze Guidelines

On December 12, a court case involving regional haze and efforts by the U.S. Environmental Protection Agency (EPA) to curb it was decided by the U.S. Court of Appeals of the District of Columbia Circuit in *Utility Air Regulatory Group v. EPA*, 05-1353, in favor of the EPA. At issue was a 2005 rule laying out a set of guidelines for imposing Best Available Retrofit Technology (BART) controls with the intent of improving visibility in national parks and wilderness areas. BART is one of the main provisions of the Regional Haze Rule (RHR) and applies to certain industrial sources built between 1962 and 1977. States (and tribes where applicable) that develop and implement regional haze implementation plans must identify BART-eligible sources (potential to emit more than 250 tons per year of a visibility impairing pollutant), determine which of these sources may be reasonably anticipated to cause or contribute to visibility impairment, and determine BART for these sources.

In arguing the case before the court on November 7, the Utility Air Regulations Group (UARG) and Center for Economic and Energy Development (CEED) (“the petitioners”) alleged that the EPA’s BART guidelines are contrary to the intent of §169(A)(b) of the Clean Air Act (CAA), which necessitates that a source must be found to contribute to regional haze (e.g., attribution determination) before BART may be applied. Under EPA’s guidelines, if a state makes an attribution determination for any single BART-eligible source within its jurisdiction, then that same attribution determination can be applied “cumulatively” to the state’s remaining BART-eligible sources. Sources therefore not necessarily found to be contributors to regional haze would still be required to expend financial resources to meet BART requirements, essentially capturing “the innocent along with the guilty.” The petitioners instead advocated that individual sources have an opportunity to show that they do not contribute to regional haze and therefore avoid unnecessary financial expenditures to meet BART requirements.

The EPA had proposed a previous set of BART guidelines that made it mandatory on the part of the agency for states to utilize the cumulative approach, but these guidelines were found to be invalid in a 2002 D.C. Circuit Court decision, *American Corn Growers Association v. EPA*, 291 F.3d 1 (D.C. Cir. 2002). Understanding that regulatory oversight by the agency was the main reason for the earlier guidelines being overturned, the EPA proposed the current guidelines with the intent of allowing states the discretion to utilize the cumulative approach instead. It is also noteworthy that the court in the 2002 case threw out the RHR Annex that contained a sulfur dioxide (SO₂) trading program, anticipated to be “better than BART,” and included a 20,000 SO₂ allowance set-aside for tribes. A separate rule written by the EPA and recently approved in October of this year, provides guidelines for states adopting a regional haze trading program which contains many of the same elements of the now-defunct Annex and would essentially allow states the discretion to include a tribal set-aside as well (as of this writing, all those states who originally adopted a trading program with the tribal set-aside have intentions of retaining such a set-aside under a revised trading program).

As the court found in favor of the EPA’s cumulative approach and if states subsequently adopt it, tribes would benefit more than under the industry approach as all BART-eligible sources within a contiguous state’s jurisdiction would need to comply with BART even if they didn’t cause visibility impairment of any of the Class I areas identified under the RHR. Essentially, tribal lands wouldn’t need to just be near Class I areas nor in the

trajectory of sources contributing to visibility impairment of Class I areas in order to enjoy better air quality over their respective jurisdictions.

States will still need to make their own determinations as how to proceed with BART, understanding that they need to comply with EPA's December 2007 deadline for submitting regional haze implementation plans. States adopting the cumulative approach face an extreme risk, however, if the court rules against this approach as they would need to redo (or the regional planning organizations that they work with) their BART analyses and corresponding determinations, therefore expending additional and limited resources in a narrow time period. It is unknown at this time, however, what would be the implications to states if they were unable to complete these analyses and determinations by the 2007 deadline.

WRAP Tribal Technical & Policy Workshop

On November 28-29, the National Tribal Environmental Council (NTEC) hosted A WRAP Tribal Technical and Policy Workshop in Albuquerque, New Mexico, with the purpose of providing a forum where tribal representatives could catch up on WRAP's latest activities that are most pertinent to tribes. There were about 25 attendees from across the WRAP region, including Alaska. Several tribal representatives new to the WRAP were present as well.

