



Via email: a-and-r-docket@epa.gov

August 20, 2014

Ms. Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Re: Comments on the Advanced Notice of Proposed Rulemaking *Managing Emissions from Oil and Natural Gas Production in Indian Country*, Docket ID No. EPA-HQ-OAR-2011-0151.

Dear Administrator McCarthy:

Western Energy Alliance (the Alliance) submits the following comments on the U.S. EPA Advanced Notice of Proposed Rulemaking *Managing Emissions from Oil and Natural Gas Production in Indian Country* (ANPR). We share EPA's stated desire for an "effective and efficient means of implementing the EPA's Indian Country Minor NSR program." However, EPA has exceeded its authority with respect to tribal sovereignty and by attempting to apply New Source Review (NSR) to existing sources in Indian Country.

The Alliance represents over 480 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. We represent independent companies, the majority of which are small businesses with an average of fifteen employees. Many of our members operate in Indian Country and require a streamlined permitting approach to reduce the resources needed to obtain permits and support the tribes' efforts to responsibly develop their mineral resources.

EPA requests input on several aspects of a program for proposed new and modified sources in the oil and natural gas production industry in Indian Country. We provide comments to these requests and suggest EPA address other issues that, if implemented, would help lead to an efficient and effective program for our industry.

Inclusion of Existing Source Emissions

The ANPR asks whether the oil and natural gas program should address existing source emissions in addition to new and modified sources. The Alliance supports the views of the tribes and does not believe EPA should include existing sources in a nationwide program for oil and natural gas production in Indian Country. Because the Clean Air Act (CAA) authorizes the NSR process only for new sources or significantly modified facilities, existing oil and natural gas sources should not be included in this rulemaking.

Nonetheless, the ANPR repeatedly asserts that EPA may regulate existing sources through a Federal Implementation Plan (FIP). *See, e.g.*, 79 FR 32504. Although the Clean Air Act (CAA) does authorize EPA to regulate existing sources through a FIP, those CAA provisions are not applicable to the ANPR, and the CAA is silent regarding EPA's ability to impose mandatory requirements on existing minor sources located in tribal areas on a nationwide scale. The ANPR has not identified any authority to the contrary. The ANPR cites CAA § 301(d)(4) and the Tribal Authority Rule as EPA's authority to impose a FIP. However, EPA provides no legal support for its position that a FIP could regulate existing minor sources. For example, the authority bestowed upon States by the CAA § 110(a)(2)(C) only permits States to regulate new and modified minor sources. EPA's authority under CAA § 301(d)(4) to impose a FIP is further limited by section 302(y).¹

A FIP is a plan "promulgated by the Administrator to fill all or a portion of a gap" in a SIP or a TIP. 42 U.S.C. § 7602(y). In 2011, when issuing the tribal minor source NSR rule, EPA identified the existing nationwide gap that the ANPR describes as "the lack of approved minor NSR permit programs to regulate construction of *new and modified minor sources* and minor modifications of major sources in Indian country." 79 FR 32513 (emphasis added; *see also* Review of New Sources and Modifications in Indian Country, 76 FR 38748, 38749-50, July 2, 2011). Therefore, EPA has *not* identified a regulatory nationwide gap in the ability to regulate *existing* minor sources, but only a regulatory gap to regulate new and modified minor sources. In fact, EPA cannot identify such a regulatory gap because the CAA, except under certain specific provision inapplicable here, does not authorize states or Indian tribes to regulate *existing* minor sources.

Indian tribes are no different than states under the CAA, and EPA action is limited to what it can mandate states under Section 110 of the CAA. CAA § 110(a)(2)(c) requires that Minor NSR programs address attainment of the National Ambient Air Quality Standards (NAAQS) for criteria pollutants, but EPA can only take "necessary" action and must make a showing that such actions are needed. A minor NSR program does not necessarily require that all construction needs a permit, and minor NSR authority does not give EPA authority to regulate existing sources. Key elements of a minor NSR program would (1) ensure a new source or modification is minor, (2) prevent impact on Prevention of Significant Deterioration (PSD) increments or minimize increment consumption, and (3) prevent contribution to a nearby nonattainment area. The CAA does not require pollution controls under minor NSR, nor is public participation required.

