



www.ntaatribalair.org
(505) 242 – 2175 x 106 office
(505) 242-2654 fax

National Tribal Air Association
2501 Rio Grande Blvd. NW, Suite A
Albuquerque, NM 87104

November 19, 2008

Executive Committee

Region 7
Anthony “Sam” Kitto
Interim Chair (Vice Chair)
Santee Sioux Nation

Region 1
Bill Thompson
Penobscot Nation

Region 2
Angela Benedict-Dunn
Secretary
St. Regis Mohawk Tribe

Region 4
Laura Cook
Poarch Band of Creek Indians

Region 5
Brandy Toft
Leech Lake Band of Ojibwe

Region 6
Ryan Callison
Cherokee Nation of Oklahoma

Region 8
James Temte
Southern Ute Indian Tribe

Region 9
Jill Sherman-Warne
Viejas Band of Kumeyaay Indians

Syndi Smallwood
Treasurer
Pechanga Band of Luiseño
Mission Indians

Region 10
Julie Simpson
Nez Perce Tribe

Alaska
Rosalie Kalistook
Orutsararmuit Native Council

Alaska
Millie Hawley
Native Village of Kivalina

Water Docket
Environmental Protection Agency
Mailcode: 2822T
1200 Pennsylvania Ave, NW
Washington, DC 20460

Attention Docket ID No. EPA-HQ-OW-2008-0390

Dear Sir or Madam:

The National Tribal Air Association (NTAA) is pleased to submit these comments regarding the Environmental Protection Agency’s (EPA) proposed geologic sequestration rule (hereinafter referred to as the “GS rule”).

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 regulatory effort to capture and sequester carbon dioxide (CO₂), a pollutant significantly contributing to global warming, implementation of the GS rule could have far-ranging impacts on the nation’s tribes. As such, our organization would like to provide the EPA with comments about the rule’s approach to such matters as hazardous substances, monitoring, and mitigation of environmental impacts; EPA’s consultation with Indian tribes concerning the rule; and the need to make a technical fix to the rule to properly include tribes.

Hazardous Substances

With respect to hazardous substances, the GS rule would prohibit the injection of these substances in Class VI injection wells (e.g., specific to geologic sequestration), but the EPA offers no means for removing hazardous impurities such as hydrogen sulfide and mercury which are often found in CO₂ streams, the types that would be sequestered as a result of the rule. In the rule, the Agency instead focuses on what is considered a hazardous substance under the Comprehensive Environmental Response, Compensation, and Liability Act, also known as CERCLA or Superfund; and the potential liability to owners and operators of geologic sequestration operations for injection of CO₂ and associated hazardous substances.

Indeed, liability is an important matter that needs to be addressed upfront, particularly since some Indian tribes and their citizens may one day be engaged in geologic sequestration. The EPA must not forget, however, that a primary purpose of the GS rule is to prevent endangerment to underground sources of drinking water (USDWs). As such, every effort should be made by the Agency to ensure that hazardous substances, at any level, do not find their way into USDWs so as to best protect human health and the environment from the harmful impacts of these substances.

The NTAA therefore recommends that the EPA clearly communicate how it will address hazardous impurities often found in CO₂ streams, specifically how such impurities will be removed or their impacts mitigated so as not to endanger USDWs.

Monitoring

Aside from how the GS rules addresses hazardous substances, the rule includes a default monitoring period of 50-years after closure of an injection well, Unfortunately, the EPA provides no objective, technical rationale as to how it arrived at this monitoring period, such as an engineering analysis, and gets around it by giving discretion to Agency Regional Administrators or jurisdictions with primacy for UIC programs for shortening or lengthening the monitoring period on a case-by-case basis. While the NTAA agrees that there should be such discretion with respect to defining post-closure monitoring periods for injection wells, it should involve substantive input by qualified engineers trained in geologic sequestration. Otherwise, USDWs could end up being adversely impacted as a result of monitoring periods improperly defined by unqualified individuals.

The NTAA therefore recommends that an objective, technical rationale be provided for deciding upon the 50-year monitoring period. In addition, our organization recommends that the GS rule specifically require that qualified engineers trained in geologic sequestration be substantively involved in any decision regarding the shortening or lengthening of the post-closure monitoring period of an injection well.

