

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

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ATTACHMENT 2  
CAPABILITY STATEMENT

APPROVAL OF APPLICATION SUBMITTED BY THE  
EASTERN SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE  
FOR TREATMENT IN A SIMILAR MANNER AS A STATE  
FOR PURPOSES OF CLEAN AIR ACT  
SECTIONS 105, 505(a)(2), 107(d)(3), 112(r)(7)(B)(iii), 126, 169B, 176A and 184



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

1595 Wynkoop Street  
DENVER, CO 80202-1129  
Phone 800-227-8917  
<http://www.epa.gov/region08>

ATTACHMENT 2

Ref: 8OPRA

SUBJECT: Treatment in a Similar Manner as a State (TAS) for Purposes of the Clean Air Act (CAA) Section 105 Grant Program and other Clean Air Act Provisions that Do Not Entail the Exercise of Tribal Regulatory Authority: Capability Statement for the Eastern Shoshone and Northern Arapaho Tribes of the Wind River Indian Reservation

FROM: Carl Daly, Director, EPA Region 8 Air Program *Carl Daly* 7/2/2013  
Alfreda Mitre, Director, EPA Region 8 Tribal Assistance Program *A. Mitre* 7/2/13

THROUGH: Derrith Watchman-Moore *Derrith Watchman-Moore* 7/2/13  
Assistant Regional Administrator  
Office of Partnerships and Regulatory Assistance

TO: Shaun L. McGrath  
Regional Administrator, EPA Region 8

The EPA Region 8 Air and Tribal Programs have reviewed the Northern Arapaho and Eastern Shoshone Tribes' request for a TAS eligibility determination under CAA § 301(d) and 40 C.F.R. Part 49 (the Tribal Authority Rule or TAR) for purposes of CAA sections 105 and 505(a)(2), and for the following other provisions of the CAA for which no separate tribal program is required: sections 107(d)(3), 112(r)(7)(B)(iii), 126, 169B, 176A and 184. After careful review of the Tribes' application, which includes a detailed statement describing their capability to administer the functions for which they are seeking eligibility, the Air and Tribal Programs conclude that the Tribes have demonstrated their capability to administer each of those functions

within the meaning of CAA § 301(d)(2)(C) and 40 C.F.R. §§ 49.6(d) and 49.7(a)(4). Therefore, the Air and Tribal Programs recommend that EPA approve the Tribes' capability for purposes of TAS for the CAA provisions described in their application dated December 17, 2008, as amended on December 23, 2008. This analysis and recommendation regarding Tribal capability does not apply to CAA regulatory programs, but applies only to the current TAS eligibility determination for the specific provisions identified above, as EPA evaluates capability on a program-by-program basis. See 59 Fed. Reg. 43956, 43963 (Aug. 25, 1994).

Under 40 C.F.R. §§ 49.6(d) and 49.7(a)(4), applicant tribes must demonstrate that they are reasonably expected to be capable, in the EPA Regional Administrator's judgment, to carry out the functions they seek to exercise in a manner consistent with the terms and purposes of the CAA and all applicable regulations. To meet this requirement, tribes may, among other things, include statements describing their previous management experience; the existing environmental or public health programs they administer; the entity or entities exercising executive, legislative, and judicial functions of the tribal government; the existing or proposed agency that will assume primary responsibility for administering the CAA functions relevant to the application; and the technical and administrative capabilities of the staff to effectively administer the CAA functions at issue. 40 C.F.R. § 49.7(a)(4).

The Northern Arapaho and Eastern Shoshone Tribes are seeking TAS for purposes of CAA sections 105 and 505(a)(2), as well as other provisions of the CAA that do not require a separate tribal program or entail the exercise of tribal regulatory authority. These provisions are, CAA sections 107(d)(3), 112(r)(7)(B)(iii), 126, 169B, 176A, and 184. None of these provisions entails the exercise of Tribal regulatory authority under the CAA or implementation of a CAA regulatory program, so the Tribes' capability to regulate air quality under the CAA or administer such a CAA regulatory program is not at issue in this application. Instead, these provisions generally relate to grant funding (e.g., for air quality planning purposes) (section 105); involvement in EPA national ambient air quality redesignations for the Tribes' Reservation (section 107(d)(3)); receiving notices of, reviewing, and/or commenting on certain nearby permitting and sources (sections 505(a)(2) and 126); receiving risk management plans of certain stationary sources (section 112(r)(7)(B)(iii)); and participation in certain interstate and regional air quality bodies (sections 169B, 176A and 184).

