Summary of Public Comments and Responses

Federal Implementation Plan for True Minor Sources in Indian Country in the Oil and Natural Gas Production and Natural Gas Processing Segments of the Oil and Natural Gas Sector; Amendments to the Federal Minor New Source Review Program in Indian Country to Address Requirements for True Minor Sources in the Oil and Natural Gas Sector

June 2016

This document provides the U.S. Environmental Protection Agency's (EPA's) responses to public comments on the "Federal Implementation Plan for True Minor Sources in Indian Country in the Oil and Natural Gas Production and Natural Gas Processing Segments of the Oil and Natural Gas Sector; Amendments to the Federal Minor New Source Review Program in Indian Country to Address Requirements for True Minor Sources in the Oil and Natural Gas Sector." The EPA published a notice of proposed rulemaking in the Federal Register on September 18, 2015 (80 FR 56554).

The Federal Implementation Plan (FIP) is designed to streamline the permitting of true minor oil and gas sources planning to locate or expand in Indian country.

During the public comment period, the EPA received 36 comment letters in response to the September 18, 2015 proposal from industry representatives and associations, environmental organizations, and municipalities. In addition, the EPA held three public hearings on the rules throughout the country and received 3 additional comments on the draft proposal. The list of commenters and affiliations appears after the Table of Contents. Throughout this document, "Reviewing Authority," "we," "us" and "our" refer to the EPA.

This document provides the EPA's responses to the public comments regarding these proposals. The verbatim text of each comment extracted from the original comment letters is included in this document, arranged by subject into groups. For each comment, we provide the name and affiliation of the commenter and the document control number (DCN) assigned to the comment letter. The verbatim comments appear as submitted except for certain formatting changes. We have put all the footnotes the commenters have used into a consistent format and also inserted brackets where needed to make the regulatory, Federal Register (FR) references clear such as using "[80 FR 56558.]" instead of "80 Fed. Reg. at 56558." Also, when we originally excerpted the comments into Microsoft Word from the EPA Docket PDF files, we corrected typos or missing letters, etc. where text blocks did not copy over consistently.

Following each set of verbatim comments, a summary of each issue raised in the verbatim comments is provided. The EPA's responses to these comments are provided immediately following each group of summarized comment excerpts. In some cases, a commenter incorporated by reference the comments of another company or organization. Rather than repeat these comment excerpts for each commenter, the EPA has listed the comment excerpt only once under the name of the person, company or organization that submitted the comment and included a list of commenters who indicated their support for that comment in a footnote. Copies of all

comment letters submitted are available at http://www.regulations.gov by searching Docket Id. No. EPA-HQ-OAR-2014-0606.

TABLE OF CONTENTS

List of Commenters

Docket Id. No.	Commenter	Affiliation
EPA-HQ-OAR-2014-0606-0008	Jack Dalrymple	North Dakota Industrial Commission (NDIC)
EPA-HQ-OAR-2014-0606-0009	Anonymous public comment	Anonymous public comment
EPA-HQ-OAR-2014-0606-0010	H. Renders	H. Renders
EPA-HQ-OAR-2014-0606-0011	A. Braden	A. Braden
EPA-HQ-OAR-2014-0606-0012	Eric Cowden	Marcellus Shale Coalition (MSC)
EPA-HQ-OAR-2014-0606-0013	K. Zafar	K. Zafar
EPA-HQ-OAR-2014-0606-0014	Shawn Bennett	Ohio Oil and Gas Association
EPA-HQ-OAR-2014-0606-0015	Matthew Hite	Gas Processors Association (GPA)
EPA-HQ-OAR-2014-0606-0018	Andrew Casper	Colorado Oil & Gas Association (COGA)
EPA-HQ-OAR-2014-0606-0019	Howard J. Feldman	American Petroleum Institute (API)
EPA-HQ-OAR-2014-0606-0020	Peter Mueller	EcoVapor Recovery Systems
EPA-HQ-OAR-2014-0606-0021	Matthew Hite	Gas Processors Association (GPA)
EPA-HQ-OAR-2014-0606-0022	James D. Elliott	Independent Petroleum Association of America (IPAA)
EPA-HQ-OAR-2014-0606-0023	Margo Thorning	American Council for Capital Foundation (ACCF)
EPA-HQ-OAR-2014-0606-0024	Kathleen M. Sgamma	Western Energy Alliance
EPA-HQ-OAR-2014-0606-0025	Kathleen M. Sgamma	Western Energy Alliance
EPA-HQ-OAR-2014-0606-0026	Clement J. Frost	Southern Ute Indian Tribe
EPA-HQ-OAR-2014-0606-0027	W. Marrs	W. Marrs
EPA-HQ-OAR-2014-0606-0031	Clement J. Frost	Southern Ute Indian Tribe
EPA-HQ-OAR-2014-0606-0032	Bill Thompson	National Tribal Air Association (NTAA)
EPA-HQ-OAR-2014-0606-0037	S. Ventsch	S. Ventsch
EPA-HQ-OAR-2014-0606-0038	Mike Smith	QEP Resources, Inc.
EPA-HQ-OAR-2014-0606-0039	Shaun Chapoose	Ute Indian Tribe
EPA-HQ-OAR-2014-0606-0040	Mark Sutton	Gas Processors Association (GPA)
EPA-HQ-OAR-2014-0606-0041	Scott Mason	Enerplus Resources (USA) Corporation
EPA-HQ-OAR-2014-0606-0042	Shaun Chapoose	Ute Indian Tribe
EPA-HQ-OAR-2014-0606-0043	Paul Billings	American Lung Association
EPA-HQ-OAR-2014-0606-0044	Robin Cooley and Joel Minor	Earthjustice et al.
EPA-HQ-OAR-2014-0606-0045	Kathleen M. Sgamma	Western Energy Alliance

