



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 49

[EPA-R08-OAR-2020-0742; FRL-10020-09-Region 8]

Approval of the Tribal Implementation Plan for the Northern Cheyenne Tribe

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a Tribal Implementation Plan (TIP) submitted by the Northern Cheyenne Tribe (Tribe) on September 25, 2017, to regulate air pollution within the exterior boundaries of the Tribe's Northern Cheyenne Indian Reservation and four tribal trust parcels (collectively, the Reservation). The EPA is proposing to approve the TIP based on maintenance of the National Ambient Air Quality Standards (NAAQS) through a permitted open burning program. The EPA is taking this action pursuant to sections 110(o), 110(k)(3), and 301(d) of the Clean Air Act (CAA or the Act).

DATES: *Comments:* Written comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R08-OAR-2020-0742, to the Federal Rulemaking Portal: <https://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the

primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit:

<http://www2.epa.gov/dockets/commenting-epa-dockets>.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically in *www.regulations.gov*. To reduce the risk of COVID-19 transmission, for this action we do not plan to offer hard copy review of the docket. Please email or call the person listed in the **FOR FURTHER INFORMATION CONTACT** section if you need to make alternative arrangements for access to the docket.

FOR FURTHER INFORMATION CONTACT: Kyle Olson, Air and Radiation Division, EPA, Region 8, Mailcode 8ARD-TRM, 1595 Wynkoop Street, Denver, Colorado, 80202-1129, (303) 312-6002, *olson.kyle@epa.gov*.

SUPPLEMENTARY INFORMATION:

Throughout this document “we,” “us,” or “our” means the EPA.

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I. The EPA Action Being Proposed Today

The EPA is proposing approval of the Tribe's TIP submission which contains programs to address: ambient air quality standards for sulfur dioxide (SO₂), particulate matter (PM₁₀ and PM_{2.5}), nitrogen dioxide (NO₂), ozone (O₃), carbon monoxide (CO), and lead; permitting; open burning; and enforcement.

II. Introduction

The Tribe is a federally-recognized Indian tribe by the U.S. Secretary of the Interior. *See* 85 FR 5462, 5464 (January 30, 2020). Beginning in 2017, the Tribe, with assistance from the EPA, began developing a draft TIP and its various elements with the goal of eventually submitting the TIP to the EPA for approval. On September 25, 2017, the Tribe requested that the EPA find the Tribe eligible for treatment in a similar manner as a state (TAS), pursuant to section 301(d) of the CAA and Title 40 part 49 of the Code of Federal Regulations (CFR), for the purpose of developing and carrying out a TIP. The Tribe also formally submitted the TIP to the EPA on September 25, 2017. On June 22, 2020, the EPA determined that the Tribe is eligible

for TAS for that purpose. Having found that the Tribe is eligible for TAS, the EPA is now proposing to approve the Tribe's TIP.

The Tribe's TIP has been developed to protect the Reservation populace from air pollution by controlling open burning sources. The TIP establishes primary and secondary ambient air quality standards for CO, lead, SO₂, PM₁₀, PM_{2.5}, NO₂, and O₃. The TIP also establishes an open burning permitting program and enforcement authorities.

III. Background

The CAA was originally enacted in 1963 and has been significantly amended over the years (most notably in 1970, 1977, and 1990). Among other things, the Act: requires the EPA to establish NAAQS for certain pollutants; requires the EPA to develop programs to address specific air quality problems; establishes the EPA's enforcement authority; and provides for air quality research. As part of the 1990 amendments, Congress added section 301(d) to the Act authorizing the EPA to treat eligible Indian tribes "in the same manner as states" and directing the EPA to promulgate regulations specifying those provisions of the Act for which TAS is appropriate. In February of 1998, the EPA implemented this requirement by promulgating the Tribal Authority Rule (TAR) (63 FR 7254 (February 12, 1998), codified at 40 CFR part 49). The EPA included relevant provisions relating to implementation plans among the provisions for which TAS is appropriate (exceptions are identified in 40 CFR 49.4).

Under the provisions of the Act and the EPA's regulations, Indian tribes must demonstrate that they meet the criteria in section 301(d) of the Act and the TAR in order to be eligible for TAS. The eligibility criteria are: (1) The Indian tribe is federally recognized; (2) the Indian tribe has a governing body carrying out substantial governmental duties and powers; (3) the functions the Indian tribe is applying to carry out pertain to the management and protection of air resources within the exterior boundaries of the reservation (or other areas within the Indian tribe's jurisdiction); and (4) the Indian tribe is reasonably expected to be capable of performing

the functions the Indian tribe is applying to carry out in a manner consistent with the terms and purposes of the Act and all applicable regulations.

