



National Tribal Air Association's

White Paper

The Utilization of Prevention of Significant Deterioration (PSD) Additional Impacts Analysis to Better Incorporate Traditional Ecological Knowledge and Address Environmental Justice in Air Quality Permitting Decisions.

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Background

NTAA acknowledges the many Tribes that are engaged in reviewing State issued air quality permits. Many of the sources associated with these permits could have significant impacts on Tribal populations both through impacting public health and through impacting spiritual and cultural resources that often get overlooked in current permitting practices. Many Tribal environmental professionals have experienced the frustration of documenting significant impact to their community and yet seeing the permits granted because the state and EPA are unable/unwilling to consider areas of the CAA that may provide for discretion in considering Tribal impacts on Tribal health, sovereignty, and Treaty rights and Environmental Justice implications of past governmental actions and systemic racism.

The purpose of this white paper is to explore where discretion in the Clean Air Act sections 165(a)(2) and section 165(a)(6) could be used in combinations with direction of EO 13175, the Agency's Indian policy, and the Agency's Indian Policy and Policy on Treaty Rights and EO 12898 on environmental justice, can provide for consideration of Tribal concerns, Traditional Ecological Knowledge and Environmental Justice, in decisions on issuing permits.

Overview of Federal Policies

EPA Indian Policy

The Agency, in keeping with the Federal Trust Responsibility, will assure that Tribal concerns and interests are considered whenever EPA's action 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 state and local governments to resolve environmental problems of mutual concerns. 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 reservations 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.

Tribal Treaty Rights

The U.S. Constitution defines treaties as part of the supreme law of the land, with the same legal force as federal statutes. Treaties are to be interpreted in accordance with the federal Indian canons of construction, a set of long-standing principles developed by courts to guide the interpretation of treaties between the U.S. government and Indian Tribes. As the Supreme Court has explained, treaties should be construed liberally in favor of Tribes, giving effect to the treaty terms as Tribes would have understood them, with ambiguous provisions interpreted for their benefit. Only Congress may abrogate Indian treaty rights, and courts will not find that abrogation has occurred absent clear evidence of congressional intent.

EPA's Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights. Provides guidance to EPA staff on conducting consultation with Tribes when its decisions impact Tribal treaty rights. In addition, "EPA will subsequently consider all relevant information obtained to help ensure that EPA's actions do not conflict with treaty rights, and to help ensure that EPA is fully informed when it seeks to implement its programs and to further protect treaty rights and resources when it has discretion to do so."

Environmental Justice (EJ) Executive Order (EO) 12898

EO 12898 calls on federal agencies covered and other agencies covered by it, to implement its provisions on environmental justice to the greatest extent practicable and permitted by existing law. As highlighted in the Presidential memorandum accompanying Executive Order 12898, existing environmental and civil rights statutes provide many legal authorities that, in appropriate circumstances, may provide opportunities to ensure that federal programs, policies, and activities do not have disproportionately high and adverse human health or environmental effects on minority or low-income communities, including Tribal communities. In implementing EO 12898 EPA development guidance on addressing EJ issues in its decision making the following are some aspects that overlap in permitting decisions:

EJ Legal Tools

EPA's legal tools document discussed using section 165(a)(2) in incorporating EJ into the permitting process. Specifically:

EPA has various discretionary authorities that give, or may give, it opportunities to promote environmental justice under programs implementing the Clean Air Act (CAA). The potential for taking environmental justice considerations into account varies greatly across the various CAA programs. A general caveat applies: Because the primary authority and responsibility to select and implement air pollution control measures often rests with the states and with authorized Indian Tribes, EPA may have limited authority to influence state or Tribal decisions. Nevertheless, the CAA does afford EPA opportunities to consider environmental justice in certain standard-setting and permitting contexts.

Program Permitting Authority

Program Permitting Authority and Implementation History Section 165(a)(2) of the CAA provides that a PSD permit may be issued only after “a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of [the proposed] source, alternatives thereto, control technology requirements, and other appropriate considerations.” Likewise, one purpose of the PSD program is “to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decision-making process.”

In addition to requiring an opportunity for public participation in permitting decisions, the “alternatives” and “other appropriate considerations” language in section 165(a)(2) can be interpreted to provide the Agency with discretion to incorporate environmental justice considerations when issuing PSD permits. EPA has recognized that this language provides a potential statutory foundation in the Clean Air Act for this discretion. However, EPA has never explicitly based a PSD permit condition solely on such discretion or section 165(a)(2) alone, and the full contours of such discretion have not yet been defined. Nevertheless, section 165(a)(2) could be construed to provide EPA with discretion (but not a mandatory obligation) to impose permit conditions on the basis of environmental justice considerations raised in public comments regarding the air quality impacts of a proposed source. EPA has argued that this provision authorizes the incorporation of plant siting considerations into PSD permitting decisions. The ability to condition a permit due to environmental justice considerations would further the purpose of part C of title I of the Clean Air Act “to protect public health and welfare from any actual or potential adverse effect . . . from air pollution . . . notwithstanding the attainment and maintenance of all [NAAQS].”²⁴ The EPA Environmental Appeals Board (EAB) first addressed environmental justice.

The additional impacts analysis assesses the impacts of air, ground and water pollution on soils, vegetation, and visibility caused by any increase in emissions of any regulated pollutant from the source or modification under review, and from associated growth. Associated growth is industrial, commercial, and residential growth that will occur in the area due to the source. In the past these analyses have been largely cursory, and EPA's language on additional impacts analysis are open to interpretation. Specifically, NTAA found several sections where Tribes need clarification. EPA's regulations and guidance for Additional Impacts Analysis can be found

here: <https://www.ecfr.gov/current/title-40/chapter-I/subchapter-C/part-52/subpart-A/section-52.21>

(1) The owner or operator shall provide an analysis of the impairment to visibility, soils and vegetation that would occur as a result of the source or modification and general commercial, residential, industrial and other growth associated with the source or modification. The owner or operator need not provide an analysis of the impact on vegetation having no significant commercial or recreational value.

(2) The owner or operator shall provide an analysis of the air quality impact projected for the area as a result of general commercial, residential, industrial and other growth associated with the source or modification.

(3) *Visibility monitoring.* The Administrator may require monitoring of visibility in any Federal class I area near the proposed new stationary source for major modification for such purposes and by such means as the Administrator deems necessary and appropriate.

Conclusion

Many of the Agency's Tribal and environmental justice policies point to using the Agency's discretion to better factor in Tribal and environmental justice concerns in the permitting process. The additional impacts analysis is one area where there are not prescriptive requirements, and it is an area where sources are required to consider non air quality related impacts. Utilizing the requirement of the Agency's Tribal policies and the EJ policies, this is an area where Tribal concerns on the impact of sources on Tribal treaty, cultural and public health concerns can influence the decisions on a permit.

Even though the state has delegated permit authority, the Agency has oversight of permitting issues. Tribes can request Tribal consultation on permits that impact them, and the Agency can use its oversight authority to influence the state's decisions. In addition, when new or modified sources impact wetlands, Forest Service activities and/or wildlife; then the EPA can use its authority to coordinate input from these other Agencies to ensure the additional impacts analysis includes these specific Tribal concerns.

In the real world, Tribal issues are often downplayed or considered not significant risks, therefore not taken into consideration when issuing permits. To adequately address EJ and better address true Tribal impacts, NTAA reminds EPA and other federal agencies to include the consideration of Tribal impacts on Tribal health, sovereignty, treaty rights and EJ implications of past governmental actions and systemic racism as part of their discretion in making decisions on issuing permits.

For more information on NTAA, please visit our website at www.ntaatribalair.org