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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1
1 CONGRESS STREET, SUITE 1100
BOSTON, MASSACHUSETTS 02114-2023

January 2, 2003

Honorable Beverly Wright
Chairperson
Wampanoag Tribe of Gay Head (Aquinnah)
20 Black Brook Road
Aquinnah, MA 02535

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Dear Chairperson Wright:

On November 14, 2002 Jeffrey Holmstead issued the attached memorandum entitled "Schedule for 8-Hour Ozone Designations and its Effects on Early Action Compacts". The purpose of this document is to alert States and Tribes about EPA's schedule for designating areas with regard to air quality and the 8-hour ozone standard. Tribes are encouraged, but not required, to submit designations recommendations for their lands. However, EPA is required by the Clean Air Act to make designations. If you wish to participate in the designation process, a recommendation is due by April 15, 2003. I want to emphasize our willingness to provide you the opportunity to learn about and to give input to this designation process. We encourage you to contact us if you are interested in making a designation recommendation and would like us to provide assistance. Please feel free to contact Ida Gagnon at 617-918-1653 or Richard Burkhardt at 617-918-1664 if you have any questions about the attached material.

In the case where you do not make a recommendation, we will promulgate a designation that seems appropriate, based on nearby air quality monitors.

At this time EPA's preliminary analysis for your tribal lands would support a nonattainment designation for your tribal lands. Our analysis is based on data collected at air quality monitoring sites in Connecticut, Rhode Island and the Greater Cape Cod area of Massachusetts. During the years 2000-2002, all of these sites have measured ozone concentrations that exceed the 8-hour ozone standard.

Another guidance document that may help you make a designation, if you so choose, is the Guidance on 8-Hour Ozone Designations for Indian Tribes dated July 2000. This is also enclosed with this letter

Sincerely,

Susan Studlien

Susan Studlien
Deputy Director, Office of Ecosystem Protection

Identiaal letter sent to each tribe

Honorable Beverly Wright, Chairperson
Wampanoag Tribe of Gay Head (Aquinnah)
20 Black Brook Road.
Aquinnah, MA 02535

Matther Vanderhoop, Director
Wampanoag Tribe of Gay Head (Aquinnah)
20 Black Brook Road.
Aquinnah, MA 02535

Honorable Melvin Francis, Sr., Tribal Governor
Passamaquoddy Tribe Pleasant Point
P.O. Box 343
Perry, ME 04667

April Francis, Environmental Assisnat
Passamaquoddy Tribe Pleasant Point
P.O. Box 343
Perry, ME 04667

Honorable Brenda Commander, Chief
HOULTON BAND OF MALISEET INDIANS
88 Bell Road
Littleton, ME 04730

Sharri Venno, Environmental Planner
HOULTON BAND OF MALISEET INDIANS
88 Bell Road
Littleton, ME 04730

Honorable Matthew Thomas, Chief
NARRAGANSETT INDIAN TRIBE
PO Box 268
Charlestown, RI 02813

Dinalyn Spears, Dir. Of Natural Resources
NARRAGANSETT INDIAN TRIBE
PO Box 268
Charlestown, RI 02813

Honorable Bobby Newell, Tribal Governor
PASSAMAQUODDY TRIBE OF INDIANS INDIAN
TOWNSHIP RESERVATION
PO Box 301
Princeton, ME 04668

Trevor White, Environmental Director
PASSAMAQUODDY TRIBE OF INDIANS INDIAN
TOWNSHIP RESERVATION
PO Box 301
Princeton, ME 04668

Honorable Barry Dana, Chief
PENOBSCOT INDIAN NATION
6 River Rd. Indian Island Reservation
Old Town, ME 04468

John Banks, Dir. Of Natural Resources
PENOBSCOT INDIAN NATION
6 River Rd. Indian Island Reservation
Old Town, ME 04468

Honorable Kenneth Reels, Chairman
MASHANTUCKET PEQUOT TRIBAL NATION
Tribal Office
Indiantown Rd.- PO Box 3060
Mashantucket, CT 06339-3060

Michael Boland, Dir. Of Natural Resources
MASHANTUCKET PEQUOT TRIBAL NATION
Tribal Office
Indiantown Rd.- PO Box 3060
Mashantucket, CT 06339-3060

Honorable William Phillips, Jr., Chief
AROOSTOOK BAND OF MICMACS
8 Northern Road
Presque Isle, ME 04769

Fred Corey, Environmental Director
AROOSTOOK BAND OF MICMACS
8 Northern Road
Presque Isle, ME 04769

Honorable Mark Brown, Tribal Chairman
MOHEGAN TRIBE
P.O. Box 488
Uncasville, CT 06382

Dr. Norman Richards,
MOHEGAN TRIBE
P.O. Box 488
Uncasville, CT 06382

Honorable Marsha Flowers, Chair Woman
EASTERN PEQUOT TRIBE
391 Norwich-Westerly Road, P.O. Box 208
North Stoningham, CT 06359

Tobias Glaza, Land Management Coord.
EASTERN PEQUOT TRIBE
391 Norwich-Westerly Road, P.O. Box 208
North Stoningham, CT 06359

Honorable James A. Cunha, Jr., Chief
PAUCATUCK EASTERN PEQUOT TRIBE
393 Gold Star Highway
Groton, CT 06340

Tobias Glaza, Land Management Coord.
PAUCATUCK EASTERN PEQUOT TRIBE
393 Gold Star Highway
Groton, CT 06340



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 14 2002

OFFICE OF
AIR AND RADIATION

MEMORANDUM

SUBJECT: Schedule for 8-Hour Ozone Designations and its Effect on Early Action Compacts

FROM: Jeffrey R. Holmstead *Jeff Holmstead*
Assistant Administrator

TO: Regional Administrators, Regions I-X

The purpose of this memorandum is to inform State and local air pollution control Agencies and Tribes (States and Tribes) about the Environmental Protection Agency's (EPA's or Agency's) schedule for designating areas for the 8-hour ozone National Ambient Air Quality Standards (NAAQS or standard) and the impact of the designation schedule on areas that are developing early action compacts (compacts). Please share this memorandum with your States and Tribes. This memorandum does not replace earlier guidance on the designation process and determining nonattainment area boundaries based on case-by-case application of air quality-related factors and presumptions. These earlier memoranda, titled "Boundary Guidance on Air Quality Designations for the 8-Hour Ozone National Ambient Air Quality Standards" dated March 28, 2000 and "Guidance on 8-Hour Ozone Designations for Indian Tribes" dated July 18, 2000, provide more detail on these issues and are located at <http://www.epa.gov/ttn/oarpg>.

