



THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

DEC 19 2012

Mr. Matt Todd
Senior Policy Advisor
American Petroleum Institute
1220 L Street, NW
Washington, D.C. 20005-4070

Dear Mr. Todd:

I am providing the U.S. Environmental Protection Agency's initial response to the letters of August 30, 2011, and November 4, 2011, from the American Petroleum Institute, the Independent Petroleum Association of America and America's Natural Gas Alliance regarding the final rule, "Review of New Sources and Modifications in Indian Country," the Tribal New Source Review Rule.

As discussed in the enclosure, the EPA concludes that partial reconsideration of the Tribal New Source Review Rule is appropriate. Specifically, with respect to the 15 items raised in the November 4, 2011, letter, the EPA intends to grant reconsideration on items 6 and 17 as set forth in the enclosure and will continue to evaluate the remaining items.

With respect to the three main items raised in the August 30, 2011, letter, items 1, 2 and 3 as set forth in the enclosure, the EPA denies reconsideration and your request that the rule be stayed.

The EPA will publish in the *Federal Register* a notice announcing this partial reconsideration and will publish a separate *Federal Register* notice in the near future that will address the specific issues for which we are granting reconsideration.

I appreciate your interest in this important matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Lisa P. Jackson".

Lisa P. Jackson

Enclosure

ENCLOSURE

Response to Petitions for Reconsideration: Review of New Sources and Modifications in Indian Country¹

In a letter dated August 30, 2011, American Petroleum Institute (API), the Independent Petroleum Association of America (IPAA) and America's Natural Gas Alliance (ANGA) (collectively the Petitioners), petitioned the EPA to, among other matters:

- (1) Reconsider the effective date of the final rule as it applies to synthetic minor sources;
- (2) Administratively stay the Tribal NSR Rule as it applies to synthetic minor permits while the rule is in reconsideration under the authority of section 307(d)(7)(B), 42 U.S.C. 7607(d)(7)(B), or while the rule is pending judicial review under section 705 of the APA, 5 U.S.C. 705;
- (3) Confirm that, during the administrative stay, the 1999 policy memo on synthetic minor sources in Indian Country (Potential to Emit (PTE) Transition Policy)² may be used to establish synthetic minor status for Prevention of Significant Deterioration (PSD) applicability purposes.

In a letter dated November 4, 2011, the Petitioners repeated six items that were also identified in the August 30, 2011, letter and raised additional items of concern. These included:

- (4) Shortening the time required to obtain a minor source permit and eliminating the Environmental Appeals Board (EAB) permit appeals process for all permits;
- (5) Issuing a general permit (GP) for oil and gas facilities;
- (6) Allowing the use of GPs for synthetic minor sources;
- (7) Shortening the 90-day time period allowed for the EPA to make the determination of whether a source is eligible for coverage under a GP;
- (8) Providing more streamlined procedures for public noticing the request for coverage under a GP;
- (9) Establishing September 2, 2014, as the implementation deadline for sources seeking site-specific permits and general permits;
- (10) Revising the rule to reflect the delineation of tribal/federal authority and to provide clarity as to where the program applies;
- (11) Stating that the emissions limitations needed to avoid Part 71/Title V applicability do not need to be established under the Tribal Minor NSR program;

¹ The Tribal NSR Rule includes two sets of regulations. The first rule, the "Federal Minor New Source Review Program in Indian Country" (the Tribal Minor NSR Rule), applies to new and modified minor stationary sources and to minor modifications at existing major stationary sources throughout Indian Country. The second rule, "Federal Major New Source Review Program for Nonattainment Areas in Indian Country" (the Tribal Nonattainment NSR Rule), applies to new and modified major sources in areas of Indian Country designated as not attaining the National Ambient Air Quality Standards.

² John S. Seitz and Eric V. Schaeffer. Policy memo. "Potential to Emit (PTE) Transition Policy for Part 71 Implementation in Indian Country." March 7, 1999.

(12) Stating explicitly that a permit is not required for true minor sources until September 2, 2014;

(13) Streamlining the minor NSR program by: reducing the amount of information requested in registration applications; streamlining final permit notification requirements; not requiring annual reports in all cases; shortening the deadline for submitting notice of relocation; and raising the *de minimis* applicability cut-offs;

(14) Streamlining the registration requirement by reducing the amount of information required to be initially submitted and by allowing companies to submit combined registrations covering multiple sources;

(15) Including portable sources within the permitting exemption we issued for mobile sources;

(16) Finalizing the proposed nonattainment NSR Appendix S Paragraph VI waiver option, in conjunction with deferring attainment deadlines under the Tribal Authority Rule (TAR);

(17) Reducing the relocation reports notice requirement to less than 30 days before the source plans to relocate; and

(18) Regulating non-National Ambient Air Quality Standards (NAAQS) pollutants under the Tribal Minor NSR Rule. The EPA does not have the authority to require the minor NSR program to apply beyond the NAAQS pollutants and precursors.

