UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

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MEMORANDUM

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

SUBJECT: Guidance to Regions for Working with Tribes during the National Ambient Air Quality Standards (NAAQS) Designations Process

FROM: Stephen D. Page, Director
Office of Air Quality Planning and Standards

TO: Regional Air Directors, Regions I-X

Purpose

This memorandum provides guidance to EPA Regional Offices for working with federally-recognized Indian tribes regarding the Clean Air Act (CAA) section 107(d)[1] designations process for Indian country.[2] The intent of this guidance is to ensure that a nationally consistent approach is used for designating areas as meeting or not meeting the NAAQS in Indian country and to ensure that outreach to, and consultation with, tribes are included as a part of the overall process. First, this guidance provides background information regarding the designations requirements for EPA and states under the CAA. Next, the guidance provides background information regarding how tribes can participate in the designations process. Finally, the guidance discusses the stepwise process for working with tribes in the designations process, and the appropriate timing for conducting outreach and consultation in that process.

Please share this guidance with tribal leaders in your Region, providing courtesy copies to tribal environmental directors or tribal air quality staff, as appropriate.

Background On Designation Requirements Under CAA Section 107(d)

CAA section 107(d) establishes, among other things, the requirement for EPA to designate areas following promulgation of a new or revised national ambient air quality standard (NAAQS). EPA generally designates areas as nonattainment, attainment, or unclassifiable relative to the promulgated NAAQS. Under section 107(d)(1)(B)(ii) of the CAA, EPA must finalize the area designations no later than two years from the date a new or revised NAAQS is promulgated, unless the Administrator has

[1] For more information regarding section 107(d), please visit: http://www.epa.gov/oaqps001/greenbk/caa-t1p.html.
[2] Indian country, as defined at 18 U.S.C. § 1151, means (a) 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, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

insufficient information to promulgate designations. In such a case, the Administrator may extend this period for up to one year beyond the original deadline.

Section 107(d) does not explicitly reference Indian tribes or Indian country. However, tribes are able to participate in the designations process, and EPA should initiate education and outreach to encourage them to do so. More information regarding tribal participation in the designations process is addressed later in this document.

Section 107(d) does establish explicit roles for states in providing recommended designations. Section 107(d)(1)(A) requires the Governor of each state to submit to EPA a list of all areas in the state and to recommend a specific designation for each area. The recommended designations are to be submitted by a date established by EPA, which can be no sooner than 120 days and no later than 1 year from the date of promulgation of a new or revised NAAQS. Because states generally do not implement CAA programs in Indian country, their designation recommendations would generally not include Indian country.

Background On "Treatment-In-A-Similar-Manner-As-A-State" for CAA Section 107(d) and Tribal Involvement in Designations

Although CAA section 107(d) does not explicitly reference Indian tribes or Indian country, CAA section 301(d) authorizes EPA to treat eligible Indian tribes in a manner similar to states for purposes of most CAA provisions. Pursuant to that authority, EPA promulgated the Tribal Authority Rule (TAR), which establishes the process for Indian tribes to seek "Treatment-In-A-Similar-Manner-As-A-State" (TAS) eligibility and sets forth the CAA provisions for which TAS is available.[3] Under the TAR, eligible tribes may seek TAS for all CAA and regulatory purposes other than a small number of provisions enumerated at 40 CFR §49.4. The section 107(d) designations process is one CAA purpose for which tribes may seek TAS. Where a tribe obtains TAS for the purposes of section 107(d) designations, EPA is obliged to treat that tribe in a manner similar to states, and EPA expects that such tribes would submit designation recommendations in the same manner as states.

Even in cases where a tribe has not obtained TAS for section 107(d) purposes, EPA may solicit relevant air quality information and designation recommendations from the tribe for its areas of Indian country. In addition, Executive Order (EO) 13175 and the Agency's 1984 Indian Policy call for us to consult with tribes on actions and decisions, such as designation of their Indian country, that affect their interests. Although tribes are generally not required to participate in the designations process, EPA believes it is important to work with all federally-recognized tribes to provide the opportunity to participate. In this regard, EPA intends to solicit relevant air quality information and designation recommendations from, and offer consultation to, all tribes, irrespective of their TAS status for designations purposes. This approach is consistent with the federal government's trust responsibility to federally-recognized Indian tribes as well as various policies relating to tribes. These policies include, but are not limited to, EO 13175, EPA's 1984 policy relating to Indian tribes and implementation of federal environmental programs, the April 10, 2009 EPA Office of Air Quality Planning and Standards guidance "Consulting with Indian Tribal Governments," and the "EPA Policy on Consultation and Coordination With Indian Tribes."[4]

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[3] See, 63 FR 7254, February 12, 1998, codified at 40 CFR Part 49.