Part A of this memorandum describes the schedule for designations, Part B addresses designation of Tribal areas and Part C addresses the effect of this schedule on States and Tribes that are developing compacts pursuant to the Texas "Protocol for Early Action Compacts Designed to Achieve and Maintain the 8-Hour Ozone Standard" (protocol) endorsed by EPA on June 19, 2002. The protocol can be found at <http://www.epa.gov/eart1r6/6pd/air/pd-1/8hourozone.pdf>.

A. Schedule for Designations for the 8-Hour Ozone NAAQS

On May 30, 2002 representatives of nine environmental organizations filed a notice of citizen suit under the Clean Air Act (Act) alleging that the Administrator failed to promulgate air

quality designations by the required statutory deadline.¹ On November 13, 2002, the nine environmental groups filed their lawsuit in the U.S. District Court for the District of Columbia. The EPA and the environmental groups have agreed upon a schedule for EPA to promulgate air quality designations for the 8-hour ozone standards by April 15, 2004. This agreement is embodied in a consent decree that was lodged with the U.S. District Court for the District of Columbia on November 13, 2002. In accordance with §113(g) of the Act, prior to finalizing the consent decree, EPA will publish a notice in the Federal Register providing a 30-day period for public review. If the public review results in revisions to the consent decree, EPA will modify this guidance as appropriate.

The EPA is now requesting that each State Governor and Tribal Chief or Leader submit updated, revised, or new designation recommendations and documentation to the Regional Administrator of the appropriate Regional Office by April 15, 2003. It should be noted that State recommendations do not apply to Indian country. The recommendations should generally be based on 2000-2002 quality assured, Federal reference or equivalent air quality monitoring data. This date will provide time for States and Tribes to quality assure the data for use in developing their recommendations and for EPA to carefully review and evaluate each recommendation prior to promulgating designations. To the extent that 2001-2003 air quality data are available and quality assured at the time of final designations, EPA will use 2001-2003 data when promulgating the designations. Therefore, EPA encourages Regional Offices, States and Tribes to prioritize and accelerate quality assurance of 2003 ozone monitoring data for use in promulgating designations. In the case where a State or Tribe does not submit a recommendation by April 15, 2003, EPA will promulgate the designation it deems appropriate.

In accordance with the Act, EPA will review the recommended designations and may make modifications as deemed necessary. If EPA determines that a modification to a recommendation is necessary, EPA will notify the State or Tribe no later than 120 days prior to promulgating the designations, which will provide an opportunity for the State or Tribe to demonstrate why EPA's modification is not appropriate. The EPA anticipates that it would provide such notification no later than October 15, 2003.

The EPA believes this timetable for promulgating designations is reasonable and appropriate and provides adequate time for States, Tribes, and local communities to develop effective ozone abatement strategies. Accordingly, EPA believes that there is no need for legislative action to alter the statutory deadline for ozone designations or related implementation

¹Section 6103 of the Transportation Equity Act for the 21st Century ("TEA-21") provided that EPA was required to designate areas for the 8-hour ozone NAAQS no later than July 18, 2000. Sec CAA section 107 Note. As part of Pub. L. 106-377, enacted in October 2000, Congress prohibited EPA from spending funds to designate areas for the 8-hour NAAQS until the earlier of a decision by the Supreme Court in Whitman v. American Trucking Assoc. or June 15, 2001. The Supreme Court issued its decision in Whitman v. American Trucking Assoc. on February 27, 2001.

requirements. In addition, EPA believes that it is possible to harmonize implementation of the 8-hour ozone and particulate matter NAAQS for 2.5 microns or less (PM_{2.5}) without seeking legislation because EPA will work with States to ensure that area designations for both NAAQS will occur in 2004. Indeed, the designation of areas for the PM_{2.5} standard by December 2004 is one of the Agency's highest priorities, due to the serious public health implications of PM_{2.5} exposure and the corresponding importance of initiating the air quality planning process for both the ozone and PM_{2.5} standards. This will enable States and Tribes to plan for implementation of both NAAQS at the same time. In addition, EPA intends to promulgate an implementation rule and release guidance addressing the 8-hour ozone program by the end of 2003 to aid States in planning for implementation prior to promulgation of designations.

The EPA is committed to ensuring that all stakeholders have an opportunity to participate in the designation process for the 8-hour ozone NAAQS, and that State, local and Tribal officials have ample time to comply with obligations that are triggered by designations. States are encouraged to involve stakeholders in developing their recommendations. Regional Offices should work with States and Tribes, particularly those Tribes located in or near an area where a monitor is recording a violation of the 8-hour ozone NAAQS.

B. Designation of Tribal Areas

Tribes have raised a number of concerns and questions to EPA about the designation process in discussions held by the Tribal Designations and Implementation Work Group. For instance, many Tribes believe that consolidated metropolitan statistical area (C/MSA) boundaries should not include reservations which are often politically and economically not integrated with the surrounding or adjacent urban area. The C/MSA presumption for the recommended nonattainment area plus nearby contributing areas in EPA's guidance recognizes the need for broader nonattainment areas associated with urban areas because of transport of pollution and precursor emissions within and into urban areas, widespread poor air quality in and near urban areas and protection of health and welfare of citizens living in the area. While EPA's guidance establishes a presumption that the metropolitan area² is the initial default area, the guidance offers a method to arrive at a different conclusion other than C/MSA through case-by-case evaluation and documentation based on the factors in the guidance. Therefore, a Tribe may make a recommendation that an area not be included in a C/MSA nonattainment area and/or that a nonattainment designation is not appropriate for the area by addressing the factors in the guidance. Another concern that Tribes have raised with the designation process is that Tribes may not have the resources to do the detailed analysis necessary to prepare recommendations. Therefore, EPA offers to work with Tribes to develop their recommendations upon request.