In the August and November 2011 letters, the Petitioners requested that the EPA reconsider the rule under the authority of CAA, section 307(d)(7)(B), 42 U.S.C. section 7607(d)(7)(B). Items 6 and 17 listed above and associated with the Petitioners' November request meet the requirements for reconsideration under section 307(d)(7)(B) of the CAA and hence the EPA intends to grant reconsideration with respect to those items. Please note that during the reconsideration process, the items under reconsideration will continue to be in effect. Regarding your request that the EPA allow the use of general permits to establish synthetic minor sources (item 6), while we are granting reconsideration of that issue, we believe that it may not be appropriate to allow the use of this mechanism for all source categories and will further evaluate the appropriate scope of any such change in the context of the reconsideration proposal. With respect to items 4-5 and 7-16 and 18 listed above and associated with the Petitioners' November request, we are continuing to evaluate these items at this time.

Regarding items 1-3 listed above and associated with Petitioners' August 30, 2011, letter, these items do not meet the requirements for reconsideration under CAA section 307(d)(7)(B). Rather, as discussed below, Petitioners' concerns regarding these issues appear to be based on a misunderstanding of the Tribal Minor NSR Rule provisions. We, therefore, deny reconsideration of these items and your request that the rule be stayed.

For sources whose potential to emit (PTE) exceeds major source levels, the requirement to obtain a permit pursuant to the major source PSD permit program (a PSD permit) prior to beginning actual construction has existed in Indian Country for many years and the Tribal Minor NSR Rule did not change that fundamental requirement. Rather, the Tribal Minor NSR Rule provides such sources with a simpler alternative: instead of obtaining a PSD Permit, a source that chooses to do so can limit its PTE

to below the major source thresholds by obtaining what is known as a synthetic minor source permit. The Tribal Minor NSR Rule makes that option, which has previously been available in most states, available to sources in Indian Country³. As stated in the proposed rule “one of the primary objectives of this rulemaking is to create a mechanism by which owners or operators of sources whose PTE exceeds major source levels can obtain emission limitations for such sources that are enforceable as a practical matter, so that they can become ‘synthetic minor sources’ and avoid major source status.” (71 FR 48696, 48714, August 21, 2006). Thus, rather than delaying construction in Indian Country, the provision was intended to expedite the required permitting process and we believe that it will do so. It is important to note that sources are only required to obtain a synthetic minor permit if they wish to limit their PTE to below the major source thresholds and thereby avoid major source PSD. A source always has the option of obtaining a PSD Permit. A delay in the effective date of the Tribal Minor NSR Rule as it applies to synthetic minor sources would only delay the availability of the alternative, simpler permitting path, not only for the oil and gas sources represented by the Petitioners, but all other source categories in Indian Country. As a result, all sources in areas attaining the NAAQS with a PTE above the major source thresholds would need to obtain a preconstruction PSD Permit.

To address industry and tribal concerns about possible delays in permitting, the EPA is taking a number of steps to facilitate easier implementation of the Tribal Minor NSR Rule. For example, we are developing general permits and/or permits-by-rule for some common source categories in Indian Country to streamline the permitting process for these sources. We also recently promulgated the Oil and Gas New Source Performance Standard (NSPS) for sources nationwide, along with a Federal Implementation Plan (FIP) specifically for the Ft. Berthold Indian Reservation in North Dakota that will limit the emissions from sources that may otherwise be required to obtain PSD permits. We will continue to pursue these and other steps to streamline permitting and facilitate easier implementation of the Tribal Minor NSR Rule.

Regarding the 1999 PTE Transition Policy, per the title, the policy memo only exempted certain sources from the requirement to obtain a federal Part 71 operating permit.⁴ As such, the policy memo was never intended to create a mechanism to enable sources to obtain synthetic minor status for PSD applicability purposes. Further, the policy specifically states: “The EPA would implement this policy from the date of this memorandum until either the EPA adopts and implements a mechanism that a source can use to limit its PTE, or the EPA explicitly approves a tribe’s or state’s program providing such a mechanism for the relevant area of Indian Country. Where the mechanism is the federal preconstruction permit program referred to above, this policy would extend to a date to be specified in the rule that establishes the preconstruction program.” (“Potential to Emit (PTE) Transition Policy for Part 71 Implementation in Indian Country” at 4 -5). In the preamble to the proposed Tribal Minor Source NSR Rule, we stated: “[U]pon the effective date of these rules when promulgated, the PTE transition policy will expire and you will have to obtain a permit under this minor NSR program for any subsequent synthetic minor sources” (71 FR 48696, 48714, August 21, 2006). In the preamble to the final Tribal Minor NSR Rule we stated: “This minor NSR program adopts and implements a mechanism that you can use to limit your potential to emit and as such it terminates the PTE transition policy” (76 FR 38748, 38769). We,

³ Prior to promulgation of the Tribal Minor NSR Rule, the primary mechanism through which a source planning to locate in Indian Country could limit its PTE to below the major source thresholds was the issuance of a source-specific FIP.

⁴ As stated in the memo, the “EPA would treat a source [in Indian Country] as non major **for the purposes of the federal Operating Permits Program (part 71)** if its actual emissions are and remain below 50 percent of the [Potential to Emit] PTE thresholds for major source status, for every consecutive 12-month period ... and it maintains adequate records to demonstrate that its actual emissions are kept below these levels.” “Potential to Emit (PTE) Transition Policy for Part 71 Implementation in Indian Country” at 1 (emphasis added).

therefore, believe it would be contrary to the Tribal Minor NSR Rule to allow major sources to continue to use this policy even for title V purposes, much less PSD purposes.

In summary, for the reasons discussed above, the EPA concludes that partial reconsideration of the Tribal Minor NSR Rule is appropriate.