[4] For a copy of the policy, see http://www.epa.gov/tribal/pdf/cons-and-coord-with-indian-tribes-policy.pdf.

It is also important that EPA conducts outreach and offers consultation to all tribes on a schedule that provides sufficient time for them to be involved in the designations process, and to submit relevant air quality information and recommended designations. In order to meet the schedule for completing the designations, EPA intends to treat tribal recommendations in the same manner and on the same schedule as state recommendations. Consistent with section 107(d), we therefore intend to: 1) Notify the tribe of any modification EPA intends to make to the recommendation no later the 120 days prior to promulgation of the final designations, and 2) provide the tribe with an opportunity to demonstrate why any modification by EPA may be inappropriate. More information regarding this process is included in the next section, "Procedures for Working with Tribes in the Designations Process."

Procedures for Working with Tribes in the Designations Process

Process for Designations of Indian Country

The steps for working with tribes in the designations process are included in detail below, and summarized in Attachment A.

→ Steps 1 through 3: 1) Promulgate NAAQS, 2) Initiate education and outreach, 3) Send consultation letter

Shortly after promulgation of a final NAAQS, EPA Headquarters and Regional Offices should initiate education and outreach to tribes on the designation process. Education and outreach activities, not to be confused with consultation, may include webinars and conference calls, and disseminating information to members of the Regional Tribal Operations Committees, other tribal environmental organizations (e.g., the National Tribal Air Association) and/or tribal environmental professionals. In addition, EPA Regional Offices should send a letter (commonly referred to as a "consultation letter") to each tribe notifying them of the designation process and conveying detailed designations guidance. This consultation letter should be addressed to all tribal leaders, providing courtesy copies to tribal environmental directors or tribal air quality staff, as appropriate.[5] The letter should inform tribes of the following:

- the promulgation of a new or revised NAAQS;
- an opportunity for "government-to-government" consultation with EPA;
- the opportunity and process (including timeline) for submitting initial designation recommendations;[6]
- the date by which EPA requests that tribes notify EPA if they wish to engage in consultation and/or participate in the designation process;
- the potential nonattainment designation for their Indian country (if applicable);[7]
- the timeframe in which EPA intends to promulgate designations; and
- specific contact information for questions and follow up on the letter.

[5] For a sample letter, see Attachment B.

[6] To help us promulgate designations on a schedule consistent with CAA requirements, EPA must have ALL initial designations recommendations from tribes and states on the same established schedule.

[7] Where possible, this notification can support early consultation with the tribes and ensure that the consultation process does not impact completing the designations on schedule.

EPA Regional Offices should follow-up with informal or courtesy contact and reminders to help ensure that tribal participation occurs in a timely way. Regional Tribal Air Coordinators and Tribal program staff at EPA Headquarters offices can help with this informal contact.

→ Step 4: Conduct consultation

After sending the consultation letter, EPA Regional Offices should conduct consultation with interested tribes when requested. Consultation is generally defined as a process of meaningful communication and coordination between an EPA representative who is considered a decision-maker for the Agency (the Associate Division Director or above) and tribal officials or their designees. When requested, consultation should be conducted according to a schedule agreed upon by the tribe and EPA.[8] The schedule should allow sufficient time for a tribe to develop and submit technical information and designation recommendations, if the tribe chooses to do so. It is important for EPA to keep in mind that tribes also have procedural and governmental protocols which must be considered in order to provide formal responses.

During consultation, EPA should ensure that those tribes who are interested in submitting a recommendation for their area of Indian country to be designated separately from the adjacent area are aware of the implications for their tribe (e.g., air quality planning and permitting) if their recommendation is granted.

→ Steps 5 through 9: 5) Receive tribal recommendations, 6) Review tribal recommendations, 7) Provide tribes with opportunity for technical dialogue regarding recommendations, 8) Notify tribes via 120-day letter, 9) Provide opportunity for tribes to submit further technical information

After consultation, but along the same schedule as state recommendations, interested tribes would submit initial designations recommendations for EPA's consideration. If a tribe elects to participate in the designations process and submits recommendations, and EPA intends to make any modifications to the recommendations, EPA should offer an opportunity for tribal staff to engage in a technical dialogue regarding the recommendations. This will ensure that tribal staff members have time to engage with their tribal leaders before they receive written notification from EPA.