An implementation plan is a set of programs and regulations developed by the appropriate regulatory agency in order to assure healthy air quality through the attainment and maintenance of the NAAQS. These plans can be developed by states, eligible Indian tribes, or the EPA, depending on the entity with jurisdiction and the EPA's approval in a particular area.

For states, these plans are referred to as State Implementation Plans or SIPs. For eligible Indian tribes, these plans are called TIPs. Occasionally, the EPA will develop an implementation plan for a specific area or source. This is referred to as a Federal Implementation Plan or a FIP. Once final approval is published in the *Federal Register*, the provisions of an implementation plan become federally enforceable. An applicable implementation plan may be comprised of both TIPs and FIPs or SIPs and FIPs.

The contents of a typical implementation plan may fall into three categories: (1) enforceable emission limitations and other control measures, means, or techniques, as well as schedules and timetables for compliance; (2) "non-regulatory" components (e.g., attainment plans, rate of progress plans, emission inventories, statutes demonstrating legal authority, monitoring programs); and (3) additional requirements promulgated by the EPA (in the absence of a commensurate state or tribal provision) to satisfy a mandatory CAA section 110 or part D requirement. The implementation plan is a living document which can be revised by the state or eligible Indian tribe as necessary to address air pollution problems. Accordingly, the EPA from time to time must take action on implementation plan revisions which may contain new and/or revised regulations that will become part of the implementation plan.

Upon submittal to the EPA, the EPA reviews implementation plans for conformance with federal policies and regulations. If the implementation plan conforms, the state's or eligible Indian tribe's regulations become federally enforceable upon EPA approval. The codification is

usually accomplished by notice-and-comment rulemaking, with publications of proposed and final rules in the *Federal Register*.

IV. Tribal Implementation Plan Requirements

What is required for the approval of a Tribal Implementation Plan?

For a tribe to receive EPA approval of a TIP, the tribe must, among other things, obtain a determination from the EPA that the tribe is eligible for TAS for purposes of the TIP and submit to the EPA a TIP that satisfies requirements of the Act and relevant regulations that apply to the plan elements and functions the tribe seeks to carry out.

The following technical elements in a TIP may include, but are not limited to:¹

- A list of regulated pollutants affected by the plan;
- Documentation that the plan contains emission limitations, work practice standards, and recordkeeping/reporting requirements; and
- Regulations.

The TAR allows tribes to develop, adopt, and submit an implementation plan for approval as a TIP in a modular fashion, so it may not be necessary to meet all of the requirements identified above.

The EPA has the authority, under the Act, to enforce the regulations in an approved TIP. The EPA recognizes that, in certain circumstances, eligible Indian tribes have limited criminal enforcement authority. The TAR specifically provides that such limitations on an Indian tribe's criminal enforcement authority do not prevent a TIP from being approved. Where implementation of the TIP requires criminal enforcement authority, and to the extent a tribe is precluded from asserting such authority, the federal government will exercise primary criminal enforcement responsibility. A memorandum of agreement between an Indian tribe and the EPA is an appropriate way to address circumstances in which the tribe is incapable of exercising

¹ United States Environmental Protection Agency, Office of Air Quality and Planning Standards. *Developing a Tribal Implementation Plan*. chapters 2 and 4. https://www.epa.gov/sites/production/files/2018-09/documents/developing_a_tribal_implementation_plan_sept._2018_1.pdf. 2018.

applicable enforcement requirements as described in 40 CFR 49.7(a)(6) and 40 CFR 49.8. The memorandum of agreement shall include a process by which the tribe will provide potential investigative leads to the EPA and/or other appropriate federal agencies in an appropriate and timely manner.

V. Northern Cheyenne Tribe's TIP Submittal

A. Northern Cheyenne Tribe TAS Eligibility

On September 25, 2017, the Tribe requested an EPA determination under the provisions of 40 CFR 49.7 that the Tribe is eligible for TAS for the purpose of developing a TIP for air quality. On June 22, 2020, the EPA determined that the Tribe meets the eligibility requirements of section 301(d) of the Act and 40 CFR 49.6 for the purposes of developing and carrying out an implementation plan under the Act. EPA's decision on the TAS is final and is provided as background only in this action. It is not subject to further public comment as part of this TIP approval.

B. What authority does the Northern Cheyenne Tribe's Department of Environmental Protection and Natural Resources (DEPNR) have?

