

Montana Consensus Council

Helping citizens and leaders build agreement and resolve disputes on tough public issues.

To: Representatives
Northern Cheyenne Tribe
Environmental Protection Agency
Montana Department of Environmental Quality

From: Matthew McKinney, Project Coordinator

Subject: Summary of Conflict Assessment on Regional Air Quality, Northern Cheyenne Indian Reservation

Date: July 2, 2003

During the past three weeks, I have had the opportunity to visit with representatives of the Northern Cheyenne Tribe, the Montana Department of Environmental Quality, and the Environmental Protection Agency. The purpose of this memorandum is to summarize the relevant portions of those conversations and to provide a preliminary road map for moving forward.

Please review this memorandum carefully, and let me know by July 9, 2003 if I have mischaracterized any of the information or views you have expressed, or otherwise missed any important issue or viewpoint. Also let me know if you have any additional suggestions on how to design the 164(e) negotiation process. *I will make any necessary changes to this memorandum after I receive your feedback, and then distribute a final copy to each of you.*

Common Interests

The parties seem to share many common interests, starting with a willingness to move forward with the 164(e) negotiation process. Everyone agrees that the 164(e) process is the best way to address the interests and concerns of all the parties, which cannot be adequately addressed through federal or state permitting processes. The 164(e) process also presents an opportunity to improve relationships among the tribal, state, and federal governments, which will help the parties address future issues.

Shared Understanding of Substantive Issues

In addition to sharing some general interests, the parties also seem to share an understanding of the substantive issues that need to be addressed.

1. *This is a regional problem that needs a regional solution.* The tribes appear to have legitimate interests and concerns about the degree to which the legal increments of sulfur dioxide and nitrogen dioxide are being violated in the Class 1 air-shed over the reservation, and the degree to which visibility is also degraded. However, the permitting of Colstrip 3& 4 appears to be part of the problem, and the proposed Roundup power plant will only contribute to an already existing problem. Thus, there are two related problems:
 - a. How to address the existing increment violations and degradation of visibility?
 - b. How to prevent future increment violations and degradation to the regional air-shed?

If these issues cannot be adequately addressed, they will most likely continue to plague future proposals for development in the area.

2. *The parties need to develop a policy to allocate increments.* How should the increments of allowable pollution in the Class 1 air-shed be allocated? Reallocated?
3. *The parties need to better analyze data and develop procedures to know when air quality in the Class 1 air-shed is being compromised, and who will do what when increments are violated and/or visibility is degraded.* There seems to be a common interest in not only reviewing existing data and what it means in terms of existing and future increment violations, but also in developing a jointly-managed system to collect and analyze data in the future. The tribe has 22 years of monitoring data, but lacks the resources to systematically and regularly analyze the data, draw conclusions, and take action when appropriate.
4. *The potential options to address both existing and future increment violations and degradation of visibility include, but are not limited to:*
 - a. Reducing emissions, and achieving the lowest technologically feasible emission rate, regardless of cost, at all of the relevant pollution sources;
 - b. Retrofitting existing plants; and
 - c. Pursuing offsets.

These and other options may provide the basis for amending the State Implementation Plan.

Procedural Conditions for Moving Forward

The parties also seem to agree on a number of procedural conditions for moving forward.

- The formal negotiation should be limited to representatives of the tribal, state, and federal governments.

