

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

**REGION VIII
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DENVER, COLORADO 80202-2466**

JULY - 7 1997

Ref: 8P2-A

Mr. Michael A. Frost, Director
Environmental Programs
Southern Ute Indian Tribe
P.G. Box 737
Ignacio, CO 81137

Dear Mr. Frost:

This is in response to your May 5, 1997 letter requesting EPA's assistance in identifying the provisions of EPA's Part 70 operating permits regulation that may become applicable to a tribal operating permits program, and in determining what type of baseline air program is needed for a tribe to implement an operating permits program. Thank you for your interest. Your request for EPA's early involvement in the development of your Part 70 program and general air program will help avoid misunderstandings and expedite the processing of the programs you submit.

As you know, the preamble of the proposed Tribal Authority Rule (TAR) (59 FR 43956, August 25, 1994) discusses a modular approach for providing tribes with flexibility to implement the Clean Air Act (CAA) on their reservations and other areas over which they have jurisdiction. This approach, if adopted in the forthcoming final TAR, would allow tribes to develop and submit to EPA for approval CAA programs to address air quality problems specific to the tribe's reservation, instead of entire complex air programs. However, any such submitted CAA program would still be required to meet all applicable minimum statutory and regulatory Federal requirements in order to receive EPA approval. Tribes would also be required to demonstrate adequate legal authority and sufficient resources to implement any of the CAA programs for which they seek approval.

Let us first discuss the elements of a Part 70 program that would make up a tribal operating permits program. Part III.D.6. of the proposed TAR (59 FR 43971), which is titled "40 CFR Part 70-State [and Tribal] Operating Permit Programs," lists in detail those provisions of a Part 70 program that, if the TAR is adopted as proposed, would be different for a tribal operating permits program than for a state Part 70 program. A summary of the Federal Register discussion follows. You may wish to refer the Federal Register pages cited in this letter for more specific information. Please

note that EPA has not yet promulgated the final TAR, and that, in response to comments submitted on the proposal, the Agency may decide to adopt certain provisions differently than as proposed. Therefore, please recognize that our response to you today is preliminary, and that the final TAR will govern how EPA evaluates submitted tribal programs.

Program Submittal Deadlines and Processing. Since tribes are not required under the CAA to implement any portion of an air program, including an operating permits program, the TAR, if adopted as proposed, would not hold tribes to the program submittal deadlines set out in 40 CFR 70.4(e). See 59 FR at 43964-66, 43981. Once a tribe submits a Part 70 program to EPA for approval, EPA would make a completeness determination within 60 days of receipt of the program. Incomplete programs would be returned to the tribe with comments detailing what additional provisions or elements are needed in order for EPA to initiate program processing for approval or disapproval. EPA would be required to complete its processing of the tribal Part 70 submittal within 1 year from determining the program to be complete.

Program Coverage. Under the proposed TAR, a tribal operating permits program would be required to cover all Part 70 sources under a tribe's jurisdiction in order to receive EPA approval. See 59 FR at 43971. EPA expects that this will usually include all Part 70 sources within the exterior boundaries of the reservation.

Deadlines for Permit Applications and Processing of Applications. If the TAR is adopted as proposed, a tribal program would have to include a 12-month deadline for Part 70 sources to submit Applications and an 18-month timeframe for a tribe to process Applications and issue permits. In the initial phase of implementing a tribal program, however, permits could be issued according to a longer schedule (no longer than five years) developed by the tribe and the EPA regional office. See 59 FR at 43967, 43971, and 43981.

Enforcement. Under the proposed TAR, a Memorandum of Agreement (MOA) between EPA and the tribe would be required in order to obtain Part 70 program approval. This MOA would provide for timely referral of criminal enforcement matters involving non-Indians to EPA, as required by Federal law. See 59 FR at 43971. Civil enforcement authority would need to meet the requirements of 40 CFR 70.11.

Operational Flexibility. The three operational flexibility provisions found at 40 CFR 70.4(b)(12), alternative operating scenarios found at 40 CFR 70.6(a)(9), and the emissions trading provisions found at 40 CFR 70.6(a)(8) and (10) were proposed as optional for a tribal operating permits program. See 59 FR at 43971-72. However, EPA received comments suggesting that these flexibility provisions should be mandatory. EPA now expects that tribal programs will have to meet the same operational flexibility requirements as state programs.

