



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

SEP - 8 2016

OFFICE OF  
AIR AND RADIATION

**MEMORANDUM**

**SUBJECT:** Tribal Treatment in the Same Manner as a State for CAA Section 126

**FROM:** Janet G. McCabe *J. G. McCabe*  
Acting Assistant Administrator

**TO:** Regional Air Division Directors  
Regions 1-10

The purpose of this memorandum is to clarify the EPA's view of a question related to Tribal Treatment in the Same Manner as a State (TAS) associated with Clean Air Act (CAA) section 126. Specifically, this memorandum clarifies that Tribes that are approved by the EPA for TAS for purposes of section 126 are eligible: 1) to receive notification from certain major new or modified sources pursuant to the terms of section 126(a), and 2) to petition the Agency under section 126(b) to address air quality impacts from a neighboring jurisdiction.<sup>1</sup> Please note that Tribes may, at their discretion, also seek TAS for the purpose of section 110(a)(2)(D)(i); however, as explained below, the EPA does not believe that Tribes would need a separate TAS approval expressly identifying that provision to be eligible to petition the EPA under section 126(b).

**Background**

Tribes have expressed interest in being able to engage with surrounding states and the EPA under section 126 of the CAA. Specifically, tribes have expressed an interest in being treated in the same manner as a "nearby state" for purposes of receiving notifications required by section 126(a). Section 126(a)(1) of the CAA requires state implementation plans to contain provisions requiring each new or modified major source subject to the CAA title I part C Prevention of Significant Deterioration program to notify nearby air agencies of potential impacts from the source. In approving prior TAS applications, the EPA has stated that eligible Tribes would receive notifications under section 126(a).

Tribes have also expressed an interest in being able to petition the EPA for a finding under section 126(b) to address cross-boundary pollution where violations of the National Ambient Air Quality Standards (NAAQS) in Indian country are caused by emissions from sources in adjacent or upwind states. Section 126(b) of the CAA permits any state, eligible Tribe, or political subdivision to petition

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<sup>1</sup> In consulting with tribes on any 126 submittal, the EPA should ensure that those tribes who are interested in submitting petitions to the Agency are aware of the need to develop an adequate technical demonstration to support the petition. The memorandum does not otherwise address the issue of the information that a state or eligible Tribe would need to provide in order for the EPA to grant such a petition.

the Administrator for a finding that any major source or group of stationary sources emits or would emit any air pollutant in violation of the prohibition of section 110(a)(2)(D)(i).<sup>2</sup> Section 110(a)(2)(D)(i), in short, prohibits any source or emissions activity in a state from emitting any amount of air pollutant which will contribute significantly to nonattainment or interfere with maintenance of the NAAQS in another state. If the Administrator makes such a finding, pursuant to section 126(c) the Administrator shall require the source or sources to cease construction, cease or reduce operations, or comply with emissions limitations and compliance schedule requirements for continued operation.

The EPA has approved seven Tribes for TAS for the purpose of section 126, and several additional TAS applications are pending. As noted above, the EPA has previously stated that the approved Tribes are eligible to receive notification from certain major new or modified sources pursuant to the terms of section 126(a). The EPA has been asked to clarify the Agency's view whether such Tribes are also eligible to petition the Agency under section 126(b) to address air quality impacts from a neighboring jurisdiction. In particular, the EPA has been asked to clarify whether Tribes would need to obtain TAS for section 110(a)(2)(D)(i) in order to be eligible to submit a section 126(b) petition.

### **EPA's View**

The Office of Air and Radiation coordinated with the Regional Offices, the Office of International and Tribal Affairs and the Office of General Counsel, to clarify EPA's view on the following specific questions:

- Can Tribes with TAS for section 126 petition the Agency without also obtaining a TAS approval from the EPA that expressly includes section 110(a)(2)(D)(i)?
- Is the downwind "other State" role of section 110(a)(2)(D)(i) a severable function for which Tribes may obtain TAS without a need to obtain TAS for upwind planning requirements?

This memo clarifies that in addition to receiving notifications as required by section 126(a), the EPA believes that Tribes that have obtained TAS for section 126 are also eligible to petition the Agency under section 126(b) to address air quality impacts from a neighboring jurisdiction. Tribes with TAS for section 126(b) do not need separate TAS approval expressly identifying and including section 110(a)(2)(D)(i) to petition the EPA. Section 126(b) itself includes a reference to the relevant prohibition of section 110(a)(2)(D)(i) and thus captures the affected "other State" role without any need for separate TAS decision-making. Further, the EPA believes that the role of an affected "other State" under section 110(a)(2)(D)(i) is severable and does not require Tribes to meet upwind planning requirements by developing or implementing a TIP as a prerequisite to submitting a section 126(b) petition. The EPA's regulations provide that Tribes may request approval for reasonably severable program elements. 40 CFR § 49.7(c). Because the role of an affected "other State" for purposes of section 126(b) petitions is not integrally related to other planning requirements, EPA's view is that it is consistent with CAA and regulatory requirements to treat that role as reasonably severable and available to interested eligible Tribes.

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<sup>2</sup> The EPA has concluded that the cross-reference in CAA section 126(b) to CAA section 110(a)(2)(D)(ii) is a scrivener's error and that Congress intended to refer to section 110(a)(2)(D)(i). *See Appalachian Power Co. v. EPA*, 249 F.3d -1032, 1040-44 (D.C. Cir. 2001).

If you or the Tribes in your Region have questions concerning this issue, please contact Pat Childers in my office at (202) 564-1082.<sup>3</sup>

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<sup>3</sup> This document is intended as a general statement of the EPA's policy with respect to the approval of Tribes' requests for TAS for purposes of section 126. This document does not substitute for any statutory provisions or regulations, nor is it a regulation itself. Each request for TAS for purposes of section 126 and each petition submitted pursuant to section 126(b) will be considered on a case-by-case basis. Thus, the policies set forth in this paper are intended solely as guidance, do not represent final agency action, and cannot be relied upon to create any rights or obligations enforceable by any party.