Environmental Impacts

The EPA is proposing to do something of a significant magnitude for the first time which is the injection of substantial amounts of carbon dioxide into the ground at high pressures. The EPA is seeking to control a pollutant that is very buoyant and corrosive, and with a technology that has to be fully tested. As such, the NTAA is concerned about the potential environmental impacts of geologic sequestration to the nation's Indian tribes.

While geologic sequestration could likely affect tribal property rights - i.e., the diminishment of mineral rights values and cause property damage, it is its potential harm to humans and the environment which most concern the NTAA. The World Resources Institute recently communicated in its report *Guidelines for Carbon Dioxide Capture, Transport and Storage*, that “risks to people and ecosystems [can] arise from the potential for CO₂ to accumulate in low-lying areas or areas with poor ventilation. If CO₂ leaks to the surface in areas with poor ventilation, such as basements or shallow dips in the ground, it can accumulate to levels that could cause stress or even asphyxiation in humans and animals.” Unfortunately, owners and operations of geologic sequestration operations will not be held liable for such injuries as the GS rule solely focuses on the protection of USDWs (e.g., prevention of CO₂ migration into USDWs). While the EPA might be correct in its understanding that geologic sequestration impacts to air, human health and ecosystems are outside the scope of the Safe Drinking Water Act, this does not negate the Agency’s trust responsibility to best manage and preserve tribal lands from any undue outside influences, and in this case, CO₂ leakage as a result of geologic sequestration.

As will be noted further in our comments, the EPA failed to adequately consult with Indian tribes on the GS rule. If the Agency had properly consulted, many tribes might have communicated that the lands on which they live are highly diverse and environmentally sensitive. As such, geologic sequestration conducted on or near these lands requires extra due diligence to ensure the safety of tribes and their environments. Every effort to mitigate the environmental impacts of geologic sequestration, even beyond impacts to USDWs, must be taken by the EPA.

The NTAA therefore recommends that the EPA provide specifics on how it will help protect Indian tribes and their lands from the environmental impacts of geologic sequestration, even impacts beyond those to USDWs.

Consultation

With respect to consultation, the EPA failed to conduct what the NTAA would consider to be meaningful consultation between the Agency and the nation’s tribes, failing among other things, to develop and follow an appropriate tribal consultation plan.

According to the EPA, the GS rule does not have tribal implications as accorded by Executive Order 13175, largely because Indian tribes do not have primacy over an underground injection control (UIC) program (the Fort Peck Assiniboine and Sioux Tribes, and the Navajo Nation have received primacy since publication of the GS rule). This is a faulty rationale as Indian tribes could be placed in harm’s way as a result of geologic sequestration occurring on or near their lands. As already noted above, geologic sequestration could have significant environmental impacts on tribes, but their cultural practices could be affected as well. For example, a number of tribes depend upon certain plants for cultural and religious ceremonies, and with increased soil acidity due to CO₂ leakage from geologic sequestration, the health and survival of these plants could be in jeopardy.

Although admitting that the GS rule will not impact tribes, the EPA claims that it did in fact consult with Indian tribes. What the NTAA can gather from the rule, however, is that the Agency simply contacted tribes about engaging in the rulemaking process and held one conference call; the EPA has also promised to “continue an ongoing dialogue with interested tribes on this rulemaking.” This approach taken by the Agency falls far short of what a true government-to-government consultation between the federal government and tribes should look like.

As inferred above, a tribal consultation plan could have helped overcome any concerns about Indian tribes not being properly consulted by the EPA with respect to the GS rule. The NTAA believes, however, that an opportunity for developing such a plan still exists, but requires at a minimum that the comment rule concerning the GS rule be extended no less than 90 days; the NTAA also gladly offers its resources to help develop such a plan.

Technical Fix to the GS Rule to Properly Include Indian Tribes

Finally, in reading the GS rule, the NTAA found that the EPA inadvertently omitted the phrase “tribal authorities” under section 146.94(c)(2). To rectify this omission from the section, the NTAA recommends the following language:

“Documentation of appropriate notification and information to such State, Tribal, and local authorities as have authority over drilling activities to enable such State, Tribal and local authorities to impose appropriate conditions on subsequent drilling activities that may penetrate the injection and confining zone(s).”

Conclusion

In summary, the NTAA is pleased to provide the aforementioned comments and recommendations concerning the GS rule. 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.

Respectfully submitted,

Sam Kitto
Interim-Chairman
National Tribal Air Association