¹ Section 301(d)(4) is not a license to take any and all action that EPA deems to be for an "appropriate purpose." *See Michigan v. EPA*, 268 F.3d at 1083 (EPA's "mission is not a roving commission to achieve pure air or any other laudable goal"). The ANPR cites the Tribal Authority Rule for the proposition that "EPA shall promulgate . . . such Federal implementation plan provisions as are necessary . . . to protect air quality, consistent with the provisions of sections 301(a) and 301(d)(4)." 79 FR 32514 n.40. The phrase "as necessary" limits EPA's authority; it does not expand it. *Virginia v. E.P.A.*, 108 F.3d 1397, 1409 *decision modified on reh'g*, 116 F.3d 499 (D.C. Cir. 1997) (language allowing EPA to prescribe regulations "as necessary" does not give EPA free rein but "keep[s] EPA within bounds"); *see also Michigan*, 268 F.3d at 1083-84.

After a nonattainment designation is made and after analysis of the emissions inventory, modeling, and other data, as well as a determination of what controls or measures are reasonable, EPA can then consider regulation of existing sources. Under the CAA, regulations promulgated to address sources that “cause and contribute to nonattainment” are triggered after official designation of nonattainment of a NAAQS. Regulating existing sources in such an area requires area-specific analysis to identify the sources contributing to a violation and the specific regulations necessary to address those issues. The analysis is required to demonstrate the existence of a specific air quality concern, and the design of a control program to address the concern will take time and is often an iterative process. A nationwide program should not be used to resolve specific nonattainment problems or potential nonattainment problems. EPA should begin by implementing appropriate permitting mechanisms that allow for efficient processing in Indian Country and then conduct an appropriate analysis of specific areas that are officially designated in violation of a NAAQS, as prescribed in the CAA.

In its discussion of existing sources in the ANPR, EPA references development of the FIP for the Fort Berthold Indian Reservation, North Dakota (“Fort Berthold”), which does cover existing sources. However, the Alliance believes the ANPR mischaracterizes the reasons for the development of the Fort Berthold FIP. Several of our member companies were intimately involved in the Fort Berthold FIP as they began to develop oil and natural gas on the reservation.

The regulation of the existing sources in Fort Berthold was not a broad extension of EPA’s air quality authority, but within EPA’s limited authority to regulate new sources. The sources covered by the FIP were subject as new sources and not as existing sources, except to the extent that the sources needed to secure minor source existing source status to enable any construction to also be minor. As further background, the North Dakota Department of Health had a long standing set of control requirements prior to the Fort Berthold FIP, and those requirements were set forth to reduce emissions to a level that would enable operators under the state’s jurisdiction to claim that a site was a minor source. These requirements established federally enforceable limits and avoided major source air programs. Ensuring minor source status prevented companies from having to contend with permitting a source under Prevention of Significant Deterioration (PSD) requirements. PSD includes ambient monitoring data, air dispersion modeling and other onerous requirements.

Operators on Indian Lands in North Dakota did not have the ability to establish a site as a minor source, which created a regulatory gap and disadvantaged operators on Indian Lands. Thus the FIP was developed to close this gap and allow operators on Indian Lands to gain minor source status. The FIP was not implemented to address NAAQS issues in a post-designation regime. EPA’s justification for the Fort Berthold FIP primarily relied on the assertion that a FIP was justified because otherwise a “regulatory gap” would exist as compared to the North Dakota program that applied to the state lands surrounding Fort Berthold. EPA did not attempt to justify the rule on the basis of emissions data, air quality information, or other evidence suggesting a need to regulate existing sources in order to attain or maintain compliance with NAAQS or to meet some other CAA-based air quality

criteria. EPA cannot use the Fort Berthold FIP as justification for regulation of existing sources nationwide.

