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November 17, 2008

OVERNIGHT MAIL AND EMAIL

Office of Management and Budget
Office of Information and Regulatory Affairs
Administrator Susan E. Dudley
725 17th Street, NW
Washington, DC 20503

RE: Office of Management and Budget Review of Significant Regulatory Action
Under Executive Order 12866 – Forest County Potawatomi Community’s
Comments to EPA’s Prevention of Significant Deterioration New Source
Review; Refinement of Increment Modeling Procedures; Proposed Rule, 72 F.R.
31372-99, RIN: 2060-AO02

Dear Ms. Dudley:

The purpose of this letter is to submit the Forest County Potawatomi Community’s (“FCPC”) comments to the Office of Management and Budget (“OMB”), specifically the Office of Information and Regulatory Affairs (“OIRA”), regarding its impending review, pursuant to Executive Order 12866, of the United States Environmental Protection Agency’s (“EPA”) Proposed Rule for Prevention of Significant Deterioration (“PSD”) New Source Review (“NSR”); Refinement of Increment Modeling Procedures (“Proposed Rule”).

For the reasons indicated below, the FCPC strongly believes that EPA’s Proposed Rule is inconsistent with and has violated the regulatory principles contained in Executive Order 12866 (“Executive Order”). Accordingly, we respectfully request that the OIRA review EPA’s Proposed rule, determine that the Proposed Rule violates the regulatory principles contained in the Executive Order, and return the Proposed Rule to EPA for further consideration of those

regulatory principles. In addition, the FCPC requests a meeting with the Administrator at the earliest available time to discuss these comments further.

I. Background on EPA's Proposed Rule

The EPA published its Proposed Rule in the Federal Register on June 6, 2007.¹ EPA's Proposed Rule seeks to amend regulations regarding PSD measures under the Clean Air Act's NSR Program. Specifically, the Proposed Rule changes the methods for calculating increases of pollutant concentrations in the ambient air in order to determine compliance with PSD increments

The National Tribal Environmental Council and the FCPC submitted comments in opposition to the Proposed Rule on April 4, 2008 ("Joint Comments"), a copy of which (without attachments) is attached to this letter. In addition, the FCPC supplemented the Joint Comments with its own comments ("FCPC Comments"), a copy of which (without attachments) is attached to this letter.

II. FCPC's Unique Standing as a Tribal Class I Area

The FCPC's standing as a non-federal Class I area is of critical importance with respect to EPA's Proposed Rule. The FCPC's reservation recently obtained Class I status on April 29, 2008, making it the first tribe to obtain Class I status since 1992. Class I protection is vitally important in order to protect the unique qualities of the FCPC reservation. As fully described at Section II of the FCPC Comments, the unique history of the FCPC, the natural, cultural and scenic qualities of the reservation, and the increased health risks faced by tribal members, all underscore the importance of air quality protection afforded FCPC's Class I lands.² For example, despite the pristine nature of the FCPC's reservation and the cultural importance of pure water to the Tribe, extensive studies of a key cultural resource on the reservation, Devils Lake, show that its waters and fish are heavily contaminated with methylmercury caused by mercury and sulfate deposition from major air emission sources.

It is also very important to note the inconsistent standards applied by EPA in attempting to promulgate the Proposed Rule on a "fast track" as opposed to the amount of time EPA delayed FCPC's Class I designation.³ As fully described in the April 2008 FCPC Comments, EPA delayed action on FCPC's Class I designation request for over 14 years, including a delay of over 12 ½ years since EPA found that FCPC met all requirements for re-designation.⁴ The EPA is now attempting, in the last minutes of this Administration, to promulgate the Proposed Rule,

¹ 72 Fed. Reg. 31372-99 (June 6, 2007).

² FCPC Comments on EPA's Proposed Prevention of Significant Deterioration New Source Review Proposed Rule (FCPC Comments), pg. 3-7, April 4, 2008.

³ FCPC Comments, pg. 1.

⁴ FCPC Comments, pg. 1.

which will significantly weaken the very same Class I protections that the FCPC has waited over 14 years to obtain.

III. Requirements of Executive Order 12866

As you are aware, the Executive Order describes the role that the OMB plays in the rulemaking process.⁵ The Executive Order contains certain regulatory principles that all federal Agencies must adhere to pertaining to the promulgation of regulations. The OMB is required under the Executive Order to review certain regulations and guidance documents to ensure that they are “consistent with applicable law, the President’s priorities, and the principles set forth in this Executive Order...”⁶

Each Agency must submit to OIRA a list of its planned regulatory actions, including a determination of which of those regulatory actions are “significant.”⁷ EPA acknowledged that its Proposed Rule is a significant regulatory action.⁸ Therefore, OIRA must review EPA’s Proposed Rule to ensure its adherence with the Executive Order before it can be published in its final form. For the following reasons, the FCPC respectfully submits that EPA’s Proposed Rule is inconsistent with and therefore violates the regulatory principles contained in the Executive Order.