List of Commenters

Docket Id. No.	Commenter	Affiliation
EPA-HQ-OAR-2014-0606-0046	Howard J. Feldman	American Petroleum Institute (API)
EPA-HQ-OAR-2014-0606-0047	Laura Nelson	Office of the Governor, State of Utah
EPA-HQ-OAR-2014-0606-0048	Rollie Wilson	Fredericks Peebles & Morgan LLP
EPA-HQ-OAR-2014-0606-0049	Jack Dalrymple	North Dakota Industrial Commission (NDIC)
EPA-HQ-OAR-2014-0606-0050	C. Lish	C. Lish
EPA-HQ-OAR-2014-0606-0051	Kenneth A. Malmquist and Todd Rudolph	SLR International Corporation and Ultra Resources, Inc.
EPA-HQ-OAR-2014-0606-0052	Lee Fuller and V. Bruce Thompson	Independent Petroleum Association of America (IPAA) and American Exploration and Production Council (AXPC)
EPA-HQ-OAR-2014-0606-0058 (0058 – Bracken)	K. Bracken	Anadarko Petroleum Corporation
EPA-HQ-OAR-2014-0606-0058 (0058 – Jacus)	J. Jacus	Western Energy Alliance
EPA-HQ-OAR-2014-0606-0058 (0058 – Dickinson)	K. Dickinson	Enerplus Resources

1.0 Comments Related to the Proposed Amendments to the Federal Indian Country Minor NSR Rule

1.1 Comments Related to Preconstruction Permit Requirements

QEP Resources, Inc. (0038): The inherently unpredictable nature of oil and natural gas production makes the preconstruction requirement proposed by EPA a burdensome requirement that will be of limited use to EPA and confusing to the public.

First, it is important to note that operators are unable to accurately determine their PTE prior to construction. A number of variables, some known and some unknown, will dictate how a well comes online and the level of emissions associated with production. For example, operators are constantly evaluating completion activities with an eye toward innovation. Within even a short amount of time, an operator may develop a more efficient completion process that may increase initial production and thereby potentially increase emissions. However, efficiencies may not be discovered until after the new process is attempted (i.e. post-construction). Accordingly, pre-construction registrations are essentially educated guesses.

Pre-construction emission estimates are of limited use to EPA. Such estimates are not accurate enough to be used in emission inventories and certainly cannot be relied on for the purposes of

air quality modeling. Moreover, inaccurate information and confusion created by a pre-construction registration will only be compounded when this information is made public. Third parties may assume pre-construction PTE estimates represent actual emissions data. In turn, overstated evaluations of oil and natural gas development's impact on airsheds will result.

In order to provide EPA and others with more accurate actual data, the pre-construction registration will need to be amended after construction once actual emissions have been determined. This revision will require duplicative work by operators and EPA will be tasked with processing and reviewing duplicative submittals.

As a solution to this problem, instead of preconstruction registration, we urge EPA to allow operators to register under the FIP by providing actual emissions data (based on the first thirty days of production) due within ninety days of the first date of production. A similar practice is already allowed by EPA under the existing NSPS OOOO rules. Several states also acknowledge the value in post construction registration and/or permitting of oil and gas production facilities.

In Wyoming, oil and gas operators may commence operation and modification of a facility prior to obtaining an Air Quality Permit under Wyoming Air Quality Standards and Regulations, Chapter 6, Section 2, so long as the operator satisfies certain emission control requirements outlined in Wyoming Department of Environmental Quality's Oil and Gas Production Facilities, Chapter 6, Section 2 Permitting Guidance (last revised September 2013). In Colorado, emission information related to new/modified oil and gas exploration and production operations (well site and associated equipment) is not required to be submitted to Colorado's Air Pollution Control Division until "after exploration and/or production drilling, workovers, completions and testing are finished." See Air Quality Control Commission Regulation No.3, Part A, Section II.D.1.111. Finally, the North Dakota Department of Health provides a similar, post-construction registration process for operators in North Dakota. A completed oil and gas well registration form and gas analysis must be submitted to the Department of Health within ninety days of the completion or recompletion of a well. North Dakota Century Code Chapter 33, Section 15-20-02.

Allowing oil and gas operators to provide emission information within ninety days of the first date of production under the FIP will conserve EPA resources and provide the Agency with more accurate information.

Enerplus (0041): Currently the Tribal Minor Source Review requires operators to submit a registration within 90 days of initial production (IP) but the proposed FIP requires sources to register 30 days prior to construction. The unpredictable nature of oil and natural gas production makes the preconstruction registration requirement overly onerous and the resulting data likely inaccurate.

Enerplus respectfully requests the EPA consider changing the proposed FIP language to allow for post-construction registration as opposed to the proposed pre-construction registration. A pre-construction registration presents a challenge to operators mainly because it is difficult to predict, within a reasonable degree of certainty, what oil and natural gas production will be from a well until production has commenced. A number of factors such as technology improvements, downhole failures, infill drilling, and reservoir characteristics, will influence the initial

productivity of a well and its associated emissions. Completions technologies are constantly improving and increasing a wells initial production, which could potentially increase its emissions. Conversely, a downhole failure during completions may result in a poorer well and possibly lower its potential emissions. Additional uncertainty is created by drilling and completing wells in different formations, at varying distances from one another, and in undefined sweet spots. AII of these unknowns lead operators to essentially make an educated guess at production and emissions rates prior to construction.

Operators will likely be conservative and, overestimate a wells production and potential to emit to ensure registration values are not exceeded upon start up. Emissions estimates from these registrations could then be used to develop inaccurate emissions inventories and even more concerning, skew modeling results for actual conditions and impacts. The unrealistically high emissions estimates will misrepresent the effects of oil and gas to the public and other agencies.

In order to provide accurate information, operators will have to amend registrations post-construction but the proposed FIP language limits a modification to physical changes and increases in emissions. If the EPA chooses to stay with the provision requiring pre-construction permitting, Enerplus respectfully requests the agency provide a mechanism for revising emissions downward, post construction when no modification or physical change has occurred.

Although post-construction registration updates are a possible solution to the imprecise preconstruction registration data, Enerplus prefers the EPA consider revising the proposed FIP to require post-construction registration thereby limiting duplicative work for both operators and the agency.

In addition, this will align permitting processes on Indian lands with post-construction permitting allowed by states adjacent to those Indian lands. States have recognized the importance of post-construction permitting, EPA has approved those permitting processes through state SIPs, and this request for post-construction permitting would not disadvantage Tribal lands.

Western Energy Alliance (0045): Pre-Construction Registration is Unworkable - The inherently unpredictable nature of oil and natural gas production makes the pre-construction requirement proposed by EPA a burdensome requirement that will be of limited use to EPA and confusing to the public.

