No. 11-1307

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OKLAHOMA DEPARTMENT OF
ENVIRONMENTAL QUALITY,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for Review of a Final Rule
of the United States Environmental Protection Agency

BRIEF OF TRIBAL INTERVENORS IN SUPPORT OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici. All parties and intervenors appearing before this Court are listed in the Brief for Petitioner. The following *amici* are appearing before this Court:

Oklahoma Independent Petroleum Association

Osage Nation

State of Minnesota

B. Rulings under Review. References to the ruling at issue appear in the Brief for Petitioner.

C. Related Cases. References to related cases appear in the Brief for Petitioner.

GLOSSARY

CAA or the Act	Clean Air Act, 42 U.S.C. §§ 7401-7671q
EPA	United States Environmental Protection Agency
FIP	Federal Implementation Plan
NAAQS	National Ambient Air Quality Standards
NSR	New Source Review
NSR Rule	"Review of New Sources and Modifications in Indian Country," 76 Fed. Reg. 38748 (July 1, 2011)
ODEQ	Petitioner Oklahoma Department of Environmental Quality
Part 49	40 C.F.R. Part 49
Part 51	40 C.F.R. Part 51
Part 71	40 C.F.R. Part 71
Pet. Br.	Brief of Petitioners
PSD	Prevention of Significant Deterioration
SDWA	Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-26
SIP	State Implementation Plan
SMSC	Shakopee Mdewakanton Sioux Community
TAR	Tribal Authority Rule, 63 Fed. Reg. 7254 (Feb. 12, 1998)
TAS	Treatment as a State

Title V	Title V of the Clean Air Act, 42 U.S.C. §§ 7661-7661f
TIP	Tribal Implementation Plan

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STATEMENT OF THE CASE

In the 1990 amendments to the Clean Air Act, 42 U.S.C. §§ 7401-7671q ("CAA"), Congress recognized that tribal governments are the appropriate authorities to implement CAA programs in Indian country. In particular, Congress added the "treatment as a state" ("TAS") provision in CAA § 301(d), 42 U.S.C. § 7601(d), allowing tribes to administer CAA programs in Indian country the same way states fulfill this function outside of Indian country. That provision gives the Environmental Protection Agency ("EPA") discretion to determine how best to integrate tribes into the CAA framework. It also authorizes EPA to administer CAA programs in Indian country when tribes are unable to or otherwise do not do so. As this Court explained in *Arizona Public Service Co. v. EPA*, 211 F.3d 1280, 1284 (D.C. Cir. 2000), the TAS provision "constitute[s] an attempt by Congress to increase the role of native American nations in [the federal-state] partnership."[1]

Specifically, CAA § 301(d)(1)(A) provides that EPA "is *authorized* to treat Indian tribes as states under this chapter" and § 301(d)(2) asserts that EPA "*shall* promulgate regulations . . . specifying those provisions for which it is appropriate to

[1] The integration of tribes into the CAA framework is described in Chapter 19 of the Clean Air Act Handbook (2d ed. 2004), cited in Pet. Br. at 6. The discussion there is consistent with the one here, although ODEQ, by quoting only one sentence from that chapter, out of context, makes it appear to be different.

treat Indian tribes as States," under the conditions enumerated in § 301(d)(2)(A)-(C) (emphases added). At the same time, § 301(d)(4) provides that when "the *Administrator* determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions" (emphasis added).

EPA implemented the TAS provision through the CAA Tribal Authority Rule ("TAR"), 40 C.F.R. §§ 49.1 - 49.22, which was upheld by this Court in *Arizona Public Service Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000). Tribal participation under the rule is voluntary, in recognition of the limited resources of tribal governments, and EPA retains the ultimate responsibility to implement and enforce the CAA and to fill in the gap when tribes do not act. 63 Fed. Reg. 7254, 7263 (Feb. 12, 1998) (final TAR).

EPA already had federal regulations for some CAA programs when it promulgated the TAR.[2] EPA recognized, however, that the lack of federal regulations for other CAA programs would result in a gap in CAA regulation in Indian country until tribes developed those programs for tribal lands. 63 Fed. Reg. at 7263. EPA

[2] For example, there were federal regulations for "prevention of significant deterioration" of air quality ("PSD"), 40 C.F.R § 52.21, which EPA was already applying in Indian country.

noted in the TAR that it was revising the federal operating permit regulations, found at 40 C.F.R. Part 71, so that they would apply to Indian country as well as to states that lacked approved Title V operating permit programs. *Id*. EPA also stated its intent to develop the rule that Petitioner Oklahoma Department of Environmental Quality ("ODEQ") is now challenging: "Review of New Sources and Modifications in Indian Country," 76 Fed. Reg. 38748 (July 1, 2011) ("NSR Rule"). *See* 63 Fed. Reg. at 7263.

The NSR Rule applies to all areas of Indian country, as that term is defined in 18 U.S.C. § 1151. ODEQ challenges its application to "non-reservation" Indian country only. Pet. Br. at 11.[3]

STATUTES AND REGULATIONS

All pertinent statutes and regulations are included in the Addendum.

SUMMARY OF ARGUMENT

Indian country is the geographic area "where 'primary jurisdiction . . . rests with the Federal Government and the Indian tribe inhabiting it, and not with the States.'" *Michigan v. EPA*, 268 F.3d 1075, 1079 (D.C. Cir. 2001) ("*Michigan II*") (quoting *Alaska v. Native Village of Venetie,* 522 U.S. 520, 527 n.1 (1998)). Pursuant

[3] The rule thus should remain intact as it pertains to reservation lands, including trust lands, regardless of the outcome of this appeal.

to the Indian country statute, 18 U.S.C. § 1151, Indian country consists of three categories of land: reservation (including tribal trust) land, allotted land, and dependent Indian communities. ODEQ claims that EPA is restricted to applying the NSR Rule to reservation land only, and not to other categories of Indian country, and that EPA has "divested" the states of jurisdiction over those other categories of Indian country. *See, e.g.*, Pet. Br. at 11, 13-14.

ODEQ's limited view of EPA's authority (and expansive view of state authority) runs directly counter to federal Indian law, which presumes federal authority over all of Indian country, to the exclusion of the states. In the NSR Rule, as in its other CAA rules for Indian country, EPA relied on the definition of Indian country in 18 U.S.C. § 1151 to determine the permissible extent of tribal jurisdiction, saw that there were gaps in CAA regulation in Indian country because most tribes have not developed NSR programs, and addressed those gaps by providing for federal regulation. EPA's approach is consistent with federal Indian law and federal policies safeguarding tribal sovereignty and self-determination.

In contesting EPA's approach, ODEQ confuses the scope of Indian country with the narrower scope of tribal jurisdiction over non-Indians on non-Indian fee land within reservations, the latter of which is determined under the *Montana* test. *See Montana v. United States*, 450 U.S. 544 (1981). By conflating these two distinct

concepts ODEQ incorrectly attempts to limit EPA's authority over Indian country to one that encompasses only formal reservation and tribal trust land.

ODEQ's position also is inconsistent with the tribal provisions in the CAA, in which Congress made clear that tribal and EPA jurisdiction extends not only to reservation land (including tribal trust land) but also to "other areas of tribal jurisdiction," CAA § 301(d)(2)(B), 42 U.S.C. § 7601(d)(2)(B), such as the allotted lands placed at issue here by ODEQ. Indeed, ODEQ's position would read that portion of § 301(d)(2)(B) out of the Act entirely.

Moreover, the CAA grants EPA discretion as to how best to administer CAA programs in Indian country. As this Court has recognized, in enacting § 301(d)(4) of the Act, 42 U.S.C. § 7601(d)(4), Congress expressly granted EPA authority to adopt federal CAA programs in cases where it is not feasible or appropriate for tribes to function as states for purposes of the Act. *Arizona Pub. Serv. Co.*, 211 F.3d at 1298. This is clearly such a case, where only a few tribes nationwide have developed their own NSR programs, resulting in a gap in NSR permitting authority in Indian country. The NSR Rule is therefore a reasonable interpretation of the CAA, which was amended in 1990 specifically to recognize the sovereignty of tribal governments in Indian country.

The NSR Rule also levels the economic playing field between Indian country and the states. Far from stifling economic development, it provides facilities in Indian country with the same regulatory certainty and options as facilities on state lands have enjoyed. The NSR Rule also has paved the way for facility upgrades leading to air quality improvements in Indian country, providing benefits that accrue both to Indian country and to all surrounding lands.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review of the NSR Rule is governed by the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)-(D), as incorporated in CAA § 307(d)(9), 42 U.S.C. § 7607(d)(9) (judicial review of CAA rulemakings), and by *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, when a statute is silent or ambiguous as to a specific issue, deference must be accorded to an agency's interpretation of the statute as long as it is reasonable. 467 U.S. at 843-45; *see also Arizona Pub. Serv. Co.*, 211 F.3d at 1287; *Shell Oil Co. v. EPA*, 950 F.2d 741, 747 (D.C. Cir. 1991) (per curiam). Deference is accorded even when an agency is interpreting the scope of its own authority, as is the case here. *City of Arlington v. FCC*, 569 U.S. __, 133 S.Ct. 1863, 1871 (2013). Moreover, where, as here, the agency promulgates regulations in response to an express congressional

delegation of rulemaking authority, "[s]uch regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.

These principles apply to this appeal, in which EPA's interpretation of its statutory authority under the CAA to issue the NSR Rule is being challenged. CAA § 301(d)(1) gives EPA the authority to treat tribes as states and § 301(d)(2) prescribes three general conditions that tribes must meet to obtain such treatment. Nowhere, however, does § 301(d), or any other provision of the CAA, prescribe the specific conditions under which EPA may promulgate an NSR program for Indian country. Instead, Congress gives EPA the discretion to determine those specifics, stating that, when EPA determines that the treatment of tribes as states is inappropriate or infeasible, "the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions," § 301(d)(4). Given Congress's silence as to the form of and precise conditions for an NSR program covering Indian country, and given its delegation of rulemaking authority to EPA regarding such a program, *Chevron* supports deference to the EPA's NSR Rule as a reasonable interpretation of the agency's CAA authority.

In addition, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Cobell v. Salazar*, 573 F.3d 808,

812 (D.C. Cir. 2009); *see also Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) ("[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians"). This principle is so strong that it can surpass even *Chevron* deference. *Cobell*, 573 F.3d at 812. When faced with an agency's interpretation of a statutory duty owed to Indians, a court should give "'careful consideration'" to an agency's statutory interpretation, *Cobell v. Kempthorne*, 455 F.3d 301, 304 (D.C. Cir. 2006) (quoting *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 n.8 (D.C. Cir. 1988)), but must employ "muted *Chevron* deference" to ensure that "the Indians' benefit remains paramount," *Cobell v. Salazar*, 573 F.3d at 812. In this case, therefore, the Court should uphold the NSR Rule not only due to *Chevron* deference but also because the agency has properly construed its statutory duties in the tribes' favor.

II. UNDER PRINCIPLES OF FEDERAL INDIAN LAW, AS REFLECTED IN THE CLEAN AIR ACT, EPA HAS JURISDICTION OVER AIR QUALITY IN ALL OF INDIAN COUNTRY

A. The Federal Government Has Jurisdiction Over All of Indian Country, Largely to the Exclusion of the States.

Indian country is defined in 18 U.S.C. § 1151 and under federal case law as consisting not only of reservations (including tribal trust land outside formal reservation boundaries), but also of allotted lands and dependent Indian communities.

See, e.g., *Venetie,* 522 U.S. at 530 (the definition of "Indian country" in § 1151 is a codification of federal case law); *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993) (Indian country includes formal and informal reservations, dependent Indian communities, and Indian allotments); *United States v. John*, 437 U.S. 634, 648-49 (1978) (same).[4] The federal government, and hence EPA, exercises authority over all of Indian country, not simply reservation land.

ODEQ does not challenge EPA's jurisdiction to issue the NSR Rule to the extent that it pertains to formal Indian reservations and tribal trust lands outside formal reservation boundaries. Pet. Br. at 11. Indeed, it would be difficult for ODEQ to bring such a challenge in light of this Court's holding in *Arizona Pub. Serv. Co*. In that case the Court upheld EPA's determination that CAA § 301(d)(2)(B), 42 U.S.C. § 7601(d)(2)(B), which authorizes EPA to treat tribes as states for functions pertaining to "the management and protection of air resources within the exterior boundaries of the reservation," is an express Congressional delegation of authority to tribes to regulate air quality within the reservation. 211 F.3d at 1284, 1287-92. The Court also held that the term "reservation" includes tribal trust lands outside formal reservation boundaries. *Id.* at 1284, 1292-94; *see also Oklahoma Tax Comm'n*

[4] Although 18 U.S.C. § 1151 is found in the criminal code it also applies to questions of tribal civil jurisdiction. *Venetie*, 522 U.S. at 527; *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975); *Michigan II*, 268 F.3d at 1079.

v. Citizen Band of Potawatomi, 498 U.S. 505, 511 (1991) (tribal trust land equivalent to reservation land); *United States v. John*, 437 U.S. at 648-49 (same). ODEQ does, however, challenge EPA's authority to issue the NSR Rule with regard to the other two categories of Indian country, allotted lands and dependent Indian communities, and specifically the former.[5] There is nothing in either federal Indian law generally or the CAA specifically that limits EPA's authority in this fashion.

Federal authority over Indian country stems from the Indian commerce clause, U.S. Const., art. I, § 8, cl. 3, and was set forth in the landmark case of *Worcester v. Georgia*, 31 U.S. 515, 558-60 (1832) (federal treaties and laws "contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union"). *See also Williams v. Lee*, 358 U.S. 217, 220 n.4 (1959) ("The Federal Government's power over Indians is derived from Art. I. § 8, cl. 3, of the United States Constitution"). Subsequent cases have made clear that this authority extends to all of Indian country. *See*, *e.g.*, *Venetie*, 522 U.S. at 527 n.1 (acknowledging definition of Indian country in 18 U.S.C. § 1151); *Michigan II*, 268 F.3d at 1079

[5] "Allotted land is land 'owned by individual Indians and either held in trust by the United States or subject to a statutory restriction on alienation.' . . . . Dependent Indian communities include 'those tribal Indian communities under federal protection that did not originate in either a federal or tribal act of 'reserving,' or were not specifically designated a reservation.'" *Arizona Pub. Serv. Co.*, 211 F.3d at 1285-86 (quoting Felix Cohen, Handbook of Federal Indian Law 38, 40 (1982)).

(same); *HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000) (recognizing that the "particular federal duty to safeguard Indian interests in land" extends through all of Indian country).

In addition, as noted by this Court, "[t]he federal government has substantial trust responsibilities toward Native Americans." *Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001); *accord HRI,* 198 F.3d at 1245 ("[t]he federal government bears a special trust obligation to protect the interests of Indian tribes, including protecting tribal property and jurisdiction") (citing, *inter alia*, *United States v. Creek Nation*, 295 U.S. 103, 109-110 (1935) (federal government is required to take "all appropriate measures for protecting and advancing" the interests of Indian tribes and tribes are "entitled to rely on" the federal government "for needed protection of [their] interests")). *See also HRI*, 198 F.3d at 1245-46 (the status of land as Indian country "implicates . . . the core sovereign interests of Indian tribes and the federal government in exercising civil . . . authority over tribal territory" and noting "the core federal trust responsibilities of administering – and safeguarding – Indian lands.").

ODEQ's claim that the states presumptively have jurisdiction over Indian country other than reservations, Pet. Br. at 19, turns the Constitution and federal case law upside down. As the Supreme Court explained in *Williams v. Lee*, "the basic policy of *Worcester* has remained." 358 U.S. at 219. There is therefore an

"assumption that the States have no power to regulate the affairs of Indians." *Id.* at 220; *accord Venetie*, 522 U.S. at 527 n.1 ("Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it and not with the States."); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215-16, 221-22 (1987); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 151 (1980). *See also Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985) ("The Constitution vests the Federal government with exclusive authority over relations with Indian tribes . . . , and in recognition of the sovereignty retained by Indian tribes . . . Indian tribes and individuals generally are exempt from state taxation within their own territory"); *Rice v. Olson*, 324 U.S. 786, 789 (1945) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.").

ODEQ relies almost entirely on the *Montana* line of cases for its contention that EPA lacks jurisdiction over non-reservation Indian country. This reliance is misplaced, because the *Montana* cases do not address the scope of the federal government's authority over Indian country. Rather, they address the scope of *tribal* jurisdiction. Moreover, the cases are limited to tribal jurisdiction over *non-Indians*; tribes have jurisdiction over Indians pursuant to their retained inherent sovereignty. Further, the cases are limited to jurisdiction over non-Indians on *non-Indian land*

within reservations, and do not rule on tribal or federal jurisdiction in the rest of Indian country.[6] ODEQ itself quotes the holding of *Montana* making these limitations clear. Pet. Br. at 25 (quoting the "general rule" that "Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation," as stated in *Strate v. A-1 Contractors*, 520 U.S. 438, 445-46 (1997)).[7] Finally, and significantly, the *Montana* cases do not apply under the CAA in any event, because Congress expressly delegated authority to tribes to regulate air quality within reservation boundaries regardless of the Indian status of either the entities regulated or the land involved. *Arizona Pub. Serv. Co.*, 211 F.3d at 1284, 1287-92.

