Fort McDowell Yavapai Nation

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October 30, 2000

Felicia Marcus, Regional Administrator
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

RE: Recommendation for Air Quality Designation of the Fort McDowell Yavapai Nation's Tribal Land as "Unclassified" for the 8-Hour Ozone NAAQS.

Dear Ms. Marcus:

The Fort McDowell Yavapai Nation ("Tribe" or "Fort McDowell") is a federally recognized Indian Tribe and its territorial boundaries are located in the northeast section of Maricopa County, Arizona. Maricopa County includes the Phoenix metropolitan area. Fort McDowell consists of 25,000 acres of land held in trust for the Tribe. There are approximately 900 Tribal members, but not all members reside within Fort McDowell.

This letter is in response to the EPA letter dated August 2, 2000 informing the Tribe that EPA may designate the Metropolitan Statistical Area within which the Tribe is located as a nonattainment area for purposes of the new 8-Hour Ozone National Ambient Air Quality Standard ("NAAQS"). Although there appears to be monitoring data from the State of Arizona and its political subdivisions that shows violations of the new 8-hour ozone standard in areas near the territorial boundaries of the Tribe, there is no monitoring data from air monitoring stations located specifically within Fort McDowell that reveals violations of the new ozone standard. Therefore, pursuant to Section 107(d)(1) of the Clean Air Act ("CAA"), the Tribe recommends that the EPA designate the area within the Tribe's territorial boundary as "unclassified" until the Tribe completes three years of air quality monitoring. At the end of the three years, there should be sufficient monitoring data to make a rational decision as to whether Fort McDowell should be designated as an attainment or nonattainment area.

In July of this year, the Tribe submitted to EPA Region IX, a proposed Tribal ambient air quality monitoring program that included a request for CAA grant funds from EPA in order for the Tribe to implement the program. The purpose of this program is to establish an ambient air quality program that would measure levels of ozone and particulate matter within the territorial boundaries of the Tribe as well as monitor the meteorological characteristics within the Tribe's territory.

Included within this proposal is a brief history of the Tribe's development of its air quality program that began in February, 1999, with the receipt of funds under the CAA to develop an air needs assessment and an emission inventory of all air pollutant emissions from sources located within the boundaries of the Tribe. By letter dated July 21, 2000, EPA Region IX informed the Tribe of EPA's approval for funding to support the Tribe's ambient air quality monitoring program.

At the present time, approximately half of the of the above referenced emission inventory has been completed by the Tribe's Environmental Department. As can be seen the Tribe is in the process of ascertaining the quality of air within Tribal boundaries in order to determine what environmental regulations, if any, may be needed to reduce or eliminate pollution from sources within Fort McDowell that cause or significantly contribute to ozone and particulate matter pollution in Maricopa County. Therefore, prior to completion of the Tribe's ambient air quality monitoring program, it would appear to be premature and without a rational basis for the area within the Tribe's boundaries to be designated as "nonattainment" for purposes of the new 8-hour ozone standard. This assessment is supported by the nonattainment criteria set forth in Question 4 of the July 18, 2000 EPA guidance document titled "Guidance on 8-Hour Ozone Designations for Indian Tribes."

The first factor in Question 4 states that areas should be designated as nonattainment for any area with an ozone monitor that measures a violation of the NAAQS. As shown above, though, there is no ambient air monitoring station currently operating within Fort McDowell. As a result there is no monitoring data available from within Fort McDowell to support a nonattainment designation.

The second factor in Question 4 holds that any Tribal reservation within a MSA or CMSA where an ozone violation has occurred should be designated as nonattainment. The rationale offered by the EPA concerning this factor relies on *presumptions* that all the air within an MSA is the same and that existing sources or expected growth within the boundaries of the Tribe at issue will contribute to bad air quality in the MSA. These presumptions should not be applicable to Indian Tribes located within a violating MSA where there is no monitoring data from within the boundaries of the particular Tribe's land base supporting such designation and where the existing sources and potential future sources of pollution within Tribal land is negligible as to causing or contributing to ozone concentrations in the MSA.

Moreover, application of these presumptions without corroborating monitoring data within Indian Country would strongly appear to be in disregard of the government-to-government relationship pledged by the EPA and its trust obligation to Fort McDowell. Fort McDowell is a sovereign government separate from the jurisdiction of the State of Arizona and its counties, cities and towns. As such, the designation of air quality within Fort McDowell should be determined by monitoring data collected within the boundaries of the Tribe and not from data collected by state or county agencies in areas outside of Fort McDowell. A pledge of a government-to-government relationship by the EPA to Tribes would seem to at least require corroborating evidence of 8-hour ozone violations within Fort McDowell in order to designate Tribal air quality as nonattainment.