- To demonstrate that they are serious about this problem and committed to participating in good faith, the key decision-makers with the tribes, state, and EPA should participate in the negotiation process. They should attend the first meeting, if possible, to confirm shared goals and expectations, and provide appropriate direction to staff.
 - In addition to key decision makers, the right people need to be at the table. Realizing that solutions are likely to be more technical than legal, we need staff or people knowledgeable with prevention of significant deterioration permitting; the visibility program; and tribal programs.
 - In sum, each government entity should create a team that includes people with experience in policy, law, and science.
- The relationship between the state’s permitting process for the proposed Roundup Power Plant and the 164(e) process needs to be clarified. What happens, for example, if the 164(e) process results in proposed amendments to the Roundup power plant permit?
 - Clarify what appears to be the EPA’s dual responsibility – to enforce the Clean Air Act and to act as a trustee on behalf of the tribes (to carry-out statutory obligations to protect health, safety, and welfare). To what degree should EPA enforce the laws and act as an advocate for the tribes?
 - Rely on face-to-face negotiations as much as possible, realizing that there will be work between meetings.
 - Ground rules should be developed that address issues related to:
 - Keeping decision-makers informed and seeking their input on a regular basis.
 - Confidentiality (see MCA 26-1-813).
 - Open meetings (see MCA 2-3-201).
 - Communicating with outside parties, and seeking their input and advice at strategic moments during the negotiation (e.g., the Bull Mountain Development Company, the Colstrip Power Plan, the Montana Environmental Information Center, and the Environmental Defense Fund).
 - Pooling resources, to make sure that everyone has equal opportunities to collect and analyze technical and legal information.
 - Decision-making protocol – what do we mean by consensus?
 - Clarify the fallback decision rule.
 - If that fails, the EPA Administrator must make a decision to resolve the dispute, and that decision becomes part of the “State Implementation Plan.”
 - If the state does not comply with the EPA Administrators directive, EPA can issue an over-riding “Federal Implementation Plan”
 - The state and/or tribe may challenge the Administrator’s decision.

- Clarify the schedule and time-line. The negotiation should be completed in 5 to 6 months, in part to accommodate the needs and interests of the developers of the proposed Roundup Power Plant.
- Clarify the role of the mediator.

Worst Possible Outcomes

If an agreement cannot be reached through the 164(e) negotiation process, the various parties anticipate a number of worst possible outcomes.

- The underlying issues go unresolved.
 - The parties limit the negotiation to the proposed power plant for Roundup, and consequently do not address the existing increment violations and sources of air pollution.
 - Any proposed facility in the future will face the same issues.
 - Air quality continues to be degraded, thereby threatening human health and the environment.
- Relationships among the parties are strained, which will limit their ability to work together on other issues in the future, such as coal-bed methane.
 - The tribes feel that their interests are not being addressed, and that the state and federal governments do not take seriously the Class 1 air quality designation.
 - The EPA is accused of coaching and supporting the tribe's position.
 - The credibility of the state's permitting process is questioned and/or compromised.
- People resort to litigation.
- The EPA is compelled to make a decision, which may or may not address the interests of all the parties.
- Economic development in the region, including energy development (e.g., coal-bed methane), is limited – including proposals for tribal economic development.

Best Possible Outcomes

According to the parties, the 164(e) negotiation process provides an opportunity to generate a number of positive outcomes, including:

- Parties recognize and fix “the problem” – the regional nature of the air pollution problem and the multiple sources of pollution, not only the contribution of the proposed Roundup power plant.
- Parties agree on how to address all of the issues and interests.
- Air quality permits at Roundup, Colstrip, and other sources in the region are consistent with the State Implementation Plan, which is in compliance with the Clean Air Act.
- The air quality permits at appropriate sites are amended by the appropriate government – either state or EPA – to bring them into compliance with the State Implementation Plan.

- A mutually agreed-upon system of collecting and analyzing data, to determine when increments and visibility are being degraded, is put into place.
 - The tribe has the capability to determine when violations occur.
 - The state and federal governments provide resources.
 - The parties agree on a mechanism to bring actions back into compliance if increments and/or visibility is being violated.
- Parties implement agreed-upon solutions.
- The parties respect the government-to-government relations, and relationships among the tribes, state, and EPA are improved. This will be critically important with respect to future work on coal-bed methane.
- We improve our understanding of the relation between the 164(e) process and state/federal air quality permitting process.
- Air quality values in the region are protected and improved.

Next Steps

The next steps are:

1. Schedule a face-to-face meeting, preferably in Billings, as soon as possible. The key decision-makers for each government should attend this initial meeting. *This meeting is currently scheduled for June 23rd.*
2. Develop a preliminary set of ground rules, including a clarification of the issues and interests that will be addressed – based in large part on this memorandum!
3. Complete an evaluation of other experiences with the 164(e) dispute resolution process -- Montana (1979), Michigan and Wisconsin, and Arizona. Highlight lessons learned, what to do, and what not to do.