Some of the highlights of the event included a demonstration of how to access tribal data in the newly unveiled Technical Support System, a presentation about Diesel Retrofit projects, and a discussion of the future of WRAP. Presenters included representatives of several tribes, Northern Arizona University, Institute of Tribal Environmental Professionals, New Mexico Environmental Department, Emissions Advantage, and WRAP staff. These presentations were captured on videotape, and we are working on getting the presentations (with the Power Points as well) up on the website, for those who could not attend. Many thanks to all of the presenters who made this workshop a success.

Communications Committee on Hiatus

For those tribal representatives that may not have heard, the WRAP Communications Committee has been put on hiatus and will be acting in an advisory capacity only. However, this will not affect the WRAP website which will continue as always. NTEC personnel assigned to WRAP will also continue to distribute information, including the *WRAP Tribal News*, as before.

Comments from the Co-Director

Well here we are again, another month gone and as usual a very productive month. Hello to everyone out there in Indian Country!!

Good things continue to take place out there. The month started off with a meeting in San Diego, California, of the Modeling Forum and Attribution of Haze Workgroup. One of the main subjects of discussion at this meeting was a proposal to combine the Modeling Forum, Air Monitoring & Reporting Forum and Attribution of Haze Workgroup into one "Technical Analysis Forum". Then around the middle of the month I had the opportunity to attend the Stationary Sources Forum meeting in Tempe, Arizona. Again this was also a productive meeting in that it was decided to merge this forum with the committee that was suggested at the San Diego meeting. Finally, I just returned from the NTEC Tribal Technical and Policy Workshop held in Albuquerque. I have to say that was without a doubt the highlight of my month and from what I heard from other attendees they felt the same way. This was a real opportunity for tribes to see, hear and ask questions about all of the work that the WRAP has been doing over the past 10+ years. We had real experts present information and they did it in such a way that the common person could understand. The Diesel Retrofit Boot Camp presentation piqued everyone's interest, possibly an opportunity to do something for the Alaska tribes in this area. Jerry Pardilla and myself intend to pursue the possibility for tribes in Alaska to get some of that diesel money

that is floating around in the form of grant funds. I will keep you informed on this. This month also furthered our progress towards some of the recommendations made to the Board back in September, in respect to climate change. If your tribe is interested in participating in the activities associated with this initiative, please contact me at lmcleod@ntec.org or call me at 406-675-3166. I am faced with an extremely compressed schedule for this initiative and would appreciate any help because I can't do it without you!

My activities for the month of October have included the following conference calls and meetings;

Participated in conference calls 13th, 17th, 20th, 21st, 27th, and the 30th. The calls were NTEC staff meeting, AoH Visibility Projections, AoH again to follow up on the meeting on the 17th, Inter-RPO conference call to discuss funding issues (again), RPO conference call on Class I groupings/consultation and finally the big one—a conference call on the Green House Gases Multi-State Registry discussed above under Climate Change.

Attended the following meetings: Attribution of Haze/Modeling Forum, Stationary Sources Joint Forum and the WRAP Tribal Technical and Policy Work Shop.

Thanks for your diligent hard work and continuous participation in the WRAP forums, committees and work groups.

This monthly newssheet is a collaboration of the National Tribal Environmental Council's (NTEC's) air program staff assigned to work with the Western Regional Air Partnership (WRAP), and condenses for the reader the activities and issues of the various forums, committees, and workgroups of the WRAP as they pertain to the tribes within the WRAP region. WRAP - a partnership of the western states (including Alaska), tribes within those states and other stakeholders - is funded by the U.S. Environmental Protection Agency, with the purpose of developing data, tools, and policies needed to improve visibility in parks and wilderness areas across the West. More information on WRAP may be found on its website, www.wrapair.org, while NTEC's website is located at www.ntec.org. If you have questions or suggestions regarding this newssheet, please contact Sandra Sac Parker, editor, at 505/242-2175 ext. 104 or e-mail sparker@ntec.org.