The Northern Cheyenne Tribal Council gave the DEPNR authority to administer the Northern Cheyenne Clean Air Act (NCCAA) programs on behalf of the Tribe in Tribal Ordinance No. DOI-008 (2017) dated December 7, 2016. The Northern Cheyenne Tribal Council had the authority to take this action pursuant to Article IV, Section 1(a), (i), and (r) of the Tribe's Amended Constitution and Bylaws.² Tribal Ordinance NO. DOI-008 (2017) authorized the DEPNR to administer the NCCAA programs, as allowed under the Act and the EPA's regulations.

C. What role does the EPA have in criminal enforcement?

The Tribe did not submit, and EPA is not proposing to approve, any criminal enforcement authority under the TIP. Accordingly, the EPA is responsible for pursuing any

² Northern Cheyenne TAS/TIP Application, section J, page 1.

criminal enforcement action for violations of the Act or implementing regulations that occur in Indian country. Consistent with 49 CFR 49.7(a)(6) and 49 CFR 49.8, on May 14, 2020, the Tribe entered into a Memorandum of Agreement (MOA) with EPA Region 8 concerning criminal enforcement of air pollution rules and regulations as part of the TAS application process. Under the terms of this MOA, the Tribe would refer alleged criminal violations of the Act that exceed the Tribe's criminal authority to EPA Region 8 if the EPA approves the Tribe for CAA criminal enforcement authorities in the future. Neither the proposed action nor the MOA prevent the Tribe from pursuing criminal enforcement actions within the Tribe's criminal authority under tribal law.

D. When did the Northern Cheyenne Tribe adopt the TIP under Tribal Law?

On December 7, 2016, the NCCAA was approved by the Tribal Council as Tribal Ordinance No. DOI-008 (2017). On September 12, 2017, the Tribal Council passed Resolution No. DOI-201 (2017) authorizing submission of the NCCAA to the EPA as a TIP under the Act. The Tribe's staff completed the public notification process for a TIP required by 40 CFR 51.102 and received no public comments and no requests for a public hearing regarding the TIP.³ In addition, the Tribe has posted the NCCAA on the Tribe's website.

E. What is included in the Northern Cheyenne Tribe's TIP submittal?

The Tribe's TIP submittal includes ambient air quality standards for CO, lead, NO₂, O₃, PM₁₀, PM_{2.5}, and SO₂, and provisions for an open burning permit program, enforcement and appeals, and emergency authority.

1. Ambient Air Quality Standards

The EPA has established primary and secondary NAAQS for six air pollutants: CO, lead, NO₂, O₃, PM₁₀/PM_{2.5}, and SO₂. See <https://www.epa.gov/criteria-air-pollutants/naaqs-table>. Most pollutants regulated by the NAAQS have two limits. The "primary" standard is designed to protect the public—including children, people with asthma, and the elderly—from health risks.

³ Northern Cheyenne TAS/TIP Application, Resolution No. DOI-201(2017), section Z, page 2.

The “secondary” standard is to prevent unacceptable effects on the public welfare, e.g., damage to crops and vegetation, buildings and property, and ecosystems.

The Tribe established primary and secondary air quality standards, which will remain consistent with any future EPA updates to the NAAQS, for the following air pollutants:

Pollutant		Primary/ Secondary	Averaging Time	Level	Form
Carbon Monoxide (CO)		primary	8 hours	9 ppm	Not to be exceeded more than once per year
			1-hour	35 ppm	
Lead (Pb)		primary and secondary	Rolling 3 month period	0.15 µg/m ³	Not to be exceeded
Nitrogen Dioxide (NO ₂)		primary	1-hour	100 ppb	98th percentile of 1-hour daily maximum concentrations, averaged over 3 years
		primary and secondary	1 year	53 ppb	Annual Mean
Ozone (O ₃)		primary and secondary	8 hours	0.070 ppm	Annual fourth-highest daily maximum 8-hour concentration, averaged over 3 years
Particle Pollution (PM)	PM _{2.5}	primary	1 year	12.0 µg/m ³	Annual mean, averaged over 3 years
		secondary	1 year	15.0 µg/m ³	Annual mean, averaged over 3 years
		primary and secondary	24 hours	35 µg/m ³	98th percentile, averaged over 3 years
	PM ₁₀	primary and secondary	24 hours	150 µg/m ³	Not to be exceeded more than once per year on average over 3 years
Sulfur Dioxide (SO ₂)		primary	1-hour	75 ppb	99th percentile of 1-hour daily maximum concentrations, averaged over 3 years
		secondary	3 hours	0.5 ppm	Not to be exceeded more than once per year

Accordingly, the EPA proposes to approve the Tribe’s standards for the pollutants listed in the table above, which are the same as the NAAQS, for incorporation into the TIP.