IV. EPA’s Proposed Rule is inconsistent with and therefore violates the Requirements of Executive Order 12866⁹

A. EPA’s Proposed Rule does not adequately seek the views of tribal officials before imposing regulatory requirements that significantly or uniquely affect those tribal entities

Section 1(b)(9) of the Executive Order requires that EPA seek the views of other governmental entities, including tribal governments, before imposing regulations that significantly burden those entities.¹⁰ Additionally, Section 1(b)(5) of the Executive Order requires EPA to design its regulations in a cost-effective manner, taking into account factors such as equity.¹¹ As fully described in Section I of the Joint Comments, EPA failed to adequately consult with Tribes regarding its Proposed Rule contrary to the requirements of

⁵ Executive Order (E.O.) 12866 (September 30, 1993), as amended by Executive Order 13258 of February 26, 2002 and Executive Order 13422 of January 18, 2007.

⁶ E.O. 12866, Section 2(b).

⁷ E.O. 12866, Section 3(f).

⁸ 73 Fed. Reg. at 31394.

⁹ All references to EPA’s Proposed Rule refer to the rule promulgated on June 6, 2007 since the FCPC has not had the opportunity to view the draft final rule sent by EPA for OMB review.

¹⁰ E.O. 12866, Section 1(b)(9)

¹¹ E.O. 12866, Section 1(b)(5)

caselaw, its Federal Trust Responsibility and Section 1(b)(9) of the Executive Order.¹² EPA did not consult or even attempt to consult with Tribes prior to publishing the Proposed Rule in the Federal Register. Subsequently, EPA failed to initiate consultation with Tribes until after the initial public comment period closed, and just before the final comment period closed.

Further, the FCPC's Class I status affords the Tribe specific protections under the Clean Air Act. As fully described in Section I.F of the Joint Comments, EPA's Proposed Rule would significantly and uniquely impact those Class I protections in violation of Section 1(b)(5) of the Executive Order.¹³ For example, EPA's proposed use of annual averages in place of short-term peak levels removes the short-term peak protection that FCPC's Class I area is required to receive under the Clean Air Act.

In contrast to the lack of any consultation with tribes, EPA utilized significant resources to consult with other governmental entities *before* the Proposed Rule was promulgated. Not only did the EPA share a version of the Proposed Rule with the Department of the Interior before it was published in the Federal Register, but it also had extensive consultation with states since 2005 regarding the Proposed Rule. EPA significantly undervalued both the consultation process with Tribes and any assessment of tribal impacts from the Proposed Rule. Instead, EPA focused solely on the interests and concerns of the states and the major emission sources in developing the Proposed Rule.

Although the EPA agreed to extend the comment period to allow tribes to submit written comments, this process is not an adequate substitution for prior consultation as envisioned in the requirements of the Executive Order.

B. EPA has failed to adequately assess the costs and benefits of the Proposed Rule

Section 1(b)(6) of the Executive Order requires that the EPA assess both the cost and benefits of an intended regulation in order to ensure that the benefits of that regulation justify the costs.¹⁴ EPA's Proposed Rule would relax the system for modeling impacts on Class I increments from proposed new sources or major modifications. As fully described in Sections II, III, IV, V, VII and X of the Joint Comments, EPA has violated Section 1(b)(6) of the Executive Order by failing to assess how the impacts of its Proposed Rule would affect National Parks, human health, tribal cultural resources and the environment.¹⁵ For example, use of annual

¹² National Tribal Environmental Council (NTEC) and The Forest County Potawatomi Community Comments in Opposition to EPA's June 6, 2007 Notice of Proposed Rulemaking Regarding Refinement of PSD Increment Modeling Procedures ("Joint Comments"), pg. 3-15.

¹³ NTEC and FCPC Joint Comments, pg. 12-15

¹⁴ E.O. 12866, Section 1(b)(6)

¹⁵ NTEC and FCPC Joint Comments, pg. 15-31, 37-39 and 41.

averaging will leave National Parks and all other Class I areas open to significant short-term impacts in clear contravention of the intent of the Clean Air Act.

