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EPA Docket Center  
Environmental Protection Agency  
Room 3334  
1301 Constitution Avenue, NW  
Washington DC 20460

**Attention Docket ID No. EPA-HQ-OAR-2008-0318**

Dear Sir or Madam:

The National Tribal Air Association (NTAA) is pleased to submit these comments regarding the Environmental Protection Agency's (EPA) Advanced Notice of Proposed Rulemaking: Regulating Greenhouse Gas Emissions under the Clean Air Act (hereinafter referred to as the "ANPR").

The NTAA is an autonomous organization of the National Tribal Environmental Council and has more than 50 principal member tribes. The NTAA's mission is to advance air quality management and policies and programs, consistent with the needs, interests, and unique legal status of American Indian tribes and Alaskan Natives. As such, the NTAA provides its resources to support the efforts of all federally recognized tribes in protecting and improving the air quality within their respective jurisdictions.

While the NTAA is appreciative of EPA's efforts to address some very important issues related to the regulation of greenhouse gases (GHGs), our organization would like to take this opportunity to comment on how such gases should and should not be regulated under the Clean Air Act (CAA); and how Indian tribes should be accounted for under any regulatory scheme, specifically the kinds of resources that such tribes should be provided with in order to effectively address climate change and its impacts to their communities.

**I. Introduction**

Climate change is perhaps the most pressing environmental issue of our time. Temperatures during the last eleven out of twelve years rank among the warmest since 1850; Arctic temperatures have experienced a temperature increase twice that of other parts of the world; the average rise in sea level since 1993 has been about 3.1 millimeters per year; droughts have become longer and more intense since the early 1970s, complemented by changes in sea surface temperatures, wind patterns and decreased snowpack; and other extreme weather conditions have occurred. Perhaps no other community of people has experienced the adverse impacts of climate change more than the nation's Indian tribes. Climate change is affecting the subsistence

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harvesting of tribes due to changes in the migratory patterns and locations of animals and traditional plants. In most cases, tribes do not have the legal right to follow these animals and plants.

In the far north, species never found before are beginning to show up along with disease-carrying insects against which Indian tribes have yet to establish immunities. Tribes can no longer travel safely on ice that has served their subsistence lifestyles well but which is now disappearing at a rapid rate. Alaska Native villages, in particular, have experienced increased storm surges which has led to subsequent coastal erosion and flooding. In fact, according to the U.S. Army Corps of Engineers, at least three tribes will need to be moved in the next 10 to 15 years as a result of these storm surges, largely due to climate change.

Indian tribes in the lower 48 are facing their own issues as well due to climate change impacts. Among them are devastated fisheries in the northwest, drought-ridden lands in the Southwest, and unpredictable growing conditions in the Midwest. It doesn't stop there but it at least illustrates what tribes across the country are facing and will continue to face without a concerted approach by the federal government to address the adverse impacts of climate change nationally.

The reality of climate change and its impacts facing tribal communities across the country necessitates wisdom on the part of the EPA as to how it will respond to regulating GHGs so as not to adversely affect Indian tribes. Otherwise, many tribes could see their traditional ways of life come to a virtual end.

## **I. Regulating Greenhouse Gases under the Clean Air Act**

The NTAA clearly understands that the impetus behind the ANPR was the *Massachusetts v. EPA* Supreme Court decision which focused on the regulation of GHGs of motor vehicles under the CAA. To regulate in such a way, however, the EPA must make an endangerment finding that confirms GHGs endanger public health and welfare, and cause or contribute to air pollution. As noted above, tribal communities are experiencing the immediate, adverse impacts of climate change on a daily basis, and in our organization's opinion, such impacts are evidence enough in supporting an immediate endangerment finding on the part of EPA. Complementing this finding should be the Agency's immediate granting of a CAA waiver request made by the State of California which would allow the state to regulate GHGs for motor vehicles. At least 16 other states would follow suit with similar regulations, meaning that the nation's GHG emissions would be significantly reduced in the short-term.

Moving beyond making an immediate endangerment finding and granting the California waiver request, the EPA must make some decisions as to how it will regulate GHGs under the CAA. The NTAA strongly believes that the Agency can take other steps under the Act that will significantly help reduce GHGs emitted into the atmosphere, but must not go much beyond these steps in the absence of legislation.

### **A. Best Regulatory Options**

As for other steps, the NTAA recommends that EPA take three specific ones.

First, the EPA should halt the approval and construction of proposed coal-fired power plants until the Agency establishes a best achievable control technology standard specific to GHG emissions. A recent EPA Environmental Appeals Board decision helped moved the Agency in such a direction, now requiring that the EPA or jurisdictions with delegated authority under the CAA to conduct a carbon dioxide BACT analysis for all future coal-fired power plants permitted under the Act's

Prevention of Significant Deterioration (PSD) program (see *In Re Deseret Power Electric Cooperative*, EPA, EAB, PSD Appeal No. 07-03, 11/13/08).