First, it is important to note that operators are unable to accurately determine their PTE prior to construction. A number of variables, some known and some unknown, will dictate how a well comes online and the level of emissions associated with production. For example, operators are constantly evaluating completion activities with an eye toward innovation. Within even a short amount of time, an operator may develop a more efficient completion process that may increase initial production and thereby potentially increase emissions. However, efficiencies may not be discovered until after the new process is attempted (i.e. post-construction). Accordingly, pre-construction registrations are essentially educated guesses.

Pre-construction emission estimates are of limited use to EPA. Such estimates are not accurate enough to be used in emission inventories and certainly cannot be relied on for the purposes of air quality modeling.

Finally, the inaccurate information and confusion created by a pre-construction registration will only be compounded when this information is made publicly available on EPA's website. Alliance members have observed instances where third parties have analyzed overstated PTE estimates, treating those numbers as actuals, which has led to overstated evaluations of oil and natural gas development's impact on airsheds.

In order to provide EPA and others with more accurate actual data, the pre-construction registration will need to be amended after construction once actual emissions have been determined. This revision will require duplicative work by operators, which is inefficient, costly, and offers no environmental benefit. Furthermore, EPA will be tasked with processing and reviewing duplicative submittals.

As a solution to this problem, instead of preconstruction registration, we urge EPA allow operators to register under the FIP by providing actual emissions data (based on the first thirty days of production) due within ninety days of the first date of production. A similar practice is already allowed by EPA under the existing NSPS OOOO rules. Several states also acknowledge the value in post-construction registration and/or permitting of oil and natural gas production facilities.

In Wyoming, oil and natural gas operators may commence operation and modification of a facility prior to obtaining an Air Quality Permit under Wyoming Air Quality Standards and Regulations, Chapter 6, Section 2, so long as the operator satisfies certain emission control requirements outlined in Wyoming Department of Environmental Quality's Oil and Gas Production Facilities, Chapter 6, Section 2 Permitting Guidance (last revised September 2013).

In Colorado, emission information related to new/modified oil and natural gas exploration and production operations (well site and associated equipment) is not required to be submitted to Colorado's Air Pollution Control Division until "after exploration and/or production drilling, workovers, completions and testing are finished." See Air Quality Control Commission Regulation No. 3, Part A, Section II.D.1.111. In allowing the submission of emission data post-construction, Colorado's Air Quality Control Commission noted:

> Oil and gas exploration activities are activities for which it is difficult for the owner or operator to estimate what emission equipment will be required, and therefore what emissions will occur, until the exploration activities are already underway, and near completion. For this reason, the Air Pollution Control Division (Division) has extended a temporary exemption from APEN and permit requirements for such activities. Before commencing exploration activities, the source must notify the Colorado Oil and Gas Conservation Commission (COGCC). In this way, the Division is aware of the activities and will be able to address any concerns that are raised by the public.

Air Quality Control Commission Regulation No. 3, Part G, Statement of Basis, Section I.K (adopted June 22, 1993).

The North Dakota Department of Health provides a similar, post-construction registration process for operators in North Dakota. A completed oil and natural gas well registration form and gas analysis must be submitted to the Department of Health within ninety days of the completion or recompletion of a well. North Dakota Century Code Chapter 33, Section 15-20-02. The Department of Health recognizes that:

> …emissions associated with the exploration and production of O&G resources cannot be predicted with any degree of precision or accuracy until after it is determined the oil or gas well will actually produce and site specific production data are collected and known. Therefore, unlike other stationary sources for which projected emissions upon startup can be estimated in advance for purposes of pre-construction air permitting, emissions from O&G exploration and production facilities are only known post-construction and completion.[1]

Allowing oil and natural gas operators to provide emission information within ninety days of the first date of production under the FIP will conserve EPA resources and provide the agency with more accurate information.

American Petroleum Institute (API) (0046):

Proposed Language

> *Minor sources complying with §§49.101 to 49.105 for oil and natural gas production, as defined in §49.102, must submit a registration form 30 days prior to beginning construction that contains the information in §49.160(c)(2). The form titled "Registration for New True Minor Oil and Natural Gas Sources and Minor Modifications at Existing Oil and Natural Gas Sources" is available at: http://www.epa.gov/air/tribal/tribalnsr.html or from EPA Regional Offices. This form is submitted instead of the application form required in §49.160(c)(1)(iii) [§49.160(c)(1)(iv)].*

Issue

The current registration form requires that oil and gas operators quantify emissions and provide production rates as part of the pre-construction registration process [§49.160(c)(2)]. Upstream oil and gas activities have many unique permitting challenges due to the uncertainty of what the well will actually produce, if anything (e.g., sometimes wells are dry holes). As previously mentioned, the potential for drilling a well that does not produce any oil and/or gas was acknowledged by EPA in the FBIR FIP. Therefore, it is not possible to quantify emissions with any certainty prior to completing the well and obtaining site-specific production data. Many states such as Wyoming, Colorado, North Dakota, and Texas have acknowledged the unique challenges presented for permitting well production sites. These states have established guidance

[1] North Dakota Department of Health, Bakken Pool Oil and Gas Production Facilities Air Pollution Control Permitting & Compliance Guidance (May 2, 2011).

and mechanisms which allow operators to drill, complete, and initially produce the well before determining what type of permit will be required. These states understand that these activities often must be implemented in order to obtain the information necessary to characterize air emissions and pursue an appropriate air permit.