Tribes are encouraged, but not required, to submit designation recommendations for their reservations, or other areas under their jurisdiction, to EPA. The Tribal Authority Rule (TAR)

² "Metropolitan area" means the Metropolitan Statistical Area (MSA) or, in areas with multiple contiguous MSAs, the Consolidated Metropolitan Statistical Area (CMSA).

offers flexibility to Tribes for specific plan submittal and implementation deadlines for NAAQS-related requirements, including but not limited to such deadlines in CAA sections 110(a)(1), 172(a)(2), 182, 187, 189, and 191. However, EPA is required by the Act and the consent decree to make designations according to a timetable. Therefore, if a Tribe wishes to participate in the designation process, it must submit a recommendation in time for EPA to consider that recommendation when making a designation. In cases where Tribes do not make recommendations, the EPA, after consultation with the respective Tribe(s), will promulgate the designation it deems appropriate.

The EPA will continue to work with the Tribes to address their concerns, consistent with the TAR. Because many of the Tribal concerns about designations will be area specific, it is important that Tribes work with EPA Regional Offices when developing recommendations. For more information on ozone designations for Tribes, see EPA's Guidance on 8-Hour Ozone Designations for Indian Tribes, available on the Office of Air and Radiation's Tribal AIR website, www.epa.gov/oar/tribal/airprogs/tribe8hd.html. The EPA plans to contact Tribes regarding consultation prior to promulgating actual designations.

C. Early Action Compacts

In this section, EPA is addressing how it anticipates the designation schedule will work for areas that develop voluntary 8-hour compacts, as provided in the protocol. The EPA endorsed this protocol on June 19, 2002. The purpose of a signed 8-hour compact is to provide local areas with flexibility to control air emissions from sources and to offer a means to achieve cleaner air faster than the Act otherwise would require. Areas that currently approach or monitor exceedances of the 8-hour ozone standard, but are designated attainment and "clean" for the 1-hour ozone standard, i.e., no monitored violations, would be eligible to qualify for the compact approach, provided the milestones and schedules discussed in the next section of this memorandum are met. Under this approach, 8-hour air quality plans would be developed consistent with a cooperative agreement between local, State or Tribe and EPA officials. These early 8-hour plans would consist of local, enforceable measures that would achieve air quality reductions earlier than otherwise would be required and that would be approved as part of the State implementation plan (SIP). In cases where a Tribe elects to participate, the local controls would be included as part of the Tribal implementation plan (TIP). For participating areas that are monitoring a violation of the 8-hour ozone standard, EPA would recognize the local area's commitment to early action by provisionally deferring the effective date of the nonattainment designation. The deferral of the effective date of the designation would be contingent upon the participating area's meeting all terms and milestones of the compact. The Agency believes that these compacts can result in early environmental progress, and we continue to support local areas' commitments to develop plans that are designed to achieve clean air faster than the Act would otherwise require.

We strongly encourage States, Tribes and local areas to begin broad-based stakeholder outreach early, and to maintain an effective and inclusive collaborative process. The early action

program is based upon, and cannot effectively operate without, broad-based support from all interests.

One of the principles of the protocol concerns deferral of the effective date of the nonattainment designation for areas that are in compliance with applicable milestones in the compact. For these areas, EPA would plan to defer the effective date of the nonattainment designation on a rolling basis such that each deferral is linked to a key milestone, as described below in the next section of this memorandum. We have included a schedule for deferrals later in this memorandum in the section entitled "Provisional Deferral of the Effective Date of Nonattainment Designation."

Key Compact Milestones and Schedules

Below EPA sets forth the key milestones, which are also outlined in the protocol, that should be included in each compact. The milestones have been supplemented as described below and in a letter dated October 18, 2002, from Gregg Cooke, EPA, to Robert Huston, Texas Commission on Environmental Quality. The Regional Offices should work closely with States, Tribes and local areas to emphasize the importance of adhering to these critical milestones and schedules, as well as the importance of implementing an effective stakeholder process.

1. December 31, 2002 - The compact must be completed, signed by local, State or Tribal and EPA officials, and submitted to EPA no later than December 31, 2002. Areas that submit compacts after that date will not qualify for the deferred effective date. These agreements represent commitments of States and local areas or Tribes that culminate in the development of the SIPs or TIPs that will achieve local reductions earlier than otherwise required, and which demonstrate attainment of the 8-hour ozone NAAQS by December 31, 2007. The compacts should follow the principles outlined in the protocol and should address the following components described in the protocol: milestones and reporting; emissions inventory; modeling; control strategies; maintenance for growth; public involvement; and local, State or Tribal and EPA commitments.

2. June 16, 2003 - The protocol requires that, after all adopted Federal and State or Tribal controls that have been or will be implemented by the attainment date of December 31, 2007 are accounted for in the modeling, the local area must adopt additional local controls, as necessary, to achieve reductions earlier than otherwise would be required, and to demonstrate attainment of the 8-hour ozone NAAQS by December 31, 2007. Therefore, by June 16, 2003, the first step in complying with this requirement, the local area will identify and describe the local control measures that are being considered during the local planning process. The June 16, 2003 deadline for describing the control measures under consideration must be met to maintain eligibility in the program. While failure to list a measure at this stage would not preclude its adoption later, it is important to develop a reasonably complete initial list of measures. We recognize that the modeling may not be complete at this stage, and that control measures may need to be modified. This milestone, therefore, will provide the public with clear information on

the measures under consideration, will help ensure that interested parties are fully aware of the level of effort and local commitment that is necessary, and will demonstrate that the local area is making progress toward meeting the critical March 31, 2004 deadline for adoption of local measures.

