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Stanley F. Mires,

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ENVIRONMENTAL PROTECTION AGENCY
40 CFR Part 49

[OAR-FRL-6521-2]

Indian Tribes: Air Quality Planning and Management

AGENCY: Environmental Protection Agency (EPA).

ACTION: Clarification.

SUMMARY: On February 12, 1998, EPA issued its final rule on implementing section 301(d) of the CAA (63 FR 7254, Indian Tribes: Air Quality Planning and Management), hereafter known as the

Tribal Authority Rule (TAR). The TAR specified provisions of the CAA for which EPA may treat Indian tribes in the same manner as states. Among other things, the preamble to the TAR described a process by which tribal assertions of jurisdiction would be submitted to "appropriate governmental entities" for review and comment. The purpose of this document is to clarify EPA's position on receiving comments on tribal jurisdictional assertions under section 301(d) of the CAA.

FOR FURTHER INFORMATION CONTACT:

David R. LaRoche, Office of Air and Radiation (OAR 6101-A), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington DC 20460 at (202) 564-7416.

SUPPLEMENTARY INFORMATION:**I. Background**

Consistent with the treatment in the same manner as a state (TAS) process that EPA has historically implemented under the Clean Water and Safe Drinking Water Acts, the preamble to EPA's proposed rule on tribal CAA programs stated that the CAA TAS process "will provide States with an opportunity to notify EPA of boundary disputes and enable EPA to obtain relevant information as needed[.]" 59 FR at 43963. The proposal also indicated that a principal concern in utilizing the eligibility process was to streamline EPA's review of such requests to eliminate needless delay. *Id.* In finalizing the TAR to provide for notice to and comment from "appropriate governmental entities," EPA was generally affirming prior TAS practice. EPA also noted in its proposal that the CAA does not mandate a specific process regarding TAS determinations, including determinations regarding jurisdiction.¹

The Agency considers such TAS determinations to be informal adjudications. Therefore, primarily to inform EPA regarding the existence of competing claims over tribes' reservation boundary assertions and assertions of jurisdiction over non-reservation areas, the TAR provided for

¹ The four criteria established by the TAR to determine a tribe's eligibility to be treated in the same manner as a state are: (1) The applicant is an Indian tribe recognized by the Secretary of the Interior; (2) the Indian tribe has a governing body carrying out substantial governmental duties and functions; (3) 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 (4) the Indian tribe is reasonably expected to be capable of carrying out the function to be exercised in a manner consistent with the terms and purposes of the CAA and all applicable regulations.

notice to and a limited opportunity for input by "appropriate governmental entities," which the Agency has defined as states, tribes and other federal entities located contiguous to the tribe applying for eligibility. See generally 63 FR at 7267 (citing 56 FR 64876, 64884 (Dec. 12, 1991)). This practice recognized, in part, that to the extent genuine reservation boundary or non-reservation jurisdictional disputes exist, the assertion of such disputes is an inherently government-to-government process. EPA further explained that "the part of the process that involves notifying 'appropriate governmental entities' and inviting them to review the tribal applicant's jurisdictional assertion is designed to be a fact-finding procedure to assist EPA in making these statutorily-prescribed determinations regarding the tribes' jurisdiction; it is not in any way to be understood as creating or approving a state or non-tribal oversight role for a statutory decision entrusted to EPA." 63 FR at 7267.

In the preamble to its final rule, EPA made clear, however, that others who might have information germane to the tribe's jurisdictional assertions would have the opportunity to provide that information to EPA through "appropriate governmental entities." The preamble stated: "Nonetheless, EPA seeks to make its notification [of the tribe's application for eligibility] sufficiently prominent to inform local governmental entities, industry and the general public * * *." 63 FR at 7267. EPA also stated that it "will consider relevant factual information from these sources as well, provided * * * they are submitted through the identified 'appropriate governmental entities'." *Id.*

II. Clarification

Concerns have been raised about whether this process potentially inhibits EPA's receipt of pertinent information on a tribe's jurisdictional claims. One expressed concern is that the "appropriate governmental entity" may not always pass the comments along to EPA. In order to avoid potential confusion and ensure that EPA receives all potentially relevant information regarding a tribe's jurisdiction, EPA wishes to clarify its position on receiving information under the TAR from persons other than "appropriate governmental entities."