If EPA includes existing sources on a nationwide basis in its oil and natural gas permitting program, it will discourage development in Indian Country in many areas. Inclusion of existing sources will make it more expensive and difficult to do business in Indian Country, and companies will move to other lands to develop oil and natural gas resources. Consistency with the most stringent state regulations is not appropriate for a nationwide program and is beyond EPA's CAA authority. For a nationwide program, a least stringent approach that ensures no Indian Lands are disadvantaged would be more appropriate.

While the Alliance does not support the inclusion of existing sources in a nationwide permitting program for Indian Country and believes EPA does not have the authority to require existing source coverage unless and until a non-attainment designation is made, we do support a predictable, certain and appropriate permitting program. In order to develop an efficient and effective program, EPA must have a solid understanding of oil and natural gas sources, emission profiles and whether emissions are trending upward or downward before imposing rigorous regulatory requirements. Thus, EPA should consider a targeted working group to bring industry experts, tribes and regulators together to ensure the future regulatory framework contains the appropriate regulatory measures embodying both certainty and technical flexibility.

EPA's Limited Authority Within Indian Country

EPA's ability to implement air quality programs is limited to those programs Congress specifically granted EPA authority to implement via the CAA. Tribes, like states, on the other hand, have independent sovereign authority to implement air quality programs outside of and apart from the CAA. For example, tribes may impose air quality requirements that far exceed or are more stringent than the programs contemplated by the CAA. EPA does not possess such independent authority. However, EPA does possess some limited authority within Indian Country. For example, EPA may implement tribal air quality programs within Indian Country where: (i) the tribe has failed to submit a TIP to EPA for approval; (ii) EPA does not approve a TIP as submitted; or (iii) EPA determines a tribe is not adequately administering or enforcing a previously approved TIP. See *Oklahoma v. EPA*, 740 F.3d 185, 193 (D.C. Cir. 2014).

Thus, in the event EPA seeks to impose air quality programs that go beyond the authority vested in EPA by the CAA, EPA must base its "additional" authority on a tribe's sovereign ability to exceed or go beyond the minimum standards embodied in the CAA. EPA may only rely on a tribe's independent and sovereign authority when the pertinent tribe authorizes EPA to do so. As referenced above, EPA's authority to implement tribal air quality programs arises "if, and only if" a tribe fails to submit a TIP to EPA for approval, EPA fails to approve a previously submitted TIP, or EPA determines a tribe is inadequately administering a previously approved TIP. When acting "in the shoes of a tribe," EPA's authority under a FIP cannot exceed that of a tribe.

As we explained in *Michigan*, § 7601(d)(4) unambiguously confers no “inherent or underlying EPA authority, but rather a role for the EPA if the tribe, for whatever reason, does not promulgate a tribal implementation program.” When regulating in the shoes of a tribe, therefore, the EPA is subject to the same limitations as the tribe itself.

Oklahoma, 740 F.3d at 194-95 (internal citations omitted). Thus, if EPA intends to utilize the sovereign authority of a tribe to implement air quality requirements that are more stringent or go beyond the programs EPA is authorized to implement under the CAA, such as regulation of existing minor sources, EPA must gain such authority from the sovereign tribe. If EPA does not gain such “additional” authority from the sovereign tribe, EPA cannot implement such requirements.

This is particularly true for programs that EPA seeks to implement on a nationwide scale. If the contrary were true, EPA would infringe upon and interfere with the sovereign rights of other tribes with different needs and desires. For example, an Indian tribe in Wisconsin could authorize EPA to implement exceedingly stringent programs on behalf of it, however, EPA could not similarly implement such stringent programs on behalf of a tribe in Colorado that did not request or authorize EPA to do so. “Congress . . . vested jurisdiction to implement the Act in the states,” see 42 U.S.C. § 7661a(d), and then authorized tribes to be treated as states, see § 7601(d)(1)(A); the Congress left no “residual . . . EPA jurisdiction, authority, or power.” *Oklahoma v. EPA*, 740 F.3d at 193 (quoting *Michigan* at 268 F.3d at 1083).

