



SOUTHERN UTE INDIAN TRIBE

DELIVERED VIA EMAIL c/o Allison Busbee: Allison.Busbee@mail.house.gov

The Honorable Ed Whitfield
Chairman
Subcommittee on Energy and Power
United States House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515-6115

Re: Clean Air Act Forum: State, Local, and Federal Cooperation under the CAA

Dear Chairman Whitfield:

Thank you for the invitation to participate in the above-referenced forum on August 2, 2012. In advance of the forum, you asked that we provide answers to certain questions. For convenience, we have reprinted each question below, followed by our answer.

Question No. 1: In your agency's experience implementing the Clean Air Act (CAA), what is working well? What is not working well?

Answer: Since 1981, utilizing CAA section 103 and 105 grant funding, the Tribe (through its Air Quality Program) has monitored the impacts of both neighboring and local sources of air pollution on the Southern Ute Indian Reservation. Currently, the Tribe operates two monitoring stations. The Tribe also has completed multiple emission inventories, most recently for calendar year 2008.

On March 2, 2012, in accordance with 40 C.F.R. Part 70, the Tribe became the first Indian tribe in the nation with delegated authority to administer the Clean Air Act's Title V operating permits program on its reservation. The Tribe's experience in actually implementing that program, therefore, has only just begun. In the development of that program, and in the ongoing development of a minor source program for the Southern Ute Indian Reservation, the Tribe has worked closely with energy companies whose operations are subject to regulation under the CAA, as well as with state and EPA air pollution control personnel. Based on that experience, and based on the Tribe's experience monitoring air quality and conducting emission inventories, the following aspects of the CAA are working well and not working well:

Working well:

- Modular approach to tribal implementation of CAA programs. In 1990, the CAA was amended to authorize Indian tribes to assume primary

regulatory authority for administering CAA programs in Indian country. Tribes meeting certain criteria, set forth in CAA Section 301(d)(2), are eligible to be “treated as a state” (TAS) with respect to any particular CAA program. Importantly, tribes are not *required* to administer CAA programs; rather tribal involvement in the administration of CAA programs by applying for TAS status is entirely voluntary. Consistent with the statutory approach, EPA’s implementing regulations allow tribes to choose to develop only certain CAA programs, and even only parts of those programs, and not others. This modular approach has enabled the Southern Ute Indian Tribe to identify its priorities and to seek approval of only those programs, or parts of programs, most appropriate in the Tribe’s view for its administration, instead of having to seek approval of entire complex programs for which the Tribe lacks expertise and resources, or which have little relevance to the Reservation. The Tribe appreciates and values the flexibility of being able to implement programs in a modular fashion to address the particular air pollution control problems that are most important to the Tribe. Further, the modular approach allows the Tribe to develop incremental expertise that may facilitate development and expansion of further programs over time.

- EPA grant funding support and technical assistance. Financial assistance via Section 105 grants (for the support of air pollution planning and control programs) and Section 103 grants (for investigations, demonstrations and studies into the causes, effects, extent, prevention and control of air pollution), as well as the technical advice and assistance provided by EPA Region 8 staff, has been critical to the development of what is known as the Reservation Air Program on the Southern Ute Indian Reservation.

Not working well:

- EPA filling the regulatory gap in Indian country. In the absence of approved tribal programs, EPA is responsible for directly implementing CAA programs in Indian country. Unfortunately, EPA’s efforts to provide CAA protection of air resources within Indian reservations have in some instances fallen short. For example, only last year did EPA finally promulgate a minor new source review preconstruction permitting program for Indian country. The lack of a federal minor source program for Indian country meant that emissions from many minor sources on the Southern Ute Indian Reservation went unregulated for decades while emissions from minor sources located in neighboring state jurisdictions were controlled under long-established state minor source programs. Congressional funding support for EPA’s development of federal implementation plans and

other measures is critically important to ensure that Indian country air resources are protected to the same extent as the air resources in other areas. Another example is the infrequency of EPA compliance inspections. Due to limited resources, EPA is simply unable to conduct the number of inspections necessary to assure compliance by sources on the Reservation.

Question No. 2: Do state and local governments have sufficient autonomy and flexibility to address local conditions and needs?

Answer: As noted above, the flexibility for Indian tribes to either apply for “treatment in the same manner as a state” status and seek authority to administer CAA programs, and the corresponding flexibility under EPA’s so-called “tribal authority rule,” under which tribes can pick and choose the CAA programs it wishes to administer, is of great importance to the Tribe. We believe, however, that even greater autonomy and flexibility is possible. For example, the minimum standards for State operating permit programs (and operating permit programs developed by eligible tribes) are found in Part 70 of Title 40 of the Code of Federal Regulations. Those minimum standards include reporting requirements for operators that are, in the Tribe’s view, sometimes unnecessarily burdensome and of little environmental benefit. Rather than requiring certain reports in every instance, tribes should be afforded the flexibility to assure compliance and improve air quality through alternative, more meaningful, mechanisms, such as the conduct of more frequent inspections. This more flexible approach would have the benefit of reducing the administrative burden on sources and the regulating agency, and allowing resources to be focused instead on activities tied more directly to air quality improvement.

Question No. 3: Does the current system balance federal, state, and tribal roles to provide timely, accurate permitting for business activities, balancing environmental protection and economic growth?