3. March 31, 2004 - The resulting local plan must be completed and submitted to the State or Tribal leader by March 31, 2004 for inclusion in the SIP or TIP and a copy must be provided to EPA by that date. The local plan shall include measures that are specific, quantified, and permanent, and that if approved by EPA, will be Federally enforceable as part of the SIP or TIP. The March 31, 2004 submission also must include specific implementation dates for the adopted local controls. In addition, the local plan must include detailed documentation supporting the plan and reports outlined in the protocol, as well as a modeling analysis based on local controls demonstrating attainment of the 8-hour ozone NAAQS by December 31, 2007.

4. December 31, 2004 - No later than December 31, 2004, States or Tribes will submit to EPA a SIP or TIP consisting of the local plan, including all adopted control measures, and a demonstration that the area will attain the 8-hour ozone standard by December 31, 2007. If a SIP or TIP has been submitted by that date, EPA will review it for completeness and approvability.

5. September 30, 2005 - EPA will take final action on any SIP or TIP revisions submitted by December 31, 2004, pursuant to the compact.

6. December 31, 2005 - No later than December 31, 2005, the area will implement the local control measures that have been incorporated into the SIP or TIP. The EPA strongly recommends that these local measures be implemented earlier (no later than the beginning of the local area's 2005 ozone season) to ensure that the area will have timely and sufficient air quality data (2005-2007) to show attainment by December 31, 2007.

7. June 30, 2006 progress assessment - The protocol requires 6-month progress reports. No later than June 30, 2006, the State or Tribe must submit to EPA a report attesting to the local area's progress since the December 31, 2005 milestone. To determine whether the effective date of the nonattainment designations should continue to be deferred, EPA will review the mid-2006 report to ensure that the area continues to implement its control measures, that emission reductions attributed to local measures are being achieved, and that improvements in air quality are being made. This 6-month report should contain sufficient information to ensure that EPA can make a comprehensive assessment of air quality progress in the local area.

8. December 31, 2007 - No later than December 31, 2007, the area must attain the 8-hour ozone NAAQS. If the area has attained the standard by December 31, 2007, EPA will withdraw the deferred nonattainment designation and replace it with an attainment designation. If the area fails to attain by this date, the nonattainment designation will become effective on April 15, 2008. In addition, pursuant to the terms of the compact, the State must submit a revised attainment demonstration SIP for the nonattainment area by December 31, 2008.

Provisional Deferral of the Effective Date of Nonattainment Designation

If an area meets the first two compact milestones, EPA anticipates that it will propose in October 2003 to defer the effective date of the nonattainment designation for that area until September 30, 2005, contingent upon the area's submission of local control measures by March 31, 2004, as required by the third compact milestone. If the area submits the required control measures, and after consideration of public comment, EPA intends to take final action by April 15, 2004 on the deferred effective date.

Under the terms of the protocol, EPA has committed to approve the SIP or TIP by September 30, 2005. Assuming the SIP or TIP is approvable, the Agency intends to propose, as part of the approval action, the second deferral of the effective date until December 31, 2006. This will allow the Agency time to determine if implementation of control measures has occurred by the December 31, 2005 milestone before further extending the effective date. If the June 30, 2006 progress assessment (described in the previous section) has been submitted, implementation has occurred, and air quality improvement is taking place, EPA will propose and, if appropriate, take final action on the third deferral of the effective date until April 15, 2008. By that date EPA will determine if an area has attained the 8-hour ozone NAAQS by December 31, 2007, as required by the protocol.

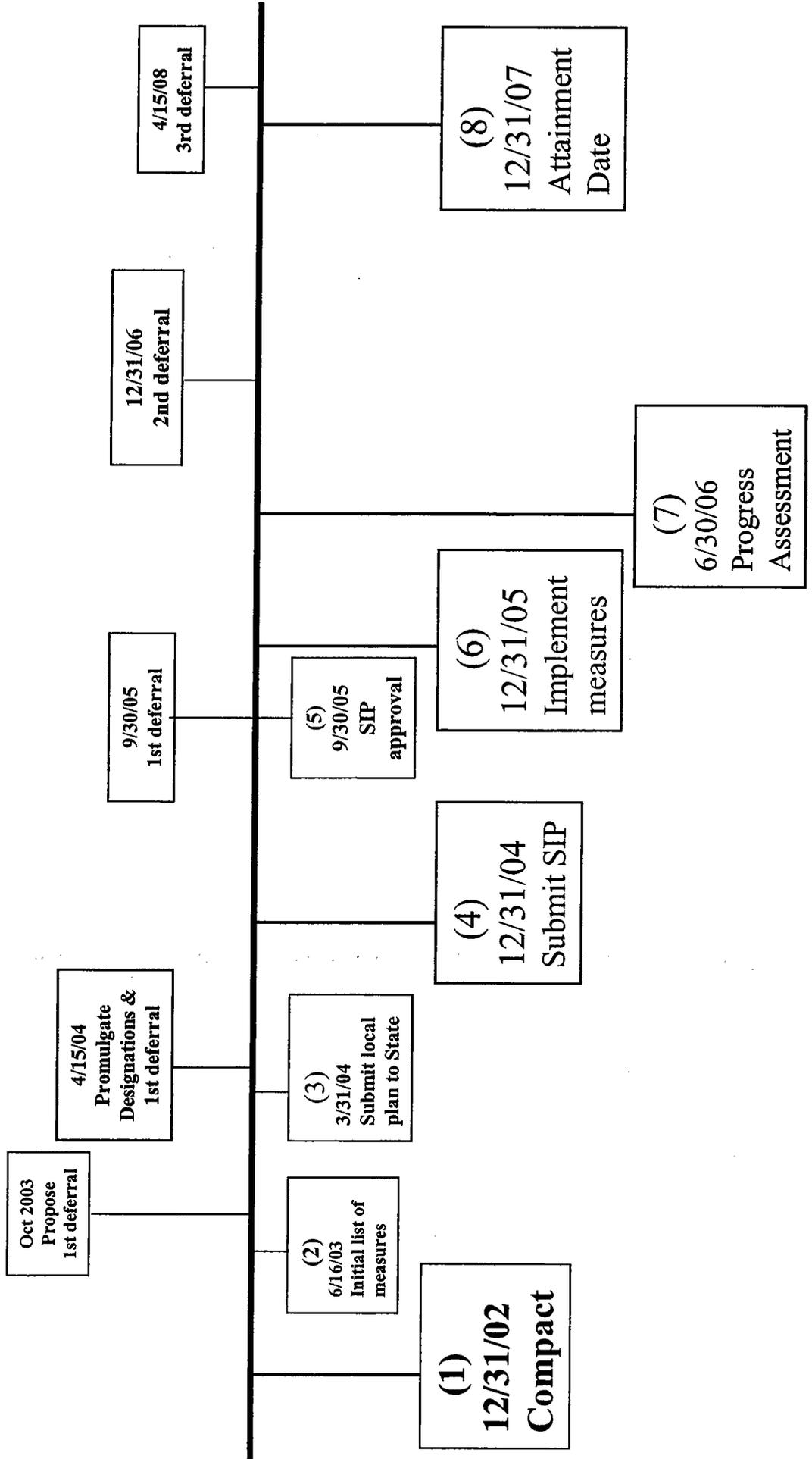
In the event of any missed key milestone, EPA will take action to propose and promulgate a finding of failure to meet the milestone, and to withdraw any deferred effective date of the nonattainment designation shortly after the missed milestone. The deferred effective dates will expire unless EPA determines, as part of the rulemaking actions described above, that all intervening milestones have been achieved. If any milestone is missed and EPA withdraws the deferred effective date, thereby triggering a nonattainment designation and applicable statutory requirements, a nonattainment SIP would have to be submitted to EPA within 1 year of the new effective date of the nonattainment designation. A timeline of key compact milestones and deferred effective dates is attached.