Permit Issuance Revisions Procedures. Procedures for issuing permits and revisions procedures at 40 CFR 70.7 would apply to tribes as they do for states under the proposed TAR. See 59 FR at 43972. The minimum period for public notice would be thirty days, which is the same for states. Tribes would be required to have authority to reopen permits for cause [40 CFR 70.7(f)].

Application Content Requirements. EPA believes that the information required in 40 CFR 70.5 is the minimum information needed to issue an effective permit. Consequently, a tribal program would have to contain at a minimum the same information requirements, if the TAR is adopted as proposed. See 59 FR at 43972.

Permit Content Requirements. The permit content requirements outlined in 40 CFR 70.6 are an essential component of an operating permits program for ensuring effective permits. Therefore, EPA proposed that a tribal program would at a minimum have to contain these same requirements. See 59 FR at 43972.

Judicial Review. Under the proposed TAR, a tribal program would be required to provide an opportunity for judicial review of a final permit action and a tribe's failure to take such final action in order to qualify for program approval. See 59 FR at 43972. EPA received numerous comments criticizing the Agency's proposed approach regarding this issue, and is currently assessing the appropriateness of its treatment. EPA will announce its response to the comments in the final TAR.

EPA Veto and Citizen Petition Process. A tribal program would have to allow for EPA's 45-day review of proposed permits and for potential EPA veto under the proposed TAR. A tribal program would also have to provide citizens the opportunity to petition EPA to veto a tribal-issued permit. See 59 FR at 43972.

Affected State Review. Like state programs, the proposed TAR would require tribal programs to provide for notification of draft permits to affected tribes or states. See 59 FR at 43967 and 43972.

General Revisions. All references to States and State officials would include Tribes and corresponding Tribal officials, under the proposed TAR. See 59 FR at 43972. Two additional provisions in the Part 70 regulations that are optional for all permitting authorities, including tribes, are the general permit [40 CFR 70.6(d)] and permit shield [40 CFR 70.6(f)] provisions. Also, although the preamble to the proposed TAR did not discuss this issue in detail, EPA would require that approved tribal programs provide that fees be collected sufficient to cover the permit program costs.

As noted earlier, the concept behind the proposed TAR rule is to allow tribes flexibility in developing their CAA programs. However, no general guidance has been developed for determining what portions of each CAA program are "reasonably

severable" from the rest of the program. The basic rule of thumb presented in the proposed TAR is that any partial CAA program must still meet the applicable minimum requirements under Federal law in order to be approved. See 59 FR at 43968-69. To date, the preamble to the proposed TAR rule is the only guidance EPA has for evaluating what Part 70 elements a tribal operating permits program should contain. Until further guidance is developed, possibly in the forthcoming final TAR, this is the guidance you should use in developing the operating permits program for your reservation. EPA is open to discussion about additional provisions of Title V or Part 70 that the Tribe believes are "reasonably severable" for a tribal program or for which it would be inappropriate to treat Tribes in the same manner as states. See 59 FR at 43981.

The guidance presented above is based on a proposed rule, and thus subject to change in the final rule. You should proceed with the development of your operating permits program based on the proposed TAR rule with this caveat in mind. Any revisions to the final TAR rule pertaining to Part 70 can be incorporated into your operating permits program prior to submittal to EPA for approval or sent to EPA after program submittal as a revision to your operating permits program.

The discussion so far has dealt mainly with those portions of Part 70 that, under the proposed TAR, you would need to adopt as part of your operating permits program. To reiterate, these regulations consist of certain Part 70 provisions regarding definitions (70.2), applicability (70.3), permit Applications (70.5), permit content (70.6), permit issuance, renewals, reopenings, and revisions (70.7), EPA and affected tribe and state review (70.8), fees (70.9), and enforcement (70.11). Enclosed is a checklist that EPA provided for states to use in developing their Part 70 programs. The checklist specifically details what authorities, requirements, legal opinions, documentation, etc. are needed for a complete operating permits program submittal. Until the TAR is finalized, you could use this same checklist in developing your program, in light of the way EPA proposed to treat these issues in the TAR. We recommend that you fill out the checklist, identifying where in your program submittal the checklist items can be found, and submit a copy of the completed checklist with your program submittal. This will ensure timely review of your program by EPA.

