



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
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OFFICE OF THE
REGIONAL ADMINISTRATOR

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

On October 13, 2004 (the "2004 Determination"), the United States Environmental Protection Agency ("EPA") approved the Navajo Nation's eligibility for treatment in the same manner as a state ("TAS") under Clean Air Act ("CAA") section 301(d) and 40 C.F.R. Part 49 for the purpose of delegation of administration of the CAA federal Title V operating permit program ("Part 71 Program") for sources located within the formal Navajo Indian Reservation (the "Reservation"), the formal satellite reservations of Alamo, Canoncito and Ramah, and the Tribal trust lands located outside of the formal reservations in the Eastern Agency. On October 15, 2004, EPA and the Tribe entered into a Delegation Agreement pursuant to the 2004 Determination and 40 C.F.R. § 71.10(a) whereby EPA delegated to the Tribe the administration of the Part 71 Program over the covered sources ("Part 71 Delegation"). At that time, the Tribe did not request that EPA make any determination regarding the Tribe's eligibility to administer the Part 71 Program over two coal-fired generating stations located on the Reservation: the Four Corners Power Plant ("FCPP") and the Navajo Generating Station ("NGS"). Thus, in the 2004 Determination, EPA made no determination regarding the Tribe's eligibility to administer the Part 71 Program over these two facilities, and they were not included within the scope of the Part 71 Delegation.¹

The Navajo Nation has now applied for a supplemental eligibility determination for the purpose of delegation of the administration of the Part 71 Program over FCPP and NGS. The Office of Regional Counsel ("ORC") and the Air Division have reviewed the Tribe's eligibility for TAS for this purpose under CAA section 301(d) and 40 C.F.R. Part 49 and have recommended a finding of eligibility. Based on this review and recommendation and the materials provided by the Tribe in their application, I have determined that the Navajo Nation meets the requirements of 40 C.F.R. § 49.6 for the purpose of entering into a supplemental delegation agreement with EPA to administer the Part 71 Program over FCPP and NGS.

Eligibility Requirements

¹ Because of ongoing litigation with the Hopi Tribe, the Navajo Nation did not previously include any air resources within the former Bennett Freeze Area in its eligibility application. Therefore, EPA's 2004 Determination also excluded any sources located in that area. The Tribe's current supplemental application does not seek an eligibility determination with respect to the Bennett Freeze Area, and thus EPA is again making no finding regarding that area.

The requirements for the eligibility determination are identified in the Tribal Authority Rule ("TAR") at 40 C.F.R. § 49.6. The four requirements are:

- The applicant is an Indian tribe recognized by the Secretary of the Interior;
- The Indian tribe has a governing body carrying out substantial governmental duties and functions;
- The functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and
- The Indian tribe is reasonably expected to be capable, in the EPA Regional Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the Clean Air Act and all applicable regulations.

The TAR provides that, where tribes have previously received authorization for a CAA program or for any other EPA-administered program, they need only identify the prior authorization(s) and provide the required information that had not been submitted with the prior application(s). 40 C.F.R. § 49.7(a)(8). The Navajo Nation has previously applied and received approval for TAS for several EPA programs, including the CAA § 105 grant program, the Safe Drinking Water Act Public Water Systems Supervision Program, the Clean Water Act Section 106 grant program and Sections 303 and 401 water quality standards and certifications programs, and delegation of the CAA Part 71 Program over most sources on the Tribe's formal reservations and Tribal trust lands. In its current application, the Tribe specifically references EPA's 2004 Determination approving the Tribe's TAS eligibility for delegation of administration of the Part 71 Program and includes supplemental information demonstrating that it meets the TAS criteria for the purpose of administering the program over FCPP and NGS.

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

The Navajo Nation fulfilled this requirement by referencing its earlier TAS application for delegation of administration of the Part 71 Program and EPA's 2004 Determination. Our review of that application and determination show that the required information was submitted and that the Navajo Nation is an Indian tribe recognized by the Secretary of the Interior. See also 70 Fed. Reg. 71194, 71196 (November 25, 2005). The Navajo Nation meets the requirement of 40 C.F.R. § 49.6(a).

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

The Navajo Nation fulfilled this requirement by referencing its earlier TAS application for delegation of administration of the Part 71 Program and EPA's 2004

Determination. Our review of that application and determination showed that the required information was submitted and that the Navajo Nation has a governing body carrying out substantial governmental duties and functions. The application describes the Navajo Nation's tripartite government, with executive, legislative and judicial branches, performing many essential governmental functions, including the use of its police powers to protect the health, safety and welfare of the Navajo people. The Navajo Nation government has enacted significant legislation, including the Navajo Nation Air Pollution Prevention and Control Act. The Navajo Nation meets the requirement of 40 C.F.R. § 49.6(b).