North Dakota

"It should be noted that emissions associated with the exploration and production of O&G resources cannot be predicted with any degree of precision or accuracy until after it is determined the oil or gas well will actually produce and site specific production data are collected and known. Therefore, unlike other stationary sources for which projected emissions upon startup can be estimated in advance for purposes of pre-construction air permitting, emissions from O&G exploration and production facilities are only known post-construction and completion."[2]

Colorado

"Oil and gas exploration activities are activities for which it is difficult for the owner or operator to estimate what emission equipment will be required, and therefore what emissions will occur, until the exploration activities are already underway, and near completion. For this reason, the Air Pollution Control Division (Division) has extended a temporary exemption from APEN and permit requirements for such activities. Before commencing exploration activities, the source must notify the Colorado Oil and Gas Conservation Commission (COGCC). In this way, the Division is aware of the activities and will be able to address any concerns that are raised by the public. Once an owner or operator has determined that an oil or gas well will be produced, and has filed well completion information, the owner or operator must file an APEN and a permit application within 30 days of that completion filing."[3]

Wyoming

"At O&G facilities production rates and associated pollutant emissions are usually unknown prior to start up. The AQD has tailored a permitting program allowing for the start up or modification of O&G facilities prior to permitting provided specific emission control requirements are met."[4]

Texas

"What is the Start of Construction Date?
When determining the applicability of air authorizations under §106.352 and the oil and gas standard permit, it is important to consider the Start of Construction of the project or registration. The start of construction is the date on which construction begins at a site after the well has been drilled and tested. The post-well test construction (i.e. building pads for engines, installing platforms for tanks, etc.) is when the start of construction

[2] North Dakota Department of Health Bakken Pool Oil and Gas Production Facilities Air Pollution Control Permitting & Compliance Guidance dated 5/2/2011 Page 5.
[3] Reg. 3 Part G Statement of Basis Page 246.
[4] Wyoming Air Quality Division C6 S2 O&G Production Facilities Permitting Guidance dated September 2013 Page 3 of 76.

should be considered. For sites that are not well tested (such as midstream sites or gathering stations), the start of construction is considered the date on which equipment is brought onsite or physical modifications are made at a site in order to install equipment."[5]

Under the proposed FIP, operators must obtain an air permit prior to constructing or modifying a stationary source. As described above, well production sites have unique challenges in estimating emissions before site-specific data can be obtained. Accordingly, the requirement to have "permit-in-hand" effectively limits the usefulness of the proposed FIP as a streamlined permitting approach because operators will not have definitive site-specific information to accurately estimate emissions or production rates and be able to make the appropriate representations in the registration application.

As a consequence, the proposed O&G FIP would not meet core streamlining objectives:

1. Minimize the time required to obtain authorization to construct and operate facilities; and
2. Reduce the burden of application processing by the permitting agencies for similar sources.

After starting up a well, operators would be forced to almost immediately file registration modification packages to correct and/or supplement the information submitted with the pre-construction registration. This iterative permitting approach would increase the backlog and burden to EPA permitting departments and eliminate core benefits to a streamlined permitting program. This approach would add confusion for the public and create uncertainty in whether the FIP appropriately addresses the industry if a large volume of sites are continuously submitting modifications.

Recommendation

Registration under the proposed FIP should consist of a two-part process:

Part 1 should allow the owner or operator to register the facility under the O&G FIP without having to supply information that is not available before the well has been completed and production data has been obtained. The "*Registration for New Oil and Natural Gas Sources and Minor Modifications at Existing Oil and Natural Gas Sources"* form should be modified to remove information not available prior to initial production such as material throughputs, production data, and emission estimates. Part 1 of the submittal should focus on the owner and operator information, well location description, production equipment anticipated to be installed, and the anticipated first date of production. Part 1 registration should be submitted 30 days prior to the anticipated first date of production and should satisfy all preconstruction requirements.

Part 2 of the process would require the owner or operator to supply information on emissions and production rates as part of a notification process within 60 days after first date of production as that date is reported as part of the mineral rights royalty notification processes under the

[5] Texas Commission on Environmental Quality Commence Construction Guidance for O&G operations.

Department of Interior. To facilitate this information, API proposes to create a new notification form (see attachment A). API also proposed changes to the forms to remove actual emissions data and to submit the projected allowable from the equipment, based on the initial production. If EPA needs to quantify actual emissions, the information will only be accurate through an emission inventory, versus utilizing data submitted with the permit application, due to the actual emissions decreasing over time.

API recommends modifying 49 CFR 49.160(c)(1)(iii) as follows:

Minor sources complying with §§49.101 to 49.105 for oil and natural gas production, as defined in §49.102, must submit Part 1 of the registration form 30 days prior to first date of production beginning construction that contains the information in §49.160(c)(2). The form titled "Registration for New True Minor Oil and Natural Gas Sources and Minor Modifications at Existing Oil and Natural Gas Sources" is available at: http://www.epa.gov/air/tribal/tribalnsr.html or from EPA Regional Offices. This form is submitted instead of the application form required in §49.160(c)(1)(iii). Part 2 of the registration form must be submitted 60 days after the first date of production. The combination of the Part 1 and Part 2 submittals will satisfy the requirements in §49.160(c)(2) [§49.160(c)(1)(iv)].

The rule should make clear that, if a change in permitting approach is needed as a result of the newly available information (e.g., a synthetic minor permit is needed for a well that previously was anticipated to be a true minor source), time will be provided to obtain the needed permit and that the affected source will not be considered in violation of the permitting program solely by virtue of having to obtain a different permit due to the newly available information. Such an approach is well within EPA's authority under the law because, under these unique circumstances, it would be impossible prior to construction to accurately characterize emissions from the source. It would be unreasonable and unlawful to construe the CAA pre-construction permitting programs to impose liability on an affected source in a situation where neither EPA nor the source has adequate information to characterize the source until after well production begins.

American Petroleum Institute (API) (0046): [On pages 28 through 40 of their written comments, API submitted "Attachment A - API's Recommended Registration Forms – Part 1 and Part 2". This attachment contains API's suggested changes for the form for General Facility Information and Emission and Production Information.]

American Petroleum Institute (API) (0046): To address the unique challenges of permitting upstream well production sites, API recommends that the EPA provide a mechanism to allow operators to drill, complete, and initially produce from gas and/or oil wells to obtain the information necessary to accurately estimate emissions and apply for appropriate air permits. API believes it is in the best interest of the operators, EPA, and the public to ensure emission representations are accurate. In addition to creating confusion and burden, unsupported emission estimates may incorrectly be used for modeling exercises and other impact analyses. More importantly, the proposed approach would put many operators in an impossible compliance situation because emissions information needed to accurately determine permitting requirements would in many cases not be available until after the well is completed. In this

situation, EPA has ample authority to devise a two-step permitting process where an initial permit is obtained based on available information and then, as needed, that permit is revised or amended once the properties of the well are actually known. Permitting in this manner can reasonably be accommodated under the expansive scope of §110(a)(2)(C).