No later than 120 days prior to promulgation, EPA should notify the tribe of the modifications EPA intends to make to the recommendations. EPA should also provide the tribe with an opportunity to submit further technical information that demonstrates why any proposed modification to its recommendation may be inappropriate. This notification is usually conducted in writing, via a letter (commonly referred to as a "120-day letter"), which would also offer an opportunity for government-to-government consultation.

Because of the potential implications for tribes, EPA believes it is important to send similar (but modified) 120-day letters to additional tribes as follows:

- all tribes that submitted initial designation recommendations (both those EPA intends to modify and those EPA intends to accept);
- all tribes with Indian country that EPA intends to designate as nonattainment; and
- all tribes with TAS status for section 107(d) purposes.

[8] When conducting consultation with a tribe, it is important for EPA to confirm with the tribe that the activity does, indeed, constitute consultation. It is also important to document that consultation has taken place.

The 120-day letter should be addressed to all tribal leaders, providing courtesy copies to tribal environmental directors or tribal air quality staff, as appropriate. We encourage EPA Regional Offices to foster coordination between states and tribes in the designations process. To that end, courtesy copies of the 120-day letters should also be provided to those states whose areas are adjacent to the relevant areas of Indian country. In addition, affected tribes should be copied on 120-day letters that are sent to relevant states.

→ Step 10: Conduct post 120-day letter consultation

When requested, consultation should be conducted after the 120-day letter is sent. This is especially important where a tribe disagrees with EPA's intended designation. Although tribes are generally not required to submit designation recommendations, the CAA does establish statutory requirements to promulgate designations within a specified timeframe. It is crucial during consultation for EPA to fully inform tribes of this statutory requirement. This will help ensure that consultation is completed by the time the final designations are promulgated. Per the EPA's Policy on Consultation and Coordination with Indian Tribes, EPA will provide feedback to the tribes(s) involved in consultation to explain how their input was considered in the final action. This feedback should be a formal, written communication from a senior EPA official involved to the most senior tribal official involved in the consultation.

→ Steps 11 through 13: 11) Determine final designations, 12) Publish final designations, 13) Conduct education and outreach

The CAA requires EPA to complete the designations process within two years of promulgation of a new or revised NAAQS unless the Administrator has insufficient information to make a decision in that timeframe. The ultimate statutory authority to promulgate designations rests with EPA. If a tribe does not submit recommendations, EPA, under its CAA authorities, will promulgate an appropriate designation for the relevant area of Indian country. EPA intends to designate all areas on the same schedule. After the final designations are determined and published in the Federal Register, it is important for EPA Headquarters and Regional Offices to conduct education and outreach to fully inform the tribes of the final designations.

Flexibility Regarding Written Contact with Tribes

To help ensure timely communication with tribes, it is important for EPA Regional Offices to submit written notice to all tribes when initially informing them of the designations process and engaging with affected tribes during the 120-day stage in the process. For all other steps in the designations process, however, written contact may not always be the most appropriate manner of communication. Each Region has the flexibility to tailor their outreach and consultation efforts, as appropriate, to tribes in a manner consistent with the agreed upon relationship it has developed. However, the structures and procedures of tribal governments in the Region should be taken into consideration.

Questions Regarding This Guidance

Staff in EPA's Office of Air Quality Planning and Standards are available for assistance throughout the designations process. Questions on this guidance may be directed to Kristin Riha at (919) 541-2031 or riha.kristin@epa.gov; or Angel McCormack at (919) 541-3588 or mccormack.angel@epa.gov.

Attachments

cc: Anna Wood, OAQPS
Lydia Wegman, OAQPS
Richard Wayland, OAQPS
Greg Green, OAQPS
Peter Tsirigotis, OAQPS
Margo Oge, OTAQ
Sarah Dunham, OAP