[6] The only exception is *Nevada v. Hicks*, 533 U.S. 353 (2001), in which the Court applied *Montana* to a tribe's assertion of jurisdiction over a state official serving a warrant on tribal trust land, finding that "the State's interest in execution of process is considerable" and did not impair the tribe's right to self-government. *Id*. at 364. The Court expressly stated, however, that its holding "is limited to the question of tribal-court jurisdiction over state officers enforcing state law." *Id*. at 358 n.2.

[7] ODEQ also neglects to mention that *Montana* sets forth two exceptions to this general rule, under which "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." 450 U.S. at 565.

As noted in *Montana*, tribes may regulate non-Indians pursuant to express congressional delegation. 450 U.S. at 564.[8]

B. EPA's Issuance of the NSR Rule was a Proper Exercise of Its CAA Authority Over and Responsibilities for Indian Country.

The federal government's authority over and responsibility for Indian country informs EPA's mandate under CAA § 101(b)(1), 42 U.S.C. § 7401(b)(1), "to protect and enhance the quality of the Nation's air resources." First, EPA bears the ultimate responsibility for protecting air quality throughout the Nation, including Indian

[8] The other cases that ODEQ cites, Pet. Br. at 30-31, also are inapposite. The Court did not find that the lands in question were Indian country in either *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), or *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), the Court found that Congress had waived immunity from state taxation of oil and gas production on the reservation at issue; there is no similar grant of state authority here. *San Manuel Indian Bingo & Casino v. Nat'l Labor Relations Bd.*, 475 F.3d 1306 (D.C. Cir. 2007), upheld the application of federal law (the National Labor Relations Act) to employment practices at an on-reservation casino, just as the CAA applies here to facilities in Indian country. In *White Mountain Apache v. Bracker*, the state taxes at issue were held to be preempted. Finally, the fact that an Indian allottee may sue for breach of an oil and gas lease on an allotment, *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968), does not in any way diminish the tribe's right to regulate the allotment.

country.[9] *See generally* NSR Rule, 76 Fed. Reg. at 38752. Second, EPA has a congressionally delegated obligation to implement the CAA in Indian country, as discussed above. EPA is thus doubly responsible for protecting air quality in Indian country, both as the agency delegated the responsibility to protect the Nation's air quality and in its special role regarding Indian tribes.

EPA's special responsibility over Indian country is recognized in CAA § 301(d)(4). Under that provision, Congress authorized EPA to "directly administer" CAA provisions for tribes whenever EPA finds that it is inappropriate or infeasible for a tribe to administer those provisions itself, and that is precisely the authority EPA exercised in the NSR Rule. NSR Rule, 76 Fed. Reg. at 38752-53 (citing S. Rep. No. 228, 101st Cong., 1st Sess. 79-80 (1989)) (CAA § 301(d) authorizes EPA to implement the Act throughout Indian country); *see also* CAA § 301(a) (authorizing the EPA Administrator "to prescribe such regulations as are necessary to carry out his functions under this chapter").

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[9] For example, EPA has authority to enforce the CAA pursuant to CAA § 113, 42 U.S.C. § 7413, and that authority exists concurrently with any state (or tribal) enforcement authority. *See, e.g., Union Electric Co. v. EPA*, 515 F.2d 206, 211 (8th Cir. 1975), *aff'd,* 427 U.S. 246 (1976) (EPA may enforce SIPs in federal courts); *United States v. SCM Corp.*, 615 F. Supp. 411 (D.Md. 1985) (SIP may be enforced by EPA as well as by the state). *See also* CAA § 303, 42 U.S.C. § 7603 (granting EPA authority to file suit or issue administrative orders in the event of air pollution threats).

Pursuant to CAA § 301(d)(2), EPA determined which CAA provisions were inappropriate to apply to tribes and codified that determination in the TAR, 40 C.F.R. § 49.4. In particular, EPA found that certain statutory deadlines and associated sanctions were inappropriate for tribes, including requirements to implement tribal implementation plans ("TIPs") within certain time frames. 40 C.F.R. § 49.4(a)-(f). The vast majority of tribes have not developed TIPs nor have they developed separate tribal NSR programs, leaving a gap in CAA regulation in Indian country, as EPA recognized in the NSR Rule. *See*, *e.g.*, NSR Rule, 76 Fed. Reg. at 38753, 38778; *see also* TAR, 63 Fed. Reg. at 7263 (recognizing regulatory gap); Part 71 Rule, 64 Fed. Reg. 8247, 8252 (Feb. 19, 1999) (same).

EPA issued the NSR Rule "to address that gap and more fully implement the NSR program in Indian country." 76 Fed. Reg. at 38778. As EPA explained when faced with the same situation regarding the CAA Title V operating permit program:

> One of EPA's primary policy objectives is to avoid gaps in title V coverage. This objective is not served by allowing States that generally lack authority to regulate air sources in Indian country, including non-Indian lands, to issue permits that may not be enforceable under Federal law.

Part 71 Rule, 64 Fed. Reg. at 8252.[10] *See also* 76 Fed. Reg. at 38778 ("absent an explicit demonstration of authority by a state to administer a CAA program in Indian

[10] EPA's authority to issue Title V permits in Indian country was upheld in *Michigan II*.

country . . . state and local governments lack authority under the CAA over air pollution sources and the owners or operators of air pollution sources throughout Indian country").

Nothing in the CAA limits EPA's gap-filling authority in Indian country to reservations. Section 301(d)(2)(B) specifically provides that tribes may implement the CAA not only within reservations but also in "other areas within the tribe's jurisdiction." When it promulgated the TAR, EPA interpreted that phrase to mean the rest of Indian country, *see* 59 Fed. Reg. 43956, 43960 (Aug. 25, 1994) (proposed TAR); 63 Fed. Reg. 7254, 7259, 7262-63 (Feb. 12, 1998) (final TAR), and this Court upheld the TAR in *Arizona Pub. Serv. Co*. Indeed, this Court upheld tribal authority to issue a TIP for non-reservation Indian country. *Arizona Pub. Serv. Co.*, 211 F.3d at 1294-95. ODEQ's interpretation of jurisdiction under the CAA as extending only to reservations is therefore contrary to this Court's decision in *Arizona Pub. Serv. Co.* and also would read half of § 301(d)(2)(B) out of the Act.[11]

[11] *See also* S. Rep. No. 101-228, at 79, 80, reprinted in Legislative History of the Clean Air Act Amendments of 1990, at 8419-20 (referring to the authority of Indian tribes to "administer and enforce the Clean Air Act in Indian lands" and in "Indian country").

EPA's exercise of authority throughout Indian country also is consistent with federal policies protecting tribal self-determination.[12] *See* 76 Fed. Reg. at 38752-53 (discussing territorial approach to CAA regulation and desire to avoid checkerboarding of Indian country, consistent with federal Indian policy); Exec. Order No. 13,175, § 3(a), 65 Fed. Reg. 67249 (Nov. 9, 2000) (federal agencies "shall respect Indian tribal self-government and sovereignty"); "Memorandum of November 5, 2009: Tribal Consultation," 74 Fed. Reg. 57881 (Nov. 9, 2009) (implementing Exec. Order 13,175).

EPA's approach of issuing a federal NSR rule for Indian country to close the CAA regulatory gap, pending the existence of an approved tribal or state program, is therefore an eminently reasonable interpretation of its authorities and responsibilities under the CAA and federal common law and policies. EPA has CAA jurisdiction throughout Indian country, whereas states must demonstrate their jurisdiction for non-reservation Indian country and tribes must do so as well, under the CAA TAS provision, CAA § 301(d)(2)(B); 40 C.F.R. § 49.6.[13] If they do so, and receive EPA approval of the program in question, the tribal or state program "will

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[12] The importance of tribal self-determination and the federal policy supporting it has served as a basis for many court decisions. *See, e.g.,Cabazon,* 480 U.S. at 216-17; *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334-35 (1983).

[13] As discussed above, the CAA expressly delegates jurisdiction to tribes within their reservations, to the exclusion of states.

replace the Federal program." 76 Fed. Reg. at 38778 (replacement by tribal program); *see id*. at n.33 (approval of state Title V program for non-reservation Indian country in Washington, following demonstration of state authority); 40 C.F.R. §§49.151(c)(1) (program applies in Indian country "where there is no EPA-approved minor NSR program"); 49.166(c) (same for major NSR program). Until then, however, the federal program is in place to ensure implementation of the CAA.

This Court's holding in *Michigan II* is not to the contrary, despite ODEQ's reliance on that case. *Michigan II* held that EPA could not apply a federal CAA operating permit program to lands where Indian country status was *in question*, 268 F.3d at 1080, 1084, which is not the situation here: the allotted lands at issue here are specifically defined in 18 U.S.C. § 1151(c) to be Indian country. Indeed, in *Michigan II* "[t]he petitioner states . . . happily concede[d] that tribes, and thus, potentially the EPA – acting for the tribe – have jurisdiction over *Indian country*," 268 F.3d at 1084, and the Court agreed with this position, holding that "EPA may implement a federal program only for *Indian country* itself, not for lands the status of which EPA deems 'in question,'" *id*. at 1088-89.

The Court in *Michigan II* was concerned that by taking jurisdiction over "in question" lands, EPA would "assume jurisdiction for itself and perpetually keep it from the states (or the tribes) because of a lack of showing of jurisdiction, without

ever deciding who has jurisdiction." *Id*. at 1086. Here, however, EPA has stated its intent to replace the federal NSR program with a tribal or state program upon a showing of adequate jurisdiction and approval, as discussed above. The Court distinguished the Tenth Circuit's decision in *HRI* on precisely this basis. In *HRI*, the Tenth Circuit upheld EPA's application of a federal program under the Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-26 ("SDWA"), to land where Indian country was in question. 198 F.3d at 1242.[14] The Tenth Circuit found it was entirely reasonable for EPA "to adopt an interpretation of its regulations requiring, when [the Indian country status of] lands [is] in dispute, presumptions in favor of Indian country status and resulting federal jurisdiction." *Id*. However, the *HRI* court did not allow the Indian country status of the land to remain in question "in perpetuity" but instead remanded to EPA with instructions to make a jurisdictional determination. *See Michigan II*, 268 F.3d at 1087.

III. THE CAA SPECIFICALLY AUTHORIZES EPA TO PROMULGATE A "NATIONWIDE" FEDERAL IMPLEMENTATION PLAN

ODEQ contends that EPA was required "to make specific determinations regarding specific implementation plans" rather than promulgating a "nationwide"

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[14] The SDWA was amended in 1986 to include a "treatment as a state" provision which, like that of the CAA, applies to areas within "the Tribal Government's jurisdiction." SDWA § 300j-11(b)(1)(B), 42 U.S.C. § 1451(b)(1)(B). EPA interpreted this language to be equivalent to Indian country, as defined in 18 U.S.C. § 1151, see 40 C.F.R. § 144.3, just as it interpreted similar language in the CAA.

federal implementation plan ("FIP") for NSR in Indian country. ODEQ argues that the FIP is not authorized by EPA's general authority under CAA § 301(a) or by EPA's regulations at 40 C.F.R. § 49.11. Pet. Br. at 53.

ODEQ conveniently omits any discussion, or even citation, of the primary authority for EPA's adoption of the FIP: CAA § 301(d)(4). As discussed above, that provision states:

> In any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose.

The legislative history of this provision indicates that it was intended to allow EPA to adopt nationwide federal plans in cases, such as this, where it is not feasible or otherwise appropriate for tribes to function as states for purposes of the Act. S. Rep. No. 101-228, at 79, reprinted in Legislative History of the Clean Air Act Amendments of 1990, at 8419. The Senate Report explains:

> [Section 301(d)(4)] incorporates language from the tribal amendments to the Safe Drinking Water Act regarding provisions of the Act where the treatment of an Indian tribe as a State is inappropriate, administratively infeasible or otherwise inconsistent with the purposes of the Act. This subsection authorizes the Administrator to include in the regulations other means for the Agency to administer directly such provision to achieve the purposes of such provisions. This provision also confirms the Agency's obligation and responsibility to enforce the Act in Indian Country should a tribal government choose not to assume primary enforcement responsibility.

Id. at 80. Similarly, the 1990 House Report notes that "[i]f treatment as a State is inappropriate, the Administrator may devise other means of administering the Clean Air Act on reservations." H.R. Rep. No. 490, 101st Cong, 2d Sess. 271 (1990).

EPA has promulgated regulations specifying that tribes are not to be treated as states in cases such as this and acknowledging EPA's authority to fill the gaps in Indian country under § 301(d)(4). Thus, 40 C.F.R. § 49.4 specifies that "it is not appropriate to treat tribes in the same manner as States" for:

> (a) Specific plan submittal and implementation deadlines for NAAQS-related requirements, including but not limited to such deadlines in sections 110(a)(1), 172(a)(2), 182, 187, 189, and 191 of the Act . . . .
> (d) The provisions of section 110(c)(1) of the Act [governing FIPs].

EPA also has promulgated regulations governing "Actions under section 301(d)(4) authority," codified at 40 C.F.R. §49.11. Those regulations provide:

> Notwithstanding any determination made on the basis of authorities granted the Administrator under any other provision of this section, the Administrator, pursuant to the discretionary authority explicitly granted to the Administrator under sections 301(a) and 301(d)(4):
>
> (a) Shall promulgate without unreasonable delay such Federal implementation plan provisions as are necessary or appropriate to protect air quality, consistent with the provisions of sections 304(a) and 301(d)(4), if a tribe does not submit a tribal implementation plan meeting the completeness criteria of 40 CFR part 51, appendix V, or does not receive EPA approval of a submitted tribal implementation plan.

If EPA had no flexibility to adopt a nationwide FIP in appropriate cases, there would be no need for the Part 49 regulations quoted above or, indeed, for § 301(d)(4).[15] Besides, the time for challenging the Part 49 regulations has long since passed. *See American Rd. & Transp. Builders Ass'n v. EPA*, 705 F.3d 453 (D.C. Cir. 2013). As discussed below, only a few tribes throughout the country have developed NSR plans and those plans are limited to synthetic minor permits. No tribes have adopted or submitted for EPA approval a comprehensive plan similar to the FIP at issue here. Given this situation, a requirement to adopt the FIP on a tribe-by-tribe basis would impose an enormous burden on both EPA and the tribes and is not administratively feasible. Section 301(d)(4) was enacted to address just such situations. ODEQ's interpretation would read it out of the Act.

As noted in the preamble to the NSR Rule, EPA has exercised its authority to develop a FIP for Indian country on other occasions, and those FIPs have been upheld by this Court. 76 Fed. Reg. 38778-79. For example, this Court agreed that EPA had broad discretion under § 301(d)(4) to determine in the TAR when it is inappropriate or infeasible to treat tribes as states and to take other measures accordingly. In *Arizona Pub. Serv. Co.* the petitioners challenged EPA's authority under § 301(d)(4)

[15] In addition, CAA § 301(d)(3) authorizes EPA to promulgate elements of TIPs. As is the case with FIPs for Indian country under § 301(d)(4), this authority is separate from the authority for SIPs in CAA § 110, 42 U.S.C. § 7410.

to exempt tribal permits from state judicial review. The Court saw "no merit" in this claim:

> EPA's interpretation is not clearly contradicted by the statute. In fact, § 7601(d)(4) [§ 301(d)(4)] allows the Agency the discretion to determine whether it is "inappropriate or administratively infeasible" to treat Indian tribes exactly the same as states in administering the Act. Petitioners offer no support for their assertions that the judicial review requirements do not come within the EPA's discretion under this section. It is obvious, then, that the Agency had a choice as to whether to treat Indian tribes identical to states with regard to the judicial review elements of § 7661a(b). The clear meaning of the statute does not foreclose the Agency's interpretation.

211 F.3d. at 1299. Similarly, this Court held in *Michigan II* that EPA has authority to develop and administer a FIP for CAA Title V operating permits in cases where: "(1) the state or tribe fails to submit an operating program; or (2) the operating program is disapproved by EPA; or (3) EPA determines the state or tribe is not adequately administering and enforcing a program." 268 F.3d at 1082.[16]

In *Arizona Pub. Serv. Co.*, the Court also addressed EPA's effort to exercise its authority under § 301(d)(4) in a way that did not infringe on tribal sovereignty and tribal self-determination:

> Nor is the Agency's interpretation unreasonable. EPA understandably was concerned that the effect of requiring tribes to submit their permitting disputes to state courts would conflict with policies

[16] The only portion of the federal operating permit program that the Court remanded in *Michigan II* was the portion pertaining to "in question" areas of Indian country, discussed in Part II.B above.

> supporting tribal sovereignty and also discourage the institution of tribal permitting programs. The Agency's decision to allow tribes to submit alternatives to waiving sovereign immunity accomplishes a reasonable balancing of these interests.

211 F.3d at 1298-99. The same is true here.

Moreover, as EPA explained in the preamble to the final NSR Rule, § 301(d)(4) "authorized us to implement the Act in non-reservation areas of Indian country in order to fill any gap in program coverage and to ensure an efficient and effective transition to EPA approved programs." 76 Fed. Reg. 38753.

> Given the longstanding air quality concerns in some areas and the need to establish requirements in all areas to maintain CAA standards, EPA believes that these FIP provisions are appropriate to protect air quality in Indian country where no EPA-approved minor NSR or nonattainment major NSR program is in place. The rules published here are based on the same CAA authority as EPA has used elsewhere in rulemaking that have been affirmed by the courts.

Id. at 38778.

In sum, EPA's decision to adopt a FIP for Indian country is consistent with the governing statute, the relevant legislative history, the applicable agency regulations and the decisions of this Court. ODEQ's arguments to the contrary fail to discuss or even cite the governing statute and should be rejected.