American Petroleum Institute (API) (0046): Additionally, it is more logical for production sites to submit their registration 30 days prior to the first date of production and not 30 days prior to construction. This is the most effective timeline as drilling or surface equipment installation can occur well ahead of production. If registration was submitted 30 days prior to first date of production, EPA can anticipate that the post-construction registration will be submitted in 90 days.

American Petroleum Institute (API) (0046): Finally, for oil and gas emissions sources the terms "total allowable emissions" and "total actual emissions" do not accurately represent emissions. Emissions from oil and gas production are dictated by the production of the well, which declines over time. The production rates and the pressure of the well peaks after the well is drilled and declines rapidly at the beginning and continues to decline over time as the reservoir is depleted or drained. Unlike a plant that is designed for a maximum throughput, which is used to calculate a "total allowable emission" rate, production facilities are limited by what the well produces, which is a natural source that the operator does not have control over.

SLR International Corporation and Ultra Resources, Inc. (0051): The requirement to initiate advance review in order to obtain approval of coverage prior to beginning construction undermines the utility of the GP or PBR process and is unworkable for the oil and gas industry. EPA should develop a streamlined approach that does not require a permittee to obtain preconstruction approval 30 to 90 days prior to beginning construction. Colorado's GP process for example provides coverage under terms and conditions of the promulgated GP for qualifying sources immediately upon submittal of a notice requesting coverage under the GP.

On August 1, 2012, EPA promulgated the Fort Berthold Indian Reservation (FBIR) FIP "to establish enforceable control requirements for reducing VOC emissions from oil and natural gas production activities on the FBIR in North Dakota." . . . "[P]romulgating these Federal regulations addresses an important initial step to fill a regulatory gap with regard to controlling VOC emissions from oil and natural gas operations on the FBIR. 77 FR 48881. EPA noted

> "[O]wners and operators of oil and natural gas operations producing from the Bakken Pool on the FBIR are potentially subject to the Federal preconstruction permitting requirements found in the Federal rules at 40 CFR 52.21 (Prevention of Significant Deterioration of Air Quality), and 40 CFR 49.151 through 49.161 (Federal Tribal NSR Rule). However, on the FBIR only NSPS OOOO and NESHAP HH provide legally and practicably enforceable VOC control requirements outside of the Federal pre-construction permitting requirements. Further, NSPS OOOO only applies to new and modified facilities and only to the oil storage tanks being utilized in the Bakken Pool operations. Thus, most owners and operators of oil and natural gas activities producing in the Bakken Pool must obtain preconstruction permits before production can begin, or if they are not obligated to obtain a permit face no control obligations whatsoever."

77 FR 48882.

Enerplus Resources (0058): Currently the Tribal Minor Source Review requires operators to submit a registration within 90 days of initial production. The proposed rulemaking requires True Minor Sources that elect to comply with the proposed FIP, to register their sources 30 days prior to beginning construction.

Enerplus respectfully requests that EPA consider changing the proposed language to allow for postconstruction registrations, as opposed to the proposed preconstruction registrations. Preconstruction registrations present a number of challenges to operators because it is difficult to predict oil and gas production and gas composition for an individual well or pad prior to startup. Factors such as completions technology improvements, downhole failures, drilling into different formations such as the Bakken or Three Forks in our case, infill drilling, and even continued uncertainty in reservoir characteristics such as the extended sweet spots, can all influence the well's productivity and the well's specific gas composition. This uncertainty leads operators to essentially guess production and emissions rates if they are required to do a registration prior to construction.

To be conservative we will likely overestimate our production and PTE to ensure registration values aren't exceeded upon startup. This will result in registrations with emissions estimates nowhere near actuals. The oil and gas industry has seen instances in the past where the PTE from permits and registrations such as these were used to analyze oil and gas emissions in scientific studies and, even more concerning, used for emissions modeling for actual conditions and impacts. These unrealistically high emissions estimates will then misrepresent impacts of oil and gas to the public and other agencies such as the Bureau of Land Management, Forest Service, and the U.S. Fish and Wildlife Service.

A possible solution to this issue would be to allow operators to update their registration after startup; but under the current proposed Indian Country Minor Source Review FIP, a modification is limited to a physical change or to an increase in emissions. There are currently no provisions to revise the FIP registration emissions downwards post- construction using actual emissions. If the EPA chooses to stay with provisions requiring preconstruction permitting, Enerplus respectfully requests the EPA provide operators the ability to adjust the FIP registrations downward, postconstruction.

In addition to the complications with preconstruction estimates, the EPA's proposed requirement for preconstruction registrations in Indian Country is inconsistent with oil and gas regulations in surrounding states. For example, the North Dakota Industrial Commission requires a facility register within 90 days of initial production, an example of a postconstruction registration. Even federal regulations such as Quad O allow operators the ability to determine PTE within 30 days of first production, another example of using actual test figure emissions. Regulations like these acknowledge the need for actual data in order for one to provide an accurate emissions estimate. The inconsistency between the proposed Indian Country FIP and other federal and state oil and gas permitting requirements poses a disadvantage to tribal members and tribal operators on a reservation where mineral royalties are a crucial source of income for the tribe and critical to their economic development and self-sufficiency.

In summary, Enerplus requests the EPA to revise the Indian Country Minor Source language to either provide for postconstruction registrations in order to be consistent with the states and Quad O; or make it publicly clear that the provided preconstruction emissions are overestimates and not representative of actual emissions and therefore should not be used for modeling or scientific analysis. If the EPA decides to stick with preconstruction registrations, please allow operators the ability to update them after production without a physical change or increase in emissions, in order for them to more accurately reflect emissions.

The EPA's summary of the above comments and the EPA's responses to these comments on the proposed amendments to the Federal Indian Country Minor NSR rule are as follows:

Comment #1: Five commenters (0038, 0041, 0045, 0046, 0051), expressed concern about the proposed pre-construction requirements and the difficulty in determining potential to emit (PTE) before a well starts production due to the unpredictable nature of well development and productivity. Two commenters (0041, 0045) stated the requirement is burdensome and would lead to inaccurate data due to the unpredictable nature of oil and natural gas production.

