

ELIGIBILITY DETERMINATION FOR THE NAVAJO NATION FOR TREATMENT IN
THE SAME MANNER AS A STATE FOR PURPOSES OF DELEGATION OF
ADMINISTRATION OF THE CLEAN AIR ACT TITLE V, 40 CFR PART 71 PROGRAM

The Office of Regional Counsel (“ORC”) and the Air Division have reviewed the Navajo Nation’s eligibility for treatment in the same manner as a state (“TAS”) under Clean Air Act (“CAA”) section 301(d) and 40 C.F.R. Part 49 in order to be delegated administration of the CAA federal Title V operating permit program (“Part 71 Program”), and have recommended a finding of eligibility. Based on this review and recommendation, I have determined that the Navajo Nation has met the requirements of 40 C.F.R. § 49.6 for the purpose of entering into a delegation agreement with EPA to administer the federal Part 71 Program.

Eligibility Requirements

The requirements for the eligibility determination are identified in the Tribal Authority Rule (“TAR”) at 40 CFR § 49.6. The TAR allows that, where tribes have previously received authorization for a CAA program or for any other EPA-administered program, they need only identify the prior authorization(s) and provide required information which had not been submitted with the prior application(s) (40 C.F.R. § 49.7(a)(8)). The Navajo Nation has previously applied and received approval for TAS for several EPA programs, including the CAA § 105 grant program, the Public Water Systems (“PWS”) Supervision Program, and the Clean Water Act Section 106 grant program. The TAS requirements set forth in the TAR are as follows:

a) The applicant is an Indian tribe recognized by the Secretary of the Interior;

The Navajo Nation fulfilled this requirement by referencing its Clean Water Act Treatment as State application under Section 106, which was approved June 30, 1993. Our review of that application and EPA’s approval thereof showed that the required information was submitted and that the Navajo Nation is an Indian tribe recognized by the Secretary of the Interior. See also 67 Fed. Reg. 46328 (July 12, 2002). The Navajo Nation meets the requirement of 40 C.F.R. § 49.6(a).

b) The Indian tribe has a governing body carrying out substantial governmental duties

and functions;

The Navajo Nation fulfilled this requirement by referencing its Clean Water Act Treatment as State application, which was approved June 30, 1993. Our review of that application and EPA's approval thereof showed that the required information was submitted and that the Navajo Nation has a governing body carrying out substantial governmental duties and functions. The application describes the Navajo Nation's tripartite government, with executive, legislative and judicial branches, performing many essential governmental functions, including the use of its police powers to protect the health, safety and welfare of the Navajo people. The Navajo Nation government has enacted significant legislation, including the Navajo Nation Air Pollution Prevention and Control Act. The Navajo Nation meets the requirement of 40 C.F.R. § 49.6(b).

c) The functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and

The Navajo Nation has met this requirement. The Tribe has provided maps and legal descriptions for the formal Navajo Indian Reservation, established by the Treaty of June 1, 1868, and expanded by subsequent acts of Congress and executive orders that enlarged the Navajo Indian Reservation.¹ The Tribe has also provided maps and legal descriptions for the "satellite" reservations of Alamo, Canoncito and Ramah and for Tribal trust lands located outside of the formal reservations in the Eastern Agency. The Tribe is proposing to administer the program for Part 71 sources located within the formal reservations and the Tribal trust lands located in the Eastern Agency outside of the formal reservations.²

Because of ongoing litigation with the Hopi Tribe, the Navajo Nation is not at this time including any air resources within the former Bennett Freeze Area in its request for eligibility determination. Therefore, EPA makes no determination with respect to the Navajo Nation's eligibility to administer the Part 71 Program in the Bennett Freeze Area.