Your second request was for EPA to list the CAA baseline programs the Southern Ute Tribe needs to have in order to implement an operating permits program. The applicable requirements to be reflected in the terms and conditions in your Part 70 permits will come from your own tribal regulations and Federal standards. Generally, Part 70 does not impose substantive new requirements or require that specific nonTitle V CAA programs be adopted. However, Title V program approval does act as a trigger for certain requirements under sections 112(9) and (j) of the CAA, and Part 70 does require that fees be paid by sources and that adequate monitoring, reporting, and recordkeeping be conducted by sources for determining compliance with the underlying applicable requirements.

EPA's preamble to the proposed TAR discussed different situations in which tribes might choose to develop specific CAA programs. See 59 FR at 43968-69. Based on the fact that your reservation has no nonattainment areas, your substantive CAA program could consist of federal regulations that would apply to the type of sources that exist within the exterior boundaries of your reservation, as well as specific tribal regulations that you develop.

As an example, you do not need to adopt or develop acid rain regulations, since you have no acid rain sources. Since you do have sources such as asphalt batch plants, rock crushers, and boilers that may be subject to the New Source Performance Standards (NSPS) found at 40 CFR Part 60 Subparts Dc, I, and OOO, you should investigate the applicability of these standards to your sources. Tribal NSPS regulations could be adopted for those source categories in which you have subject sources and for sources that, if modified, would also be subject. The same would be true if you have any sources subject to the National Emissions Standards for Hazardous Air Pollutants found at 40 CFR Part 61 and the Maximum Achievable Control Technology (MACT) standards found at 40 CFR Part 63. Sources also exist on your reservation that are subject to the Prevention of Significant Deterioration (PSD) regulations found at 40 CFR 51.166; thus you may want to consider developing a PSD program. However, your consideration of implementing the complex PSD program should include estimates of the number of sources that would be subject and the resources and training necessary to implement the program.

A tribal PSD program would be part of a Tribal Implementation Plan (TIP). Like a State Implementation Plan (SIP), a TIP contains regulations and requirements to achieve and preserve the National Ambient Air Quality Standards (NAAQS) for protection of public health and welfare. All areas of the country, including tribal reservations, must achieve these standards. Air quality in all areas must not be allowed to be polluted to levels that exceed the national standards for six major pollutants (sulfur dioxide, nitrogen oxides, particulate matter, lead, ozone, and carbon monoxide).

As we said before, the Southern Ute Reservation does attain the currently effective national standards and has no nonattainment areas. (Note, however, that EPA just recently decided to revise the standards for ozone and particulate matter and the reservation's air quality has not been analyzed for attainment of these new standards.) Unlike states, which are directed to develop SIPs or face sanctions under the CAA, tribes need not develop TIPs in order to avoid sanctions, under the proposed TAR. However, a TIP will help the tribe protect air quality on the reservation, particularly from pollution from older sources and smaller sources, and thus help the tribe continue to attain the national standards.

Some of the tribal sources that would be subject to Part 70 have no non-Title V applicable requirements, because they are "grandfathered" from the federal regulations (including PSD) or they are not subject to Federal requirements due to their size or

amount of emissions. Part 70 permits issued to these sources would be called "hollow permits." Under a tribal Part 70 program for your reservation, a significant number of tribal sources would be issued hollow permits, unless you adopt tribal regulations to regulate emissions from these sources. To ensure that the NAAQS are achieved and preserved, states have developed minor source permitting programs for smaller sources and general regulations in their SIPs for regulating opacity, emissions of sulfur dioxide and nitrogen oxides, emissions from open burning, etc. We recommend that you develop a minor source permitting program and some general regulations that would apply to both new and older sources and include these programs in a TIP. Minor source permitting programs are a good means for requiring sources to install control equipment and for tracking emissions from new sources.

Region VIII will maintain an active role in providing assistance to the tribe during the development of its Part 70 program and in ensuring that any other EPA-approved tribal programs are implemented consistent with the minimum Federal requirements. We look forward to working with the Southern Ute Tribe in the development of its operating permits program. If you have any questions concerning our response, please contact Monica Morales, of my staff, at (303) 312-6936.

Sincerely,

Richard R. Long
Director
Air Program

Enclosure