

Federal Agencies Propose Environmental Rules for Energy Projects on Indian Reservations

September 7, 2006

Federal agencies recently issued two Notices of Proposed Rulemaking (NOPRs) for regulations describing proposed new requirements and procedures for environmental approvals of projects on Indian reservations. These regulations have the potential to cause significant and largely favorable changes in how companies, and particularly energy companies, conduct business on Indian reservations.

- **Tribal Energy Resource Agreement Proposed Regulations** – On August 21, the Department of the Interior (DOI) issued a Proposed Rule to implement the provisions of Title V of the Energy Policy Act of 2005 (EPAAct 2005). That Title authorizes tribes to enter into umbrella agreements with DOI for energy development or power generation projects on their reservations. DOI approval will not then be needed when the tribe enters into agreements with energy companies on specific projects covered by the umbrella agreement. **Comments are due by September 20th.**
- **Minor and Major New Source Review Proposed Regulations** – On August 10th, the Environmental Protection Agency (EPA) issued proposed rules that would implement New Source Review (NSR) requirements for both minor and major sources on Indian reservations. The regulations will fill a gap that has existed since the Clean Air Act was first enacted. It also represents another effort by EPA to establish the standard of “allowable” emissions rather than “actual emissions,” so it has the potential to establish a more favorable precedent for the overall New Source Review process under the Clean Air Act. **Comments are due by November 10th.**

Below is a brief summary of the two regulations:

The Tribal Energy Resource Agreement Regulations

Tribal Energy Resource Agreements (TERAs) between tribes and DOI were authorized by Title V of EPAAct 2005 to streamline approvals of energy mineral development and energy generation projects on reservations. Covered projects include: oil and gas development, renewable and non-renewable generation projects, and rights-of-ways for pipelines or transmission lines carrying power, oil or gas from sources on reservations. Projects not covered by the proposed regulations include: rights-of-way for transmission lines or pipelines that cross reservations but do not use electricity, oil, or gas from a project on the reservation. (These latter projects have been the major source of the controversy and disagreement during the Section 1813 debate over reservation rights-of-way, so the proposed regulations do not significantly impact that debate.) Also, TERAs only cover projects on tribally-owned land held in trust by DOI, not trust land owned by individual Indians.

The Proposed Rules seek to streamline energy project approvals by providing for umbrella TERAs between DOI and a tribe, in which DOI gives programmatic approval to all of the proposed energy projects the tribe has included in the TERA. Once DOI has approved the TERA, the tribe may enter into agreements with energy companies for development of each energy project specified in the TERA without obtaining additional approvals from DOI for that project, thereby allowing project approvals to move forward more quickly.

This program will have a particular impact on the environmental reviews required: DOI must conduct a broad-based or programmatic NEPA review of the projects covered by the TERA prior to approving it. However, there will no longer be a need for a DOI NEPA review at the time the tribe and the energy company enter into the project-specific agreement because without the need for DOI approval of that

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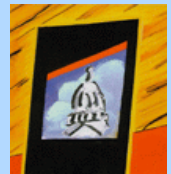
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agreement, there is no federal action to trigger a DOI NEPA review. Instead, the regulations require that the tribe itself conduct a NEPA-type analysis of the specific project, using the tribe's own environmental review process. The proposed regulations set out the minimum standards the tribe's review process must meet, which include providing for public comment on the environmental impacts of the project. However, the tribe's environmental analysis does not have to be made subject to judicial review.

Potential Implications for Energy Companies Proposing to Do Business with Tribes

TERAs offer important changes and opportunities for energy companies doing business on reservations. Under the TERA approach, companies doing business on lands owned by tribes that have elected to use the TERA program face new choices and new requirements. The most significant are:

- Although there will no longer be a site-specific NEPA review by DOI of specific projects covered by a TERA, the multiple federal and tribal environmental reviews required appear to continue to burden the laudable goal of streamlined processes.
- The proposed regulations impose a heavy burden on tribes to demonstrate they have the expertise, experience, laws, and administrative structures in place to assume their responsibilities under the TERA program, which may discourage some tribes from using the program. However, helping tribes meet these burdens may be an area in which an energy company can become a valuable resource to a tribe.
- Since DOI will no longer be a party to the specific agreement between the energy company and the tribe, DOI will not be available as a possible source of redress if the energy company believes the tribe has violated that agreement. This will require tighter agreements with tribes in regard to remedies.