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

The Navajo Nation meets this requirement. In connection with prior TAS applications, including the Tribe's initial TAS application for delegation of administration of the Part 71 Program, the Tribe provided maps and legal descriptions of the formal Navajo Indian Reservation, established by the Treaty of June 1, 1868, and expanded by subsequent acts of Congress and executive orders that enlarged the Reservation. The Tribe also provided maps and legal descriptions of the formal satellite reservations of Alamo, Canoncito and Ramah and of Tribal trust lands located outside of the formal reservations in the Eastern Agency. As part of its current supplemental TAS application, the Tribe has provided an additional map of the Reservation indicating the locations of the FCPP and NGS facilities, both of which are located within the exterior boundaries of the Reservation. Through its supplemental TAS application, the Tribe is applying to administer the federal Title V operating permit program over two additional Part 71 sources located within the formal Reservation by amending or supplementing the existing Part 71 Delegation.

Under a Part 71 Delegation, the federal Title V program will continue to apply to FCPP and NGS until such time as EPA approves a permitting program under 40 C.F.R. Part 70 for those sources. The Navajo Nation has enacted laws providing all relevant procedures and necessary authorities to enable the Tribe to administer the Part 71 Program. The Tribe has a permitting office within the Navajo Nation Environmental Protection Agency ("NNEPA") that is duly authorized under Tribal law to issue federal Part 71 permits pursuant to a delegation agreement with EPA. In addition, as described in greater detail below under Section (d), the Tribe has enacted the Navajo Nation Air Pollution Prevention and Control Act and the Navajo Nation Air Quality Control Operating Permit Regulations, which contain all relevant procedures for administration of the federal program. In particular, the Tribal statute and regulations establish administrative procedures for the receipt, processing, and issuance or denial of permit applications, the collection of permitting fees, and the pursuit of various enforcement-related activities including development of compliance plans and schedules of compliance, monitoring, inspections, audits, requests for information, issuance of notices, findings and letters of violation, and development of cases up until filing of a complaint or order.

EPA is aware of certain provisions contained in leases and grants of rights-of-way (the "Covenants" and "Grants") as between the Navajo Nation and the two facilities. The Tribe references these provisions in its supplemental TAS application and states that, due to these provisions, a dispute has existed between the Tribe and the facilities regarding the Tribe's ability to administer the federal Part 71 Program over these facilities. However, the Tribe also asserts that it has entered into a Voluntary Compliance Agreement ("VCA") with the facilities' operating agents that resolves the dispute for as long as the VCA remains in effect. A copy of the fully-executed VCA is attached to the Tribe's supplemental application.

EPA has reviewed the Covenants and Grants as well as the terms of the VCA. As described in the VCA, EPA recognizes that the Tribe and the participants of FCPP and NGS disagree as to the Tribe's jurisdiction to regulate the facilities, which, as described in the VCA, includes a disagreement regarding the Tribe's ability to administer the federal Part 71 program over the facilities on EPA's behalf. In view of the commitments made by the parties in the VCA, it is not necessary for EPA to resolve this disagreement in approving the Tribe's supplemental TAS application. Under the terms of the VCA, the Tribe and the operating agents of FCPP and NGS agree that they will not assert or challenge any effect of the Covenants and Grants on the authority of the Tribe to administer a delegated Part 71 program with respect to FCPP and NGS or on the applicability to those facilities of the requirements of the Navajo Nation laws that have been expressly incorporated into Section 5.4 of the VCA – which sets forth relevant provisions and procedures relating to Tribal administration of Part 71 permits issued to the facilities – and into a Part 71 permit administered by the Tribe pursuant to a delegation agreement, without prejudice to their rights to assert or challenge the Covenants or Grants after expiration or termination of the VCA. Thus, under the VCA, FCPP and NGS have agreed, for the term of the VCA, not to assert the Covenants or Grants as an impediment to the Tribe's administration, on behalf of EPA, of the Part 71 Program over the facilities. The facilities have also agreed to comply with relevant Tribal statutory and regulatory provisions enumerated in the VCA that would be incorporated into Part 71 permits issued to the facilities by the Tribe on EPA's behalf.

In light of the commitments contained in the VCA, EPA believes that, so long as the VCA remains in effect, there is no need for EPA to address or make any determination regarding any potential effect of the Covenants or Grants on the Tribe's eligibility to administer the Part 71 program over the facilities. In approving the Tribe's TAS eligibility for the purpose of administering the Part 71 Program over FCPP and NGS, EPA is thus making no determination regarding the scope, validity or effect of the Covenants or Grants. Because EPA is making no determination on the impact of the Covenants or Grants on the Tribe's ability to administer the Part 71 Program, as discussed in further detail in Section (d) below, this determination is contingent upon the continued effectiveness of the VCA.

The Navajo Nation has demonstrated that the functions it will exercise in administering the federal Part 71 Program over FCPP and NGS pertain to the

Title V fees, including the enforcement activities referenced in 40 C.F.R. § 71.9(b), which include functions such as inspections, audits and stack tests.² As detailed in the 2004 Determination, the Navajo Nation's permitting laws and regulations include all relevant procedures and authorities to collect fees and conduct the enforcement activities covered by Title V fees, as well as other aspects of the Part 71 program. EPA recognizes that the VCA contains certain provisions relating to administration by the Tribe of CAA Title V permitting for FCPP and NGS that are not included in the Navajo Nation CAA as well as certain other provisions that may vary from that Tribal law.³ However, none of these VCA provisions affects the Tribe's ability to perform the functions needed for purposes of receiving full delegation of administration of the Part 71 Program over the two facilities. In fact, Section 5.4 of the VCA specifically references all the relevant regulatory provisions necessary for the Tribe to administer a Part 71 Program.