Second, the EPA should begin the process of proposing new source performance standards (NSPS) under section 111 of the CAA for GHGs emitted by coal-fired power plants, petroleum refineries, and cement kilns. Under this section, the Agency can use a pick-and-choose approach as to which source categories to establish standards; it can be selective in picking those categories with the greatest contribution of GHG emissions with the Agency prescribing a rational emissions threshold. Some things that the EPA should consider for regulating GHGs under this section are the magnitude of GHG emissions from a source category; the potency of the particular GHGs emitted; whether the emissions are continuous, seasonal or intermittent; the availability of information regarding the category's GHG emissions, and whether regulating GHG emissions from the source category would be beneficial.

Third, the EPA should begin a rulemaking on low-carbon fuels by utilizing the Agency's authority under section 211 of the CAA.

None of these regulatory actions, however, should preempt the work being conducted by such groups as the Regional Greenhouse Gas Initiative and Western Climate Initiative which are already accomplishing much in moving toward significant GHG emission reductions in the respective regions that they serve.

## **B. Regulatory Options to Avoid**

What the EPA should at least avoid is regulating GHGs under CAA sections 108, 112, the PSD program, and Title V program.

### **1. Section 108**

Section 108 requires the EPA to establish national ambient air quality standards (NAAQS) for a given pollutant if its emissions are found to "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." The NTAA believes that regulating GHGs as a NAAQS, however, is inappropriate for the following reasons:

- Listing a pollutant under section 108 requires a thorough scientific assessment for GHGs meaning that listing could be significantly delayed until such an assessment is complete
- Issuing air quality criteria requires the EPA to follow a tight timeframe, something made difficult with GHGs; from the date of listing a pollutant under section 108, the EPA has 12 months to propose standards, and only 3 additional months to issues final NAAQS for the pollutant(s)
- Regulating GHGs under section 108 defeats one of the purposes of this CAA provision which is to mitigate the impacts of local emissions sources; GHGs would continue to have a global impact regardless of the controls required of local sources
- Determining an appropriate NAAQS for GHGs, either individually or as a group, would be difficult to say the least since the full effects associated with elevated atmospheric concentrations of GHGs occur over a long period of time with significant uncertainties associated with health and welfare impacts
- Establishing a NAAQS for each of the GHGs, essentially bringing the number of pollutants regulated under section 108 to twelve, would be costly and a substantial administrative burden to both sources and permitting authorities

- The existing emissions threshold for a NAAQS pollutant is 250 tons per year (tpy), far below what even a large residential building emits; sources never expecting to be controlled for their emissions would now be brought under section 108 and any attempt by the EPA to adjust the 250 tpy threshold to limit the number of source regulated for GHGs would more than likely be subject to litigation
- Based on the global atmospheric composition of GHGs, the EPA would likely designate the country in attainment or non-attainment, meaning that additional burdens and timeframes would be placed on local jurisdictions and their respective sources
- If the country was placed in non-attainment, attaining a GHG NAAQS within a 10-year horizon would be unsuitable for GHGs due to their long atmospheric time; the entire country would likely remain in non-attainment for an unknown number of years
- Sources unable to invest in cost-effective control strategies might consider relocating to non-regulated locations (e.g., overseas) meaning that states and tribes could lose jobs, taxes, etc. as a result of these sources relocating
- State and tribal implementation plans would still need to account for international GHG emissions for attainment and non-attainment purposes (see CAA sections 115 and 179b); increasing global emissions would therefore interfere with states and tribes trying to achieve a GHG NAAQS

With this all said, section 108 would likely have too many issues to overcome to be effectively invoked for regulating GHGs as a NAAQS, hence NTAA's recommendation that the EPA not follow such an approach.

## **2. Section 112**

Aside from looking at GHGs as a NAAQS, the EPA could also consider regulating such GHGs as hazardous air pollutants (HAPs). There is little scientific evidence, however, which shows that GHGs have the serious health effects associated with typical HAPs. In addition, the emissions thresholds under section 112 are exceedingly low, meaning that small GHG emitters such as large single-family residences and retail buildings would be considered major sources for the first time. This would not only place a costly and administrative burden on these sources, but would also place a comparable burden on permitting authorities having no experience regulating such sources. As such, the NTAA strongly recommends to the EPA that it not regulate GHGs under section 112 of the CAA.

## **3. PSD Program**

While regulation of GHGs under the PSD program could be coming based on the aforementioned Environmental Appeals Board decision, the NTAA remains hesitant in providing its full support to do so, particularly based on recent actions by the EPA to impose a proposed PSD increment modeling rule.