IV. THE NSR RULE PROVIDES SUBSTANTIAL BENEFITS IN INDIAN COUNTRY

Prior to the NSR Rule there was no clear mechanism for permitting major sources in nonattainment areas in Indian Country. Nor was there a mechanism for obtaining "synthetic minor" permits, which are available under state NSR programs and which recognize that emissions from potentially major sources in clean air areas will be sufficiently limited by operating parameters to avoid triggering major source permit requirements. Instead, for what would have been synthetic minor sources elsewhere, costly, complex and time-consuming requirements for major source permits were imposed in Indian country. This led to an uneven economic playing field in which facilities on state lands were allowed to obtain abbreviated synthetic minor permits, but similar (and often competing) facilities in Indian country were not. In some cases, facility upgrades leading to air quality improvements could not be accomplished as a result of this limitation. The NSR Rule put an end to this disparate treatment: invalidation of the NSR Rule would be a major blow to tribal environmental and economic development.

A case in point is the situation with respect to Intervenor Shakopee Mdewakanton Sioux Community (SMSC), which operates the Mystic Lake Casino Hotel in Minnesota as well as other tribal facilities that require air quality permits. Pursuant to the NSR Rule, SMSC has applied to EPA for synthetic minor permits for fourteen diesel generators located on its reservation, has received permits for three

generators, and expects the rest to be issued this year. Notices of minor source and emergency-only operations have been filed for an additional fifteen generators that may require future permitting. Many of these generators have been in place for ten or more years but could not feasibly be replaced in the absence of a synthetic minor rule. Within the next ten years, SMSC likely will replace ten of these generators with newer, cleaner models that also will qualify for synthetic minor permits.

Nor are the benefits of the Rule confined to SMSC operations. According to EPA staff, as of May 30, 2013, 48 synthetic minor permit applications had been filed for sources on tribal lands since the NSR Rule was promulgated, and four of those permits have been issued.[17] SMSC's experience with EPA during the prior years of the "regulatory gap" indicates that unless the NSR Rule is upheld and remains in place, SMSC will not be allowed (or allowed only with great difficulty) to install newer cleaner generators to replace those which are reaching the end of their useful life. The environmental benefits of installing newer, cleaner generators serve the interests of all, since air quality is not confined by borders.

ODEQ's argument that the NSR Rule will result in regulatory uncertainty is based at least in part on a misunderstanding regarding allotted lands. ODEQ appears to confuse allotted lands, which are Indian country and are by definition owned by

[17] Personal communication from Mike Koerber, EPA, to Kurt Blase, counsel for SMSC.

Indians, with non-Indian-owned fee lands, which are not Indian country unless they are within formal reservations or otherwise qualify as dependent Indian communities. *See* Pet. Br. at 32 (non-reservation Indian country landholdings "will be predominantly nonmember"). The cases ODEQ cites – *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Hagen v. Utah*, 510 U.S. 399 (1994); and *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010) – involved non-Indian-owned fee lands, not allotted lands. Moreover, in each of those cases the reviewing court concluded that the tribal reservation in question was diminished so that the lands at issue were no longer within reservation boundaries. ODEQ's demographic inferences from these cases do not support its confused assertions about land ownership and jurisdiction in Indian country.[18]

[18] A similar mistake is made throughout the amicus brief filed by the Oklahoma Independent Petroleum Association. OIPA argues that the Indian country status of allotted lands is uncertain when ownership interests are split between Indians and non-Indians, particularly when there is split ownership of the mineral and surface estates. Under 18 U.S.C. § 1151(c), Indian allotments without extinguished titles are considered Indian country regardless of whether the allotment is a "split estate." The Tenth Circuit upheld EPA's authority to regulate split estates as Indian country when either the surface or mineral estate is under Indian ownership, explaining that "[t]he split nature of the surface and mineral estates does not alter the jurisdictional status of these lands for [Safe Drinking Water Act] purposes." *HRI*, 198 F.3d at 1254. Although the court was addressing a split estate where the surface was tribal trust land rather than allotted land, its holding applies equally to EPA's exercise of CAA authority over split estates involving allotments.

There are also financial and regulatory benefits to SMSC from the NSR Rule, and regional environmental benefits. The NSR Rule simplifies and clarifies permitting air emission sources in Indian country, resulting in a significant cost savings per source. Without the NSR Rule, generators in Indian country used for load management, and possibly generators used solely for emergency backup, would have to be permitted as major sources. Major source permitting is a very expensive and time consuming process. The NSR Rule allows the issuance of synthetic minor permits to generators that operate for limited hours each year for load management purposes, as well as for emergency use. This option provides significant cost savings under interruptible load rate structures. The savings to SMSC will be on the order of $1,000,000 per year.

The NSR Rule also clarifies the status of air emissions sources and removes regulatory ambiguity. With the Rule both tribal governments and EPA staff have a clear road map for permitting emissions sources in Indian country. Without the NSR Rule it is unclear whether generators that are restricted to emergency-only operation can be installed without a major source construction permit. Every water plant, sewer plant, lift station, and government center backup generator potentially would need a construction permit. The financial burden to prepare and file such construction permits would be very high.

Minnesota, as an example, has eleven federally recognized Indian tribes within its borders, including intervenors SMSC and the Red Lake Band of Chippewa Indians. All will likely apply for permits under the NSR Rule. Under the Rule, emissions sources will be regulated and permitted and air quality will be improved. If it is held that EPA cannot issue a rule for all of Indian country the regulatory vacuum will return, at least with respect to non-reservation Indian country. Such a result would negatively impact air quality and dramatically increase regulatory uncertainty for tribal governments. It would also have significant financial impacts on tribes in the form of higher electricity and compliance costs, and in the economic development inhibited by a lack of clear rules.

The NSR Rule was long overdue. It corrects a long-standing inequity between tribal and other facilities, clears the air in Indian country and surrounding state lands, and paves the way for future environmental and economic development on tribal lands. ODEQ's arguments against the FIP are without merit and should not be allowed to block the path of nationwide progress in tribal air quality protection.

V. THE CHECKERBOARD NATURE OF OKLAHOMA INDIAN COUNTRY DOES NOT AFFECT THE VALIDITY OF THE NSR RULE

ODEQ asserts that the NSR Rule is invalid in Oklahoma because "there are no Indian reservations in Oklahoma" and there are many Indian allotments. Pet. Br. at 55. ODEQ's broad statement about reservations is inaccurate, as some federal

statutes specifically define the term reservation to include "former Indian reservations in Oklahoma." *See* Felix Cohen, Cohen's Handbook of Federal Indian Law (2005) at 298 (citing 25 U.S.C. § 1452(d) (Indian Financing Act); 25 U.S.C. § 3103(12) (National Indian Forest Resources Management Act); and 25 U.S.C. § 3501(2) (Indian Energy Resources Act)). Tribal trust lands in Oklahoma also constitute "reservation" land. *Potawatomi*, 498 U.S. at 511. The number of Indian allotments does not alter the fact that they are defined as Indian country under 18 U.S.C. § 1151(c). The checkerboarding in Oklahoma, although it may present some additional challenges, does not provide a basis for state jurisdiction in contravention of federal law. EPA has express authority under the CAA to regulate in Indian country.[19]

ODEQ attempts to minimize Oklahoma tribes' interest in self-determination by making broad generalizations about the assimilation and lack of sovereignty, self-governance, and independence of Oklahoma Indian tribes based on case law from

[19] For example, the Navajo Nation has extensive checkerboarding in the area known as the "Eastern Navajo Agency," an area in western New Mexico that is comprised of allotted, private, state, and federal lands. That checkerboarding has not prevented the Navajo Nation from applying tribal regulations to the allotted lands in that area. *See*, *e.g.*, 7 N.N.C. § 254 (defining the jurisdiction of the Navajo Nation as extending over all "Navajo Indian country," including "all Navajo Indian allotments"). Nor has it prevented EPA from applying federal environmental regulations to those allotted lands. *See*, *e.g.*, 40 C.F.R. § 147.1603 and Subpart HHH, §§ 147.3000 - 147.3016 (the SDWA regulations applicable to Navajo "Indian lands," at issue in *HRI*, and other Indian lands in New Mexico, *see* § 147.3000); § 144.3 (defining "Indian lands" as Indian country under 18 U.S.C. § 1151).

the 1940s, at the beginning of the federal Indian termination period (1943-1961). These generalizations ignore the sweeping reform in federal Indian policy since then, to a policy that now promotes tribal sovereignty and self-determination. In particular, ODEQ relies on *Okla. Tax Comm'n v. United States*, 319 U.S. 598 (1943), for the statement that,

> while [the Supreme Court] had previously 'held that a State might not regulate the conduct of persons in Indian territory on the theory that the Indian tribes were separate political entities with all the rights of independent status,' that condition 'has not existed for many years in the State of Oklahoma.' *Id*. at 602. 'Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy' and they are 'actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions.' *Id*. at 603.

Pet. Br. at 59. This *dicta* is in direct conflict with current federal Indian policy supporting tribal self-determination and sovereignty, as well as with the Supreme Court's own statements about the existence and status of Indian country in Oklahoma in the *Sac & Fox* and *Potawatomi* cases of the early 1990s. Tribes have as compelling an interest in exercising sovereignty and tribal autonomy over their respective portions of Indian country in Oklahoma as they do elsewhere.

ODEQ's reliance on *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973), is similarly misplaced. Pet Br. at 59. That case noted that the doctrine of "Indian sovereignty" "has not been rigidly applied in cases where Indians have left

the reservation and become assimilated into the general community." 411 U.S. at 171. Here, the relevant interest being weighed is a tribe's interest in self-determination regarding the Indian country over which it has jurisdiction, not the interests of individual Indians who have left the reservation and become assimilated.

ODEQ also cites *United States v. Okla. Gas & Elec. Co.*, 127 F.2d 349, 353 (10th Cir. 1942), *aff'd*, 318 U.S. 206 (1943), in which the Court of Appeals for the Tenth Circuit "observed that it is 'common knowledge that lands allotted in severalty to Indians in Oklahoma are essentially a part of the [non-Indian] community in which they are situated . . . .'" Pet. Br. at 59. The sentence concludes, however, by saying that such lands are "subject to the *limited* control by the state, or its political sub-divisions." 127 F.2d at 353 (emphasis added). The full quote therefore recognizes that, although there is some degree of state control over Oklahoma Indian allotments, the control is limited in its scope, and it should remain so here.

Federal jurisdiction over Indian country may be factually more intricate in Oklahoma due to the checkerboard nature of Indian country there, but that situation in and of itself does not justify giving additional jurisdiction to the state. The NSR Rule does not take any jurisdiction away from Oklahoma, but rather reflects existing federal jurisdiction over Indian country under the CAA. *United States v Sands*, 968 F.2d 1058, 1062 (10th Cir. 1992), is a case in point. There the court rejected the

federal government's assertion that Oklahoma should assume criminal jurisdiction over "checkerboard" Indian allotments because the state had jurisdiction over neighboring non-Indian land. The court noted that individual Indian allotments are Indian country under 18 U.S.C. § 1151, and thus are subject to federal, not state, jurisdiction. The court declined to extend state jurisdiction over those lands, notwithstanding the government's comment "that law enforcement might be easier if the State had jurisdiction over the checkerboard of Indian and non-Indian land involved." *Id*. at 1063.

Oklahoma thus provides no legitimate basis for its position that the NSR Rule should apply to reservation but not non-reservation Indian country. If, however, the Court disagrees, the Court should remand the Rule to EPA without *vacatur*, since the disruptive consequences of *vacatur* in this case would be severe. *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n,* 988 F.2d 146, 150-51 (D.C. Cir. 1993). The NSR Rule fills a regulatory gap in Indian country, providing standards and permitting authority for a wide variety of air pollution activities that fell outside of state-delegated authority but that federal regulations did not adequately address. Since implementation of the Rule, owners and operators of emissions sources in Indian country have been able to obtain various CAA permits for the first time, and they would be thrust into legal limbo if the NSR Rule were vacated. When

regulations are already in place and those affected have acted in reliance upon them, remand without *vacatur* is appropriate. *See Sugar Cane Growers Co-op. of Florida v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002).[20]

CONCLUSION

For all the foregoing reasons, the Court should uphold the NSR Rule.[21]

Respectfully submitted,

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[20] Alternatively, the Court may remand and order only a partial *vacatur*. *See Mississippi v. EPA*, DC Cir. No. 08-1200 (July 23, 2013), slip op. at 48 (partial *vacatur* to preserve environmental benefits of rule pending remand); *Sierra Club v. EPA*, 705 F.3d 458, 465-66 (D.C. Cir. 2013) (partial *vacatur* appropriate where plaintiff challenged only parts of the rule); *Michigan II*, 268 F.3d 1087.

[21] The Tribal Intervenors reserve the right to seek attorneys fees and costs pursuant to CAA § 307(f), 42 U.S.C. § 7607(f), should the NSR Rule be upheld and the Court deem it appropriate.

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Date: July 25, 2013

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

Pursuant to Fed. R. App. P. 32(a)(7)(B), I hereby certify that this Brief of Tribal Intervenors in Support of Respondent contains 8717 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) as not counting toward the type-volume limitation. This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) as it has been prepared in a proportionally spaced typeface using WordPerfect X4 with Times New Roman 14-point font.

By: /s/ Jill E. Grant

CERTIFICATE OF SERVICE

I certify that on July 25, 2013, a true and correct copy of the foregoing **BRIEF OF TRIBAL INTERVENORS IN SUPPORT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY** was electronically filed via the Court's CM/ECF system. Counsel of Record registered with CM/ECF will be served by the appellate CM/ECF system.

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ADDENDUM

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5 U.S.C.

United States Code, 2011 Edition
Title 5 - GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I - THE AGENCIES GENERALLY
CHAPTER 7 - JUDICIAL REVIEW
Sec. 706 - Scope of review
From the U.S. Government Printing Office, www.gpo.gov

§706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: "This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title]."

18 U.S.C.

United States Code, 2011 Edition
Title 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 53 - INDIANS
Sec. 1151 - Indian country defined
From the U.S. Government Printing Office, www.gpo.gov

§1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

(June 25, 1948, ch. 645, 62 Stat. 757; May 24, 1949, ch. 139, §25, 63 Stat. 94.)

Historical and Revision Notes

1948 Act

Based on sections 548 and 549 of title 18, and sections 212, 213, 215, 217, 218 of title 25, Indians, U.S. Code, 1940 ed. (R.S. §§2142, 2143, 2144, 2145, 2146; Feb. 18, 1875, ch. 80, §1, 18 Stat. 318; Mar. 4, 1909, ch. 321, §§328, 329, 35 Stat. 1151; Mar. 3, 1911, ch. 231, §291, 36 Stat. 1167; June 28, 1932, ch. 284, 47 Stat. 337).

This section consolidates numerous conflicting and inconsistent provisions of law into a concise statement of the applicable law.

R.S. §§2145, 2146 (U.S.C., title 25, §§217, 218) extended to the Indian country with notable exceptions the criminal laws of the United States applicable to places within the exclusive jurisdiction of the United States. Crimes of Indians against Indians, and crimes punishable by tribal law were excluded.

The confusion was not lessened by the cases of *U.S. v. McBratney*, 104 U.S. 622 and *Draper v. U.S.*, 17 S.Ct. 107, holding that crimes in Indian country by persons not Indians are not cognizable by Federal courts in absence of reservation or cession of exclusive jurisdiction applicable to places within the exclusive jurisdiction of the United States. Because of numerous statutes applicable only to Indians and prescribing punishment for crimes committed by Indians against Indians, "Indian country" was defined but once. (See act June 30, 1834, ch. 161, §1, 4, Stat. 729, which was later repealed.)

Definition is based on latest construction of the term by the United States Supreme Court in *U.S. v. McGowan*, 58 S.Ct. 286, 302 U.S. 535, following *U.S. v. Sandoval*, 34 S.Ct. 1, 5, 231 U.S. 28, 46. (See also *Donnelly v. U.S.*, 33 S.Ct. 449, 228 U.S. 243; and *Kills Plenty v. U.S.*, 133 F.2d 292, certiorari denied, 1943, 63 S.Ct. 1172). (See reviser's note under section 1153 of this title.)

Indian allotments were included in the definition on authority of the case of *U.S. v. Pelican*, 1913, 34 S.Ct. 396, 232 U.S. 442, 58 L.Ed. 676.

1949 Act

This section [section 25], by adding to section 1151 of title 18, U.S.C., the phrase "except as otherwise provided in sections 1154 and 1156 of this title", incorporates in this section the limitations of the term "Indian country" which are added to sections 1154 and 1156 by sections 27 and 28 of this bill.

Amendments

1949—Act May 24, 1949, incorporated the limitations of term "Indian country" which are contained in sections 1154 and 1156 of this title.

Short Title of 1976 Amendment

Pub. L. 94–297, §1, May 29, 1976, 90 Stat. 585, provided: "That this Act [amending sections 113, 1153, and 3242 of this title] may be cited as the 'Indian Crimes Act of 1976'."

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Title 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 85 - AIR POLLUTION PREVENTION AND CONTROL
SUBCHAPTER III - GENERAL PROVISIONS
Sec. 7601 - Administration
From the U.S. Government Printing Office, www.gpo.gov

§7601. Administration

(a) Regulations; delegation of powers and duties; regional officers and employees

(1) The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter. The Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his powers and duties under this chapter, except the making of regulations subject to section 7607(d) of this title, as he may deem necessary or expedient.