EPA continues to recognize that the tribal eligibility determination process is an inherently government-to-government process. Normally, most of the relevant information on jurisdictional boundaries resides with those sovereign entities most concerned

with the specific jurisdictional claims. However, private citizens may at times possess information relevant to jurisdictional determinations. In such cases, EPA believes that nothing in the nature of the government-to-government relationship between the U.S. and the tribe requires involvement of a third sovereign—the state—in order to facilitate EPA's receipt of information. It has been EPA's general practice in making TAS eligibility determinations to accept all relevant information regarding such issues, whether or not it comes from "appropriate governmental entities." In other words, when a member of the public has submitted relevant information on a tribe's jurisdictional claims directly to EPA, it has been EPA's practice to consider those comments in making its final determination.

Consequently, for purposes of the TAR, on those occasions when a member of the public may have relevant information on a tribe's jurisdictional claim, that information may be submitted directly to the appropriate EPA Regional office. In this context, "relevant information" is limited to information related to the tribe's jurisdictional assertions, e.g., the geographic boundaries of the reservation, the status of areas outside the reservation boundaries, agreements that may limit the tribe's jurisdiction, etc. However, given the government-to-government nature of the process, as well as the need to inform all affected parties about relevant comments that are submitted, where a member of the public elects to submit comments directly to EPA, EPA suggests that the commenter also send a copy to its "appropriate governmental entity." EPA will treat such information in the same way it treats all information received during the process and respond accordingly. All other aspects of the TAS tribal eligibility process, as described in the preamble and regulatory section of the TAR, remain unchanged.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule, for purposes of 5 U.S.C. 804(3).

Dated: January 3, 2000.

Carol M. Browner,

Administrator.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[WY-001-0005; FRL-6521-1]

Standards of Performance for New Stationary Sources; Supplemental Delegation of Authority to the State of Wyoming

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule and delegation of authority.

SUMMARY: The purpose of this document is to inform the public that, on June 3, 1999, EPA updated its delegation of authority to the State of Wyoming for implementation and enforcement of the Federal new source performance standards (NSPS) as in effect on July 1, 1997. EPA granted delegation in response to a May 21, 1999 request from the Governor of Wyoming. EPA is also updating the table in 40 CFR part 60 regarding the NSPS delegation status for EPA Region VIII States, and EPA is updating the Region VIII address listed in 40 CFR part 60.

EFFECTIVE DATE: This action will be effective February 9, 2000. The delegation of authority to Wyoming became effective on June 3, 1999.

ADDRESSES: Copies of the documents relative to this delegation are available for inspection during normal business hours at the Air and Radiation Program, Environmental Protection Agency, Region VIII, 999 18th Street, Suite 500, Denver, Colorado 80202-2466. Copies of the State documents relevant to this delegation are available for public inspection at the Air Quality Division, Department of Environmental Quality, 122 West 25th Street, Cheyenne, Wyoming 82002.

FOR FURTHER INFORMATION CONTACT: Vicki Stamper, EPA Region VIII, (303) 312-6445.

SUPPLEMENTARY INFORMATION:

I. What Is the Purpose of This Document?

EPA provides notice that, on June 3, 1999, we delegated authority to the State of Wyoming to implement and enforce the NSPS of 40 CFR part 60 as in effect on July 1, 1997. EPA is also updating the table in 40 CFR 60.4 regarding the NSPS delegation status for Region VIII States. Last, EPA is updating the Region VIII address listed in 40 CFR 60.4.

EPA considers these changes to 40 CFR 60.4 to be minor amendments. Section 553 of the Administrative