As for EPA's trust responsibility to Indian Tribes, such obligation would at the very least seem to include providing Fort McDowell and other Indian Tribes the same period of time to collect ozone data that was given to State governments prior to commencing the current designation process. According to the EPA memorandum dated March 28, 2000, State governments are allowed to make 8-hour ozone recommendations to EPA based upon a monitoring period from 1997 to 1999. A decision to designate Fort McDowell as nonattainment without affording the Tribe the same three year monitoring and study period would appear to be arbitrary and unequitable as well as in violation of the EPA's trust obligation to Fort McDowell.

The third factor in Question 4 requires nonattainment designation for areas with sources of ozone precursors that contribute to ambient air quality in a nearby nonattainment area. Although the Tribe's emission inventory of all pollutant sources in Fort McDowell is not yet complete and the Tribe's monitoring station is not currently in operation, the Tribe seriously doubts that the rather limited pollution sources within Fort McDowell significantly or even moderately contribute to the formation of ozone within Maricopa County. The Phoenix metropolitan area has a population of more than two million people in contrast to less than 1000 Tribal members that live within Fort McDowell. The Tribe just does not have the population, resources or industry to cause or contribute to an ozone problem within Maricopa County.

The last factor in Question 4 would require nonattainment designation for an area that was previously designated a nonattainment area for the 1-hour ozone standard. Unfortunately, Fort McDowell was previously included in an area designated as nonattainment under the 1-hour ozone standard. However, the same circumstances complained about in this recommendation letter appear to have been what actually occurred in the previous inclusion of Fort McDowell in a nonattainment area since that action was not based upon any monitoring data collected from within Fort McDowell. The Tribe would argue that a previous determination that appears to be unsupported by a rational basis may not, in itself, be of sufficient legal authority to support a rational basis for designating the Tribe as nonattainment under the new 8-hour standard.

With regard to the eleven mitigating factors that EPA will consider to determine if a particular Tribe within a violating MSA should be classified as other than nonattainment, the Tribe agrees that such criteria is relevant and should be taken into account by EPA. However, all the mitigating factors pertaining to scientific data concerning conditions within Indian Country depend to a significant extent upon a Tribe's implementation of an ambient air quality program. As explained above, though, the Tribe does not currently have scientific data asked for in the eleven mitigating factors. Furthermore, due to the relative newness of the Tribe's air quality program, the Tribe has not fully completed its emissions inventory for the mitigating factors dealing with emission sources within Indian Country. However, for those mitigating factors that do not depend upon scientific data or research, the following is a response to such issues.

As shown above, Fort McDowell has a very small population. The Tribe's primary economic enterprise is a gaming casino. As for industry located within the Reservation, the Tribe operates a limited sand and gravel operation and a concrete ready mix company. Nearly all Fort McDowell

Tribal members are employed by the Tribe and, thus, do not have to commute off reservation for work. At present, the Tribe does not intend to expand its industrial enterprises due to the limited land base that the Tribe possesses and the desire of the Fort McDowell community to protect its environment.

However, Fort McDowell and other Tribes in Arizona are currently negotiating new gaming compacts with the State of Arizona. In the event negotiations fail or gaming becomes no longer economically viable for the Tribe, then the Tribe will be forced to look at other economic opportunities to supplant the revenue needed by the Tribe to provide governmental services to Tribal members and other people living within Fort McDowell. In such a scenario, the Tribe would have to consider all business ventures including industrial enterprises. If the EPA designates Fort McDowell as a nonattainment area, this decision could greatly impact the Tribe's potential for economic development. This is especially true if Fort McDowell was used as an off set area for the continued development and expansion of the Phoenix metropolitan area. It would be unequitable to allow other cities, towns and communities within Maricopa County to fully develop their economy at the expense of Fort McDowell and other neighboring Indian Tribes.

In conclusion, based upon the information and arguments provided above, the Fort McDowell Yavapai Nation formally recommends that the EPA designate the Tribe's land base as "unclassified" under the new 8-hour ozone standard. This action would allow the Tribe to implement its air quality monitoring program for a period of three (3) years to allow a conclusive determination of the Tribe's air quality from which the EPA could make an appropriate and rational decision as to the designation of the Tribe's land base as either an attainment or nonattainment area.

Sincerely,

Fort McDowell Yavapai Nation

Dr. Clinton M. Pattea

DR. CLINTON M. PATTEA
Tribal Council President

CC: FMYN Environmental Department