(2) Not later than one year after August 7, 1977, the Administrator shall promulgate regulations establishing general applicable procedures and policies for regional officers and employees (including the Regional Administrator) to follow in carrying out a delegation under paragraph (1), if any. Such regulations shall be designed—

(A) to assure fairness and uniformity in the criteria, procedures, and policies applied by the various regions in implementing and enforcing the chapter;

(B) to assure at least an adequate quality audit of each State's performance and adherence to the requirements of this chapter in implementing and enforcing the chapter, particularly in the review of new sources and in enforcement of the chapter; and

(C) to provide a mechanism for identifying and standardizing inconsistent or varying criteria, procedures, and policies being employed by such officers and employees in implementing and enforcing the chapter.

(b) Detail of Environmental Protection Agency personnel to air pollution control agencies

Upon the request of an air pollution control agency, personnel of the Environmental Protection Agency may be detailed to such agency for the purpose of carrying out the provisions of this chapter.

(c) Payments under grants; installments; advances or reimbursements

Payments under grants made under this chapter may be made in installments, and in advance or by way of reimbursement, as may be determined by the Administrator.

(d) Tribal authority

(1) Subject to the provisions of paragraph (2), the Administrator—

(A) is authorized to treat Indian tribes as States under this chapter, except for purposes of the requirement that makes available for application by each State no less than one-half of 1 percent of annual appropriations under section 7405 of this title; and

(B) may provide any such Indian tribe grant and contract assistance to carry out functions provided by this chapter.

(2) The Administrator shall promulgate regulations within 18 months after November 15, 1990, specifying those provisions of this chapter for which it is appropriate to treat Indian tribes as States. Such treatment

shall be authorized only if—

(A) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(B) 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

(C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and all applicable regulations.

(3) The Administrator may promulgate regulations which establish the elements of tribal implementation plans and procedures for approval or disapproval of tribal implementation plans and portions thereof.

(4) In any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose.

(5) Until such time as the Administrator promulgates regulations pursuant to this subsection, the Administrator may continue to provide financial assistance to eligible Indian tribes under section 7405 of this title.

(July 14, 1955, ch. 360, title III, §301, formerly §8, as added Pub. L. 88–206, §1, Dec. 17, 1963, 77 Stat. 400, renumbered Pub. L. 89–272, title I, §101(4), Oct. 20, 1965, 79 Stat. 992; amended Pub. L. 90–148, §2, Nov. 21, 1967, 81 Stat. 504; Pub. L. 91–604, §§3(b)(2), 15(c)(2), Dec. 31, 1970, 84 Stat. 1677, 1713; Pub. L. 95–95, title III, §305(e), Aug. 7, 1977, 91 Stat. 776; Pub. L. 101–549, title I, §§107(d), 108(i), Nov. 15, 1990, 104 Stat. 2464, 2467.)

Codification

Section was formerly classified to section 1857g of this title.

Amendments

1990—Subsec. (a)(1). Pub. L. 101–549, §108(i), inserted "subject to section 7607(d) of this title" after "regulations".

Subsec. (d). Pub. L. 101–549, §107(d), added subsec. (d).

1977—Subsec. (a). Pub. L. 95–95 designated existing provisions as par. (1) and added par. (2).

1970—Subsec. (a). Pub. L. 91–604, §15(c)(2), substituted "Administrator" for "Secretary" and "Environmental Protection Agency" for "Department of Health, Education, and Welfare".

Subsec. (b). Pub. L. 91–604, §3(b)(2), substituted "Environmental Protection Agency" for "Public Health Service" and struck out provisions covering the payment of salaries and allowances.

Subsec. (c). Pub. L. 91–604, §15(c)(2), substituted "Administrator" for "Secretary".

1967—Pub. L. 90–148 reenacted section without change.

Effective Date of 1977 Amendment

Amendment by Pub. L. 95–95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as a note under section 7401 of this title.

Modification or Rescission of Rules, Regulations, Orders, Determinations, Contracts, Certifications, Authorizations, Delegations, and Other Actions

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95–95 [Aug. 7, 1977] to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95–95 [this chapter],

see section 406(b) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

Disadvantaged Business Concerns; Use of Quotas Prohibited

Title X of Pub. L. 101–549 provided that:

"SEC. 1001. DISADVANTAGED BUSINESS CONCERNS.

"(a) In General.—In providing for any research relating to the requirements of the amendments made by the Clean Air Act Amendments of 1990 [Pub. L. 101–549, see Tables for classification] which uses funds of the Environmental Protection Agency, the Administrator of the Environmental Protection Agency shall, to the extent practicable, require that not less than 10 percent of total Federal funding for such research will be made available to disadvantaged business concerns.

"(b) Definition.—

"(1)(A) For purposes of subsection (a), the term 'disadvantaged business concern' means a concern—

"(i) which is at least 51 percent owned by one or more socially and economically disadvantaged individuals or, in the case of a publicly traded company, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals; and

"(ii) the management and daily business operations of which are controlled by such individuals.

"(B)(i) A for-profit business concern is presumed to be a disadvantaged business concern for purposes of subsection (a) if it is at least 51 percent owned by, or in the case of a concern which is a publicly traded company at least 51 percent of the stock of the company is owned by, one or more individuals who are members of the following groups:

"(I) Black Americans.

"(II) Hispanic Americans.

"(III) Native Americans.

"(IV) Asian Americans.

"(V) Women.

"(VI) Disabled Americans.

"(ii) The presumption established by clause (i) may be rebutted with respect to a particular business concern if it is reasonably established that the individual or individuals referred to in that clause with respect to that business concern are not experiencing impediments to establishing or developing such concern as a result of the individual's identification as a member of a group specified in that clause.

"(C) The following institutions are presumed to be disadvantaged business concerns for purposes of subsection (a):

"(i) Historically black colleges and universities, and colleges and universities having a student body in which 40 percent of the students are Hispanic.

"(ii) Minority institutions (as that term is defined by the Secretary of Education pursuant to the General Education Provision Act (20 U.S.C. 1221 et seq.)).

"(iii) Private and voluntary organizations controlled by individuals who are socially and economically disadvantaged.

"(D) A joint venture may be considered to be a disadvantaged business concern under subsection (a), notwithstanding the size of such joint venture, if—

"(i) a party to the joint venture is a disadvantaged business concern; and

"(ii) that party owns at least 51 percent of the joint venture.

A person who is not an economically disadvantaged individual or a disadvantaged business concern, as a party to a joint venture, may not be a party to more than 2 awarded contracts in a fiscal year solely by reason of this subparagraph.

"(E) Nothing in this paragraph shall prohibit any member of a racial or ethnic group that is not listed in subparagraph (B)(i) from establishing that they have been impeded in establishing or developing a business concern as a result of racial or ethnic discrimination.

"Sec. 1002. Use of Quotas Prohibited.—Nothing in this title shall permit or require the use of quotas or a

requirement that has the effect of a quota in determining eligibility under section 1001."

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Title 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 85 - AIR POLLUTION PREVENTION AND CONTROL
SUBCHAPTER III - GENERAL PROVISIONS
Sec. 7607 - Administrative proceedings and judicial review
From the U.S. Government Printing Office, www.gpo.gov

§7607. Administrative proceedings and judicial review

(a) Administrative subpenas; confidentiality; witnesses

In connection with any determination under section 7410(f) of this title, or for purposes of obtaining information under section 7521(b)(4) [1] or 7545(c)(3) of this title, any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under the [2] chapter (including but not limited to section 7413, section 7414, section 7420, section 7429, section 7477, section 7524, section 7525, section 7542, section 7603, or section 7606 of this title),,[3] the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 7521(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subparagraph,[4] the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title,,[3] any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) [1] of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of

this title, or his action under section 1857c–10(e)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

(c) Additional evidence

In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to [5] the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(d) Rulemaking

(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(F) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV–A of this chapter (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II of this chapter,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV–A of this chapter (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person

raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

(e) Other methods of judicial review not authorized

Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

(f) Costs

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

(g) Stay, injunction, or similar relief in proceedings relating to noncompliance penalties

In any action respecting the promulgation of regulations under section 7420 of this title or the administration or enforcement of section 7420 of this title no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

(h) Public participation

It is the intent of Congress that, consistent with the policy of subchapter II of chapter 5 of title 5, the

Administrator in promulgating any regulation under this chapter, including a regulation subject to a deadline, shall ensure a reasonable period for public participation of at least 30 days, except as otherwise expressly provided in section [6] 7407(d), 7502(a), 7511(a) and (b), and 7512(a) and (b) of this title.

(July 14, 1955, ch. 360, title III, §307, as added Pub. L. 91–604, §12(a), Dec. 31, 1970, 84 Stat. 1707; amended Pub. L. 92–157, title III, §302(a), Nov. 18, 1971, 85 Stat. 464; Pub. L. 93–319, §6(c), June 22, 1974, 88 Stat. 259; Pub. L. 95–95, title III, §§303(d), 305(a), (c), (f)–(h), Aug. 7, 1977, 91 Stat. 772, 776, 777; Pub. L. 95–190, §14(a)(79), (80), Nov. 16, 1977, 91 Stat. 1404; Pub. L. 101–549, title I, §§108(p), 110(5), title III, §302(g), (h), title VII, §§702(c), 703, 706, 707(h), 710(b), Nov. 15, 1990, 104 Stat. 2469, 2470, 2574, 2681–2684.)

References in Text

Section 7521(b)(4) of this title, referred to in subsec. (a), was repealed by Pub. L. 101–549, title II, §230(2), Nov. 15, 1990, 104 Stat. 2529.

Section 7521(b)(5) of this title, referred to in subsec. (b)(1), was repealed by Pub. L. 101–549, title II, §230(3), Nov. 15, 1990, 104 Stat. 2529.

Section 1857c–10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977), referred to in subsec. (b)(1), was in the original "section 119(c)(2)(A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977)", meaning section 119 of act July 14, 1955, ch. 360, title I, as added June 22, 1974, Pub. L. 93–319, §3, 88 Stat. 248, (which was classified to section 1857c–10 of this title) as in effect prior to the enactment of Pub. L. 95–95, Aug. 7, 1977, 91 Stat. 691, effective Aug. 7, 1977. Section 112(b)(1) of Pub. L. 95–95 repealed section 119 of act July 14, 1955, ch. 360, title I, as added by Pub. L. 93–319, and provided that all references to such section 119 in any subsequent enactment which supersedes Pub. L. 93–319 shall be construed to refer to section 113(d) of the Clean Air Act and to paragraph (5) thereof in particular which is classified to subsec. (d)(5) of section 7413 of this title. Section 7413(d) of this title was subsequently amended generally by Pub. L. 101–549, title VII, §701, Nov. 15, 1990, 104 Stat. 2672, and, as so amended, no longer relates to final compliance orders. Section 117(b) of Pub. L. 95–95 added a new section 119 of act July 14, 1955, which is classified to section 7419 of this title.

Part C of subchapter I of this chapter, referred to in subsec. (d)(1)(J), was in the original "subtitle C of title I", and was translated as reading "part C of title I" to reflect the probable intent of Congress, because title I does not contain subtitles.

Codification

In subsec. (h), "subchapter II of chapter 5 of title 5" was substituted for "the Administrative Procedures Act" on authority of Pub. L. 89–554, §7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

Section was formerly classified to section 1857h–5 of this title.

Prior Provisions

A prior section 307 of act July 14, 1955, was renumbered section 314 by Pub. L. 91–604 and is classified to section 7614 of this title.

Another prior section 307 of act July 14, 1955, ch. 360, title III, formerly §14, as added Dec. 17, 1963, Pub. L. 88–206, §1, 77 Stat. 401, was renumbered section 307 by Pub. L. 89–272, renumbered section 310 by Pub. L. 90–148, and renumbered section 317 by Pub. L. 91–604, and is set out as a Short Title note under section 7401 of this title.

Amendments

1990—Subsec. (a). Pub. L. 101–549, §703, struck out par. (1) designation at beginning, inserted provisions authorizing issuance of subpoenas and administration of oaths for purposes of investigations, monitoring, reporting requirements, entries, compliance inspections, or administrative enforcement proceedings under this chapter, and struck out "or section 7521(b)(5)" after "section 7410(f)".

Subsec. (b)(1). Pub. L. 101–549, §706(2), which directed amendment of second sentence by striking "under section 7413(d) of this title" immediately before "under section 7419 of this title", was executed by striking "under section 7413(d) of this title," before "under section 7419 of this title", to reflect the probable intent of Congress.

Pub. L. 101–549, §706(1), inserted at end: "The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action."

Pub. L. 101–549, §702(c), inserted "or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title," before "or any other final action of the Administrator".

Pub. L. 101–549, §302(g), substituted "section 7412" for "section 7412(c)".

Subsec. (b)(2). Pub. L. 101–549, §707(h), inserted sentence at end authorizing challenge to deferrals of performance of nondiscretionary statutory actions.

Subsec. (d)(1)(C). Pub. L. 101–549, §110(5)(A), amended subpar. (C) generally. Prior to amendment, subpar. (C) read as follows: "the promulgation or revision of any standard of performance under section 7411 of this title or emission standard under section 7412 of this title,".

Subsec. (d)(1)(D), (E). Pub. L. 101–549, §302(h), added subpar. (D) and redesignated former subpar. (D) as (E). Former subpar. (E) redesignated (F).

Subsec. (d)(1)(F). Pub. L. 101–549, §302(h), redesignated subpar. (E) as (F). Former subpar. (F) redesignated (G).

Pub. L. 101–549, §110(5)(B), amended subpar. (F) generally. Prior to amendment, subpar. (F) read as follows: "promulgation or revision of regulations pertaining to orders for coal conversion under section 7413(d)(5) of this title (but not including orders granting or denying any such orders),".

Subsec. (d)(1)(G), (H). Pub. L. 101–549, §302(h), redesignated subpars. (F) and (G) as (G) and (H), respectively. Former subpar. (H) redesignated (I).

Subsec. (d)(1)(I). Pub. L. 101–549, §710(b), which directed that subpar. (H) be amended by substituting "subchapter VI of this chapter" for "part B of subchapter I of this chapter", was executed by making the substitution in subpar. (I), to reflect the probable intent of Congress and the intervening redesignation of subpar. (H) as (I) by Pub. L. 101–549, §302(h), see below.

Pub. L. 101–549, §302(h), redesignated subpar. (H) as (I). Former subpar. (I) redesignated (J).

Subsec. (d)(1)(J) to (M). Pub. L. 101–549, §302(h), redesignated subpars. (I) to (L) as (J) to (M), respectively. Former subpar. (M) redesignated (N).

Subsec. (d)(1)(N). Pub. L. 101–549, §302(h), redesignated subpar. (M) as (N). Former subpar. (N) redesignated (O).

Pub. L. 101–549, §110(5)(C), added subpar. (N) and redesignated former subpar. (N) as (U).

Subsec. (d)(1)(O) to (T). Pub. L. 101–549, §302(h), redesignated subpars. (N) to (S) as (O) to (T), respectively. Former subpar. (T) redesignated (U).

Pub. L. 101–549, §110(5)(C), added subpars. (O) to (T).

Subsec. (d)(1)(U). Pub. L. 101–549, §302(h), redesignated subpar. (T) as (U). Former subpar. (U) redesignated (V).

Pub. L. 101–549, §110(5)(C), redesignated former subpar. (N) as (U).

Subsec. (d)(1)(V). Pub. L. 101–549, §302(h), redesignated subpar. (U) as (V).

Subsec. (h). Pub. L. 101–549, §108(p), added subsec. (h).

1977—Subsec. (b)(1). Pub. L. 95–190 in text relating to filing of petitions for review in the United States Court of Appeals for the District of Columbia inserted provision respecting requirements under sections 7411 and 7412 of this title, and substituted provisions authorizing review of any rule issued under section 7413, 7419, or 7420 of this title, for provisions authorizing review of any rule or order issued under section 7420 of this title, relating to noncompliance penalties, and in text relating to filing of petitions for review in the United States Court of Appeals for the appropriate circuit inserted provision respecting review under section 7411(j), 7412(c), 7413(d), or 7419 of this title, provision authorizing review under section 1857c–10(c)(2)(A), (B), or (C) to the

period prior to Aug. 7, 1977, and provisions authorizing review of denials or disapprovals by the Administrator under subchapter I of this chapter.

Pub. L. 95–95, §305(c), (h), inserted rules or orders issued under section 7420 of this title (relating to noncompliance penalties) and any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter to the enumeration of actions of the Administrator for which a petition for review may be filed only in the United States Court of Appeals for the District of Columbia, added the approval or promulgation by the Administrator of orders under section 7420 of this title, or any other final action of the Administrator under this chapter which is locally or regionally applicable to the enumeration of actions by the Administrator for which a petition for review may be filed only in the United States Court of Appeals for the appropriate circuit, inserted provision that petitions otherwise capable of being filed in the Court of Appeals for the appropriate circuit may be filed only in the Court of Appeals for the District of Columbia if the action is based on a determination of nationwide scope, and increased from 30 days to 60 days the period during which the petition must be filed.

Subsec. (d). Pub. L. 95–95, §305(a), added subsec. (d).

Subsec. (e). Pub. L. 95–95, §303(d), added subsec. (e).

Subsec. (f). Pub. L. 95–95, §305(f), added subsec. (f).

Subsec. (g). Pub. L. 95–95, §305(g), added subsec. (g).