The TERA program is an important first step in a goal long sought by many tribes and energy companies – reducing the red-tape and time involved in launching energy projects on reservations. However, the EPA 2005 provisions and NOPR governing TERAs are complex, so it is not yet clear how much progress the program will make toward achieving that goal. The NOPR process provides energy companies with an opportunity to impact the process.

Proposed Regulations Establishing Minor and Major New Source Review Criteria for Indian Reservations

EPA is proposing to promulgate two sets of air quality regulations: (1) Minor NSR regulations to apply to minor stationary sources and minor modifications at major stationary sources on Indian reservations; and (2) Major NSR regulations to apply to all new major stationary sources and major modifications located on Indian reservations that are designated as not attaining the National Ambient Air Quality Standards (NAAQS). The proposed rule will fill a regulatory gap that currently exists on Indian reservations because States lack jurisdiction over clean air enforcement on reservations, while EPA, which has primary jurisdiction, has, until now, failed to issue regulations. (Tribes may assume enforcement authority from EPA, just as States may, but, to date, no tribe has exercised this authority.)

The NOPR has the potential to create significant precedent through its use of an “affordable emissions” test for the minor NSR program on reservations. This test provides increased regulatory and permitting certainty by establishing a “bright line” trigger based on the facilities *allowable* emissions. Facilities that qualify as minor sources would be able to make any physical or operational change that does not increase emissions above their current allowable levels. Using allowable or potential emissions as a test means a source can assume its highest possible emissions as a trigger for NSR, even if it will never reach those levels. In proposing to adopt this test, EPA is departing from prior court decisions, notably *New York v. EPA*, 413 F.3d 801 (D.C. Cir. 2005), where the D.C. Circuit Court of Appeals rejected EPA's efforts to apply a definition of “modification” based on *allowable* emissions in the context of major source NSR, holding that the applicability of major source NSR must instead be based on changes in actual emissions. Nonetheless, EPA states in the proposed rule that it believes it has the discretion to define “modification” differently for minor source NSR on tribal lands because minor NSR has a different statutory basis (CAA Section 110 (a) (2) (C)) than major NSR (CAA Section 111 (a) (4)). Accordingly, EPA argues, the

applicability of the D.C. Circuit Court of Appeals decision is limited to major source NSR programs, but is nonetheless soliciting comments on whether its proposed definition is appropriate.

Under the proposed non-attainment major NSR rule, new major stationary sources and major modifications at existing major stationary sources in non-attainment tribal lands would be required to comply with the provisions of 40 C.F.R. Part 51, Appendix S, a transitional rule which generally applies to areas that do not have a state implementation plan (SIP). Pursuant to Appendix S requirements, affected facilities would be required to install emissions controls meeting the lowest achievable emissions rate (LAER), obtain emissions offsets (which are projects to offset the increase caused by the modification), compliance certification, and demonstrate a net air quality benefit resulting from the proposed offset project.

Implications for Companies Engaged in Activities Subject to the Clean Air Act

For those companies engaged or planning to engage in activities on reservations that may produce emissions, the proposed regulations, when finalized, will provide them with certainty as to their CAA permitting obligations, filling a vacuum that has existed for almost 30 years.

For all companies that are involved with CAA compliance, the proposed regulations represent another effort by EPA to establish “allowable emissions” rather than “actual emissions” as the appropriate standard for modifications to major sources and may serve as another forum for the “allowable emissions” NSR standard to be debated.

For Additional Information

Van Ness Feldman has provided comprehensive representation on Indian law issues since the firm was established in 1977. It has specialized in business development on reservations, with a particular focus on energy projects. Combining its Native American law practice with the firm’s nationally respected energy law practice, the firm has represented tribes in negotiations with energy companies doing business on reservations and has represented energy companies in negotiations with tribes. Its approach in both cases has been to help the parties find common ground so the client’s goal of moving forward on the development activity can be achieved. In addition to energy and other business development-related work, the firm’s Native American practice has included work on Native American and Alaska Native Corporations issues before Congress and the Department of the Interior and development of joint ventures between tribal companies and private businesses to tap the special rights tribal firms have to sole source federal contracts. The firm offers energy and other companies a one-day seminar “*How to Do Successful Business in Indian Country*,” which provides both a legal overview and practical advice on working with tribes. For assistance in evaluating the implications of the proposed new regulations or information on the seminar, please contact Dan Press or any member of our Native American Practice at (202) 298-1800.

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