Questions on designations should be directed to Sharon Reinders at 919/541-5284.
Questions on 8-hour compacts should be directed to David Cole at 919/541-5565.

cc: Air Directors, Regions I-X
Margo Oge, OTAQ

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Early Action Compact Timeline





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

JUL 18 2000

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

MEMORANDUM

SUBJECT: Guidance on 8-Hour Ozone Designations for Indian Tribes

FROM: John S. Seitz, Director *Henry Thomas*
Office of Air Quality Planning and Standards (OAQPS), MD-10

TO: Air Directors, Regions I-X

The attached document, "Guidance on 8-Hour Ozone Designations for Indian Tribes," supplements the Boundary Guidance on Air Quality Designations for the 8-Hour Ozone National Ambient Air Quality Standards and 8-Hour Designation, issued March 28, 2000, by the Environmental Protection Agency (EPA). This document offers Tribes additional information on recommendations for designating areas as attainment/unclassifiable or nonattainment for the 8-hour ozone standard, if they choose to make recommendations to EPA. Its purpose is: (1) to provide Tribes an explanation of the Clean Air Act section 107 designation process and how it applies to them; (2) to describe the factors a Tribe should consider when recommending a designation for lands or areas within the Tribe's jurisdiction; and (3) to explain how EPA will consult with Tribes.

The accompanying guidance offers flexibility to each Regional Office to tailor outreach efforts to the Tribes in your region in a manner consistent with the relationships you have developed and the structures of Tribal governments in your Region. The time line for making designation recommendations and for EPA to promulgate designations is potentially very short for both States and Tribes. However, due to the time needed for EPA to communicate this guidance and to provide assistance to the Tribes, you should allow Tribes until September 30, 2000, to recommend designations for the 8-hour ozone standard.

I want to underline the importance of giving Tribes the opportunity to learn about and to give input to this designation process. Regional Offices should begin now to contact Tribes, send out this guidance, encourage discussion, and provide assistance for those Tribes interested in making a designation recommendation by September 30, 2000. Regional offices should also start to review available data and develop preliminary designations for lands or areas within their Tribes' jurisdiction.

This document reflects the contributions from six regional offices who worked with an OAQPS team, and OAQPS appreciates their willingness to help produce this guidance. Tribal representatives gave input to this document on June 20. Questions on this guidance may be directed to Sharon Reinders at 919-541-5284, or Julie McClintock at 919 541-5339.

Please share this Guidance with your States, as well as the Tribes.

cc: Deputy Regional Administrators, Regions I-X
Margo Oge, OTAQ

Guidance on 8-Hour Ozone Designations for Indian Tribes

The Boundary Guidance on Air Quality Designations for the 8-Hour Ozone National Ambient Air Quality Standards, issued March 28, 2000 to State and local air pollution control agencies and Tribes provides the basis for this document. (This is available on EPA website www.epa.gov/airlinks/). The purpose of this document is threefold: (1) to provide an explanation of the process for designating areas under §107(d) of the Clean Air Act (CAA) for the 8-hour ozone standard and how it applies to Tribes; (2) to describe the factors Tribes should consider when recommending a designation for lands within their jurisdiction; and (3) to explain how the Environmental Protection Agency (EPA) will consult with Tribes.¹ Throughout this document EPA will refer to Tribal lands or areas as "Indian country".²

The EPA promulgated a revised 8-hour ozone National Ambient Air Quality Standard (NAAQS) in July 1997. The requirement for EPA to designate whether an area is attainment/unclassifiable or nonattainment following promulgation of a NAAQS, and the time line for making such designations is contained in section 107(d)(1) of the Clean Air Act (CAA or Act) and §6103 of the Transportation Equity Act for the 21st Century (TEA-21§6103(a)). Under these statutory provisions, EPA is required to designate areas for the revised standard by July, 2000. The EPA, with this memorandum, provides guidance for Tribes describing the criteria for drawing boundaries for nonattainment areas and setting deadlines for the steps in the designation process.