1974—Subsec. (b)(1). Pub. L. 93–319 inserted reference to the Administrator's action under section 1857c–10(c)(2)(A), (B), or (C) of this title or under regulations thereunder and substituted reference to the filing of a petition within 30 days from the date of promulgation, approval, or action for reference to the filing of a petition within 30 days from the date of promulgation or approval.

1971—Subsec. (a)(1). Pub. L. 92–157 substituted reference to section "7545(c)(3)" for "7545(c)(4)" of this title.

Effective Date of 1977 Amendment

Amendment by Pub. L. 95–95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as a note under section 7401 of this title.

Termination of Advisory Committees

Advisory committees established after Jan. 5, 1973, to terminate not later than the expiration of the 2-year period beginning on the date of their establishment, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a committee established by the Congress, its duration is otherwise provided for by law. See section 14 of Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 776, set out in the Appendix to Title 5, Government Organization and Employees.

Pending Actions and Proceedings

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95–95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95–95, see section 406(a) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

Modification or Rescission of Rules, Regulations, Orders, Determinations, Contracts, Certifications, Authorizations, Delegations, and Other Actions

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95–95 [Aug. 7, 1977] to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95–95 [this chapter], see section 406(b) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

[1] *See References in Text note below.*

[2] *So in original. Probably should be "this".*

[3] *So in original.*

[4] *So in original. Probably should be "subsection,".*

[5] *So in original. The word "to" probably should not appear.*

[6] *So in original. Probably should be "sections".*

Code of Federal Regulations

Title 40 - Protection of Environment

Volume: 1
Date: 2011-07-01
Original Date: 2011-07-01
Title: Section 49.4 - Clean Air Act provisions for which it is not appropriate to treat tribes in the same manner as States.
Context: Title 40 - Protection of Environment. CHAPTER I - ENVIRONMENTAL PROTECTION AGENCY. SUBCHAPTER B - GRANTS AND OTHER FEDERAL ASSISTANCE. PART 49 - INDIAN COUNTRY: AIR QUALITY PLANNING AND MANAGEMENT. Subpart A - Tribal Authority.

§ 49.4 Clean Air Act provisions for which it is not appropriate to treat tribes in the same manner as States.

Tribes will not be treated as States with respect to the following provisions of the Clean Air Act and any implementing regulations thereunder:

(a) Specific plan submittal and implementation deadlines for NAAQS-related requirements, including but not limited to such deadlines in sections 110(a)(1), 172(a)(2), 182, 187, 189, and 191 of the Act.

(b) The specific deadlines associated with the review and revision of implementation plans related to major fuel burning sources in section 124 of the Act.

(c) The mandatory imposition of sanctions under section 179 of the Act because of a failure to submit an implementation plan or required plan element by a specific deadline, or the submittal of an incomplete or disapproved plan or element.

(d) The provisions of section 110(c)(1) of the Act.

(e) Specific visibility implementation plan submittal deadlines established under section 169A of the Act.

(f) Specific implementation plan submittal deadlines related to interstate commissions under sections 169B(e)(2), 184(b)(1) and (c)(5) of the Act. For eligible tribes participating as members of such commissions, the Administrator shall establish those submittal deadlines that are determined to be practicable or, as with other non-participating tribes in an affected transport region, provide for Federal implementation of necessary measures.

(g) Any provisions of the Act requiring as a condition of program approval the demonstration of criminal enforcement authority or any provisions of the Act providing for the delegation of such criminal enforcement authority. Tribes seeking approval of a Clean Air Act program requiring such demonstration may receive program approval if they meet the requirements of § 49.8.

(h) The specific deadline for the submittal of operating permit programs in section 502(d)(1) of the Act.

(i) The mandatory imposition of sanctions under section 502(d)(2)(B) because of failure to submit an operating permit program or EPA disapproval of an operating permit program submittal in whole or part.

(j) The “2 years after the date required for submission of such a program under paragraph (1)” provision in section 502(d)(3) of the Act.

(k) Section 502(g) of the Act, which authorizes a limited interim approval of an operating permit program that substantially meets the requirements of Title V, but is not fully approvable.

(l) The provisions of section 503(c) of the Act that direct permitting authorities to establish a phased schedule assuring that at least one-third of the permit applications submitted within the first full year

after the effective date of an operating permit program (or a partial or interim program) will be acted on by the permitting authority over a period not to exceed three years after the effective date.

(m) The provisions of section 507(a) of the Act that specify a deadline for the submittal of plans for establishing a small business stationary source technical and environmental compliance assistance program.

(n) The provisions of section 507(e) of the Act that direct the establishment of a Compliance Advisory Panel.

(o) The provisions of section 304 of the Act that, read together with section 302(e) of the Act, authorize any person who provides the minimum required advance notice to bring certain civil actions in the Federal district courts against States in their capacity as States.

(p) The provisions of section 502(b)(6) of the Act that require that review of a final permit action under the Title V permitting program be “judicial” and “in State court,” and the provisions of section 502(b)(7) of the Act that require that review of a failure on the part of the permitting authority to act on permit applications or renewals by the time periods specified in section 503 of the Act be “judicial” and “in State court.”

(q) The provision of section 105(a)(1) that limits the maximum Federal share for grants to pollution control agencies to three-fifths of the cost of implementing programs for the prevention and control of air pollution or implementation of national primary and secondary ambient air quality standards.

Code of Federal Regulations

Title 40 - Protection of Environment

Volume: 1
Date: 2011-07-01
Original Date: 2011-07-01
Title: Section 49.11 - Actions under section 301(d)(4) authority.
Context: Title 40 - Protection of Environment. CHAPTER I - ENVIRONMENTAL PROTECTION AGENCY. SUBCHAPTER B - GRANTS AND OTHER FEDERAL ASSISTANCE. PART 49 - INDIAN COUNTRY: AIR QUALITY PLANNING AND MANAGEMENT. Subpart A - Tribal Authority.

§ 49.11 Actions under section 301(d)(4) authority.

Notwithstanding any determination made on the basis of authorities granted the Administrator under any other provision of this section, the Administrator, pursuant to the discretionary authority explicitly granted to the Administrator under sections 301(a) and 301(d)(4):

(a) Shall promulgate without unreasonable delay such Federal implementation plan provisions as are necessary or appropriate to protect air quality, consistent with the provisions of sections 304(a) and 301(d)(4), if a tribe does not submit a tribal implementation plan meeting the completeness criteria of 40 CFR part 51, appendix V, or does not receive EPA approval of a submitted tribal implementation plan.

(b) May provide up to 95 percent of the cost of implementing programs for the prevention and control of air pollution or implementation of national primary and secondary ambient air quality standards. After two years from the date of each tribe's initial grant award, the maximum Federal share will be reduced to 90 percent, as long as the Regional Administrator determines that the tribe meets certain economic indicators that would provide an objective assessment of the tribe's ability to increase its share. The Regional Administrator may increase the maximum Federal share to 100 percent if the tribe can demonstrate in writing to the satisfaction of the Regional Administrator that fiscal circumstances within the tribe are constrained to such an extent that fulfilling the match would impose undue hardship.

Calendar No. 427

101ST CONGRESS *1st Session* | SENATE | REPORT 101-228

CLEAN AIR ACT AMENDMENTS OF 1989

REPORT

OF THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

together with

ADDITIONAL AND MINORITY VIEWS

TO ACCOMPANY

S. 1630

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ments should apply to vessel emissions occurring while at the OCS source, or when enroute to or from the OCS source and to or from the corresponding onshore area.

This legislation provides EPA, the Federal agency experienced and knowledgeable in air quality regulation, up to twelve months to establish regulations to implement section 327. These regulations should address administrative procedures, including fees, necessary for EPA to implement section 327 in areas where delegation to a State or local agency has not occurred. For all substantive air quality requirements, EPA should not write a unique set of requirements for the OCS but should adopt by reference the same requirements for emission controls, offsets, permitting, monitoring, reporting, and enforcement, as would apply if the OCS source was located in the corresponding onshore area. The regulations should also specify the procedures to be followed by the Administrator in determining under what circumstances the more stringent requirements of another onshore area should apply, rather than the requirements of the closest onshore area. Such procedures should consider those factors specified in subsection (b)(2), and should apply whether or not EPA has delegated authority to a State or local air regulatory agency.

This legislation transfers the responsibility for OCS air regulation from the Interior Department to the Environmental Protection Agency (EPA), in order to ensure consistent implementation of air quality laws and regulations for both onshore and offshore sources. It is also expected that EPA will delegate the authority to implement section 327 to the agency which has been delegated authority under the Act to regulate air pollution in the corresponding onshore area, whether that agency is a State or local air regulatory agency. EPA should delegate such authority expeditiously following receipt of a written petition requesting delegation from an onshore air regulatory agency. EPA should not withhold such delegation unless EPA finds that the onshore air regulatory agency's procedures are inadequate to meet the requirements of this Act.

This legislation is intended to supersede any inconsistent authorities, including, but not limited to, section 5(a)(8) of the Outer Continental Shlef Lands Act (OCSLA) (43 U.S.C. 1334(a)(8)). It is intended that the requirements of section 5(a)(8) will remain in effect until the requirements of section 327 apply. This legislation eliminates the requirements under section 5(a)(8) which have been interpreted by the Department of the Interior to require air pollution regulation only when the agency has proven that an individual OCS facility will cause a significant adverse impact on onshore air quality.

INDIAN TRIBES (SECTION 112)

SUMMARY

The bill adds a new section 328 to the Act authorizing the Administrator to treat tribes as States under the Act. Within eithteen months of enactment the Administrator is to promulgate regulations specifying for which provisions of the Act it is appropriate to treat Indian tribes as States. Tribes may be treated as States only if the tribe is recognized by the Secretary of Interior and has a gov-

erning body carrying out substantial government duties; the functions under the Act to be carried out by the tribe are within the tribal government's jurisdiction; and the tribe is, in the Administrator's judgment, capable of carrying out the functions it is authorized to exercise. Tribes shall not be treated as states for the purposes of being assured of receiving at least one half of one percent of grants awarded under section 105 of the Act. For provisions of the Act where treatment of tribes as States is not feasible, the Administrator is authorized to include other means for administering those provisions.

DISCUSSION

The purpose of new section 238 of the Act is to improve the environmental quality of the air witin Indian country in a manner consistent with the EPA Indian Policy and "the overall Federal position in support of Tribal self-government and the government-to-government relations between Federal and Tribal Governments," as stated in the document *EPA Policy for the Administration of Environmental Programs on Indian Reservations*, Nov. 8, 1984.

Congress amended the Act in 1977 to authorize Indian tribes to redesignate their reservations for prevention of significant deterioration purposes, but did not address air quality planning or enforcement authority for Indian tribes in those amendments. The amendments in the bill are necessary to ensure that tribes will be allowed to participate fully in programs established by the Act as they take affirmative measures to manage, regulate, and protect air quality.

These amendments are intended to provide Indian tribes the same opportunity to assume primary planning, implementation and enforcement responsbilities for programs under the Act as they are presently accorded under the Safe Drinking Water Act and Clean Water Act. Subsection 328(a) authorizes the Administrator to treat Indian tribes as States and to provide grant and contract assistance to tribes to carry out functions provided by the Act. Thus, new section 328(a) of the Act constitutes an express delegation of power to Indian tribes to administer and enforce the Clean Air Act in Indian lands, as Indian tribes were delegated the power to administer and enforce the Safe Drinking Water Act and Clean Water Act. *See Brendale* v. *Confederated Yakima Indian Nation, U.S.*, 109 S.Ct. 2994, 3006-3007 (1989).

Subsection (b)(1) of section 328 requires the Administrator to promulgate final regulations within eighteen months of the enactment of the bill specifying the criteria that must be met for Indian tribes to be treated as States. Subsection (b)(1) establishes the following three criteria for treating Indian tribes as states:

(1) the Indian tribe must be federally-recognized and have a governing body carrying out substantial duties and powers;

(2) the functions to be exercised by the Indian tribe are to be carried out on the tribe's reservation or otherwise within the area of the tribal government's jurisdiction; and

(3) the Indian tribe must reasonably be expected, in the Administrator's judgment, to be capable of carrying out the func-

tions to be exercised in a manner consistent with the terms and purposes of the Act and all applicable regulations.

Subsection 328(b) (2) incorporates language from the tribal amendments to the Safe Drinking Water Act regarding provisions of the Act where the treatment of an Indian tribe as a State is inappropriate, administratively infeasible, or otherwise inconsistent with purposes of the Act. This subsection authorizes the Administrator to include in the regulations other means for the Agency to administer directly such provision to achieve the purposes of such provisions. This provision also confirms the Agency's obligation and responsibility to enforce the Act in Indian Country should a tribal government choose not to assume primary enforcement responsibility. Additionally, the subsection provides that an Indian tribe may not assume primary enforcement responsibility for a program under the Act in a manner less protective of public health than similar State programs. Because Indian tribes lack criminal jurisdiction over non-Indians, however, the provision states that Indian tribes are not required to exercise criminal jurisdiction to comply. Criminal sanctions against violators are to be sought by the Agency itself, consistent with the Federal government's general authority in Indian Country.

Miscellaneous and Conforming Amendments (Section 113)

SUMMARY

The bill amends section 106 of the Act to provide that regional ozone transport commissions are eligible for financial assistance under that section.

This section also directs the Administrator, in a free-standing provision of the bill, to analyze the accuracy of the Industrial Source Complex (ISC) Model as applied to surface coal mines and make any necessary revisions before using the model to determine the effects of mines on air quality for the purpose of new source review or of demonstrating compliance with national ambient air quality standards for particulate matter applicable to periods of 24 hours or less.

DISCUSSION

The amendment directs the Administrator to develop new or revised modelling techniques, including emission factors, for use in determining the prospective fugitive dust emissions from surface coal mines. The current model—the Industrial Source Complex (ISC) Model—is more suitable for multiple point sources such as smokestacks but does not lend itself to use in determining fugitive emissions from surface coal mines which include several sources moving within the perimeter of the mining area. As a result, studies and actual practice have indicated that the ISC model may overpredict fugitive dust emissions, especially for the short-term (24-hour) standard.

To counter this problem, some States have been requiring use of the ISC model to determine compliance with the annual standard for fugitive dust emissions from new or modified surface coal mines

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Part 1

CLEAN AIR ACT AMENDMENTS OF 1990

REPORT

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U.S. HOUSE OF REPRESENTATIVES

ON

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together with

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after enactment of the bill need to submit a new plan within 18 months of the designation. Such plans must demonstrate attainment within five years of the designation. Areas that are currently designated nonattainment for SO_2 or NO_2 but which never received full approval of their SIPs under the current law have to submit corrective SIPs within 18 months of enactment showing attainment within five years of enactment.

Attainment dates.—Under section 192, areas that have approved SIPs but have received (or in the future receive) SIP calls for one of these pollutants must provide for attainment within five years of the date of the SIP call.

Section 107. Provisions related to Indian tribes

Section 107 includes a series of provisions authorizing the Administrator to treat Indian tribes as States for certain purposes, including, under certain circumstances, allowing tribes to develop implementation plans and receive grants.

Authority to treat tribes as States.—Under Section 301 the Administrator is authorized to treat tribes as States for Clean Air Act purposes and for providing financial assistance (although tribes are not entitled to the minimum of one-half of one percent of annual appropriations to which States are entitled under Section 105). EPA must promulgate regulations outlining the circumstances under which treatment as a State is appropriate for tribes and procedures for approving tribal implementation plans. If treatment as a State is inappropriate, the Administrator may devise other means of administering the Clean Air Act on reservations. The receipt of grants is not contingent on the promulgation of regulations so that, until EPA promulgates regulations, EPA may continue to give grants to tribes.

Grant eligibility.—Clean Air Act Section 105(a)(1)(B) provides that tribes are eligible to receive air grants by including tribal air pollution control agencies in the list of agencies eligible to receive grants. At his discretion, the Administrator may decide which of the eligible tribes shall receive grants.

Definition of "Air Pollution Control Agency".—Clean Air Act Section 302(b) broadens the definition of air pollution control agencies to include those of Indian tribes.

Tribal implementation plans.—New section 110(t) provides that tribal implementation plans are to be reviewed in the same manner as SIPs. When plans become effective, they shall apply within the exterior borders of the reservation.

Section 108. Miscellaneous provisions

Section 108 includes a number of miscellaneous amendments to Title I of the CAA, including, among others, the following:

Transportation guidance.—Section 108(a) provides that within nine months and periodically thereafter the Administrator, after consultation with the Secretary of Transportation and State and local officials, is to update the transportation-air quality planning guidelines issued in 1978, at the start of the initial Part D planning process. Within one year the Administrator is required to publish guidance on 15 listed transportation controls.

federal register

Thursday
August 25, 1994

Part III

Environmental Protection Agency

40 CFR Parts 35, 49, 50 and 81
Indian Tribes: Air Quality Planning and Management; Proposed Rule

Based on recent Supreme Court case law, EPA has construed the term "reservation" to incorporate trust land that has been validly set apart for use by a Tribe, even though that land has not been formally designated as a "reservation." *See* 56 FR at 64,881 (Dec. 12, 1991); see also *Oklahoma Tax Commission* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 111 S.Ct. 905, 910 (1991). EPA will be guided by relevant case law in interpreting the scope of "reservation" under the CAA.