The Tribes' TAS application demonstrates that they are capable of performing the functions at issue for each of the specified CAA provisions. The Tribes have included in their application a detailed statement of their resources and capabilities

relevant to the particular CAA functions they seek to carry out pursuant to their application and have addressed each of the factors identified in 40 C.F.R. § 49.7(a)(4)(i)-(v). This information includes a specific demonstration of capability on the part of the Tribes' environmental agency, the Wind River Environmental Quality Commission (WREQC), addressing each of the identified CAA provisions.

**Previous Management Experience – 40 C.F.R. § 49.7(a)(4)(i)**

40 C.F.R. § 49.7(a)(4)(i) provides that applicant tribes' capability statements may include descriptions of their previous management experience, including their administration of programs and services authorized under other federal statutes such as the Indian Self-Determination and Education Assistance Act.

In their TAS application, the Tribes describe and provide an organizational chart of the Joint Programs managed by their Joint Business Council. The Joint Programs include several public health and environmental elements, including the WREQC, a Tribal Water Engineer's Office, and a Tribal Fish and Game section. Among other things, the Tribes also manage a Transit Authority, a Head Start Program, and Minerals Compliance and Homeland Security functions. In 2006, total revenues for the Joint Programs were \$27.7 million. The Tribes also have substantial experience managing programs under agreements with the U.S. Departments of the Interior, Energy, Agriculture, Justice, and Housing and Urban Development, as well as with EPA. The Tribes have a Joint Finance Office that undertakes annual audits for purposes of compliance with federal law. In addition, the Tribes note that each Tribe also manages several of its own separate programs providing services – including social services, health, education and housing services, and utilities – to its members. This information demonstrates significant prior management experience on the part of the Tribes and the WREQC.

**Existing Environment and Public Health Programs – 40 C.F.R. § 49.7(a)(4)(ii)**

40 C.F.R. § 49.7(a)(4)(ii) provides that applicant tribes' capability statements may include descriptions of any existing environmental or public health programs administered by the tribal governing body. The Tribes' statement notes that their principal Joint Programs addressing environmental and public health issues are managed by WREQC. WREQC is a joint Tribal department established by the Joint Business Council in 1988. Its authorizing statute is found in Chapter 10 of Title XI of the Tribes' Law and Order Code, which the Tribes included with their TAS application. WREQC administers numerous environmental and public health programs, including

programs for air quality, water quality, brownfields, underground storage tanks, and solid waste.

Among other things, WREQC's air quality program has compiled emissions inventories for the Reservation, collects air monitoring data for air quality parameters, and works with EPA on inspections of major air emission sources on the Reservation and enforcement matters. The Tribes' water quality program conducts monitoring at numerous Reservation locations, develops water quality standards for Reservation waters, comments on permits for point source water discharges on the Reservation, develops the Tribes' nonpoint source management plan and assessment reports under section 319 of the federal Clean Water Act, inspects underground injection facilities, samples drinking water wells, and is developing groundwater quality standards. The Tribes' Brownfields program works with federal, state and local agencies on brownfields issues. The program identifies contaminated sites on the Reservation, evaluates risks to human health, and develops site-specific assessments and clean-up plans. The Tribes also operate a Tribal Response Program assisting in emergency situations such as floods, fires, and railroad and highway accidents involving hazardous materials. The Underground Storage Tank Program conducts compliance inspections, provides compliance assistance to facility operators, and assists in the removal of leaking tanks. Finally, the WREQC solid waste program focuses on cleaning up Reservation dump sites and has also developed a 25-year integrated solid waste management plan and proposed solid waste codes and regulations for the Reservation.

In addition to WREQC, the Tribes administer programs related to natural resources pursuant to their Water and Fish and Game Codes and have additional public safety programs administered by their Department of Transportation and pursuant to their Building and Zoning Codes. The Tribes also note that each of the two Tribes manages their own separate programs addressing public health and have Tribal utility departments managing public water and sewer systems.

