

**Procedural Rules
of the
Southern Ute Indian Tribe/State of Colorado Environmental Commission**

I. Authority and Purpose.

These procedural rules are adopted pursuant to the authority vested in the Southern Ute Indian Tribe/State of Colorado Environmental Commission by (1) the Intergovernmental Agreement Between the Southern Ute Indian Tribe and the State of Colorado Concerning Air Quality Control on the Southern Ute Indian Reservation dated December 13, 1999, (2) tribal law (Resolution of the Council of the Southern Ute Indian Tribe # 00-09), (3) State law (C.R.S. § 24-62-101), and (4) as recognized in federal law (Act of October 18, 2004, Pub. L. No. 108-336, 118 Stat.1354).

The purpose of these rules is to establish procedures the Commission will follow in holding meetings, selecting air quality programs that should apply to the Reservation and promulgating the standards, rules and regulations for those programs, and reviewing appealable administrative actions taken by the Southern Ute Indian Tribe.

II. Definitions.

A. “Administrator” means the administrator of the United States Environmental Protection Agency.

B. “Aggrieved” means suffered “injury in fact” and otherwise satisfies the requirements of Constitutional standing.

C. “BIA” means the Bureau of Indian Affairs.

D. “Commission” means the Southern Ute Indian Tribe/State of Colorado Environmental Commission.

E. “EPA” means the United States Environmental Protection Agency.

F. “Final rules” means the air quality programs, standards, rules and regulations adopted by the Commission pursuant to the rule making procedures set forth herein.

G. “IGA” means the Intergovernmental Agreement Between the Southern Ute Indian Tribe and the State of Colorado Concerning Air Quality Control on the Southern Ute Indian Reservation dated December 13, 1999.

H. “Person” means any person, public or private corporation, company, partnership, firm, association or society of persons, trust, estate, the United States or a state and any political subdivision, program, or agency thereof, the Tribe and any department, division,

program, enterprise, company or political subdivision thereof, and any other recognized legal entity.

I. “Proposed rule” means the air quality program, standards, rules and regulations proposed by the Commission for adoption pursuant to the rule making procedures set forth herein.

J. “Reservation” means the Southern Ute Indian Reservation, the exterior boundaries of which were confirmed by Congress in the Act of May 21, 1984, Pub. L. No. 98-290, 98 Stat. 201, 202 (found at “Other Provisions” note to 25 U.S.C. § 668).

K. “Reservation Air Program” means the single air quality program applicable to all lands within the exterior boundaries of the Southern Ute Indian Reservation, the establishment of which is the purpose of the IGA.

L. “State” means the State of Colorado.

M. “Technical Secretary” means the person appointed by the Commission pursuant to section VII. (k) of the IGA to perform any administrative or clerical functions necessary to issue orders and conduct Commission business such as preparing materials for consideration by the Commission, coordinating meetings of the Commission, and such other duties as requested by the Commission.

N. “Tribe” means the Southern Ute Indian Tribe.

III. Meeting Procedures.

A. Frequency. The Commission will hold meetings for the conduct of its business on dates and at times set by the agreement of the Commission members and/or upon the recommendation of the Technical Secretary.

B. Notice and agenda. The Technical Secretary shall provide notice of the meeting date and agenda for meetings to the Commission members and the public, via e-mail to the Commission members and to each person who has requested notification and by publication in at least one of the area’s major newspapers, at least 20 days before each meeting unless for good cause a shorter time is necessary. Good cause shall include but not necessarily be limited to a meeting held to adopt a temporary or emergency rule.

C. Materials. Written materials for consideration by the Commission will be made available by the Technical Secretary to the Commission members and the public at least seven days before the meeting unless for good cause a shorter time is necessary. Good cause shall include but not necessarily be limited to a meeting held to adopt a temporary or emergency rule.

D. Other Items for Consideration. The Commission may, in addition to other business, consider other items brought to the attention of the Commission by any member

of the public. Any person seeking the Commission's formal consideration on a matter must submit the matter for inclusion on the agenda to the Technical Secretary at least 30 days before the meeting. Matters submitted beyond this deadline will be considered at the next meeting unless the Commission determines for good cause shown that the matter should be considered immediately.

E. Presiding Officer. The chairperson of the Commission, or another member of the Commission as designated by the chairperson, shall preside at each meeting.