EPA invites all eligible Tribes to submit designation recommendations, and in any event, will consider all Tribal designation recommendations, whether or not a Tribe has been determined to be eligible for this purpose. Interested Tribes should submit their recommendations for area designations and boundaries with supporting documentation as described in the March Boundary Guidance to EPA by September 30, 2000. This timing was selected because EPA recognizes that it is unreasonable for Tribes to meet the deadlines for the States, since EPA is only now issuing this guidance and needs to provide adequate time for consultation between EPA and the Tribes on their specific recommendations. Even so, a rapid response is needed if a Tribe wishes to make a recommendation to EPA on a designation for the 8-hour ozone standard by September 30. However, it should be noted that Tribes are not

¹ This document contains EPA policy and does not establish a binding norm nor finally determine the issues addressed. This guidance is not binding on States, Tribes, the public, or EPA. When EPA approves a designation, it become binding on Tribes, the public, and EPA as a matter of law.

² For definition of "Indian country" see 18 U.S.C. § 1151.

required to recommend designations³. The EPA intends to review and respond to the Tribal recommendations by late fall. From October until March 2001, EPA will consult with affected Tribes if EPA wishes to modify a designation recommendation. The EPA will not issue final designations prior to late March 2001 because, pursuant to the CAA, it must provide Tribes with 120 days to consider any modifications that EPA may propose to make to each Tribe's designation recommendation. The EPA will promulgate the designation it deems appropriate in cases where Tribes do not make their own recommendations as it would for States.

The following questions and answers explain the criteria for drawing boundaries for nonattainment areas and the steps in the designation process.

1. What is ozone and how is it regulated?

Ground-level ozone, the primary constituent of smog, continues to be a pervasive pollution problem in areas throughout the United States. Ozone is not emitted directly into the air but is formed by the reaction of volatile organic compounds (VOCs) and nitrogen oxides (NOx) in the presence of heat and sunlight. Ground-level ozone forms readily in the atmosphere, usually during hot summer weather. VOCs are emitted from a variety of sources, including motor vehicles, chemical plants, refineries, factories, manufacturing consumer and commercial products, and other industrial sources. Nitrogen oxides are emitted from motor vehicles, power plants, and other sources of combustion. Ozone and the precursor pollutants that cause ozone also can be transported into an area from pollution sources found hundreds of miles from the area.

Increased hospital admissions and emergency room visits for respiratory causes have been associated with ambient ozone exposures. Repeated exposures to ozone can make people more susceptible to respiratory infection, result in lung inflammation, and aggravate pre-existing respiratory diseases such as asthma. Ozone also affects vegetation and ecosystems, leading to reductions in agricultural and commercial forest yields, reduced growth and survivability of tree

³ The CAA, §301(d), authorizes EPA to treat eligible Indian Tribes in the same manner as States. Pursuant to §301(d)(2), EPA promulgated regulations known as the "Tribal Authority Rule" (TAR) on February 12, 1998 that specifies those provisions of the Act for which it is appropriate to treat Tribes as States, 63 FR 7254, codified at 40 CFR §49(1999). The TAR also establishes procedures and criteria by which Tribes may receive from EPA a determination of eligibility which is a requirement for Tribes to manage CAA and other Federal programs. Under the TAR, Tribes may choose to develop and implement their own CAA programs, but are not required to do so. The designations process contained in §107(d)(1) of the Act is included among those provisions determined appropriate by EPA for treatment of Tribes in the same manner as States. Under the TAR, Tribes generally are not subject to the same submission schedules imposed by the CAA on States.

seedlings, and increased plant susceptibility to disease, pests, and other environmental stresses (e.g., harsh weather). In long-lived species, these effects may become evident only after several years or even decades, thus having the potential for long-term effects on forest ecosystems.

Ozone is regulated under the CAA. Under the CAA, EPA is required to set NAAQS for pollutants considered harmful to public health and the environment. EPA adopted the 8-hour ozone NAAQS in July, 1997. In May 1999, and as modified in October 1999, the U.S. Court of Appeals for the D.C. Circuit remanded the 8-hour ozone standard and determined that the CAA limits the manner in which EPA can implement it. However, the court affirmed EPA's authority to make designations for the standard.

2. What are air quality designations?

The EPA is required to designate geographic areas as attainment, unclassifiable, or nonattainment under section 107 of the CAA after promulgating a new or revised NAAQS. Section 107(d)(1)(A) of the CAA states that areas should be designated as follows:

1. Nonattainment if the area does not meet the NAAQS, or has sources that contribute to ambient air quality in a nearby area that does not meet the NAAQS,
2. Attainment if the area meets the NAAQS (unless the area contributes to ambient air quality in a nearby nonattainment area that does not meet the NAAQS), and
3. Unclassifiable if the area cannot be classified as meeting or not meeting the NAAQS on the basis of available information.

The designation of an area affects what must be done to implement the ozone NAAQS. After the effective date of designation, areas designated as attainment/unclassifiable are required to maintain and prevent significant deterioration of their good air quality. Areas designated as nonattainment are required to prepare a plan, and submit it to EPA for approval to reduce the 8-hour average concentration of ozone in the area to a level at or below the level of the NAAQS. Due to the uncertainty created by the litigation regarding how the 8-hour ozone standard may be implemented, EPA will issue guidance on implementing the 8-hour ozone NAAQS at a future date.

Section 107 of the CAA requires all areas to be designated nonattainment if they do not meet the standard or contribute to ambient air quality in a nearby area that does not meet the standard. When an air monitor shows that air quality in an area is in violation of the ozone NAAQS, EPA's policy is to designate an area around the monitor that includes the nearby area sources that may be contributing to the violation as nonattainment. For ozone, this area may be large. EPA takes this approach because of the way ozone is formed and transported into surrounding areas. It takes time and sunlight to make ozone, and the winds move the air during the time between the emission of precursors and the subsequent formation of ozone. Our goal is to protect public health and welfare by defining a nonattainment area that encompasses the area where air quality is worse than the NAAQS, and the area where the sources of ozone precursors

are located. EPA also believes that designating large areas facilitates a coordinated response in developing plans to reduce emissions. Therefore, EPA's Boundary Guidance document encourages states and Tribes to base attainment and nonattainment boundaries on Metropolitan Statistical Areas (MSAs) or Consolidated Metropolitan Statistical Areas (CMSAs)⁴. These are large, county-based areas defined by the Office of Management and Budget based on information supplied by the U.S. Department of Commerce, Bureau of the Census. Tribal lands encompassed within these areas are considered to be part of the C/MSA. In the past, areas within C/MSAs have generally experienced higher levels of ozone precursor emissions and ozone concentrations than areas outside of C/MSAs. Therefore, EPA recommends that the entire area within the C/MSA, as well as nearby areas contributing to the nonattainment problem, i.e. the airshed, be designated as nonattainment to best protect public health and ensure that all the sources of precursor emissions will be controlled to emission levels that protect the NAAQS.