ATTACHMENT A.
PROCESS FOR DESIGNATIONS OF INDIAN COUNTRY

Step	Activity
1	Final NAAQS promulgated and published in Federal Register
2	Education and outreach conducted by EPA Headquarters and Regional Offices on designations process
3	Letters sent by EPA Regional Offices to tribes requesting designations recommendation and offering consultation. Letters should inform tribes of the following: • the promulgation of a new or revised NAAQS; • an opportunity for "government-to-government" consultation with EPA; • the opportunity and process (including timeline) for submitting initial designation recommendations; • the date by which EPA requests that tribes notify EPA if they wish to engage in consultation and/or participate in the designation process; • the potential nonattainment designation for their Indian country (if applicable); • the timeframe in which EPA intends to promulgate designations; and • specific contact information for questions and follow up on the letter
4	Consultation conducted by EPA Regional Offices
5	Tribes provide designation recommendations
6	EPA reviews recommendations and conducts own analysis (e.g., multi-factor analysis)
7	If EPA intends to modify a tribe's recommendation, EPA Regional Offices offer tribal staff an opportunity for technical dialogue
8	120-day letters (which provide an opportunity for consultation) sent by EPA Regional Offices to the following tribes: • all tribes that submitted initial designation recommendations; • all tribes with Indian country that EPA intends to designate as nonattainment; and • all tribes with TAS status for CAA Section 107(d) purposes
9	Tribes have opportunity to submit further technical information, if they disagree with intended designation
10	Consultation conducted by EPA Regional Offices and additional information evaluated
11	Final designations determined
12	Final designations signed by EPA Administrator and published in Federal Register
13	Education and outreach conducted by EPA Headquarters and Regional Offices on final designations

ATTACHMENT B.
SAMPLE TRIBAL DESIGNATIONS CONSULTATION LETTER

(INSERT DATE)

«FIRST» «LAST»
«TITLE»
«TRIBE_NAME»
«ADDRESS»
«CITY», «FULL_STATE» «ZIP»

«Dear «TITLE» «LAST Name»:

The purpose of this letter is to provide you with information and guidance on the U.S. Environmental Protection Agency's (EPA) designations process for the (INSERT POLLUTANT) national ambient air quality standard (NAAQS). Your tribe may find it important to engage with us in the process of assigning designations for Indian country. Although your involvement is not required, we would like to invite you to participate in the designations process and to offer you consultation. We want to ensure early, transparent and effective communication in proposing area designations for the revised (INSERT POLLUTANT) standard.

On (INSERT DATE), EPA revised the primary (INSERT "AND SECONDARY," IF APPLICABLE) NAAQS for (INSERT POLLUTANT) to provide increased protection of public health and welfare from (INSERT POLLUTANT) pollution. The new primary (INSERT POLLUTANT) standard was lowered from (INSERT INFO REGARDING OLD AND NEW STANDARD(S)). (INSERT ANY ADDITIONAL INFORMATION REGARDING THE STANDARD(S)).

Establishing area designations is a key step in the process of providing the health and/or welfare protection intended by the Clean Air Act (CAA). Within two years of promulgation of a new or revised NAAQS, EPA must list and designate all areas in the country as either:

Attainment—areas that meet the standard;
Nonattainment—areas that either do not meet the standard, or are contributing to a nearby area that does not meet the standard; or
Unclassifiable—areas where there is insufficient information to make a determination.

These designations are based on current air quality information, recommendations from state Governors and tribal Leaders, and other relevant information discussed in the attached guidance document. We encourage you to submit your recommendation for designation of your area for consideration in this process.

[Add if area violating: Preliminarily, we believe your area potentially may be designated nonattainment for the (INSERT POLLUTANT) standard.*]* We invite and encourage you to participate in the designations process. Please notify us by (INSERT DATE) if you are interested in participating in the designations process and/or consulting with us regarding the process. When requested, consultation will

be conducted in accordance with the *EPA Policy on Consultation and Coordination with Indian Tribes* (www.epa.gov/tribal/consultation/consult-policy.htm). If you choose to participate in the designations process, we ask that you provide your recommendation to EPA by (INSERT DATE).

The enclosed memorandum provides guidance on the process for designating areas under the revised (INSERT POLLUTANT) NAAQS. We plan to announce our intended designations no later than 120 days prior to promulgating the final designations. Following the announcement of intended designations, tribes will have an additional opportunity to consult with us on any modifications EPA may propose to a tribe's original recommendation.

In accordance with section 107(d)(1)(B) of the CAA, we are required to issue final designations by no later than (INSERT DATE). Our designations will be based on the most recent three calendar years of certified, quality-assured monitoring data available, and any other relevant information. If a tribe does not submit a recommendation, we will promulgate an appropriate designation for the relevant area of Indian country.

As the process moves forward, we will keep you and your staff informed of any additional guidance or other support activities. We look forward to working with you and your staff to develop area designations under the revised (INSERT POLLUTANT) standard(s) in a timely manner. If your tribe is interested in consultation or participating in further discussions or meetings with EPA officials about the designations process, please do not hesitate to contact me or (INSERT NAME) of my staff at (INSERT TELEPHONE NUMBER) or (INSERT EMAIL).

Sincerely,

(INSERT NAME)
Regional Administrator

Enclosure

cc: Tribal environmental director
Tribal environmental staff
Appropriate State/local Agencies