F. Format. Meetings will be conducted in accordance with Robert's Rules of Order but may proceed on an informal basis.

G. Action. Section VII of the IGA provides, in part, that "The Commission shall only act by a majority vote of all of its members." The Commission interprets the Intergovernmental Agreement's Commission voting provision as meaning four votes, unless there are one or more vacancies on the Commission, in which case a majority vote of all Commissioner members could be less than four votes. The Commission reserves the right to delay a vote if, in the Commission's discretion, a proposed action warrants the participation of all Commission members in the vote.

H. Recording. The proceedings of all meetings will be tape recorded by the Technical Secretary and copies of the tapes will be made available to the public at cost.

I. Minutes. Minutes of the proceedings of all meetings will be kept by the Technical Secretary and the draft minutes will be provided to the Commission along with other materials for review and approval at the next meeting. The minutes will be available to the public upon approval.

J. Public Involvement. All meetings of the Commission will be open to the public, except for executive sessions. Members of the public may participate in meetings in an appropriate manner as determined by the Commission in its discretion. Public comments are welcome and encouraged at all Commission meetings as provided on the agenda.

K. Executive Sessions. The Commission may hold executive sessions to discuss confidential information such as litigation and personnel matters.

IV. Rule-making Procedures.

A. Presentation of recommended programs and initial draft standards, rules and regulations.

1. The Tribe shall prepare and present to the Commission for its consideration, recommended air quality programs and an initial draft of all standards, rules and regulations for the proper implementation of those programs. Programs and proposed standards, rules and regulations presented by others shall be referred to the Tribe.

2. Upon presentation of a recommended program and an initial draft of standards, rules and regulations by the Tribe, the Commission shall confirm that the draft has been furnished by the Tribe to the State for the State's review.

3. Thereafter, the Commission shall meet to consider the recommended program and initial draft standards, rules and regulations and may solicit written or oral comment thereon from the Tribe's Environmental Programs Division, the State's Air Pollution Control Division, and others. In considering the recommended program and initial draft standards, rules and regulations, the Commission shall consider the following:

- a. The existing quality of air on the Reservation.
- b. The long-term plan for improving and maintaining air quality within the Reservation.
- c. The specific environmental, economic, geographic and cultural needs of the Reservation.
- d. An appropriate balance of interests between safety, economic livelihood, and anti-degradation concerns.
- e. Conformity with the interests of the Tribe and compatibility with State of Colorado air quality goals.
- f. Existing rules and regulations pertaining to air quality off the Reservation including those of the Colorado Air Quality Control Division and Air Quality Control Commission, the authorized agency of the State of New Mexico and other neighboring states and tribes.
- g. Existing federal rules and regulations pertaining to air quality.

4. Based on the comments and recommendations received, and subject to revision as the Commission deems appropriate, the recommended program and initial draft standards, rules or regulations may be accepted by the Commission as a proposed rule for additional comment as set forth below.

B. Notice of proposed rule making. Following acceptance of a recommended program and initial draft standards, rules and regulations by the Commission, the tribal staff (or Technical Secretary if one has been appointed) shall cause a notice of the proposed rule to be published for comment in at least three of the area's newspapers of general circulation, such as the Durango Herald, the Farmington Daily Times, the Cortez Journal, the Southern Ute Tribal Drum, the Pine River Times, the Pagosa Sun, or the newspapers, if any, of neighboring tribes (e.g., Jicarilla Apache Nation and Ute Mountain Ute Tribe). The notice shall include a statement of the time, place and nature of the rule

making proceeding, which proceeding shall be no less than 30 days after the publication of the notice; a reference to the legal authority under which the proposed rule is proposed; a deadline for the submission of written comments on the proposed rule; either the terms or substance of the proposed rule or a summary description of the subjects and issues involved; and, if the complete proposed rule is not published, then notice of where a complete copy of the proposed rule can be obtained. Additionally, a copy of the notice shall be sent to the Colorado Air Pollution Control Division, the Colorado Air Quality Control Commission, EPA, BIA, the counties of Archuleta, La Plata, and Montezuma, Colorado, the county of San Juan, New Mexico, the authorized air quality agency of the State of New Mexico, Ute Mountain Ute Tribe, Jicarilla Apache Nation, and the Navajo Nation, and to each person who has requested notification of all proposed rule makings.