Section 301(d)(2)(B) of the CAA also provides that a Tribe may be treated in the same manner as a State for functions regarding air resources "within the exterior boundaries of the reservation or *other areas within the tribe's jurisdiction*" (emphasis added). The emphasized language envisions potential Tribal jurisdiction under the CAA over areas that lie outside the exterior boundaries of a reservation, upon a fact-based showing of a Tribe's inherent authority over sources located on such lands. Thus, this provision authorizes an eligible Tribe to develop and implement Tribal air quality programs on off-reservation lands that are determined to be within the Tribe's inherent jurisdiction. Accordingly, for purposes of this rule, EPA proposes to conclude that an eligible Tribe may be able to implement its air quality programs on off-reservation lands up to the limits of "Indian country," as defined in 18 U.S.C. section 1151, provided the Tribe can adequately demonstrate authority to regulate air quality on the off-reservation lands in question under general principles of Indian law.

In sum, EPA is proposing to interpret the CAA as granting approved Tribes regulatory authority over all air resources within the exterior boundaries of their reservations. Thus, no independent fact-based showing of inherent Tribal jurisdiction will be required for air resources located within such reservation boundaries. EPA recognizes that "other" off-reservation areas may fall within Tribal jurisdiction. EPA is proposing to interpret the CAA as providing no blanket grant of Federal authority for such areas. Thus, for off-reservation areas, a Tribe must demonstrate that it has inherent authority over sources it seeks to regulate under general principles of Indian law.

B. Federal Authority and Protection of Tribal Air Resources

The CAA authorizes EPA to protect air quality throughout Indian country. EPA intends to use this authority to remedy and prevent gaps in CAA protection for Tribal air resources. EPA's authority to provide this CAA protection is based in part on the general purpose of the Act, which is national in scope. As stated in section 101(b)(1) of the Act, Congress intended to "protect and enhance the quality of the *Nation's* air resources so as to promote the *public* health and welfare and the productive capacity of its *population*" (emphasis added). It seems clear that Congress intended for the CAA to be a "general statute applying to all persons to include Indians and their property interests." *Phillips Petroleum Co.* v. *United States E.P.A.*, 803 F.2d 545, 556 (10th Cir. 1986) (holding that the Safe Drinking Water Act applied to Indian Tribes and lands by virtue of being a nationally applicable statute; see generally *id.* at 553–58).

Section 301(a) of the Act delegates to EPA broad authority to issue such regulations as are necessary to carry out the functions of the Act. Further, several provisions of the Act call for Federal issuance of a program where, for example, a State fails to adopt a program, adopts an inadequate program or fails to adequately implement a required program. *E.g.*, sections 110(c) and 502 (d), (e), (i) of the Act. It follows that Congress intended that EPA would similarly have broad legal authority in instances when Tribes choose not to develop a program, fail to adopt an adequate program or fail to adequately implement an air program authorized under section 301(d). In addition, section 301(d)(4) of the CAA empowers the Administrator to directly administer CAA requirements so as to achieve the appropriate purpose, where Tribal implementation of CAA requirements is inappropriate or administratively infeasible. These provisions evince Congressional intent to authorize EPA to directly implement CAA programs where Tribes fail to submit approvable programs or lack authority to do so.

In fact, EPA is currently providing Federal support for CAA protection within reservations. For example, EPA administers the permit program governing review of proposed new and modified major stationary sources of air pollution ("new source review" or "NSR") on Reservations and other areas in Indian country (hereafter "Tribal lands"). There are several reasons for this emphasis in the exercise of EPA's authority.

Many Tribal lands have air quality that presently meets the national ambient air quality standards ("NAAQS"), and the central concern is to prevent the relatively clean air from significantly deteriorating. Thus, EPA has ensured that major sources seeking to locate on Tribal lands obtain the Prevention of Significant Deterioration ("PSD") permit required under the CAA's NSR program. In broad overview, this program imposes limitations on the ambient air quality impact of new or modified major stationary sources and requires the application of best available control technology on such sources. See section 165 of the Act. Similarly, in those circumstances where the air quality on Tribal lands currently is worse than the NAAQS, EPA's administration of the nonattainment NSR program prevents the air quality from further deteriorating by ensuring that a proposed major source implements the most stringent control technology (the "lowest achievable emission rate" as defined in section 171(3)) and offsets its emissions by obtaining emissions reductions from nearby sources. Section 173 of the Act.

Owners and operators that construct air pollution sources on Tribal lands without first obtaining the proper permit from EPA expose themselves to Federal enforcement action and citizen suits. For example, section 165 of the Act, 42 U.S.C. 7475, prohibits the construction of a major emitting facility that does not have a PSD permit. Section 173, 42 U.S.C. 7503, contains a similar requirement for new and modified major stationary sources in nonattainment areas. Sections 113 and 167, 42 U.S.C. 7413 & 7467, authorize EPA to take enforcement action (including, in certain instances, criminal action) against an owner or operator that is in violation of the requirement to obtain a preconstruction permit that meets the requirements of the Act. Furthermore, section 304 of the Act, 42 U.S.C. 7604, authorizes any person to bring a "citizen suit" in U.S. district court against an owner or operator who constructs any new or modified major stationary source without a PSD permit or nonattainment NSR permit that meets the Act's requirements.

EPA also currently provides technical and financial support to Tribes that have initiated the process of developing Tribal air programs. For example, some EPA Regional Offices are currently providing such assistance to Tribes that have air quality that is worse than the NAAQS. The objective is to assist the

Confederated Tribes and Bands of the Yakima Indian Nation, 112 S.Ct. 683, 693 (1992). In addition, statutes should be interpreted so as to comport with tribal sovereignty and the federal policy of encouraging tribal independence. See *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue of New Mexico*, 458 U.S. 832, 846 (1982).

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9, 35, 49, 50, and 81

[OAR–FRL–5964–2]

RIN 2060–AF79

Indian Tribes: Air Quality Planning and Management

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Clean Air Act (CAA) directs EPA to promulgate regulations specifying those provisions of the Act for which it is appropriate to treat Indian tribes in the same manner as states. For those provisions specified, a tribe may develop and implement one or more of its own air quality programs under the Act. This final rule sets forth the CAA provisions for which it is appropriate to treat Indian tribes in the same manner as states, establishes the requirements that Indian tribes must meet if they choose to seek such treatment, and provides for awards of federal financial assistance to tribes to address air quality problems.

EFFECTIVE DATE: March 16, 1998.

FOR FURTHER INFORMATION CONTACT: David R. LaRoche, Office of Air and Radiation (OAR 6102), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington D.C. 20460 at (202) 260–7652.

SUPPLEMENTARY INFORMATION: Supporting information used in developing the final rule is contained in Docket No. A–93–3087. The docket is available for public inspection and copying between 8:30 a.m. and 3:30 p.m. Monday through Friday, at EPA's Air Docket, Room M–1500, Waterside Mall, 401 M Street SW, Washington, D.C. 20460. A reasonable fee may be charged for copying.

This preamble is organized according to the following outline:

I. Background of the Final Rule

Summary of Issues Raised by the Proposal

EPA proposed rules on August 25, 1994 (59 FR 43956) to implement section 301(d) of the Act. The proposal elicited many comments from state and tribal officials, private industry, and the general public. A total of 69 comments were received, of which 44 were from tribes or tribal representatives; 13 from state and local governments or associations; 10 from industry (primarily utilities and mining); and, 1 from Department of Energy (DOE) and 1 from an environmental interest group in Southern California. The tribes and several other commenters generally express support for the proposed rule and the delegation of CAA authority to eligible tribes to manage reservation air resources. Tribes especially urge EPA to expedite the finalization of this rule to enable tribes to begin to implement their air quality management programs and encourage EPA to recognize that the development of tribal air programs will be an evolving process requiring both time and significant assistance from EPA.

Most of the tribal commenters express concern with the inclusion of the citizen suit provisions which, they believed, effected a waiver of their sovereign immunity; they recommend that this provision be deleted in the final rule. This is a major issue for tribes. State and local government and industry commenters are primarily concerned that the proposed rule would create an unworkable scheme for implementing tribal air quality programs, and many of these commenters question the scope of tribal regulatory jurisdiction.

Responses to many of the comments related to issues of jurisdiction and sovereign immunity are included in sections II.A and II.B in the analysis of comments below. Responses to comments on the issues raised concerning federal implementation in Indian country are addressed in sections II.C and II.D of this document. All other comments are addressed in a document entitled ''response to comments'' that can be found in the docket for this rule cited above.

II. Analysis of Major Issues Raised by Commenters

A. Jurisdiction

1. Delegation of CAA Authority to Tribes

It is a settled point of law that Congress may, by statute, expressly delegate federal authority to a tribe. *United States* v. *Mazurie*, 419 U.S. 544, 554 (1975). *See also South Dakota* v. *Bourland*, 113 S. Ct. 2309, 2319–20 (1993); *Brendale* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 426–28 (1989) (White, J., for four Justice plurality). Such a delegation or grant of authority can provide a federal statutory source of tribal authority over designated areas, whether or not the tribe's inherent authority would extend to all such areas. In the August 25, 1994 proposed tribal authority rule, EPA set forth its interpretation that the CAA is a delegation of federal authority, to tribes approved by EPA to administer CAA programs in the same manner as states, over all air resources within the exterior boundaries of a reservation for such programs. Today, EPA is finalizing this approach. This grant of authority by Congress enables eligible tribes to address conduct relating to air quality on all lands, including non-Indian-owned fee lands, within the exterior boundaries of a reservation.

EPA's position that the CAA constitutes a statutory grant of jurisdictional authority to tribes is consistent with the language of the Act, which authorizes EPA to treat a tribe in the same manner as a state for the regulation of ''air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction.'' CAA section 301(d)(2)(B). EPA believes that this statutory provision, viewed within the overall framework of the CAA, establishes a territorial view of tribal jurisdiction and authorizes a tribal role for all air resources within the exterior boundaries of Indian reservations without distinguishing among various categories of on-reservation land. *See also* CAA sections 110(o), 164(c).

In light of the statutory language and the overall statutory scheme, EPA is exercising the rulemaking authority entrusted to it by Congress to implement the CAA provisions granting approved tribes authority over all air resources within the exterior boundaries of a reservation. *See generally Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 842–45 (1984). This interpretation of the CAA as generally delegating such authority to approved tribes is also supported by the legislative history, which provides additional evidence of Congressional intention regarding this issue. See S. Rep. No. 228, 101st Cong., 1st Sess. 79 (1989) (''the Act constitutes an express delegation of power to Indian tribes to administer and enforce the Clean Air Act in Indian lands'' (citation to *Brendale* omitted)) (hereinafter

may implement its air quality programs in non-reservation areas under its jurisdiction, generally including all non-reservation areas of Indian country. One tribal commenter asserts that the ''Indian country'' standard is the standard consistently used by courts in determining a tribe's jurisdiction.

(b) Request for Clarification. Several commenters request that EPA clarify what is meant by the phrase ''other areas within a Tribe's jurisdiction.'' Some commenters state that this phrase must be clarified to avoid conflicts between states and tribes in interpreting their own jurisdiction and uncertainty for regulated sources. One commenter urges EPA to develop published criteria by which the Agency will decide whether a tribe may develop and implement a CAA program in areas outside the exterior boundaries of a reservation. Some commenters also request that EPA clarify what is meant by ''Indian country.''

EPA notes that the phrase ''other areas within the tribe's jurisdiction'' contained in CAA section 301(d)(2)(B) and 40 CFR 49.6 is meant to include all non-reservation areas over which a tribe can demonstrate authority, generally including all non-reservation areas of Indian country. As noted above, it is EPA's interpretation that Congress has not delegated authority to otherwise eligible tribes to implement CAA programs over non-reservation areas as it has done for reservation areas. Rather, a tribe seeking to implement a CAA program over non-reservation areas may do so only if it has authority over such areas under general principles of federal Indian law.

EPA notes that the definition of ''Indian country'' contained in 18 U.S.C. section 1151, while it appears in a criminal code, provides the general parameters under federal Indian law of the areas over which a tribe may have jurisdiction, including civil judicial and regulatory jurisdiction. *See DeCoteau* v. *District County Court*, 420 U.S. 425, 427 n. 2 (1975). EPA acknowledges that there may be controversy over whether a particular non-reservation area is within a tribe's jurisdiction. However, EPA believes that these questions should be addressed on a case-by-case basis in the context of particular tribal applications. EPA has established a process under section 49.9 for appropriate governmental entities to comment on assertions of authority in individual tribal applications. More discussion of the parameters of ''Indian country'' is provided in the detailed response to comment document.

Some tribal commenters object to EPA's description of the proposed requirement in § 49.7(a)(3)(ii) that, where a tribe seeks to have its program cover areas outside the boundaries of a reservation, the tribe must demonstrate its ''inherent authority'' over those areas. These commenters assert that the term ''inherent authority'' must be clarified because it may inappropriately limit the potential sources of tribal authority to regulate non-reservation air resources. EPA agrees that there may be cases where a tribe has authority to regulate a non-reservation area that derives from a federal statute or some other source of federal Indian law that is not based on ''inherent authority.'' Section 49.7(a)(3)(ii) only asks a tribe seeking to implement a CAA program in a non-reservation area to ''describe the basis for the tribe's assertion of authority * * *.'' Under this provision, a tribe may include any basis for its assertion of authority.

Some tribal commenters ask EPA to take the position that the phrase ''other areas within the tribe's jurisdiction'' means that tribes will have control over sources in close proximity to a reservation. One tribe comments that EPA has a trust responsibility to ensure that tribes have authority to control sources of air pollution outside of reservation boundaries that affect the health and welfare of tribal members living within reservation boundaries. One tribe asks whether non-reservation jurisdictional areas include ceded lands where tribes retain the right to hunt and fish.

As noted above, it is EPA's position that, while Congress delegated CAA authority to eligible tribes for reservation areas, the CAA authorizes a tribe to implement a program in non-reservation areas only if it can demonstrate authority over such areas under federal Indian law. Thus, a tribe may implement a CAA program over sources in non-reservation areas, including ceded territories, if the tribe can demonstrate its authority over such sources under federal Indian law. CAA provisions regarding cross-boundary impacts are the appropriate mechanisms for addressing cases where sources outside of tribal authority affect tribal health and environments. See, e.g., CAA sections 110(a)(2)(D), 126, and 164(e). The issue of cross-boundary impacts is discussed further in the response to comments document.

(c) *Comments challenging EPA's interpretation of the CAA.* Some commenters state that CAA section 110(o) limits the jurisdictional reach of a TIP to areas located within the boundaries of a reservation. One commenter asserts that since a tribe can only implement its TIP within a reservation, to allow a tribe to implement other parts of the CAA in non-reservation areas would be unmanageable and unreasonable.

EPA believes that the reference in CAA section 110(o) to ''reservation'' is simply a description of the type of area over which a TIP may apply. EPA does not believe the provision was intended to limit the scope of TIPs to reservations. CAA section 301(d)(1) authorizes EPA to treat a tribe in the same manner as a state for any provision of the Act (except with regard to appropriations under section 105) as long as the requirements in section 301(d)(2) are met. EPA has decided to include most of the provisions of section 110 in the group of provisions for which treatment of tribes in the same manner as a state is appropriate. Section 301(d)(2) permits EPA to approve eligible tribes to implement CAA programs, including TIPs, over non-reservation areas that are within a tribe's jurisdiction.

An industry commenter asserts that the Senate Report evidences that Congress intended to provide tribes the same opportunity to adopt programs as provided under the CWA and SDWA. This commenter asserts that tribal jurisdiction under those statutes is limited to reservations. EPA notes that the SDWA does not limit tribal programs to reservations. See 42 U.S.C. 300j–11(b)(1)(B) (authorizing a tribal role ''within the area of the Tribal Government's jurisdiction.''). EPA also notes that there is evidence in the Senate Report that Congress intended to authorize EPA to approve eligible tribes for CAA programs in non-reservation areas of Indian country that are within a tribe's jurisdiction. The report states that section 301(d) is designed ''to improve the environmental quality of the air wit[h]in Indian country in a manner consistent with EPA Indian Policy and 'the overall Federal position in support of Tribal self-government and the government-to-government relations between Federal and Tribal Governments' * * *.'' Senate Report at 79 (emphasis added) (citing EPA's 1984 Indian Policy); *see also, id.* at 80.

3. Other Jurisdictional Issues

Several local governments comment that the final rule should ensure that tribes with very small reservations do not have authority under an air program to adversely affect economic development in adjacent areas, intrude upon the jurisdiction of local governments, or create checkerboarded regulation. One commenter asserts that the proposal would allow for EPA approval of ''islands'' of Indian

acknowledges the seriousness of the concerns identified by the commenters and agrees that a clearer presentation of the Agency's intentions is appropriate.

Most tribal commenters support establishing federal air programs under the circumstances outlined in the proposal, but many are concerned with the past lack of enforcement of environmental programs on tribal lands. Almost all commenters express concern with the lack of a definite timetable for federal initiation of air programs to protect tribal air resources and prevent gaps in protection. Tribal commenters generally support the provision in the proposal to develop an implementation strategy and a plan for reservation air program implementation; however, they request that EPA develop time frames and establish dates for developing the implementation strategy. A state commenter argues that the proposal did not sufficiently allow for state comment or input in the development of the implementation strategy, asserting that both state and tribal involvement will be necessary to avoid regulatory conflicts. A number of government and industry commenters suggest that EPA elaborate on the process for developing tribal air programs in light of the interrelationship between existing air programs and new tribal programs. Another commenter requests that EPA resolve the process for transition from existing programs to tribal programs as part of this rulemaking. One state comments that the transfer must be accomplished without leaving sources of air pollution and the states in air quality ''limbo'' pending development of either tribal or EPA programs to regulate sources under the jurisdiction of a tribe. Another state argues that if a tribe has no approved program and EPA has no reason for enforcement, section 116 preserves the state's inherent authority to regulate non-member sources on a reservation. One tribe asks that the process for transferring administration of an EPA-issued permit for a source on tribal lands to the tribe be made more explicit. Many tribal commenters request technical and administrative support in the form of guidance documents, training, sufficient financial resources, and EPA staff assigned to work with tribes on tribal CAA programs who are knowledgeable about tribal law and concerns. These commenters also express concern that limited resources might prevent EPA from providing this critical support.