Several commenters (0038, 0041, 0045) thought that pre-construction estimated emissions would be of limited value to the EPA and would create confusion for the public once released or used in modeling the effects of oil and natural gas production. One commenter noted that the pre-construction requirements limit the usefulness of the proposed FIP because owners/operators will not have definitive source-specific information before production begins.

One commenter (0041) requested that if the EPA were to retain the pre-construction requirements, then the EPA should provide a mechanism for revising emissions estimates after actual emissions are known.

Several commenters (0038, 0045, 0046, 0051) pointed to rules or state permitting programs that require post-construction information to be submitted, rather than pre-construction. For example, the Federal Indian Country Minor New Source Review (NSR) rule requires operators to submit registration forms within 90 days of initial production. Several commenters pointed to state requirements, which acknowledge the unique challenges of permitting well production sites. Wyoming allows operation prior to permitting as long as the operator satisfies certain emission control requirements. In Colorado, emissions information is not required to be submitted until after drilling, workovers, completions, and testing are completed. North Dakota also has owners/operators submit the oil and natural gas well registration form within 90 days of completion of a well. Commenters believe that providing information after the well begins production will conserve the EPA's resources and provide the EPA with more accurate information, as well as align permitting processes on Indian lands with state permitting processes on adjacent lands.

As an alternative to pre-construction information, two commenters (0038, 0045) suggested that the EPA allow owners/operators to provide actual emissions data based on the first 30 days of production, due to the EPA 90 days after startup, similar to 40 CFR part 60, subpart OOOO.

As another alternative to providing pre-construction information, one commenter suggested a two-part approach:

Part 1: 30 days prior to the anticipated first date of production, submit owner/operator information, well location description, production equipment anticipated to be installed, and the anticipated first date of production.

Part 2: Within 60 days after first date of production, supply information on emissions and production rates as part of a notification process. The commenter requested 60 days as that date is used as part of the mineral rights royalty notification processes under the Department of Interior.

The same commenter (0046) submitted revisions to the draft registration form that we made available with the September 2015 proposed rule. The commenter asked the EPA to remove actual emissions data and to require operators to submit projected allowable emissions from the equipment, based on the initial production. The commenter stated that if the EPA needs to quantify actual emissions, the information will only be accurate through an emission inventory, versus using data submitted with the permit application, due to the actual emissions decreasing over time.

Response #1: The EPA has revised the Federal Indian Country Minor NSR rule and the registration form to incorporate a two-step registration process for oil and natural gas true minor sources locating or expanding in Indian country, as suggested by commenters. Generally, we prefer to receive registration forms complete with source and emissions information prior to construction, as we proposed and as required in §49.160 of the Federal Indian Country Minor NSR rule for other source categories. However, we recognize the unique nature of the oil and natural gas industry and believe in this instance a two-part registration process is warranted.

The Part 1 Registration Form will be due 30 days before the source begins construction. The Part 2 Registration Form will be due within 60 days after the "startup of production," in accordance with the subpart OOOOa definition of startup of production. (For the Part 2 Registration Form, we are adding the definition for "Startup of production" to §49.152(d), which points directly to the term as defined under 40 CFR part 60, subpart OOOOa.) Sources must determine the potential for emissions within 30 days after startup of production, information which is required as part of the Part 2 Registration Form. The EPA has selected 60 days as the submittal date for the Part 2 Registration Form – the date requested by the commenter – as that timeframe will allow sufficient time for sources to assemble the emissions information required as part of the Part 2 Registration Form and to submit it to the EPA.

The control requirements from the eight New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) standards in this FIP will apply during production (the six standards included in the original proposal and two standards being added in the final rule). The owner/operator must account for emissions from startup of production as required in the Part 2 Registration Form submission. We disagree with the commenter about the type of emissions information that must be submitted with the registration form. Pursuant to §49.160 of the Federal Indian Country Minor NSR rule, sources are required to

submit allowable and actual emissions, not just allowable, as requested by the commenter. The owner/operator should calculate an estimate of the actual annual emissions using estimated operating hours, production rates, in-place control equipment, and types of materials processed, stored, or combusted during the upcoming consecutive 12 months.

The source, as documented by owners/operators should use the definition in the EPA's rulemaking on "Source Determination for Certain Emission Units in the Oil and Natural Gas Sector"[6] in defining each source on its registration form.

1.2 Comments Related to Tribal Sovereignty and the Definition of Indian Country in 40 CFR 49.152

Marrs (0027): The intentions of the EPA in this particular instance would likely provide better protections than TIPs in existence, proposed, or otherwise. However, there is a history of pseudo-sovereignty for those living in Indian country that cannot be ignored.[7] An extreme example of the danger of such loopholes in tribal versus EPA authority reared its head recently in North Dakota, where the tribal chairman, Tex Hall, of the Mandan, Hidatsa, and Arikara Nation wanted to achieve "sovereignty by the barrel" by allowing oil companies, under relatively no tribal oversight or EPA requirements, to create a massive oil operation on tribal land. The tribal chairman essentially opted not to enforce tribal environmental regulations, which had previously been developed. The result has been pollution, crime, and corruption, with little of the oil revenue actually improving the day-to-day lives of tribal members.[8]

Again, this example is extreme, and it should be noted that tribal leaders are not presumed to behave in the way of Mr. Hall but there is an obvious need for more federal oversight should the infrastructure of the tribe be ill-equipped to deal with powerful oil and gas interests. It would appear that this proposed rule would aid in the regulation of minor sources, which, when accumulated, would still have a negative impact on the health of American Indians located in Indian country. The EPA appears, through this proposed rule, to understand the potential for unleashing mass industry on tribal lands without tribal authorities having the ability to properly regulate the industry on their own. The EPA would be wise in continuing to consider this regarding oil and natural gas exploration in Indian country, while maintaining a tribe's choice on who to do business with, as well as the relative autonomy to create their own air pollution plans.

Ute Indian Tribe (0039): The Tribe agrees with the main theme of the Environmental Protection Agency's (EPA) proposed rulemaking entitled Review of New Sources and Modifications in Indian Country: Federal Implementation Plan for Managing Air Emissions from True Minor Sources Engaged in Oil and Natural Gas Production in Indian Country (FIP). The proposed rule or FIP is intended to protect the Reservation's air shed while allowing for streamlined permitting of minor oil and gas sources. However, we ask that the Environmental Protection Agency (EPA)

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[6] "Source Determination for Certain Emission Units in the Oil and Natural Gas Sector," signed May 12, 2016, http://www.epa.gov/airquality/oilandgas/actions/html.