The Tribe is also not currently requesting that EPA make any determination regarding the Tribe's eligibility to administer the Part 71 Program over two coal-fired generating stations located on the Reservation, the Four Corners Power Plant and the Navajo Generating Station. As the Tribe is not proposing to assume administration of the Part 71 permitting program over these facilities, EPA makes no determination with respect to the Tribe's eligibility to administer

¹ Copies of the Treaty and the acts of Congress and executive orders were attached as exhibits to the Tribe's CWA Section 106 Application and are relied upon here.

² Under the CAA and the TAR, EPA treats tribal trust lands validly set apart for the use of an Indian tribe as reservation land even though that land has not been formally designated as a reservation. For the purposes of this document, EPA refers to the formal reservations and the Tribal trust lands located in the Eastern Agency outside of the formal reservations as the "Reservation."

the program over the two power plants.

EPA notes that the federal Part 71 Program will continue to be implemented under federal authority throughout the areas described and applied for by the Tribe until such time as EPA approves a CAA permitting program under 40 C.F.R. Part 70 for such areas. Consistent with this eligibility determination, EPA and the Tribe may enter into a delegation agreement pursuant to which the Tribe would administer the federal program over the areas covered by this eligibility determination on behalf of EPA. The Navajo Nation has enacted laws providing all relevant authorities to enable the Tribe to carry out administration of the federal program. The Tribe has a permitting office within the Navajo Nation Environmental Protection Agency that is duly authorized under Tribal law to issue federal Part 71 permits pursuant to a delegation agreement with EPA. In addition, as described in greater detail below under Section (d), the Tribe has enacted the Navajo Nation Air Pollution Prevention and Control Act and the Navajo Nation Air Quality Control Operating Permit Regulations; they contain all relevant authorities and procedures for administration of the federal program. In particular, the Tribal statute and regulations establish administrative authorities and procedures for the receipt, processing, and issuance or denial of permit applications, the collection of permitting fees, and the pursuit of various enforcement-related activities including development of compliance plans and schedules of compliance, monitoring, inspections, audits, requests for information, issuance of notices, findings and letters of violation, and development of cases up until filing of a complaint or order.

The Navajo Nation has demonstrated that the functions it will exercise in administering the federal Part 71 Program pertain to the management and protection of air resources within the exterior boundaries of the Reservation. The Tribe meets the requirement of 40 C.F.R. § 49.6(c).

d) the Indian tribe is reasonably expected to be capable, in the EPA Regional Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the Clean Air Act and all applicable regulations.

The functions to be exercised, in this case, pertain to the administration of the federal Part 71 Program. The Navajo Nation has been working closely with EPA Region 9 to develop its air program capacity since 1987. The Tribe adopted the Navajo Nation Air Pollution Prevention and Control Act, 4 NNC §§ 1101-1162 (amended April 22, 2004 and signed into law May 7, 2004), ("Navajo Nation CAA") in 1995, and has been working on compliance issues with stationary sources on the Reservation for many years. Furthermore, the Navajo Nation has adopted its own air permitting regulations, which the Tribe expects will be the basis for their future application for approval of a Part 70 program. The Air Division has also reviewed the Tribe's staff and administrative capability, and found that the Tribe is reasonably expected to be capable of administering a delegated Part 71 Program. The Navajo Nation EPA has a staff of 67 people working on a variety of environmental programs. The staff includes scientists, inspectors, engineers, and legal counsel. The Navajo Nation has received primacy for the Public Water Systems component of the Safe Drinking Water Act and has applied for primacy for the Underground Injection Control Program as well. Navajo Air Program staff have worked on a variety of air issues involving the major sources on the Reservation, and they have participated in training and internships with EPA and the Arizona Department of Environmental Quality.

Where EPA is granting a full delegation of administration of the Part 71 program and suspending its collection of federal Part 71 fees, EPA also requires that the Tribe demonstrate it has the ability to collect permit fees and to conduct activities covered by Title V fees, including the enforcement activities referenced in 40 C.F.R. § 71.9(b), which include functions such as inspections, audits and stack tests.³ The Navajo Nation has developed its permitting laws and regulations to include all relevant requirements to collect fees and conduct the enforcement activities covered by Title V fees, as well as other aspects of the Part 71 program. The Tribe enacted the Navajo Nation CAA as one of its first steps in developing a Navajo Nation Air Quality Program to regulate air quality throughout the Navajo Nation.

