M E M O R A N D U M

TO: Candace Carroway
U.S. EPA - OAQPS

FR: Jerry Pardilla

RE: Comments about OAQPS Draft Plan for Citizen Involvement in the Title V Program

DA: August 12, 1999

I have reviewed the Draft Plan and have prepared comments below. I offer these as tribal perspectives, rather than as established tribal positions. If you need specific tribal comments, please solicit individual tribes for their viewpoints. My comments address general concerns and specifics about the three-part implementation strategy.

General Concerns

Even though the Tribal Authority Rule has been promulgated, it may be quite some time before tribes establish permitting programs for sources regulated by Title V of the Clean Air Act. The EPA will need to administer federal operating permits programs in Indian country until such time as tribes are able to assume responsibility. In fact, EPA will have to be prepared to implement these permits programs for an indefinite period of time, since tribes—unlike states—are not required to develop such programs. I am concerned about how the EPA will consult with tribes as it administers federal permits programs in Indian country.

The OAQPS Draft Plan provides for citizen oversight in the operating permit program to hold agencies accountable. The Draft Plan assumes that co-regulators (states and tribes) have federally approved programs and strives to increase citizen participation. However, the Plan does not clearly address the situation in which the EPA administers permit programs for tribes. In this case, how does the EPA plan to involve tribes, as citizens? Tribes must not be relegated to the status of citizens or even stakeholders. Tribes are sovereigns who must be necessary partners to the permitting process for sources within their homelands. Moreover, EPA has obligations to provide technical assistance and support to tribes to increase their expertise and capacity to develop their own operating permit programs. This is certainly consistent with the agency's Indian Policy.

As EPA prepares guidance for citizen involvement in the permit process, the Tribal Authority Rule (TAR) may need to be clarified. As you know, the TAR sets out fundamental differences as to how states and tribes establish federally-approved air programs. In particular, the modular approach for tribal air programs may potentially create a mosaic of tribal and EPA components. A good

communication plan will be needed so that citizens may know which agency administers the Title V program. Likewise, the TAR, in its final form, did not address the issue of citizen suits. This is the ultimate action that citizens can invoke for agency accountability. It is unclear whether these provisions apply within Indian country, whether EPA can impose such provisions on tribes, and whether the definition of citizen includes non-tribal members within or outside Indian country. In my view, the TAR side-stepped the issues of citizen suits and sovereign immunity. I understand what happened in the rule-making process, and that the waiver of sovereign immunity is a highly sensitive matter for many tribes.

I am not sure how tribes will respond to guidance that compels the same citizen involvement provisions as states. I recommend that these citizen involvement provisions allow flexibility to account for the legal and resource differences between tribes and states. Furthermore, I would urge EPA to consult with each tribe who seeks federal approval for a Title V program. I do not imply that tribes would not welcome citizen participation in a permitting process. But, that the EPA recognize that tribes have their own internal mechanisms for citizen involvement and due process, which tend to vary from tribe to tribe. The governing federal law is the Indian Civil Rights Act of 1968 which established "Bill of Rights" protections to persons in Indian country. Among those protections is due process. Some tribes have also adopted Administrative Procedures Acts. Again, EPA must consult with tribes to determine the mechanisms by which each tribe provides for citizen involvement. The agency must work closely with each tribe to provide for citizen oversight, thus striking a careful balance between citizen involvement and tribal authority. Tribes are wary of possible infringements on their authority in the federal delegation process.

The resource concern is that tribes generally do not have the regulatory infrastructure to provide citizen-friendly information systems. The EPA needs to be prepared to assist tribes with this aspect of citizen involvement, possibly through technical assistance and support as tribes develop their air programs. Tribes may need both an electronic and hardcopy based system. This raises the issue of the "digital divide" and that some tribal locations may not have widely available electronic access. Your citizen involvement plan recognizes this by preparing handbooks for distribution.

Specific Concerns

The first strategy envisions citizen training. I like this strategy. Will there be training cycles beyond FY2000? Perhaps in the specific milestones, this might be addressed. Will Northern Arizona University (NAU) continue to do this training for tribes? I would urge you to continue to fund NAU to do both introductory and advanced level training for tribes. At some point, do you envision that there would be integrated training? Perhaps offered by the Regions? This would foster communication between states and tribes, and improve citizen understanding of tribal governments and their regulatory programs too. I would urge you to consider not only NAU for curriculum development but the tribal colleges as well, particularly if the training is done on a regional basis.

The second strategy addresses access to existing data and information. Simply put, there are data gaps for tribal environments. This issue is larger than public access since many tribes do not have basic or even baseline data. There are pressing needs for air quality monitoring, and data collection for tribal airsheds. Resources for tribal staff and equipment are needed to make this a meaningful strategy for citizens to access information about tribal permitting programs.

Citizens' handbooks are an excellent component to this strategy. I agree with emphasis placed on procedures for effective participation. I recommend the inclusion of sections about tribes as regulators and also where to find sources of information.

The third strategy is geared towards integrating citizen involvement principles into the development of OAQPS regulations and policies. This is a responsible action, and should be conducted in a fair and open process. I would urge the agency to conduct outreach and dialogue with citizens such that permitting agencies are also afforded opportunities to contribute to the development of guidance documents for citizen participation in Title V programs.

Conclusion

I hope these comments are helpful and provide some insight. Please call me if you have any questions or would like clarifications. I want to emphasize again that these are my opinions or perspectives, and are not to be construed as tribal positions. The NTEC Board has not formally adopted these as position statements and our members have not adopted these either. Nevertheless, thank you for considering my comments.