[7] See California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). (A more recent case to address the state of tribal sovereignty)

[8] Deborah Sontag and Brent McDonald, In North Dakota, a Tale of Oil, Corruption, and Death, New York Times, (December 28, 2014). Available at http://www.nytimes.com/2014/12/29/us/in-north-dakota-where-oil-corruption-and-bodiessurface.html?_r=0

achieve this goal in a manner that also promotes tribal sovereignty, authority, self-determination, and our ability to develop our resources to benefit our members.

The Tribe relies on its oil and gas development as the primary source of funding for our tribal government and the services we provide. We use these revenues to govern and provide services on the second largest reservation in the United States. Our Reservation covers more than 4.5 million acres and we have about 3,000 members living on the Reservation. The Tribe is also a major employer and engine for economic growth in northeastern Utah.

The Tribe takes an active role in the development of its resources, however, despite our progress, the Tribe's ability to fully benefit from its resources is often limited by the federal agencies regulating oil and gas development on the Reservation. In order to avoid these limits the Tribe asks that EPA work hard to implement its proposed rule in a manner that recognizes that Indian lands are not public lands. This will require EPA's careful attention to developing its rule and implementing the rule in a manner that does not undermine our governmental authority and our ability to develop our resources to benefit our members.

Ute Indian Tribe (0039): The Tribe is very concerned about EPA's proposal to revise the definition of Indian Country for the purposes of this rule. The Tribe, like many tribes, is surrounded by state and county governments that seek to challenge our jurisdictional authority. EPA should be extremely careful that its efforts to regulate air quality in Indian Country do not result in court decisions that reduce tribal jurisdiction over portions of Indian Country. The Tribe recommends further consultation with tribes on this issue, as well as with the Department of Justice, well before EPA attempts to finalize this rule.

In short, before EPA made a distinction years ago between on-reservation and off-reservation Indian Country for the purposes of a tribe assuming Clean Air Act authority, EPA should have considered the implications of this distinction. From a tribal perspective there is no distinction. Tribal lands, allotments and dependent communities are all under tribal jurisdiction and authority. Tribes exercise jurisdiction over these lands through existing tribal sovereignty and in accordance with numerous Federal programs that affirm tribal authorities and tribal self-determination over these lands and areas.

To minimize any additional impacts from EPA's faulty distinction in the proposed rule, first, EPA should be cautious of how the rule appears. By restating the definition of Indian Country in the rule, it appears that EPA is defining the term. Of course, EPA cannot change the definition of Indian Country through the proposed rule. The term Indian Country was defined by Congress in statute at 25 U.S.C. § 1151. EPA's regulations cannot change or modify this definition. To avoid any confusion, EPA should revise the rule to make clear that Indian Country is statutorily defined.

The Tribe recommends that EPA delete from 40 CFR § 49.167 its recitation of the definition of Indian Country. Rather than repeating 25 U.S.C. § 1151 in regulatory text, EPA should simply refer readers to the statute. In other words, EPA's regulatory text would read:

> *Indian Country* is defined in 25 U.S.C. § 1151.

By simply referencing the statute, rather than appearing to change the definition of Indian Country, EPA will help to clarify the application of the proposed rule and its relationship to Indian Country which has meaning far beyond EPA's proposed rule.

In addition, the proposed and final rules should not state that EPA is "revising the definition of Indian Country." EPA is doing no such thing. As a result of Oklahoma Dept. of Environmental Quality v. EPA, 740 F.3d 185 (D.C. Cir. 2014), EPA is required to consider how it will apply the proposed rule in certain portions of Indian Country, but EPA is not revising the definition of Indian Country.

In other words, the Oklahoma case is not about the definition of Indian Country, but the process EPA is using to apply the proposed rule to certain parts of Indian Country. The Tribe recommends that EPA remove all references to revised definitions of Indian Country from the proposed rule. Rather than purporting to revise the definition of Indian Country, the Tribe suggests that EPA include a new section discussing the applicability of the proposed rule.

Ute Indian Tribe (0039): The Tribe generally supports EPA's proposed language that the rule would apply to "all Indian reservation lands where no EPA-approved program is in place and all other areas of Indian country where no EPA-approved program is in place and over which an Indian tribe, or the EPA, has demonstrated that a tribe has jurisdiction." While this is a good start, EPA should make clear that a tribe's jurisdiction does not need to be "demonstrated" to exist. EPA should also be clear that the term jurisdiction is not just referring to Clean Air Act jurisdiction, but all forms of jurisdiction.

The Tribe also recommends that EPA address in the rule the underlying source of the problem-EPA procedures for recognizing tribal authority to implement the Clean Air Act. The distinction that EPA created in its regulations between on-reservation and off-reservation Indian Country was not included in the Clean Air Act and is not consistent with how tribes exercise authority over their lands. Most important, EPA should not require tribes to demonstrate authority over off-reservation areas. These areas were included in the definition of Indian Country for a reason-because tribes exercise authority over these areas.

American Petroleum Institute (API) (0046):

<u>Proposed Language</u>
EPA proposes to modify the definition of Indian country in 40 CFR 49.152 to read as follows: [new material in bold]

Indian country, as defined in 18 U.S.C. 1151, means the following:

1) All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent and including rights-of-way running through the reservation;
2) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof and whether within or without the limits of a state; and

3) All Indian allotments, the Indian titles to which have not been extinguished, including rights of way running through the same.
4) **For purposes of this rule, references to Indian country include all Indian reservation lands where no EPA-approved program is in place and all other areas of Indian country where no EPA-approved program is in place and over which an Indian tribe, or the EPA, has demonstrated that a tribe has jurisdiction.**

Issue

The EPA should not be vested with power to make determinations or demonstrations about Tribal jurisdiction. Any such demonstration of jurisdiction should be left to the sovereign whose jurisdiction is being asserted. In this case that sovereign is the Tribe, not the federal government or an agency of the federal government. Although EPA has indicated that this should only impact Trust lands in Oklahoma, Tribal allotments would also be impacted by the change in definition.