This information demonstrates that the Tribes have substantial existing programs and capabilities addressing a wide variety of environmental and public health issues on the Reservation.

**Entities Exercising Executive, Legislative, and Judicial Functions – 40 C.F.R. § 49.7(a)(4)(iii)**

40 C.F.R. § 49.7(a)(4)(iii) provides that applicant tribes' capability statements may include descriptions of the entity or entities exercising the executive, legislative, and judicial functions of the tribal government. The Tribes' application includes relevant

information describing the governing bodies of the individual Tribes as well as the manner in which the Tribes jointly administer governmental functions. The application states that the governing body of the Northern Arapaho Tribe is the Northern Arapaho Business Council, which exercises executive and legislative authority, in consultation with the General Council of the Northern Arapaho Tribe, and which has a Chair selected by the Business Council's members. The supreme governing body of the Eastern Shoshone Tribe is its General Council, which has delegated authority to carry out the Shoshone Tribe's business to the Shoshone Business Council, which itself has a Chairman selected by the Business Council's members. The Tribes describe that their respective Business Councils meet collectively on management and administration of joint matters in a joint session as the Joint Business Council. The Joint Business Council enacts laws and establishes programs to perform activities and deliver services of common benefit to both Tribes and Reservation residents. Joint programs include: WREQC, the Tribal Water Engineer, Fish and Game, Tribal Minerals Department, the Wind River Tax Commission, the Tribal Court, the Tribal Employment Rights Office, and the Division of Transportation. The Joint Business Council has also enacted a Law and Order Code that, among other things, establishes a Tribal Court system exercising civil and criminal jurisdiction on the Reservation. The Tribal Court includes a chief judge and three associate judges appointed by the Joint Business Council. In addition, a Tribal Court of Appeals consists of a three-judge panel of the Tribal Court.

The Northern Arapaho Tribe and the Eastern Shoshone Tribe are each separate federally-recognized Tribes. The Tribes note that each Tribe, through its respective governing body, exercises a variety of inherent governmental functions, including: negotiating with federal, state, and local governments, managing Tribal economic affairs and enterprises; levying and collecting taxes and fees; promulgating and enforcing laws; and regulating the conduct of trade on the Reservation.

The Tribes' application is very informative regarding their individual and joint governmental structures, including their various executive, legislative and judicial bodies. The Tribes' governmental organizations are clearly established so as to be capable of administering the CAA functions specified in their TAS application.

#### **Tribal Agency Administering CAA Program – 40 C.F.R. § 49.7(a)(4)(iv)**

40 C.F.R. § 49.7(a)(4)(iv) provides that applicant tribes' capability statements may include descriptions of the agency that will administer a CAA program. The Tribes' application states that WREQC has primary responsibility for developing and administering the Tribes' air quality program. WREQC was established in 1988 by Resolution of the Tribes' Joint Business Council, which enacted WREQC's authorizing

statute found in the Tribes' Law and Order Code. The Tribes supplied a copy of the WREQC authorizing statute with their application. The Tribes describe that WREQC is managed by an Executive Director and WREQC's final actions and decisions are subject to review in Tribal Court. As of the date of the application, WREQC operated on an annual budget of approximately \$1.5 million.

The Tribes describe WREQC's principal authorities as including, among other things: developing environmental laws and procedures (subject to approval of the Joint Business Council); administering a water discharge permitting system; establishing rules and procedures governing its agency activities (including providing for public participation); applying for and receiving federal financial assistance (with the consent of the Joint Business Council); and establishing a schedule of fines and penalties for violations of Tribal environmental regulations. WREQC administers a variety of environmental programs described above in this memo and detailed in the Tribes' application – including air quality, water quality, brownfields, underground storage tank, and solid waste programs – and receives funding through several EPA grant authorities, as well as U.S. Department of Energy and Department of Agriculture programs.

In describing their Environmental Quality Commission, the Tribes state: "

Protecting the natural resources of the Wind River Indian Reservation is, and has been, a way of life, and remains one of the major priorities of the Shoshone and Northern Arapaho Tribes. The Tribes believe that the earth, water, and sky together sustain us as a people and that we are related to all the animals and other living things such as plants, trees, rocks, and soils. What effects all living things will also affect us. Therefore, our lives must revolve around and be dedicated to the protection of all the natural resources.