C. Public comment on proposed rules.

1. Written comments shall be submitted to the Commission by any person within the time set forth in the notice, and copies of the comments received shall be distributed to the Tribe's Environmental Programs Division.
2. The Tribe's Environmental Programs Division, with the participation of any members of the Commission so desiring, shall prepare a summary of comments received and transmit the summaries and comments to the Commission.
3. At such time as the Commission may designate, the Commission shall convene a public hearing, notice of which shall have been previously published and announced, at which time any member of the public so desiring shall have an opportunity to comment upon the proposed rule.

D. Final adoption of programs, standards, rules and regulations.

1. After considering the written comments received and the public hearing testimony (except where otherwise not required under IV.G.), and based upon the factors set forth in section IV. A. 3., the Commission may adopt the program and promulgate air quality standards, rules and regulations for the Reservation Air Program which shall be no less stringent than the minimum standards required by federal law.
2. Notice of the final rules adopted by the Commission shall be published in the same manner and in the same newspapers as used in publishing the proposed rule and shall be distributed in the same manner and to the same persons as the proposed rule. The final rules shall become effective 30 days after publication or a longer period as determined by the Commission.
3. Upon adoption, the final rules shall establish the minimum air quality standards for the Reservation Air Program.
4. The final rules, once adopted, shall be subject to periodic review by the Commission.

E. Rule making record. The Commission shall maintain an official rule making record for each program, standards, rules and regulations it proposes. The record shall be available for public inspection and shall contain all of the following:

1. A copy of the notice of proposed rule making initially published.
2. A copy of all written comments received by the Commission and all other written materials considered or prepared by or for the Commission in connection with the program, standards, rules and regulations.
3. Any official transcript of oral presentations made to the Commission in connection with the program, standards, rules and regulations, or if not transcribed, the tape recording of those presentations.
4. A copy of all materials submitted to the Commission and the minutes of the Commission meetings at which the program, standards, rules and regulations were reviewed.
5. A copy of the final rules.

On judicial review, the record required by this section constitutes the official Commission rule making record with regard to the program standards, rules and regulations.

F. Temporary or Emergency Rules. A temporary or emergency rule may be adopted without compliance with the procedures prescribed in subsections C and D of this section and with less than the 30 days notice prescribed in subsection B of this section (or where circumstances imperatively require, without notice) only if the Commission finds that immediate adoption of the rule is imperative to comply with a federal law or regulation or for the preservation of public health, safety, or welfare and compliance with the requirements of this section would be contrary to the public interest and makes such a finding on the record. Such findings and a statement of the reasons for the action shall be published with the rule. A temporary or emergency rule shall become effective on adoption or on such later date as is stated in the rule, shall be published promptly, and shall have effect for not more than three months from the adoption thereof or for such shorter period as may be specifically provided by the Commission, unless made permanent by compliance with subsections B, C, and D of this section.

G. Direct Final Rulemaking. Subsections IV.B and C do not apply when the Commission for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are unnecessary. Notice of a direct final action shall be published in the same manner required for publication of a proposed rule pursuant to Section IV.B.

V. Administrative Appeal Procedures.

A. Appealable Administrative Actions and Request for Hearing. An applicant, any person who participated in the public comment process and is aggrieved by a final action or inaction of the Tribe under this code, and any other person who could obtain judicial review of that action under applicable law, may, within 30 days following the date of the action or inaction, appeal to the Commission by sending a written request for a hearing to the Commission.

B. Hearing Procedures. Hearings shall be governed by the following rules of procedure:

1. Following receipt of a request for review, a hearing of the Commission must be held at a time and place set by the Commission, but in no event shall the hearing be held more than 90 calendar days following receipt of the appeal.

2. Notice of the hearing shall include the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing is to be held; and the matters of fact and law asserted.

3. Notice of the hearing shall be sent by certified mail to the person who requested the hearing. Additionally, notice of the hearing shall be printed in the major newspapers in the Reservation area including the Southern Ute Tribal Drum, the Durango Herald, the Pine River Times, the Pagosa Sun, the Farmington Daily Times, and the Cortez Journal at least 20 days before the date of the hearing.

4. All parties may be represented by counsel at their own expense.

5. The Commission may have the advice and assistance of the general counsel for the Tribe at the hearing. In addition, the Commission may have the advice and assistance of an expert to provide assistance with understanding technical information presented at the hearing.