PSD increment is the amount of pollution allowed in a given area and is tracked so as to prevent the air quality in clean areas from deteriorating below NAAQS levels. To compound this deficient performance is EPA's proposed PSD increment modeling rule that could have implications on how PSD is tracked in attainment areas, meaning among other things, that jurisdictions could be allowed to average emissions credits, specifically of a long-term nature; could mask short-term spikes in air pollution that the PSD program was intended to prevent; allow air pollution from major sources operating under variances to be ignored when completing PSD analytical requirements; allow a change to how the time period of emissions used to model pollutant concentrations is chosen that "could allow a polluter to cherry-pick the time period, selecting one that would show a lower or

more favorable emissions rate when determining baseline, instead of using a standardized time period”; and allow jurisdictions to determine their own modeling methodologies which could allow

modeling techniques to be used that reflect cleaner air than actually exists. The Forest County Potawatomi Tribe and National Tribal Environmental Council specifically weighed in against this proposed rule with the Agency, communicating that the aforementioned problems with the rule could have equally adverse impacts to Indian tribes. The NTAA therefore recommends not currently using the PSD program to regulate GHGs until our concerns are properly addressed.

#### **4. Title V Program**

The CAA’s Title V program has been considered another option for regulating GHGs, one which the NTAA also does not fully support. For one thing, smaller sources regulated for GHGs under this program would be subject to fees imposed on them by permitting authorities to run the program. According to the EPA, there is no clear authority under the CAA to administer a fee against GHG emissions, meaning that permitting authorities might be hamstrung in regulating for such emissions with limited resources as a result of not having the authority to impose fees for GHG emissions. For example, using EPA’s 2008 rate of \$43.40 per ton of pollutant, the Navajo Nation would have to pay \$551,180,000 annually for the 12.7 million tons of CO<sub>2</sub> expected to be emitted each year from its proposed Desert Rock coal-fired power plant. Paying so much per ton could virtually “bust the bank” for this facility and others like it. This would place an undue financial burden on a number of tribal sources, both major and minor, and also on tribal permitting authorities if the CAA does not end up allowing them to impose fees for GHG emissions. As such, current and future economic development on tribal lands could be adversely impacted. The NTAA therefore recommends not using the Title V program for now to regulate GHGs until our concerns are properly addressed.

## **II. Providing Resources to Indian Tribes to Address Climate Change Impacts**

As noted above, federally-recognized Indian tribes – sovereign nations with certain rights ensured by the U.S. Constitution, treaties and legal precedence – are facing the immediate, adverse impacts of climate change. Historically, tribal communities have borne the disproportionate weight of negative environmental consequences created by commercial and industrial operations, and in this case, those created by climate change. Tribes should therefore not have the same burden to reduce GHG emissions than that of states as such tribes have not been the major contributors of GHG emissions; and they often have limited staff to address environmental issues facing their respective communities – i.e., climate change will add to this already heavy burden.

Indian tribes should instead be provided with sufficient resources to address climate change and its adverse impacts to tribal communities. At a minimum, tribes need to be provided with the tools to more fully educate their members about climate change in general, ways to mitigate its impacts, others ways to adapt to such change, and a host of other issues. Thus far, such tools have been in short supply for tribes.

Aside from the important educational tools that should be made available, the EPA should provide resources to Indian tribes to conduct activities such as the following:

- Compile GHG emission inventories, conduct GHG emissions modeling, and monitor GHG emissions;

- Develop and deploy new technologies to tribal communities and their respective sources to reduce and mitigate the impacts of GHG emissions;
- Promote energy efficiency;
- Invest in renewable energy development;
- Mitigate impacts on low-income Indian energy consumers;
- Prevent and suppress wildland fire; and
- Develop and implement projects consistent with sustainable use of water resources.

If such resources are provided to Indian tribes via a cap-and-trade program, such a program should also provide for the following:

- A tribal set-aside to help insure that Indian tribes have some degree of the necessary resources to address climate change impacts affecting their communities;
- A fair and socially-responsible apportionment of allowances (e.g., for equity purposes);
- Direct monies provided to tribes as a result of the allowances being auctioned off by the EPA (e.g., don't necessarily force tribes to manage and sell allowances themselves); and
- No need for tribes to have treatment-as-a-state status to access the allowances and/or monies.

### **III. Conclusion**

In summary, the NTAA is pleased to provide the aforementioned comments and recommendations concerning the ANPR. If and when the EPA proceeds forward on any regulation of GHGs, such an action must be preceded by sufficient government-to-government consultation between the Agency and the nation's Indian tribes, and in accordance with Executive Order 13177, an order issued during the Clinton Administration that directs each agency to have an "accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."

If you should have any questions or comments, please feel free to contact Stephen Hartsfield, NTAA Program Director, via phone at (505) 242-2175 ext. 106, or via e-mail at [shartsfield@ntec.org](mailto:shartsfield@ntec.org).

Respectfully submitted,

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