2. Open Burning Program

The proposed TIP establishes a general prohibition on open burning on the Reservation (see NCCAA Section 5.1), unless otherwise exempted under NCCAA Section 5.2 (i.e., open burning for cultural, traditional, or spiritual purposes or open burning activity that is less than

four feet in diameter and less than three feet in height) or is permitted under NCCAA Section 5.7. The Tribe reserves the right to issue burn bans, per NCCAA Section 5.6, and prohibits the burning of listed materials in NCCAA Section 5.4 (unless authorized for training fires).

Permitting procedures for open burning are specified in NCCAA Section 5.7. Permits are required for open burning activity on the Reservation that is four or more feet in diameter or three or more feet in height (unless exempted under NCCAA Section 5.2) prior to commencing open burning activities. Permits may be issued only if the Air Quality Administrator determines, in consultation with the appropriate Bureau of Indian Affairs, Northern Cheyenne Agency personnel, that the proposed open burning activity will not cause an adverse impact on Reservation air quality or otherwise endanger public health or welfare on the Reservation. Permits are also required to contain certain minimum permit conditions, including setback requirements, equipment and supply requirements, wind speed limitations, and extinguishment conditions, etc. Violations of any applicable permit terms or conditions are considered violations of the NCCAA. For all permitted open burning activities, the permittee must notify the Air Quality Administrator at least two working days prior to commencing an open burning activity and must notify Northern Cheyenne Fire Protection not less than one hour prior to commencing the open burning activity (during regular business hours). Section 5.5 of the NCCAA specifies, however, that no person shall commence or continue an open burning activity within the Reservation that is determined by the Director of the Tribe's DEP NR, in consultation with the Air Quality Administrator, to cause or contribute to an exceedance of any Northern Cheyenne Ambient Air Quality Standard. The EPA is proposing to approve the conditions and procedures the Tribe has established for its open burning permitting program.

3. Enforcement

Section 3 of the proposed TIP covers civil enforcement and appeals. Under the TIP, the Tribe's Air Quality Administrator can issue compliance orders for TIP violations. A compliance order can include civil penalties up to \$5,000 per day for each violation and an assessment of

costs incurred by DEP NR. The Air Quality Administrator can file an action in Northern Cheyenne Tribal Court pursuant to the Northern Cheyenne Rules of Civil Procedure to enforce a penalty order or to seek preliminary injunctive relief against any person who is suspected to have violated the TIP or a compliance order.

Alleged violators can challenge compliance orders by petitioning the DEP NR Director for administrative review within 30 days of receiving the order. The Director shall promptly review petitions for administrative review and issue a written decision that upholds, vacates, or modifies the order. Alleged violators can challenge a decision by the Director by filing an action in Northern Cheyenne Tribal Court pursuant to the Northern Cheyenne Rules of Civil Procedure. The Tribal Court shall uphold any decision by the Director unless it is arbitrary and capricious or contrary to law.

The EPA finds the Tribe has adequately established an enforcement mechanism to carry out its regulations, and the EPA proposes to approve it.

VI. What EPA action is being taken today?

The EPA is proposing approval of the Tribe's proposed TIP, which contains programs to address ambient air quality standards for the NAAQS pollutants, an open burning program, and enforcement provisions. The public docket contains the Tribe's proposed TIP, TAS eligibility determination, and enforcement MOA with the EPA.

VII. Incorporation by Reference

In this document, the EPA is proposing to include regulatory text in an EPA final rule that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference the TIP amendments described in Section VI of this preamble. The EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* (refer to docket EPA-R08-OAR-2020-0742).

VIII. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP or TIP submission that complies with the provisions of the Act and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). In reviewing TIP submissions, the EPA's role is to approve tribal choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely proposes to approve tribal law as meeting Federal requirements and does not impose additional requirements beyond those imposed by tribal law. For that reason, this proposed action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because this action is not significant under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 9, 2000), requires the EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” The EPA has concluded that this proposed rule will have tribal implications in that it will have substantial direct effects on the Northern Cheyenne Tribe. However, it will neither impose substantial direct compliance costs on tribal governments nor preempt tribal law. The EPA is proposing to approve the TIP at the request of the Tribe. Tribal law will not be preempted as the Tribe has already incorporated the TIP into Tribal law on December 7, 2016. The Tribe has applied for, and fully supports, the proposed approval of the TIP. If it is approved, the TIP will become federally enforceable.

List of Subjects in 40 CFR Part 49

Environmental Protection, Administrative practice and procedure, Air pollution control, Incorporation by reference, Indians, Indians-law, Indians-tribal government, Intergovernmental relations, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: February 17, 2021.

Debra H. Thomas,
Acting Regional Administrator,
Region 8.