<http://www.wreqc.com/>

The Tribes have also included a detailed statement addressing the specific functions of each of the CAA provisions for which they are seeking TAS. The statement is summarized below and clearly demonstrates WREQC's capability to administer these functions.

1. **Grant Funding (CAA Section 105)**

Under CAA § 105, eligible tribes may apply for grant funding at a reduced match requirement for purposes of, among other things, air quality planning for their

reservations. The Tribes currently receive funding for their air quality program under CAA § 103. Their program has focused on developing air emissions inventories and air quality monitoring. In 2002, the Tribes completed an air quality assessment and air emissions inventory providing an estimate of air pollution emissions within the Reservation. The Tribes have been conducting air quality monitoring since 2003. In 2006, a Tribal Representative participated in two EPA inspections of CAA, Part 71, Title V permitted facilities located within the exterior boundaries of the Reservation. In, 2012, the Tribes updated an air monitoring shelter and added new air monitoring equipment. The application describes the development of plans for possible future activities, including, among other things, eventually developing air quality standards and a Tribal Implementation Plan, and establishing additional air quality monitoring stations. The Tribes also receive grant funding from EPA under a variety of other federal environmental programs as well as funding from other federal agencies.

The Tribes describe WREQC's procedures for accounting and reporting on the use of funds obtained under CAA § 103. The Tribes included personnel and procurement policies as part of their application, and also describe their Joint Finance Office's roles and responsibilities regarding expenditures of federal grant funds. WREQC provides work plans and budgets to the Joint Finance Office for each federal grant WREQC receives. The Tribes continue to update their policies and procedures to ensure that WREQC's accounting and grants management systems include itemized posting and reporting of expenditures and otherwise meet the federal grants management requirements referenced in 40 CFR Part 31.

WREQC's experience administering grants under CAA § 103 – as well as other grants provided by EPA and other federal agencies – demonstrates the necessary capacity to administer grants under CAA § 105 at a reduced match. They have a proficient air quality program undertaking important air monitoring activities on the Reservation, which will be enhanced through additional opportunities facilitated by CAA § 105 funding.

**2. Notification and Comment Provisions - CAA Sections 505(a)(2), 107(d)(3), 126**

Several of the provisions for which the Tribes seek TAS involve receiving notices of, and providing Tribal input on, air quality issues in and around the Reservation. For instance, under CAA § 505(a)(2), eligible tribes receive notices of, and have an opportunity to comment on, certain permits for sources in nearby areas. More specifically, CAA § 505(a)(2) requires a permitting authority to notify all states (or a tribe with "affected state" status) whose air quality may be affected and that are contiguous to the state in which the emission originates, or that are within 50 miles of



the source, of certain permit applications or proposed permits. Any such state (or tribe with "affected state" status) has an opportunity to submit written recommendations regarding the issuance of the permit and its terms and conditions. If any part of those recommendations is not accepted by the permitting authority, such authority must notify the state (or tribe with "affected state" status) submitting the recommendations and the Administrator in writing of its failure to accept those recommendations and the reasons therefor. Under CAA § 107(d)(3), eligible tribes participate in EPA's process for redesignating the status of their areas with respect to attainment or nonattainment of the national ambient air quality standards promulgated by EPA. Under CAA § 126, eligible tribes would receive notices in the same manner as affected states of the construction of new or modified major stationary sources and of existing major stationary sources which may have certain cross-boundary impacts. CAA § 126 also includes an opportunity to petition EPA in certain circumstances.

As described above, WREQC has developed an air quality program that already participates in review of facility operations and relevant air quality issues on the Reservation. WREQC has periodically worked with EPA on air inspections of major sources on the Reservation as well as in air permit enforcement actions conducted by EPA. WREQC has participated as a cooperating agency in reviews of significant projects affecting Reservation air quality under the National Environmental Policy Act. The Tribes also corresponded with EPA regarding air and water quality concerns at the U.S. ChemTrade Logistics Inc. (ChemTrade) sulfuric acid production facilities on the Reservation. The Northern Arapaho Tribe was a plaintiff-intervenor and party to a consent decree involving Clean Air Act violations at the facility.