Thus, under § 7410(c)(1), EPA’s FIP authority is limited to acting in place of a single state, and by extension a *single* tribe. EPA cannot exceed its statutory authority on a nationwide scale as applicable to Indian Country in its entirety where only some or a few Indian tribes have asked or authorized EPA to do so. As pointed out by the District of Columbia Circuit Court of Appeals, “[i]t is significant that neither the EPA nor the Intervenor, Navajo Nation, can cite a single reference in the Clean Air Act that suggests that the agency has some overarching jurisdiction to implement federal programs.” *Michigan*, 268 F.3d at 1083. Thus, in EPA’s forthcoming proposal, EPA should clarify whether it is acting in its implementing authority under section 301(d) of the CAA or whether EPA intends to utilize “additional” authority as granted by a sovereign tribe. If EPA intends to use the later, EPA’s actions should be limited to a tribe-by-tribe basis, and not on a nationwide level through a FIP.

Permitting Approaches

The ANPR asks for comment on the various mechanisms to manage oil and natural gas emissions, including a general permit (GP), permits by rule (PBRs) and a federal implementation plan (FIP). The Alliance believes the permitting approach and requirements therein are more important than the mechanism itself and should include a self-implementing streamlined process, which could be accomplished through the use of either a FIP for new sources or PBRs.

PBRs require notice or registry of a source with the agency, but allow the immediate construction of the facility. Analysis of applications for coverage under a GP would take at least 90 days and must occur prior to construction of the site. EPA should design the permitting approach to apply on the date that construction begins but allow notice of coverage after commencement of construction. Once the well is drilled, it is unclear if operators would have to reapply for GP coverage if their first application proves incorrect. Use of PBRs or a FIP alleviates this problem while still managing emissions from oil and natural gas sites.

PBRs and FIPs also require far less resources from EPA. Operators simply provide notice to EPA, and no further action is needed by EPA staff. If, however, a GP is chosen, each source application would need to be evaluated by EPA. Thousands of applications for coverage under the GP would be sent to EPA, and development would slow or even stop while EPA processes so many applications. We are concerned EPA does not have the resources to process so many applications in a timely manner. PBRs or a FIP would not require nearly the resources that GPs would.

More generally, Indian Country Minor NSR permitting should be similar to states' minor source permit programs as discussed in the preamble of the July 1, 2011 final rule (76 FR 38754). We understand EPA is looking at several state programs to as examples for permitting oil and natural gas sites. The Alliance encourages EPA to focus on states with a long history of oil and natural gas development, including Texas, Oklahoma, Louisiana and Wyoming.

Synthetic Minor Sources

The ANPR makes little mention of synthetic minor status for oil and natural gas sources. One stated goal in the ANPR is streamlining of the Minor NSR program, therefore, treatment of synthetic minor sources in the same manner as true minor sources would help achieve EPA's streamlining goal and should also be made effective to limit HAPs.

States make no differentiation between synthetic minor permits and true minor permits, and operators on Indian Lands should have the same opportunity to create synthetic minor sources as they do on surrounding state lands. Failing to do so would further disadvantage Indian Lands.

Setback Requirements

The ANPR requests comments on "[T]he concept of including a setback requirement in a [FIP], as well as the distances we might consider for any such setback requirement, and on the type of structures for which a setback requirement might be appropriate." As is discussed below, specific setback requirements are already embodied in Indian mineral leases and the regulations implementing and governing the same. EPA should not promulgate rules or regulations that conflict with the setback requirements that are already present in these federal pronouncements, and doing so would be improper, imprudent, and unlawful.

The federal government has long recognized that Indian mineral leases are contracts governed by ordinary principals of contractual construction.² In addition, federal contracts, including contracts that involve lands held in trust for tribes and individual Indians, are governed by the principals of general contract law.³ As a consequence, Indian mineral leases should be viewed and treated as contracts that cannot be unilaterally modified by: (i) the lessor; (ii) the lessee; or (iii) the federal government as tasked with the fiduciary duty to review, approve, and enforce them.