C. EPA has failed to promulgate a cost-effective rule that imposes the least burden on society

Section 1(b)(5) of the Executive Order requires EPA to design its regulations in the most cost-effective manner possible.¹⁶ In addition, Section 1(b)(11) requires that EPA design its regulations to have the least burden on society, taking into account the sizes of different entities across the regulated universe.¹⁷ As fully described in Section XI of the Joint Comments, EPA has violated Sections 1(b)(5) and (11) by creating a virtually impossible task for Class I tribes to conduct permit application reviews under the applicable Class I procedures.¹⁸ For example, EPA's proposal to defer to State's under a best professional judgment standard makes it virtually impossible for Class I tribes to analyze and raise concerns with the states increment and other analysis.

D. EPA's Proposed Rule, as currently drafted, is inconsistent with the Clean Air Act and EPA's own guidance documents

Section 1(b)(10) of the Executive Order requires EPA to design its regulations so that they are not inconsistent with its other regulations and guidance documents.¹⁹ As fully described in Sections III, IV, V and XII of the Joint Comments, EPA has violated Section 1(b)(10) of the Executive Order because its Proposed Rule is inconsistent with the Clean Air Act and departs from the procedures established in prior Agency guidance documents with respect to the modeling of Class I increments.²⁰ For example, EPA's proposal to forego critical short-term increment analysis is contrary to its long-standing NSR guidance.

E. EPA's Proposed Rule is drafted so as to cause uncertainty and potential litigation.

Section 1(b)(12) of the Executive Order requires EPA to draft its regulations in a manner that avoids uncertainty along with the potential for litigation arising from that uncertainty.²¹ As fully described in Sections IV, VI, VII and VIII of the Joint Comments, EPA's Proposed Rule violates Sections 1(b)(5) and (12) of the Executive Order in that its regulatory concepts are drafted in a vague manner that will create significant uncertainty when applied in future permitting decisions.²² For example, EPA's proposed deference to states under a vague best

¹⁶ E.O. 12866, Section 1(b)(5)

¹⁷ E.O. 12866, Section 1(b)(11)

¹⁸ NTEC and FCPC Joint Comments, pg. 42-43.

¹⁹ E.O. 12866, Section 1(b)(10)

²⁰ NTEC and FCPC Joint Comments, pg. 21-31 and 43-47.

²¹ E.O. 12866, Section 1(b)(12)

²² NTEC and FCPC Joint Comments, pg. 25-30 and 31-40.

professional standard creates significant uncertainty regarding how permitting decisions will occur. In addition, the potential uncertainty created by EPA's Proposed Rule is likely to result in extensive litigation initiated by affected parties. For example, EPA's proposal to forego Clean Air Act required short-term increment analysis will clearly result in litigation that the U.S. government faces a high likelihood of losing.

F. EPA's Proposed Rule is not based on the best available scientific and technical information

Section 1(b)(7) of the Executive Order requires EPA to base its regulations on the best reasonably obtainable scientific and technical information available.²³ As fully described in Sections IV, V, VII and X of the Joint Comments, EPA has violated Section 1(b)(7) of the Executive Order because many of the technical concepts contained in the Proposed Rule fail to make use of the best reasonably obtainable scientific and technical information available.²⁴ For example, EPA's proposal to use annual averaging clearly fails to take into account the significant continuous emission monitoring and other technical data that could be used to develop a standard consistent with the requirements of the Clean Air Act.

G. EPA's Proposed Rule fails to assess adverse impacts on other federal Agencies.

EPA's Proposed Rule, in addition to avoiding inconsistency with its own Agency rules, must also attempt to avoid negative impacts and inconsistency with regulations of other federal Agencies.²⁵ EPA received significant comments from numerous parties related to the Proposed Rule who were concerned about the preservation of our National Parks. EPA's failure in its Proposed Rule to adequately address impacts on Class I National Parks significantly impacts existing regulations promulgated by the National Park Service. For example, the National Park Conservation Association raised significant concerns regarding the impacts of annual averaging on the ability to protect National Parks from short-term increment exceedances.

V. Recommendations

Based upon the foregoing comments, the FCPC respectfully request that OMB take the following action with respect to its review of EPA's Proposed Rule pursuant to the Executive Order: (1) remand the proposed rule back to EPA for further change to conform to all of the principles contained in Executive Order 12866 ("Amended Proposal"); (2) direct the EPA to provide proper consultation on the Amended Proposal with all interested parties including tribal and federal agencies having jurisdiction over Federal Class I areas; and (3) publish the Amended Proposal and allow further notice and comment before the rule is finalized.

²³ E.O. 12866, Section 1(b)(7)

²⁴ NTEC and FCPC Joint Comments, pg. 25-31, 37-38 and 41.

²⁵ E.O. 12866, Section 1(b)(9) and (10)

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In addition, the FCPC requests a meeting with the Administrator at the earliest available time in order to discuss these comments further.

Respectfully submitted,

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Enclosures

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