As indicated above, EPA recognizes the seriousness of the concerns expressed in these comments and has undertaken an initiative to develop a comprehensive strategy for implementing the Clean Air Act in Indian country. The strategy will articulate specific steps the Agency will take to ensure that air quality problems in Indian country are addressed, either by EPA or by the tribes themselves. This strategy [a draft of which is available in the docket referenced above] addresses two major concerns: (1) Gaps in Federal regulatory programs that need to be filled in order for EPA to implement the CAA effectively in Indian country where tribes opt not to implement their own CAA programs; (2) identifying and providing resources, tools, and technical support that tribes will need to develop their own CAA programs.

EPA believes that the strategy being developed addresses many of the concerns expressed by the commenters. Once tribal programs are approved by EPA, tribes will have authority to regulate all sources within the exterior boundaries of the reservation under such programs. One of the most prevalent concerns is the status of sources (current and future) in Indian country not yet subject to the limits of an implementation plan. Commenters want assurance that EPA would step in to fill this gap and ensure adequate control. The Agency has consistently recognized the primary role for tribes in protecting air resources in Indian country and has expressed its continued commitment to work with tribes to protect these resources in the absence of approved tribal programs. The Agency has issued permits and undertaken the development of Federal Implementation Plans (FIP) to control sources locating in Indian country. For example, the Agency is working with both the Shoshone-Bannock and the Navajo Tribes to address pollution control of major sources on their Reservations. The Agency has also issued PSD preconstruction permits to new sources proposing to locate in Indian country. The Agency has started to explore options for promulgating new measures to ensure that EPA has a full range of programs and Federal regulatory mechanisms to implement the CAA in Indian country.

Since the 1994 proposal, EPA has tried specifically to identify the primary sources of air pollution emissions in Indian country, and evaluate the CAA statutory authorities for EPA to regulate those sources pending submission and approval of a TIP. EPA has determined that the CAA provides the Agency with very broad statutory authority to regulate sources of pollution in Indian country, but there are instances in which EPA has not yet promulgated regulations to implement its statutory authority.

One example is the absence of complete air permitting programs in Indian country. EPA has promulgated regulations establishing permit requirements for major sources in attainment areas, and issued Prevention of Significant Deterioration permits to new or modifying major sources. See 40 CFR 52.21. However, EPA has not promulgated regulations for a permitting program in Indian country for either minor or major sources of air pollution emissions in nonattainment areas. Therefore, EPA is currently drafting nationally applicable regulations for such minor and major source permitting programs. The permitting programs are expected to apply to construction or modification of all minor sources and to major sources in nonattainment areas. In addition, the planned permitting program would allow existing sources to voluntarily participate in the permitting program and accept enforceable permit limits. EPA regional offices would be the permitting authority for this program. With respect to Title V operating permits, EPA has proposed to include Indian country within the scope of 40 CFR Part 71. Therefore, the Part 71 regulations would apply to all major stationary sources of air pollution located in Indian country.

Many CAA requirements apply in Indian country without any further action by the EPA. For example, the standards and requirements of the Standards of Performance for New Sources, 42 U.S.C. 7411 and 40 CFR Part 60, apply to all sources in Indian country. Similarly, the National Emissions Standards for Hazardous Air Pollutants, 42 U.S.C. 7412 and 40 CFR Part 63 apply in Indian country.

EPA has, however, identified categories of sources of air pollution, such as open burning and fugitive dust, that are not covered by those regulations. For these categorical sources, EPA believes that it has the authority to promulgate regulations on a national basis that would apply until a TIP has been submitted and approved. EPA has also identified a number of general air quality rules, such as the prohibition against emitting greater than 20 percent opacity, which could be promulgated nationally for application in Indian country pending TIP approval.

EPA is optimistic that any additional regulations can be promulgated and implemented relatively quickly, since, along with the protections they would provide, such regulations can also serve as models which tribes can use in drafting TIPs.

EPA wishes to emphasize that the national rules it intends to promulgate will be analogous to, but not the same

FEDERAL REGISTER

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Part II

Environmental Protection Agency

40 CFR Parts 49 and 51
Review of New Sources and Modifications in Indian Country; Final Rule

Under the PSD program for attainment areas, a major source or modification must apply Best Available Control Technology (BACT), which may be based on pollution prevention techniques. In addition, the source must analyze the impact of the project on ambient air quality to assure that no violation of the NAAQS or PSD increments will result and must analyze impacts on soil, vegetation and visibility. Sources or modifications that would impact Class I areas (*e.g.,* national parks) may be subject to additional requirements to protect air quality related values (AQRVs) that have been identified for such areas.

2. What are the general requirements of the minor NSR program?

Section 110(a)(2)(C) of the Act requires that every SIP include a program to regulate the construction and modification of stationary sources, including a permit program as required by parts C and D of title I of the Act, to ensure attainment and maintenance of the NAAQS. Parts C and D address the major NSR program for major sources and the permitting program for minor sources is addressed by section 110(a)(2)(C) of the Act. We commonly refer to the latter program as the minor NSR program. A minor source means a source whose PTE is lower than the major NSR applicability threshold for a particular pollutant as defined in the applicable nonattainment major NSR program or PSD program.

States must develop minor NSR programs to attain and maintain the NAAQS and the Federal requirements for state minor NSR programs are outlined in 40 CFR 51.160 through 51.164. These Federal requirements for minor NSR programs are considerably less prescribed than those for major sources and as a result there is a larger variation of requirements in the state minor NSR programs.

Furthermore, Section 110(a)(2)(C) of the Act provides us with a broad degree of discretion in developing a program to regulate new and modified minor source construction activities in Indian country.

B. What is the basis for EPA's authority to implement CAA programs in Indian country?

The Tribal Authority Rule (TAR) authorizes eligible Indian Tribes to implement EPA-approved nonattainment major NSR (part D of title I of the Act), PSD (part C of title I of the Act) and other programs under the Act in the same manner as states. This is accomplished when Indian Tribes develop Tribal Implementation Plans (TIPs), which are plans similar to SIPs. If a Tribe develops a TIP to implement a CAA program, the TIP, once it is approved, will replace the Federal program as the requirement for that area of Indian country and the Tribe will become responsible for implementing that particular program. However, if Indian Tribes are unable or choose not to include a CAA program such as NSR in a TIP, we will implement the program under these rules.

The Act provides us with broad authority to protect air resources throughout the Nation, including air resources in Indian country. *See,* for example, the preamble discussion for the proposed and final TAR (59 FR 43956, 43958–61, August 25, 1994; 63 FR 7254, 7262–64, February 12, 1998) and the preamble discussion for the proposed revisions to the part 71 Federal operating permits program for Indian country (62 FR 13748, 13750, March 21, 1997). In the preambles to the proposed and final TAR, we discussed generally the legal basis under the Act for EPA and Tribal regulation of sources of air pollution in Indian country. We concluded that the Act constitutes a statutory delegation of Federal authority to eligible Tribes over all sources of air pollution within the exterior boundaries of their reservations.

Further, under the Act, Tribes may also apply to administer Tribal air quality programs for non-reservation areas over which they can show jurisdiction.[9] *See* 63 FR 7254–7259; 59 FR 43958–43960; *Arizona Public Service Co.* v. *EPA,* 211 F.3d 1280 (DC Cir. 2000), cert. den., 532 U.S. 970 (2001).

In the preamble to the TAR, we also concluded that the Act authorizes us to protect air quality throughout Indian country. *See* 63 FR 7262, 59 FR 43960–43961 citing sections 101(b)(1), 301(a) and 301(d) of the Act.

In addition, section 301(a) of the Act provides us broad authority to issue such regulations as are necessary to carry out the mandates of the Act. Several provisions of the Act call for Federal implementation of a program where, for example, a state or in this case a Tribe, fails to adopt a program or adopts an inadequate program. *See,* for example, sections 110(c)(1), 502(d)(3) and 502(i)(4) of the Act. These provisions exist in part to ensure that the benefits of the Act are realized throughout the United States, whether or not local governments choose to participate in implementing the Act. Especially in light of the problems associated with transport of air pollution across state and Tribal boundaries, it follows that Congress intended that we have the authority to operate a Federal program in the absence of an adequately implemented EPA-approved program. *See,* for example, 59 FR 43958–61, August 25, 1994; 62 FR 13750, March 21, 1997 and 63 FR 7262–64, February 12, 1998.

This interpretation is most evident from Congress' grant of authority to the EPA under section 301(d)(4) of the Act. Section 301(d)(4) authorizes the Administrator to directly administer provisions of the Act so as to achieve the appropriate purpose where Tribal implementation of those provisions is inappropriate or administratively infeasible. We determined that it is inappropriate to subject Tribes, among other things, to the mandatory submittal deadlines and to the related Federal oversight mechanisms in section 110(c)(1) of the Act, which are triggered when we make a finding that states have failed to meet required deadlines or disapprove a state plan submittal. *See* 40 CFR 49.4(d).

By determining that Tribes should not be treated similarly to states for purposes of the specific FIP obligation under section 110(c)(1) of the Act, we are not relieved of the general obligation

[9] We believe that in the context of programs under the Act, states generally lack the authority to regulate air quality in Indian country as defined in 18 U.S.C. 1151. *See Alaska* v. *Native Village of Venetie Tribal Government,* 522 U.S. 520, 527 fn. 1 (1998) (''Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it and not with the States.''), *California* v. *Cabazon Band of Mission Indians,* 480 U.S. 202 (1987) and *HRI* v. *EPA,* 198 F.3d 1224 (10th Cir. 2000); see also discussion in EPA's final rule for the federal operating permits program (64 FR 8251–8255, February 19, 1999). To provide additional certainty to regulated entities, we believe it is helpful to clarify the extent to which state NSR programs have force in Indian country. We interpret past approvals and delegations of NSR programs as not extending to Indian country unless the state has made an explicit demonstration of jurisdiction over Indian country and we have explicitly approved or delegated the state's program for such area. This is consistent with Congress' requirement that we approve state and tribal programs only where there is a demonstration of adequate authority. *See* sections 110(a)(2)(E), 110(o) and 301(d) of the Act and 40 CFR part 49. Since states generally lack the authority to regulate air resources in Indian country, we do not believe it would be appropriate for us to approve state programs under the Act as covering Indian country where there has not been an explicit demonstration of adequate jurisdiction and where we have not explicitly indicated our intent to approve the state program for an area of Indian country. In state NSR program approvals and delegations, we generally were not faced with state assertions of authority to regulate sources in Indian country. However, to the extent states or others may have interpreted our past approvals or delegations that were not based on explicit demonstrations of adequate authority and did not explicitly grant approval in Indian country as approvals to operate NSR programs in Indian country, we wish to clarify any such misunderstanding.

under the Act to ensure the protection of air quality throughout the Nation, including throughout Indian country. Rather, consistent with the provisions of sections 301(a) and 301(d)(4) of the Act, we expressed our intent to promulgate without unreasonable delay such FIP provisions as are necessary or appropriate to protect air quality if Tribal efforts do not result in adoption and approval of Tribal plans or programs. *See* 63 FR 7265, 40 CFR 49.11.

Under section 301(d)(4) of the Act, Congress authorized the EPA to maintain the territorial approach by implementing the Act in Indian country in the absence of an EPA-approved program. We believe that Congress authorized us, consistent with our Indian policy, to avoid the checker-boarding of Indian reservations based on land ownership by Federally implementing the Act over all reservation sources in the absence of an EPA-approved Tribal program. *See* S. Rep. No. 228, 101st Cong., 1st Sess. 79 (1989) (implementation of the Act to be in a manner consistent with EPA's Indian policy). In addition, section 301(d)(4) authorized us to implement the Act in non-reservation areas of Indian country in order to fill any gap in program coverage and to ensure an efficient and effective transition to EPA-approved programs.

Our interpretation of section 301(d) of the Act as authorizing our implementation throughout Indian country is also supported by the legislative history. *See* S. Rep. No. 228, 101st Cong., 1st Sess. 80 (1989) (noting that section 301(d) of the Act authorizes the EPA to implement provisions of the Act throughout ''Indian country'' when there is no approved Tribal program); *Id.* at 80 (noting that criminal sanctions are to be levied by the EPA, ''consistent with the Federal government's general authority in Indian country''); *Id.* at 79 (the purpose of section 301(d) of the Act is to ''improve the environmental quality of the air within Indian country in a manner consistent with the EPA Indian Policy'').

Therefore, with these final rules, we will exercise our authority to administer the minor NSR permitting program and the nonattainment major NSR program in Indian country, which is generally the area over which a Tribe may potentially receive approval of programs under the Act. As noted in the final TAR, we interpret the Act as establishing a territorial approach to implementation of the Act within Indian country by delegating to eligible Tribes authority over all reservation sources without differentiating among the various categories of on-reservation lands (63 FR 7254–7258). In addition, the Act authorizes eligible Tribes to implement Tribal programs under the Act in non-reservation areas over which a Tribe has jurisdiction, generally including all areas of Indian country (63 FR 7258–7259).

In order to further our commitment to use our authority under the Act to protect air quality throughout Indian country by directly implementing the Act's requirements, we are now exercising the rulemaking authority entrusted to us by Congress to directly implement the minor NSR permitting program and nonattainment major NSR permitting program throughout all areas of Indian country. *See* generally, *Chevron USA, Inc.* v. *NRDC,* 467 U.S. 837, 842–45 (1984).

C. What is the status of the NSR air quality programs in Indian country?

No Tribe is currently administering an EPA-approved PSD program. Therefore, EPA has been implementing a FIP for major sources in attainment areas and has been issuing PSD permits in Indian country. *See* 40 CFR 52.21. For the nonattainment major NSR program or the minor NSR program in Indian country, no Tribes have been administering an EPA-approved nonattainment major NSR program and only a few Tribes have been administering EPA-approved minor NSR programs.[10] In addition, there has been no FIP in place to implement these programs until now. Hence, there was a regulatory gap in Indian country. This final rule will allow us to address that gap and more fully implement the NSR program in Indian country. We are finalizing the minor NSR program at 40 CFR 49.151 through 49.165 and the nonattainment major NSR program at 40 CFR 49.166 through 49.175 and these programs will continue to apply except where we explicitly approve an implementation plan for such programs for a specific area in Indian country.[11] The requirements finalized under these rules do not apply to State permitting programs.

As we stated previously, sections 301(d) and 110(o) of the Act give the Tribes the authority to develop their own Tribal programs and we encourage eligible Tribes to develop their own minor and nonattainment major NSR programs for incorporation into TIPs. However, we understand that not all Tribes have the resources to design and implement NSR programs; therefore, in the absence of an EPA-approved program, this final rulemaking provides a Federal program for implementing the minor NSR and the major NSR program in nonattainment areas of Indian country. Tribes may use this program as a model if they choose to develop their own Tribal Implementation plans and obtain our approval.

Since, in most cases and in the absence of an EPA-approved program, it would be neither practical nor administratively feasible for us to develop and implement a separate program for each area of Indian country,; these final rules will implement a flexible FIP for Indian country that provides new and modified minor sources and major sources in nonattainment areas with procedures to demonstrate that they will be operating in a manner that is protective of air resources and the NAAQS. In addition, these rules will ensure that any economic growth occurring in Indian country will be in harmony with the preservation of Clean Air Act resources.

D. What consultation and outreach has been done with Tribal leaders and representatives?

Prior to undertaking this rulemaking, we sought to include Tribes early in the rulemaking process. On June 24, 2002, we sent approximately 500 letters to Tribal leaders seeking their recommendations for effective consultation and their involvement in developing these rules.

We received responses from 75 Tribes. Of these 75 Tribes, 69 designated an environmental staff member to work with us on developing the rules. Aside from the designated staff, many Tribal leaders asked that we keep them informed of our progress through e-mail, meetings with the EPA Regional Offices, newsletters and Web sites. In addition, 53 percent of the Tribal leaders also requested direct phone calls or conference calls to discuss the subject and 16 percent of the respondents requested face-to-face consultation. Of these, six Tribes requested senior EPA staff to meet with Tribal leaders.

As a result of this feedback, we developed a consultation plan that included three meetings held at the reservations of the Menominee Tribe in Wisconsin, the Mohegan Tribe in Connecticut and the Chehalis Tribe in Washington. A fourth meeting was held

[10] For example, the St. Regis Mohawk Tribe has in place an EPA-approved TIP that includes provisions for minor NSR and synthetic minor permitting (*See* http://www.srmtenv.org/pdf_files/airtip.pdf). In addition, the Gila River Indian Community has developed a TIP that includes a minor NSR program (*See http://www.epa.gov/region9/air/actions/gila-river.html*).

[11] Although many states have developed regulatory programs for minor sources, those programs do not apply in Indian country unless explicitly approved by EPA for such areas.

requirements for the nonattainment major NSR program are very similar to those finalized for the minor NSR program at 40 CFR 49.157. *See* section IV.B of this preamble for more information on these requirements and the comments we received.