Indian mineral leases are generally authorized and issued in accordance with either: (i) the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. §§ 396a-396g; (ii) the Act of March 3, 1909 (“1909 Act”), 25 U.S.C. § 396; or (iii) the Indian Mineral Development Act of 1982 the (IMDA), 25 U.S.C. §§ 2101-2108. Indian mineral leases authorized by the IMLA and the 1909 Act must be issued on template forms prepared by and approved by the Bureau of Indian Affairs (BIA).⁴ Every Indian mineral lease issued under the IMLA and the 1909 Act contains the following provision or a similar provision:

[T]he lessee agrees: To exercise reasonable diligence in drilling and operating wells for oil and gas on the lands covered hereby . . . to carry on all operations hereunder in a good and workmanlike manner in accordance with approved methods and practice . . . *not to drill any well within 200 feet of any house or barn now on the premises without the lessor’s written consent* approved by the [Secretary].

These bargained for contracts entered into between Indian mineral owners and mineral lessees, being subsequently reviewed and approved by the Secretary of the Interior, already include a bargained for and agreed upon “setback” requirement limited at 200 feet. It would be improper, imprudent, and possibly unlawful for the EPA to infringe upon the authorities and Congressionally granted oversight of the Secretary of Interior with respect to such leases.

Moreover, the federal government’s regulations implementing the IMLA and 1909 Act specifically include the 200 foot setback. Both regulations include the following provision, “[t]he lessee shall: Not construct any well pad location within 200 feet of any structures or improvements without the Indian surface owner’s written consent.” 25 C.F.R. §§

² See *Hall-Houston Oil Co. v. Acting Western Reg’l Dir.*, BIA, 43 IBIA 227 (2006); see also *Wassman v. Pacific Reg’l Dir.*, BIA, 41 IBIA 238 (2005); *Midthun v. Acting Rocky Mountain Reg’l Dir.*, BIA, 48 IBIA 282 (2009).

³ See *Naegele Outdoor Advertising Co. v. Acting Sacramento Area Dir.*, BIA, 24 IBIA 169, 177 (1993) see also *Priebe & Sons, Inc. v. United States*, 332 U.S. 407 (1947); *United States v. Humboldt Fir, Inc.*, 426 F. Supp 292 (N.D. Calif. 1977), *aff’d mem.*, 625 F.2d 330 (9th Cir. 1980).

⁴ The IMDA was specifically enacted to permit Indian mineral lessors and lessees to negotiate unique mineral development agreements not authorized under the IMLA or the 1909 Act. Thus, mineral leases issued under the IMDA are not based on BIA approved forms, nor subject to the same extensive federal management as leases issued under the IMLA and the 1909 Act. See 25 C.F.R. §§ 211.57; 212.57 (“Leases . . . and other instruments relating to mineral leasing shall be on forms, prescribed by the Secretary . . . The provisions of a standard lease . . . may be changed, deleted, or added to by written agreement of *all parties* (emphasis supplied)).

211.47(f); 212.47(f). Thus, BIA, through binding federal regulations has already established setback requirements that lessees of Indian minerals must agree to follow. EPA may not and should not enact setbacks inconsistent with those included in BIA's regulations, nor may EPA, as the federal government's agent, unilaterally amend or modify the terms of existing Indian mineral leases.

BIA amended the regulations implementing the IMLA and the 1909 Act in 1996 (61 FR 35634 (July 8, 1996)). During the comment period, several commenters suggested that BIA include new regulatory provisions that would conflict with existing lease terms. BIA, however, determined that such a tactic would be imprudent stating, "a change is made to clarify that 25 CFR Parts 211 and 212 do not affect certain key provisions of existing mineral leases and permits." 61 FR 35636. BIA also clarified that its regulatory revisions provided the federal government with the opportunity to:

[F]ulfill its trust responsibility by providing adequate provisions to ensure the protection of the trust resources and at the same time benefit the Indian mineral owners by removing unnecessary regulatory barriers and complications that could make their minerals less attractive to industry and thus frustrate development.