The EPA's approach recognizes the pervasiveness of ozone by looking at cross-boundary and multi-jurisdictional areas to control ozone precursors. The EPA believes that, in most cases, Indian country within C/MSAs should have the same designation as the surrounding area. However, based on the factors outlined in question 4, below (and in question 5 of the March 28 Boundary Guidance document), there may be situations where a different designation is appropriate.

3. How does the designation process affect Tribes?

A State recommendation for a designation of an area that surrounds Indian country does not dictate the designation for Indian country. However, the conditions that support the State's designation recommendation, such as air quality data and the location of sources, may indicate the likelihood that similar conditions exist in Indian country.

Designating an area under the CAA is accomplished by EPA through a formal rulemaking process. The EPA will follow the process outlined in Section 107(d) and the March Boundary Guidance. These are the general steps:

1. EPA will send individualized letters to the Tribes with a request that any interested Tribe make a designation recommendation for Indian country areas accompanied by supporting documentation to the EPA Regional office by September 30, 2000.⁵ Tribes are not required to recommend designations. (Tribes not making a designation recommendation, please skip to #4).

⁴ Henceforth in this Guidance, the term C/MSA will refer to both CMSAs and MSAs.

⁵ Documentation described in the March Boundary Guidance, page 7.

2. EPA will consult with each Tribe (regardless of whether or not a Tribe has received an eligibility determination to implement Section 107 of the CAA) throughout the designation process, and EPA will facilitate discussions among States and Tribes when several jurisdictions are involved in an area designation. Information about designation recommendations by States (including lands adjacent to Indian country) will be made available on an EPA web site, www.epa.gov/ttn/rto/area.

3. EPA intends to review and respond to a Tribe's designation recommendations by late fall, 2000. After consulting with each affected Tribe, EPA may make modifications it believes are appropriate to the recommendation. Whenever EPA disagrees with any designation recommendation, EPA is required under section 107 to notify the Tribe (or State) of any modifications it intends to make to the recommended designation at least 120 days prior to promulgating the designation.

4. In cases where Tribes do not make designation recommendations, then EPA, in consultation with the Tribes, will promulgate the designation it determines is appropriate. It is agency policy that EPA "... in keeping with the Federal trust responsibility, will assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments." (EPA 1984 Indian Policy).

5. EPA will make final decisions on designations. These decisions will be published in the Federal Register, along with a date by which these decisions will become effective.⁶ Historically, the effective date is usually 30 to 60 days after publication, but it may be later. Given this process, designations would not become effective prior to early 2001 at the earliest, nor would the requirements that are a consequence of the designation.

4. What factors should a Tribe consider when recommending a designation?

The EPA has established the following criteria (based on section 107, and described in the March Boundary Guidance) for designating areas as nonattainment for the 8-hour ozone NAAQS. Areas that meet these criteria should be designated as nonattainment.

- Any area with an ozone monitor that measures a violation of the NAAQS
- Any area located within a Metropolitan Statistical Area (MSA) or Consolidated Metropolitan Statistical Area (C/MSA) where a violation of the NAAQS has been measured. However, see the list of 11 mitigating factors below.

⁶In the process of determining when to finalize the proposed designations and make them effective, EPA will carefully consider the time needed to prepare for any applicable requirements, as well as the status of ongoing litigation and administrative proceedings.

- Any area with sources of ozone precursors that contribute to ambient air quality in a nearby nonattainment area (an area that does not meet the NAAQS). However, see the list of 11 mitigating factors below.

- Any area located within an area previously designated as nonattainment for the 1-hour ozone NAAQS

Considering the above criteria, the following examples generally illustrate the designation that may be appropriate for areas in Indian country that match the situations described:

- Indian country with an air quality monitor showing that the 8-hour ozone NAAQS is not being met should be designated nonattainment.

- Indian country with an air quality monitor showing that the NAAQS is being met generally should be designated attainment. However, it should be designated nonattainment when: (1) a portion of Indian country is located within a C/MSA with a violating monitor⁷, or (2) existing sources of ozone precursors or expected growth⁸ contribute to air quality in a nearby ozone nonattainment area, or (3) air quality modeling shows that the NAAQS is being violated in Indian country.

- Indian country without a monitor, but located within a C/MSA with a violating monitor, should generally be designated nonattainment based on presumptions that: (1) 8-hour ozone concentrations within the MSA violate the NAAQS, and/or (2) existing sources or expected growth contribute to the bad air quality in the C/MSA.

- Indian country without a monitor, that is located nearby or adjacent to a C/MSA with a violating monitor, will generally be designated unclassifiable. However, it should be designated nonattainment when: (1) existing sources or expected growth contribute to air quality in the nonattainment area, or (2) air quality modeling shows that the NAAQS is being violated in Indian country.

⁷ There are often several air quality monitors within a C/MSA, some measuring ozone concentrations above the standard and some measuring concentrations below the standard. It is EPA's policy to use data from the monitor measuring the highest ozone concentrations as the basis for designating the whole area.

⁸ This term refers to potential new stationary and mobile sources of air pollution that, based on factors such as population trends, and commercial, industrial, transportation, and economic forecasting, may reasonably be expected to occur in an area.

In addition to the criteria listed above, EPA will consider the following 11 factors to determine whether areas located within a nonattainment C/MSA (including those in Indian country) should be excluded from the nonattainment designation, and/or whether areas located nearby or adjacent to a nonattainment C/MSA should be included in the nonattainment designation. Tribes that wish to justify designations other than those suggested in the examples above should explain how each of the following factors affect specific designations in Indian country and how the resulting recommendation is consistent with §107(d)(1) of the CAA.