As demonstrated by its various activities, WREQC's air quality program is capable of receiving air quality related notices and if it so chooses, providing informative comments or other information and analysis to EPA and other relevant authorities.

### **3. Risk Management Plans - CAA Section 112(r)(7)(B)(iii)**

Under CAA § 112(r)(7)(B)(iii), eligible tribes receive risk management plans (RMPs) prepared by certain stationary sources. The Tribes state that these plans would be received by WREQC's Director and the coordinator of the Tribal Response Program. As described above, the Tribal Response Program assists emergency workers and Reservation residents with respect to a variety of emergency situations, including accidents involving releases of hazardous materials. The Program has already developed experience responding to emergencies, including chemical spills and railroad derailments and a flash flood causing thousands of tires from an illegal dump

to be washed onto the Tribes' lands. As the Tribes note, receiving risk management plans will be valuable to Tribal first responders in the event of release of hazardous materials from a stationary source. The Tribes have developed important experience in emergency response and have demonstrated capability as appropriate entities to receive relevant risk management plans under this provision of the CAA.

Under the EPA's authority in CAA § 112(r)(7)(B)(iii), the Agency has established a central point of submittal for all RMPs. The electronic submission system and database of RMPs is the form and method of complying with the requirement to submit an RMP to a state and to each of the other points of compliance under CAA § 112(r)(7)(B)(iii). 40 CFR § 68.150(a). Each state and other point of compliance may access the RMP database through the CDX system. Submission to this system will be deemed submission to the Tribes. Upon this TAS approval, the Tribes' WREQC Director and coordinator may establish access to this system in a similar manner as states.

4. **Participation in Air Pollution Regions and Commissions - CAA Sections 169B, 176A and 184**

Under CAA §§ 169B, 176A, and 184, eligible tribes participate in the same manner as states in various air pollution regions and commissions, including participation in the development and submission of recommendations to EPA to address interstate air pollution issues. The Tribes note that WREQC air program staff already interact with several federal and state agencies on air quality issues of mutual interest and have participated in a variety of groups and meetings addressing interstate air pollution issues, including:

- Western Regional Air Partnership (WRAP) EPA Regions 6, 8, 9 and 10
- Western Governors Conference
- Southwest Wyoming Technical Air Forum (modeling studies)
- Greater Yellowstone Air Corridor Coalition
- Wyoming Southwestern Air Partnership Region 8 Intertribal Air Coordinators Coalition

The Tribes' prior experiences and the various activities and capacities of their Air Quality Program demonstrate their capability to participate in air pollution regions and commissions.

#### Technical and Administrative Capabilities – 40 C.F.R. § 49.7(a)(4)(v)

40 C.F.R. § 49.7(a)(4)(v) provides that applicant tribes' capability statements may include descriptions of their technical and administrative capabilities to administer an effective air quality program. The descriptions provided above and detailed in the Tribes' application, of the various programs administered by WREQC, and in particular by the Air Quality Program, support the Tribes' technical and administrative capability to administer the functions under the CAA for which they seek TAS. WREQC has gained environmental program implementation experience, including important activities involving inventory development, assessments and monitoring of air quality. The Tribes have submitted an organizational chart for WREQC indicating appropriate staffing and available technical consulting resources. The Tribes have also provided resumés of WREQC personnel involved in the Air Quality Program – including their air quality coordinator and data analysis personnel – demonstrating a depth of relevant experience and training. We find that the Tribes' application describes technical and administrative resources that clearly support their capability to administer the CAA functions for which they seek TAS.

#### Conclusion

After careful review of the Tribes' submission, our understanding of the Tribal programs as set forth above and consultation with relevant Regional staff and programs, the EPA Region 8 Air and Tribal Programs find that the Tribes have demonstrated that they are capable, within the meaning of CAA § 301(d)(2)(C) and sections 49.6(d) and 49.7(a)(4) of the TAR, of administering each of the CAA provisions identified in their TAS application. The Region 8 Air and Tribal Programs recommend that the EPA Region 8 Regional Administrator approve the Tribes' capability for TAS purposes as part of EPA's overall determination regarding their TAS eligibility.