Thus, in discussing whether BIA should promulgate regulations with terms in conflict with existing Indian mineral lease provisions, BIA stated that the federal government did not desire to amend lease provisions through regulations and that such a position was the "most equitable method of handling [such] issues." 61 FR 35644. The same should be true in this instance. Here, it would be inequitable for EPA to insist that Indian mineral lessors and their lessees comply with setback requirements other than those embodied in the Indian mineral leases themselves and the regulations governing the same; thereby creating an impermissible conflict between the regulations of the Secretary of Interior and EPA and imposing a requirement in conflict with IMLA and 1909 Act oil and gas leases.

In addition, BIA contemplated a very similar situation in 1996. For example, 25 C.F.R. Part 211 permits an Indian Tribe that is organized under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479, to supersede the regulations found in 25 CFR Part 211. *See* 25 C.F.R. § 211.29. However, as BIA recognized, superseding provisions would not be permitted that: (i) modified provisions of an existing lease or permit which constitutes substantially the consideration which the lease or permit would not have been made; or (ii) provide for a regulatory taking (61 FR 35652). EPA cannot implement regulations or rules superseding BIA's regulations in instances where Indian tribes cannot. It would be contrary to reason to permit EPA to supersede Indian mineral lease regulations and not permit Indian mineral owners to do the same.

The 200 foot setback requirement contained in Indian mineral leases and BIA's regulations constitute a favorable lease provision that establishes a portion of the consideration that lessees extend when seeking to develop Indian minerals. Phrased differently, without such a provision, or with a substantial modification to the same absent the lessee's consent, it is more than probable that the underlying Indian mineral lease would not have

been made. Consequently, EPA should not attempt to promulgate regulations that contravene the requirements of existing Indian mineral leases and BIA regulations.

Similarly, it would be improper for EPA to look to state law or impose state setback requirements on Indian lands subject to EPA's CAA jurisdiction. EPA's ANPR states, "[s]ome states air rules also contain setback requirements that ensure that new oil and natural gas production activities occur outside a set distance from certain types of structure." As EPA is likely aware, state setback requirements only apply to fee and state owned mineral developments governed by state oil and gas conservation commissions ("Commissions"). Commissions have absolutely no authority with respect to the development of Indian minerals. See 25 C.F.R. § 1.4; see also *Samden Oil Corp. v. Andrus*, 466 F.Supp. 521 (D. Okla. 1978); *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Calvert*, 233 F.Supp. 909 (D. Mot. 1963), rev'd on other grounds, *Yoder v. Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana*, 339 F.2d 360 (9th Cir. 1964); *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Board of Oil and Gas Conservation of the State of Montana*, 792 F.2d 782 (9th Cir. 1986); *Cheyenne-Arapahoe Tribe of Indians v. United States*, 966 F.2d 583 (10th Cir. 1992); *Woods Petroleum Corp. v. Dep't of the Interior*, 47 F.3d 1032 (10th Cir. 1995). Therefore, it is clear that EPA should also not look to state law or implement state law setback requirements with respect to Indian mineral leases. A decision to the contrary would conflict with well-established federal case law and place Indian lessors under the jurisdiction of state requirements that are wholly inapplicable to Indian, trust minerals.

Accordingly, EPA should refrain from any attempt to promulgate rules and regulations that include setback requirements that: (i) run afoul of similar setback requirements embodied in existing Indian mineral leases; (ii) are contrary to existing BIA regulations; or (iii) are based on state law.

In conclusion, the Alliance reiterates the need for a streamlined, self-implementing nationwide permitting program for oil and natural gas in Indian Country that allows for the creation of synthetic minor sources, respects the sovereignty of the Tribes and does not disadvantage development on Tribal Lands. We thank EPA for the opportunity to comment on the provisions included in the ANPR and would like to continue to work with EPA as it develops a permitting program. If you have questions, please contact me at urick@westernenergyalliance.org.

Sincerely,



Ursula Rick
Manager of Regulatory Affairs

Cc: Cindy Beeler, Energy Policy Advisor, EPA Region 8
Greg Green, Director, EPA Outreach and Information Division
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