E. What are the provisions for final action on a permit, permit reopenings and administrative and judicial review procedures?

In general, these provisions are based closely on selected provisions of part 124, subpart A. The specific provisions are as follows:

1. Final Action on a Permit

This final rule requires that after making a decision to issue or deny your permit, the reviewing authority must notify you of the decision in writing and, if the permit is denied, provide the reasons for the denial. If the reviewing authority issues a final permit to you, it must make a copy of the permit available at any location where the draft permit was made available. In addition, the reviewing authority must provide adequate public notice of the final permit decision to ensure that the affected community, general public and any individuals who commented on the draft permit have reasonable access to the decision and supporting materials. *See* final 40 CFR 49.172(a).

The reviewing authority's final decision on your permit must be based on an administrative record and the final rule includes requirements on what must be in that record. For example, the administrative record must include the application and any supporting data furnished by the applicant and all comments received during the public comment period, including any extension or reopening. *See* final 40 CFR 49.172(b) and (c) for a listing of all the requirements.

A few commenters largely supported the proposed provisions for providing notice of final permit actions. However, the commenters recommended that such notice be provided in the same manner that it was provided during the public comment on the draft permit. The commenters believed that numerous inconsistencies will occur if the agency uses subjective discretion based, as we proposed, ''upon the circumstances of your permit.''

Based on the comments received, we are finalizing slightly different final permit public notice requirements for the nonattainment major NSR program and the minor NSR program. We believe that for major sources in nonattainment areas making a copy of the permit available at all of the locations where the draft permit was made available will not be too burdensome for the reviewing authorities and will ensure that the affected community and the general public have reasonable access to the applicable information. These provisions are included in 40 CFR 49.171 of this final rule. However, for minor sources, we continue to believe that depending on the circumstances of your permit, the reviewing authority may elect to provide notice directly to the individuals who commented on the draft permit and/or use any of the other methods of public notice discussed in section IV.B.4 of this preamble because providing the same public noticing procedures as those that were used during the comment period for the draft permit might be too burdensome for minor sources. These provisions are included in 40 CFR 49.157 of this final rule.

Regarding the administrative record for a permit decision, we are finalizing these provisions as proposed and under 40 CFR 49.172(b) and (c). The records, including any required applications for each draft and final permit or application for permit revision, must be kept by the reviewing authority for no less than 5 years. These provisions are the same as the ones for the minor NSR program and details of the comments received and the rationale behind finalizing these provisions are included in section IV.B.3 of this preamble. We did not receive any comments about these provisions specifically for the nonattainment major NSR program.

2. Permit Reopenings

Regarding the permit reopening provisions, the final rule requires that a permit may be reopened for cause by the reviewing authority on its own initiative, such as if it contains a material mistake or fails to assure compliance with permit requirements. *See* final 40 CFR 49.172(e). Details of the comments received and the rationale behind finalizing these provisions are included in section IV.B.5 of this preamble. We did not receive any comments about these provisions specifically for the nonattainment major NSR program.

3. Administrative and Judicial Review Procedures

At 40 CFR 49.172(d), we have finalized the provisions under which permit decisions for major nonattainment NSR permits may be appealed. Details of the comments received and the rationale behind finalizing these provisions are included in section IV.B.5 of this preamble. We did not receive any comments about these provisions specifically for the nonattainment major NSR program.

F. How is EPA revising Appendix S?

As we explain in more detail in section V.A. of this preamble, we are amending Appendix S to include the alternative sites analysis provisions of CAA section 173. Therefore, we are finalizing a change to Appendix S that will add a Condition 5 to the provisions under 40 CFR Appendix S Paragraph IV.A. This condition will state that the permit applicant shall conduct an analysis of alternative sites, sizes, production processes and environmental control techniques for such proposed source that demonstrates that the benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction or modification.

In addition and as proposed, we are finalizing a minor change to Appendix S that is related to the ''emission limitations and standards of the Act.'' Existing paragraph II.B of Appendix S requires the reviewing authority to review each proposed new major source and major modification to determine whether it will meet ''any applicable NSPS in 40 CFR part 60 or any national emission standard for HAPs in 40 CFR part 61.'' While we have incorporated this requirement into final 40 CFR 49.169(a), we believe that it should be expanded to include the newer national emission standards for HAPs codified at 40 CFR part 63 (commonly referred to as MACT standards). Accordingly, we are revising paragraph II.B of Appendix S to add these standards under the Act and to match the revised language of this paragraph with the final 40 CFR 49.169(a). We did not receive any comments for this proposed provision.

VI. Legal Basis, Statutory Authority and Jurisdictional Issues

A. What is the basis for EPA's authority to implement these NSR programs in Indian country?

As we have described in section III of this preamble, in the absence of an EPA-approved program, we are authorized to develop a FIP to protect air quality by directly implementing provisions of the Act throughout Indian country. *See, e.g.,* 59 FR 43958–61 (August 25, 1994), 63 FR 7262–64 (February 12, 1998) and 62 FR 13750 (March 21, 1997). For the PSD program, no Tribe is currently administering an EPA-approved PSD program.[30] Therefore, EPA has been

[30] Under the Act and the TAR (*see* 40 CFR part 49, subpart A), eligible tribes may seek approval of

Continued

implementing a FIP and issuing PSD permits for major sources in attainment areas in Indian country. *See* 40 CFR 52.21.

For the nonattainment major NSR program and the minor NSR program in Indian country, no Tribes have been administering an EPA-approved nonattainment major NSR program and only a few Tribes have been administering EPA-approved minor NSR programs.[31] In addition, there has been no FIP in place to implement these programs until now. Hence, there was a regulatory gap in Indian country. This final rule will allow us to address that gap and more fully implement the NSR program in Indian country. We are finalizing the minor NSR program at 40 CFR 49.151 through 49.165 and the nonattainment major NSR program at 40 CFR 49.166 through 49.175.

It is important to recognize, however, that even though we are adopting this Federal program that applies in Indian country, the Tribes may still develop TIPs, similar to SIPs, to implement these programs. If a Tribe develops a TIP to implement NSR, the TIP, once it is approved by EPA, will replace the Federal program as the requirement for that area of Indian country and the Tribe will become the reviewing authority under its TIP.

A few commenters remarked upon EPA's analysis of its jurisdiction in Indian country (citing various court cases as well as legislative history). These commenters believed that in general Congress placed the primary responsibility of preventing air pollution on states and thus states have the responsibility to adopt or enforce any emission standards in Indian country. Some of these commenters also added that this FIP violates the CAA because the Administrator has failed to make a finding that any specific state or Tribe has failed to submit an implementation plan or that any specific implementation plan either fails to satisfy the minimum criteria under the Act or has been disapproved in whole or in part. In addition, the commenter believed that the Act only authorizes the adoption of a FIP on a jurisdiction-by-jurisdiction basis, not nationally. Two of these commenters also stated that even if the EPA adopts the proposed nationwide FIP, the FIP cannot supersede and EPA must acknowledge, the State of Oklahoma's right to administer its state air quality programs in areas of Indian country within Oklahoma under the Federal Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users (2005). We disagree with these commenters to the extent they believe EPA does not have authority under the Act to implement these programs in Indian country.

EPA's Authority To Implement the CAA in Indian Country. In the final rule titled, ''Indian Tribes: Air Quality Planning and Management,'' generally referred to as the ''Tribal Authority Rule'' or ''TAR,'' EPA explains that it intends to use its authority under the CAA ''to protect air quality throughout Indian country'' [32] by directly implementing the CAA's requirements where Tribes have chosen not to develop or are not implementing an EPA-approved CAA program. 63 FR 7254, February 12, 1998. The final TAR at 40 CFR 49.11 states that EPA would ''promulgate without unreasonable delay such FIP provisions as are necessary or appropriate to protect air quality'' for these areas. The EPA is exercising its authority under sections 301(a) and 301(d)(4) of the CAA and 40 CFR 49.11(a) to promulgate FIPs in order to remedy an existing regulatory gap under the CAA with respect to Indian country.

Although many facilities in these areas may have historically followed state and local government air quality programs, with rare exception, EPA has never approved those governments to exercise regulatory authority under the CAA in any area of Indian country. In addition, EPA has never approved a state or local government to implement a minor NSR or nonattainment major NSR program in Indian country.[33] Since the CAA was amended in 1990, EPA has been clear in its approvals of state programs that the approved state program does not extend into Indian country. It is EPA's position that, absent an explicit demonstration of authority by a state to administer a CAA program in Indian country and absent an explicit finding by EPA of such jurisdiction and explicit approval of the state in Indian country, state and local governments lack authority under the CAA over air pollution sources and the owners or operators of air pollution sources throughout Indian country.

Because only a few Tribes have yet sought eligibility to administer a minor NSR program and no Tribe has yet sought eligibility for the nonattainment major NSR program, a gap for implementation of these programs currently exists in Indian country. Given the longstanding air quality concerns in some areas and the need to establish requirements in all areas to maintain CAA standards, EPA believes that these FIP provisions are appropriate to protect air quality in Indian country where no EPA-approved minor NSR or nonattainment major NSR program is in place.

The rules published here are based on the same CAA authority as EPA has used elsewhere in rulemaking that have been affirmed by the courts. The EPA's interpretation of its authority has been affirmed by the U.S. Court of Appeals for the District of Columbia Circuit in *Arizona Public Service Co.* v. *EPA,* 211 F.3d 1280 (DC Cir. 2000), *cert. denied* 121 S. Ct. 1600 (2001). In addition, EPA's authority to issue operating permits to major sources located in Indian country under title V of the Act, pursuant to nationwide regulations at 40 CFR part 71, was affirmed in *State of Michigan* v. *EPA,* 268 F.3d 1075 (DC Cir. 2001). The EPA has used this same authority to issue a number of FIPs to address air pollution concerns on a regional basis and at specific facilities located in Indian country. *See* Federal Implementation Plans Under the Clean Air Act for Indian Reservation in Idaho, Oregon, Washington, 40 CFR part 49, subpart M (70 FR 18074, April 8, 2005) (upheld in *Safe Air for Everyone* v. *EPA,* 2006 WL 3697684 (9th Cir. 2006)); FIP for Tri-Cities landfill, 40 CFR 49.22 (64 FR 65664, November 23, 1999); Salt River Pima-Maricopa Indian Community, 40 CFR 49.22 (64 FR 65663, November 23, 1999); FIP for the Astaris-Idaho LLC Facility (formerly owned by FMC Corporation) in the Fort

their own PSD programs for their reservations and/or for other areas under their jurisdiction.

[31] For example, the St. Regis Mohawk Tribe has in place an EPA-approved TIP that includes provisions for minor NSR and synthetic minor permitting (See *http://www.srmtenv.org/pdf_files/airtip.pdf*). In addition, the Gila River Indian Community has developed a TIP that includes a minor NSR program (*See http://www.epa.gov/region9/air/actions/gila-river.html*).

[32] ''Indian country'' is defined under 18 U.S.C. 1151 as: (1) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent and including rights-of-way running through the reservation, (2) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof and whether within or without the limits of a state, and (3) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Under this definition, EPA treats as reservations trust lands validly set aside for the use of a tribe even if the trust lands have not been formally designated as a reservation.

[33] For purposes of approving the Washington Department of Ecology (WDOE) operating permits program under 40 CFR part 70, EPA explicitly found that WDOE demonstrated that the Washington Indian (Puyallup) Land Claims Settlement Act, 25 U.S.C. 1773, gives explicit authority to state and local governments to administer their environmental laws on all nontrust lands within the 1873 Survey Area of the Puyallup Reservation in Tacoma, Washington.

Hall PM–10 Nonattainment Area, 40 CFR 49.10711 (65 FR 51412, August 23, 2000) and FIP for Four Corners Power Plant, Navajo Nation, 40 CFR 49.23 (72 FR 25698, May 7, 2007) (upheld in *Arizona Public Service Co.* v. *EPA,* 562 F.3d 1116 (10th Cir. 2009)).

Effects of State Law. The rules established by EPA here are in effect under the CAA. The EPA recognizes that in a few cases, other state or local governmental entities may have established air quality requirements that the commenters believe apply to activities in Indian country. However, unless those rules or requirements have been explicitly approved by EPA under the CAA to apply in Indian country, compliance with those other requirements does not relieve a source from complying with the applicable provision of this FIP. As EPA has stated elsewhere, states generally lack the authority to regulate air quality in Indian country. *See Alaska* v. *Native Village of Venetie Tribal Government,* 522 U.S. 520, 527 fn.1 (1998) (''Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian Tribe inhabiting it and not with the States.''), *California* v. *Cabazon Band of Mission Indians,* 480 U.S. 202, 216 and n.18 (1987); see also *HRI* v. *EPA,* 198 F.3d 1224, 1242 (10th Cir. 2000); see also discussion in EPA's final rule for the Federal operating permits program, 64 FR 8251–8255, February 19, 1999.

Furthermore, with regard to Indian reservations, EPA interprets the CAA as establishing unitary management of air resources and as a delegation of Federal authority to eligible Tribes to implement the CAA over all sources within reservations, including non-Indian sources on fee lands. Accordingly, even if a state could demonstrate authority over non-Indian sources on fee lands within an Indian reservation, EPA believes that the CAA generally provides the Agency the discretion to Federally implement the CAA over all Indian reservation sources in order to ensure an efficient and effective transition to Tribal CAA programs and to avoid the administratively undesirable checker-boarding of reservation air quality management based on land ownership. The EPA believes that Congress intended that EPA take a territorial view of implementing air programs within reservations. The EPA also believes that air quality planning for a checker-boarded reservation area would be more difficult and that it would be inefficient if a state were to exercise regulation over piecemeal tracts of land within such areas, possibly with similar Indian country sources being subject to different substantive requirements. The EPA's approach provides for coherent and consistent environmental regulation within Indian country.

Although EPA does not recognize state or local air regulations as being effective within Indian country for purposes of the CAA, absent an express approval by EPA of those regulations for an area of Indian country, this rulemaking does not address the validity of state and local law and regulations with respect to sources in Indian country or the authority of state and local agencies to regulate such sources, for purposes other than the Federal CAA. We are specifically not making a determination that these Federal CAA rules override or preempt any other laws that have been established outside the scope of the Federal CAA. The EPA does not, therefore, believe that any further preemption analysis suggested by the commenters is needed in these circumstances. As described above, EPA believes that its authority under the CAA to implement these programs in Indian country is clear and well-established and has been upheld by reviewing courts in similar circumstances.

With regard to the comments relating to Indian country and the State of Oklahoma, EPA recognizes that the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 (SAFETEA) contains a provision (section 10211) relating to implementation of environmental regulatory programs under Federal environmental laws, including the CAA, in Indian country in Oklahoma. However, to date, neither the State of Oklahoma, nor any Indian Tribe in Oklahoma, has applied for EPA approval to administer either of the CAA programs included in this rulemaking for any area of Indian country. In the absence of an EPA-approved program, these FIPs will apply throughout Indian country, including Indian country in Oklahoma. In promulgating these FIPs, EPA is not acting on any potential request by the State of Oklahoma to administer any CAA or other regulatory program in Indian country, nor is EPA acting on any potential treatment-in-the-same-manner-as-a-state application for an environmental regulatory program by any Indian Tribe in Oklahoma. The EPA would address any such applications when necessary and on a case-by-case basis and in full consideration of the requirements of Section 10211 of SAFETEA. Section 10211 of the SAFETEA is thus not implicated in this rulemaking and is not a relevant consideration in EPA's promulgation of the minor and nonattainment major NSR programs for Indian country, including Indian country in Oklahoma.

B. How does a Tribe receive delegation to assist EPA with administration of the Federal minor and major NSR rules?

With this action, we are finalizing the provisions on administrative delegation to Tribes as proposed. Our authority for such delegations is discussed in the following paragraphs.

Under the procedures set forth in the TAR, Tribes may seek to demonstrate eligibility for approval of Tribal programs under the Act, including a Tribal NSR program, under Tribal law.[34] The TAR allows Tribes to seek approval for such programs covering their reservations or other areas within their jurisdiction. However, we recognize that some Tribes may choose not to develop Tribal NSR programs for submission to EPA for approval under the TAR, but that these Tribes may still wish to assist us in implementing all or some portion of the Federal NSR program for their area of Indian country. In addition, although sections 110(o) and 301(d) of the Act and the TAR authorize us to review and approve TIPs, neither the Act nor the regulations provide that approval of Tribal programs under Tribal law is the sole mechanism available for Tribal agencies to take on permitting responsibilities. Accordingly, we are exercising our discretion to delegate administration of the Federal NSR program to interested and qualified Tribal agencies satisfying the requirements of final provisions at 40 CFR 49.161 and 49.173. By assisting us with administration of the Federal program through delegation, Tribes may remain appropriately involved in implementation of an important air quality program and may develop their own capacity to manage such programs in the future should they choose to do so. Therefore final 40 CFR 49.161 and 49.173 of the minor and major NSR rules, respectively, provide Tribal governments the option of seeking delegation from us of the administration of the Federal NSR program or aspects of the program, for their area of Indian country.

We have well-established processes for delegating our Federal authority to states and/or Tribes for administering Federal rules under the Act, including

[34] As noted elsewhere, the TAR contains a process, pursuant to section 301(d) of the Act, for tribes to seek treatment in a similar manner as a state (TAS), for various provisions and programs of the Act.