Since the passage of the Navajo Nation CAA, the Navajo Air Quality Program has been conducting air quality monitoring and inspections, has completed an air emissions inventory, and has developed operating permit and acid rain permit regulations that the Tribe intends to submit for approval under Parts 70 and 72, respectively, 4 NNR §§ 11-2H-101 through 11-2H-795. It is a violation of the Navajo Nation CAA and the Navajo Nation Air Quality Control Operating Permit Regulations (“Navajo Nation AQCOPR”) to violate a federal Part 71 permit. 4 NNC § 1154; 4 NNR § 11-2H-501(A). With respect to permit fees, the Navajo Nation CAA and the Navajo Nation AQCOPR include explicit provisions regarding permit fees and the collection of fees. 4 NNC § 1134(B); 4 NNR §§ 11-2H-601 through 11-2H-603. The Navajo Nation CAA also includes explicit provisions authorizing the Tribe to conduct the enforcement activities covered by Title V fees such as issuing information requests, conducting inspections and audits, and requiring sources to conduct emissions monitoring. See 4 NNC §§ 1103(B) (Administration; Authority of Director), 1151 (Record-keeping, Entry, Monitoring and Inspections), 1152 (Orders to Comply), and 1161(B) (Rulemaking and Other Administrative Procedures; Administrative subpoenas). The Navajo Nation CAA and the Navajo Nation AQCOPR were passed after a public notice and comment period, and there were no adverse comments to these provisions or objections to the Navajo Nation’s authority to collect fees. The Navajo Nation has also collected fees from both members and non-members of the Tribe for other environmental programs, including the Navajo Underground Injection Control program. Additionally, all of the facilities subject to the federal Part 71 Program that the Tribe will administer operate pursuant to consensual relationships (leases) with the Tribe.

The Navajo Nation has demonstrated that it is reasonably expected to be capable of carrying out the functions to be exercised in administering the federal Part 71 Program in a manner consistent with the terms and purposes of the CAA and all applicable implementing regulations. The Tribe meets the requirement of 40 C.F.R. § 49.6(d).

Notification of “Appropriate Governmental Entities”

40 C.F.R. § 49.9(b) provides that the Regional Administrator shall notify appropriate

³CAA section 502(b)(3)(a)(ii) specifies that the permit fees collected may be used for “implementing and enforcing the terms and conditions of permits (not including any court costs or other costs associated with any enforcement action).”

governmental entities within 30 days of receipt of the Tribe's initial, complete application under the CAA. There are twelve appropriate governmental entities:

- the Hopi Tribe;
- the Jicarilla Apache Tribe;
- the Pueblo of Laguna;
- the Ute Mountain Ute Tribe;
- the Pueblo of Zuni;
- the States of Utah, Arizona, Colorado and New Mexico;
- the U.S. National Park Service;
- the U.S. Forest Service; and
- the U.S. Bureau of Land Management.

Consistent with 40 C.F.R. § 49.9(b), within 30 days of EPA's receipt of the Tribe's complete application, these entities were provided with notice and a 30-day opportunity to comment. In addition, public notice with an opportunity for public comment was provided in the form of an advertisement in the Navajo Times.

Comments were received from the New Mexico Environment Department and the Arizona Department of Environmental Quality, in both cases consisting of letters of support for the Tribe's application.

Determination

Based on the information provided to me by the Navajo Nation, the Air Division, and the Office of Regional Counsel, I have determined that the Navajo Nation is eligible for TAS for the purpose of entering into a delegation agreement with EPA for the purpose of administering the federal Part 71 Program.

Date: _____

Wayne Nastri, Regional Administrator