Because the VCA avoids the need for EPA to address or make any determination regarding any potential effect of the Covenants or Grants on the Tribe's ability to administer the Part 71 Program over FCPP and NGS, this determination is contingent upon the continued effectiveness of the VCA. If and when the VCA terminates or expires with respect to either of the two power plants, this determination would no longer be applicable for the TAS approval for the Tribe to administer a Part 71 Program with respect to that source. In the case of expiration or termination of the VCA, Section 5.15 of the VCA recognizes that there would be no regulatory gap as the Navajo-issued permit last in effect for the source, in this case most likely a Navajo-issued Part 71 permit, would remain in effect and enforceable by EPA until such time as it is replaced by a new EPA permit.

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

Notification of "Appropriate Governmental Entities"

On October 27, 2005, EPA provided notice of the Tribe's supplemental TAS application and a 30-day opportunity to comment to the following appropriate governmental entities:

² CAA section 502(b)(3)(a)(ii) specifies that the permit fees collected may be used for "implementing and enforcing the terms and conditions of permits (not including any court costs or other costs associated with any enforcement action)."

³ As stated in Section 5.3.2(e) of the VCA, the VCA contains provisions at Section 5.12 (Administration of Permits), 5.5.2 (Applications For Renewal), and Article 8 (Dispute Resolution) that are not contained in Navajo Nation laws as well as provisions in Article 6 (Permit Content), Section 5.11.2 (New or Amended Laws or Regulations), 9.3 (Administrative Penalties), 9.4 (Shutdown Orders), and 9.6 (Citizen Suits) that vary from the Navajo Nation CAA.

management and protection of air resources within the exterior boundaries of the Reservation. The Tribe meets the requirement of 40 C.F.R. § 49.6(c).

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

NNEPA has a staff of 67 people – including scientists, inspectors, engineers, and legal counsel – working on a variety of environmental programs. The functions to be exercised, in this case, pertain to the administration of the Part 71 Program. NNEPA has been working closely with EPA Region 9 to develop its air program capacity since 1987 and is already administering the Part 71 Program with respect to most sources located on the formal reservations or Tribal trust lands outside the formal reservations since entering into the October 2004 Delegation Agreement with EPA. In addition to being delegated the Part 71 Program to administer for all sources other than the power plants, the Navajo Nation has already received primacy for the Public Water Systems component of the Safe Drinking Water Act, has been approved for TAS for the purpose of Clean Water Act water quality standards, and has been working toward seeking primacy for the Underground Injection Control Program. For its air program, as described in EPA's 2004 Determination, the Tribe adopted the Navajo Nation Air Pollution Prevention and Control Act, 4 NNC §§ 1101-1162 (amended April 22, 2004 and signed into law May 7, 2004), ("Navajo Nation CAA") in 1995, and has been working on compliance issues with stationary sources on the Reservation for many years. Furthermore, the Navajo Nation has adopted its own air permitting regulations, which provided the basis for the October 2004 Part 71 Delegation and which the Tribe expects will be the basis for its future application for approval of a Part 70 program.

The Air Division has reviewed the Tribe's staff and administrative capability, and found that the Tribe is reasonably expected to be capable of administering a delegated Part 71 Program with respect to the two power plants. NNEPA Air Program staff have worked on a variety of air issues involving major sources on the Reservation, and they have participated in training and internships with EPA and the Arizona Department of Environmental Quality. Moreover, the Tribe has already been administering the Part 71 Program with respect to all other major sources on the Reservation for over a year, including reviewing permit applications, issuing permits and inspecting sources. In its supplemental TAS application, the Tribe states that it will hire an additional environmental engineer with expertise in coal-fired technology to assist its Air Quality Control Program/Operating Permit Program in addressing emissions and permitting requirements for FCPP and NGS. The Tribe also asserts that it will hire three additional environmental specialists as it begins to establish field offices to handle issues regarding Part 71 sources, including FCPP and NGS.

Where EPA is granting a full delegation of administration of the Part 71 Program and suspending its collection of federal Part 71 fees, EPA also requires that the Tribe demonstrate it has the ability to collect permit fees and to conduct activities covered by

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

In addition, public notice with an opportunity for public comment was provided in the form of an advertisement in the Navajo Times. EPA received a letter in support of the Tribe's application from the U.S. Bureau of Land Management on November 18, 2005. No other comments were received.

Determination

Based on the information provided to me by the Navajo Nation, the Air Division, and the Office of Regional Counsel, I have determined that the Navajo Nation is eligible for TAS for the purpose of entering into a supplemental delegation agreement with EPA to administer the federal Part 71 Program over FCPP and NGS provided that the VCA remains in effect.

Date: 21 MAR 06


Wayne Nastri, Regional Administrator