Answer: Before the 1990 amendments, the CAA assigned air quality protection responsibilities between the federal government and the states, but did not provide a role for Indian tribes. Congress recognized this omission and amended the Act to provide for tribes to assume implementation and enforcement responsibility for CAA programs in a manner similar to that assumed by states. We believe the role established for Indian tribes under the CAA is appropriate.

The Tribe has concerns, however, regarding the permitting of business activities and the balance between environmental protection and economic growth. The Tribe is sensitive to the fact that excessive regulatory burdens can have a suffocating effect on business development and economic growth, especially on fragile reservation economies. With the extent to which tribes, along with many others, have been impacted by the economic downturn, it is especially important to consider the appropriate balance between environmental protection and economic growth. In that regard, the CAA could be improved first, by providing a single uniform reporting structure. Current reporting requirements are highly complex and often overlapping. This inefficiency is often exacerbated with the promulgation of each additional final rule, emission standard, and requirement. The consistency and predictability provided through the

creation of a single uniform and efficient reporting structure covering all CAA programs and rules will shift the focus and burden of regulated communities and permitting agencies from that of maintenance and enforcement of administrative reporting requirements to that of compliance and enforcement of real world emissions. Second, the CAA could be improved by focusing on regulations that are more results-oriented and less prescriptive, for example, by establishing emission limitations rather than mandating installation of a particular type of control technology. Establishing an emission limit would allow the regulated community to determine the most efficient means to achieve that limit, and would give the regulated community the flexibility to account for local conditions and meet such standards in creative ways and with lower costs.

Question No. 4: Does the CAA support a reasonable and effective mechanism for federal, state, tribal and local cooperation through State Implementation Plans? How could the mechanism be improved?

Answer: The opportunity for eligible tribes to develop a Tribal Implementation Plan for achieving and maintaining the National Ambient Air Quality Standards for that tribe's reservation, combined with (1) the opportunity of an affected state to comment on EPA's proposed approval of a TIP and (2) the EPA/tribal consultation regarding development of any necessary Federal Implementation Plan constitute reasonable and effective mechanisms for federal, state, and tribal cooperation in the development of implementation plans for Indian country. It is the Tribe's view that Congress should not attempt to mandate additional cooperation between tribes and states. EPA encouragement of tribal and state governments to resolve their differences through negotiation is sufficient.

Question No. 5: Are cross-state air pollution issues coordinated well under the existing framework?

Answer: Because it has a checkerboard reservation, and because the Reservation is located in the Four Corners, the Tribe often faces transboundary air pollution issues. Where tribal and State governments, managing regulatory programs for reservation and state areas, respectively, may encounter trans-boundary problems arising from inconsistent standards, policies, or enforcement activities, EPA encourages the tribal and state governments to resolve their differences through negotiation at the local level. The Tribe believes that approach is appropriate. Where air pollution crosses political boundaries, effective regulation calls for coordination and cooperation among all governments having a regulatory role impacting the airshed. Regulatory differences among tribes and states are best resolved locally by tribes and states acting out of mutual concern for the environment and the health of the affected populace.

On the Southern Ute Indian Reservation, air pollution is regulated under a unique intergovernmental arrangement between the Tribe and State of Colorado, with the support of EPA. Under the arrangement, the Tribe and State formed a joint Southern Ute Indian Tribe/State of Colorado Environmental Commission which is responsible for selecting the Clean Air Act programs that will apply on the Reservation and promulgating the regulations for the programs. The Commission is composed of six members – three appointed by the Governor of the State of Colorado and three appointed by the Southern Ute Indian Tribal Council. The Tribe is

responsible for incorporating the regulations into applications to EPA for program approval. Once program approval is received, the Tribe is responsible for day-to-day administration of the programs. The Commission also acts as an administrative review body for challenges to tribal actions. In March 2012, the first program developed under the arrangement, a Part 70 operating permit program, was approved by EPA. Currently, a minor source program is being developed by the Environmental Commission. In addition to its work with the Environmental Commission, the Tribe is an active participant in the Four Corners Air Quality Group and other regional air pollution control planning efforts.

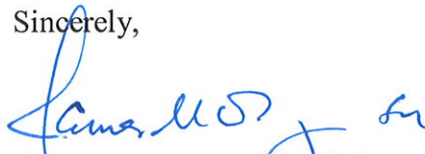
Question No. 6: Are there other issues, ideas or concerns relating to the role of federalism under the CAA that you would like to discuss?

Answer: From our perspective, the CAA has been constructed in a manner that, overall, is respectful of tribal sovereignty. Under the CAA, tribes have the opportunity to apply for TAS status and to administer CAA programs, provided the practical capability and resource limitations can be addressed. Nor does the CAA expressly displace inherent tribal authority to regulate air pollution in Indian country.

One way the CAA could be improved is by the addition of language recognizing EPA's trust responsibility to Indian tribes in the administration of the CAA. In our view, EPA should not only comply with the statutory mandates but also assure that tribal concerns and interests are considered whenever EPA's actions and decisions may affect reservation environments.

In conclusion, we thank you for the opportunity to provide answers to the Committee's questions and we look forward to participating in the forum on August 2nd.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jimmy R. Newton, Jr.", written over a circular stamp or mark.

Jimmy R. Newton, Jr., Chairman
Southern Ute Indian Tribal Council