6. The person who requested the hearing and the Tribe have the right to testify, present testimony of witnesses and other evidence, and to ask questions of adverse witnesses.

7. Hearings shall be conducted as administrative proceedings with all rights of due process; however, formal rules of evidence and procedure need not be followed, although the Commission shall exclude irrelevant, immaterial, or unduly repetitious evidence. The Commission shall determine the facts in a fair, reasonable and orderly fashion.

8. The initial burden of proof shall be on the appellant. After the appellant has presented its case, the Tribe will then have the opportunity to present its case. The Commission may ask questions of any witnesses for clarification and may recall witnesses, if necessary, but must maintain neutrality.

9. All matters at issue must be proven by a preponderance of the evidence.

10. In the event a party does not make an appearance at the date and time set for hearing, the Commission shall enter a default judgment against that party, provided however, that proper notice has been given and such proof of notice is on file.

11. A full and complete record of all proceedings and the hearing shall be kept by tape recording, stenographic, or other means. The stenographer shall furnish, upon payment and receipt of any fees therefor, a certified transcript of the whole or any part of the record to any party in such hearing requesting the same.

12. The hearing may be continued at the discretion of the Commission for good cause.

13. The Commission shall issue all decisions in writing within 30 days after the hearing and mail copies to all parties. The Commission shall have the authority to affirm, reverse, or modify the Tribe's action or inaction, or remand the matter to the Tribe for the purpose of adducing additional specified and material evidence and findings thereon. Commission actions shall be deemed final in such cases upon the mailing of the decision by first class mail to the address listed in the request for hearing.

14. Notice of the right to judicial review shall be included with the Commission's decision.

C. Judicial Review. Any final order of the Commission that would be subject to appellate review if it were made by the Administrator, shall be subject to judicial review by the United States Court of Appeals for the Tenth Circuit in accordance with Section 6 (1) of the *Southern Ute and Colorado Intergovernmental Agreement Implementation Act of 2004* (i.e., the Act of October 18, 2004, Pub. L. No. 108-336, 118 Stat. 1354-56).

VI. Conflict of Interest

A. Definitions.

1. Actual Conflict of Interest Means:

a. In a rulemaking proceeding or other action of general applicability, an inability of a Commissioner to objectively participate in the matter before the Commission because the Commissioner has an unalterably closed mind on a matter critical to the disposition of the proceeding. An official act that affects a group of industries or businesses does not, in and of itself, constitute an actual conflict of interest even though the Commissioner may be employed by or otherwise have an interest in one of the industries or businesses impacted by the official act.

- b. In an adjudicatory proceeding:
 - i. The Commissioner has, in some measure, adjudged the facts or the law in the case in advance of the hearing, or
 - ii. The Commissioner, or the Commissioner's employer, has a financial interest in the outcome of the proceeding.

2. Apparent Conflict of Interest means a personal or financial interest which could reasonably be perceived as an interest that may influence the Commissioner's decision.

3. Potential Conflict of Interest means an apparent or actual conflict of interest that may come about due to reasonably foreseeable events.

B. Disclosure of a Conflict of Interest

1. If a Commissioner perceives that he or she may have an actual, apparent, or potential conflict of interest, the Commissioner will disclose the basis of the possible conflict of interest to the Commission and others in attendance before the discussion or hearing begins, or as soon thereafter as the Commissioner perceives the possible conflict of interest.

2. Members of the public, parties, the Tribe, the State, or other Commissioners may bring to the Commission's attention circumstances that they believe constitute a conflict of interest for a Commissioner with respect to a proceeding.

3. Such disclosure shall constitute an affirmative defense to any claim of impropriety in the action taken by the Commission.

C. Participation by a Commissioner with a Conflict of Interest

1. Due to the requirements of Section VII of the IGA and Subsection III. G of these rules (providing that the Commission may only act by a majority vote of all of its members), the Commissioner or Commissioners may participate, in spite of a conflict of interest, if they have complied with the disclosure requirements applicable to an actual, apparent or potential conflict of interest prior to acting. After disclosing a conflict and declaring he or she believes that he or she can make impartial decisions based on the evidence presented, a Commissioner may cast a yay or a nay vote; or in the alternative, may cast his or her vote as an abstention. An abstention shall count as a vote for purposes of Subsection III.G of these rules and Section VII of the IGA, but shall not be counted as a yay or nay vote.