- Emissions and air quality in adjacent areas (including adjacent C/MSAs)
- Population density and degree of urbanization including commercial development in Indian country (e.g., shows a significant difference from surrounding areas)
- Monitoring data representing ozone concentrations in local areas and larger areas (i.e., urban or regional scale)
- Location of emission sources (emission sources and nearby receptors should generally be included in the same nonattainment area)
- Traffic and commuting patterns
- Expected growth (including extent, pattern and rate of growth)
- Meteorology (whether/transport patterns)
- Geography/topography (e.g., mountain ranges or other air basin boundaries)
- Jurisdictional boundaries (e.g., counties, air districts, existing 1-hour nonattainment areas, reservations, etc.)
- Level of control of emission sources
- Regional emission reductions impacts (e.g., NOx SIP call or other enforceable regional strategies)

5. How does ozone transport apply?

Local ozone concentrations may be affected by long-range transport of ozone and its precursors, and in addition, by emissions from sources in nearby areas that contribute to nonattainment. Ozone is a widespread problem in some areas. Tribes should evaluate the impact of long-range transport when air quality monitors on lands that are not adjacent to a C/MSA show that the 8-hour ozone standard is being violated. The evaluation should include a review of

the amount of VOC and NO_x emissions from sources in Indian country, emissions from sources in up-wind areas, the meteorology of the area, and the times when peak ozone concentrations occur, among other things.

Regional strategies are needed to address emissions from sources that contribute to the long-range transport component of ozone nonattainment. Tribes are encouraged to participate in regional planning organizations that will address these long-range transport issues. Emissions for sources in Indian country in areas that are designated nonattainment may be addressed in Federal or Tribal implementation plans (FIPs or TIPs), as discussed below.

6. What are the consequences of a given designation once effective⁸?

Since Tribes are not required by the CAA or TAR to develop implementation plans, the explanations that follow should be understood in that context.

Nonattainment: In a nonattainment area the goal is to implement a strategy that will meet the standards by reducing specific pollutants below the levels of the NAAQS. A FIP or TIP should generally contain: (a) an emissions inventory to identify the sources of air pollution, their location, and the types of pollutants emitted; (b) enforceable emission limits that will require application of at least Reasonably Available Control Measures or Reasonably Available Control Technology (RACM or RACT); (c) evidence that the emission limits will reduce emissions enough to prevent NAAQS violations in Indian country and in other jurisdictions (i.e., an attainment demonstration); and (d) a new source review preconstruction permit program to ensure that new and modified sources of pollution do not impede progress toward cleaner air.

Currently, there are no EPA regulations setting forth general requirements for a New Source Review (NSR) permitting program applicable to any new or modified major stationary sources located either on State lands or in Indian country in areas that would be designated nonattainment for the 8-hour standard. However, the statutory requirements for nonattainment NSR in section 173 could be adapted in order to regulate emissions from new major sources and major modifications to existing sources. In the future, when EPA establishes Federal nonattainment NSR regulations, Tribes may choose to adopt EPA's regulations. When EPA determines that it is necessary or appropriate (e.g., when a Tribe lacks an approved TIP with a preconstruction permitting program), EPA may regulate the construction of new or modified major stationary sources in Indian country by developing a FIP. Tribes should contact the appropriate EPA Regional office if they are interested in additional information on the process for regulating emissions from major stationary sources that plan to construct or make

⁸ See draft of "Explanation of Tribal Authority to Develop a Tribal Implementation Plan" for more details on developing a Tribal program under the CAA on web site: <http://www.epa.gov/aor/tribal/airprogs/>.

modifications in Indian country, especially if such construction will occur in an area that becomes designated as either attainment/unclassifiable or nonattainment for the 8-hour ozone standard.

Activities in areas that are designated nonattainment for the 8-hour ozone standard that are conducted or supported by Federal agencies must "conform" to the purpose of an applicable implementation plan, as required by section 176(c) of the CAA. The EPA's conformity rules apply to Federal activities within nonattainment areas and areas that have moved from nonattainment to maintaining the standards, i.e., areas that are redesignated as attainment. A Federal agency must demonstrate, prior to initiating a project, that its action conforms to all applicable requirements in an implementation plan and will not cause or contribute to NAAQS violations. Transportation conformity rules govern Federal/State highway and transit-related activities, and all other types of Federal activities are governed by general conformity rules. The transportation conformity rule requires transportation agencies to estimate the total motor vehicle emissions that would result from the area's transportation system if the proposed improvements were built. These emissions must be within levels that the applicable implementation plan predicts are consistent with attainment. It should be noted that under the Federal Lands Highways Program, 23 U.S.C §§202(d), 204, as amended by the Transportation Equity Act for the 21st Century (TEA-21) authorization to promulgate and implement regulations regarding planning and construction, as well as transit-related improvement projects on Indian reservation roads are entrusted to the Secretary of the Interior through the assistance of the Bureau of Indian Affairs.

The general conformity rules provide Federal agencies with the following options for demonstrating conformity in ozone nonattainment areas: (1) obtaining emission reductions that offset the emissions from the new project, (2) showing that the project's emissions are already included in, or accommodated by, the emissions inventory for the area, or (3) obtaining an agreement to include the project's emissions in the applicable implementation plan.

Attainment/unclassifiable: In an attainment or unclassifiable area the goal is to maintain air quality that is cleaner than the NAAQS. A Tribal or Federal program in such areas will generally contain enforceable emission limits for existing emission sources, a program to limit the impacts of emissions from new and modified major stationary sources, and provisions to prevent significant contribution by sources located in Indian country to NAAQS violations in other jurisdictions.

Major sources, located in Indian country that is designated attainment/unclassifiable for any pollutant, such as the 8-hour ozone standard, would be subject to the Federal program for the Prevention of Significant Deterioration (PSD) upon the date that designations under the 8-hour standard become effective.⁹

⁹See Title 40 Code of Federal Regulations Part 52.21 (40 CFR 52.21).