Recommendation

EPA proposes to modify the definition of Indian country in 40 CFR 49.152 to read as follows:

Indian country, as defined in 18 U.S.C. 1151, means the following:

(1) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent and including rights-of-way running through the reservation;

(2) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof and whether within or without the limits of a state and/or

(3) all Indian allotments, the Indian titles to which have not been extinguished, including rights of way running through the same

(4) For purposes of this rule, references to Indian Country include all Indian reservation lands ~~where no EPA-approved program is in place and all other areas of Indian country where no EPA-approved program is in place,~~ for which a Tribal implementation plan approved by EPA pursuant to 40 CFR part 51 is not in effect, and over which an Indian Tribe~~, or the EPA,~~ has demonstrated that it has jurisdiction.

Rollie Wilson (0048): Hi Pat (Childers), During our meeting last week we had a brief conversation about EPA's proposed FIP for oil and gas minor sources in Indian Country - I hope I said all that right. The Tribe is concerned about a change in the definition to Indian Country, although I did not do a good job recalling the issue for the meeting participants. It appeared at the meeting that the EPA folks present said that there would be no change to the definition and/or they supported the Tribe's view. But, when I've pulled up the language again, it seems to me that there is a potential change. I have not figured out yet whether the Tribe thinks it is good or bad. But, with a better recollection of the information below, can EPA tell us a little more about what's going on here and why this is being proposed to be added to the definition. Thanks,

Rollie

The revised definition of Indian Country adds a new subpart 4 to its recitation of the Indian criminal jurisdiction definition of Indian country. New subpart 4 in 40 CFR Sections 49.152; 49.167 provides that:
Indian country, as defined in 18 U.S.C. 1151, means the following as applied to this program:
(4) For purposes of this rule, references to Indian country include all Indian reservation lands where no EPA-approved program is in place and all other areas of Indian country where no EPA-approved program is in place and over which an Indian tribe, or the EPA, has demonstrated that a tribe has jurisdiction. 80 FR 56575.
……
At the moment my thinking is that we need to be very careful how your rule interacts with the definition of Indian country and perhaps extracting Indian country somewhat from the rule. For example, rather than rephrasing the definition just cite to it. And in your new language that you all added to deal with the OK case (Oklahoma Dept. of Environmental Quality v. EPA, 740 F.3d 185 (D.C. Cir. 2014)), I read the last word "jurisdiction" to mean "jurisdiction for any purpose." In other words, could be regulatory or criminal or whatever jurisdiction. Tribal jurisdiction just exists. You don't have to prove it exists or demonstrate it exists. We need to make sure the rule does not suggest that the jurisdiction does not already exist. Thanks for your consideration.

Rollie

The EPA's summary of the above comments and the EPA's responses to these comments on the proposed amendments to the Federal Indian Country Minor NSR rule are as follows:

Comment #2: Several commenters (0039, 0046, 0048) expressed concern about the EPA's proposed definition change for the term Indian country as used in the rule. Two commenters (0039, 0046) disagreed with the fourth paragraph added to the definition of Indian country and noted that the EPA should not be vested with power to make determinations or demonstrations about tribal jurisdiction and that any such demonstration of jurisdiction should be left to the sovereign whose jurisdiction is being asserted. These commenters assert that although the EPA has indicated that this should only impact trust lands in Oklahoma, tribal allotments would also be impacted by the change in definition. One commenter (0046) recommended that the definition of Indian country include Indian reservation lands for which a tribal implementation plan (TIP) approved by the EPA pursuant to 40 CFR part 51 is not in effect, and over which an Indian tribe has demonstrated that it has jurisdiction.

One commenter (0039) stated that the EPA should be cautious of how the rule appears. By restating the definition of Indian country in the rule, it appears that the EPA is defining the term. The commenter stated that, of course, the EPA cannot change the definition of Indian country through the proposed rule because the term Indian country was defined by Congress in statute and the EPA's regulations cannot change or modify this definition. The commenter suggested that the EPA should make it clear that Indian country is already statutorily defined and simply cross reference the relevant statute.

The commenter (0039) further states that the proposed and final rules should not state that the EPA is "revising the definition of Indian Country." The commenter states that the EPA is doing

no such thing. As a result of Oklahoma Department of Environmental Quality (ODEQ) v. EPA, the EPA is required to consider how it will apply the proposed rule in certain portions of Indian country, but the EPA is not revising the definition of Indian country. In other words, ODEQ v. EPA is not about the definition of Indian country, but rather the process the EPA is using to apply the proposed rule to certain parts of Indian country. The commenter recommends that the EPA remove all references to revised definitions of Indian country from the proposed rule. Rather than purporting to revise the definition of Indian country, the commenter suggests that the EPA include a new section discussing the applicability of the proposed rule.

Response #2: Regarding the commenters who expressed concern about the EPA's proposed changes to the sections of the rule that define Indian country, the EPA acknowledges the potential for confusion given that Indian country is a statutorily defined term at 18 U.S.C. 1151. We note that the EPA did not intend to, nor could we, change or in any way affect the statutory definition at 18 U.S.C. 1151 or the manner in which that statute is interpreted and applied for other purposes. Rather, we intended simply to address a 2014 decision of the D.C. Circuit (ODEQ v. EPA) that addressed the scope within Indian country of the EPA's authority to administer the Federal Indian Country Minor NSR rule – and, thus, the FIP in this action – and the Federal Indian Country Nonattainment Major NSR rule.[9] In that decision, the court invalidated the rules as applied to non-reservation areas of Indian country, unless the EPA or a tribe demonstrates that a tribe has jurisdiction over such a non-reservation area. The court did not disturb application of the rules to Indian reservations. Our intent was, thus, not to alter the applicable definition of Indian country, but instead to address the scope of applicability of the rules within Indian country in light of the D.C. Circuit decision. To avoid potential confusion, we have altered the manner in which we are addressing this court ruling.

In the final rule, we have left the Indian country definitions largely intact and simply provided cross-references within the definitional sections of both rules – §§49.152 and 49.167 – stating that the geographic scope of the rules' applicability will be as specified in the program overview sections of both rules – §§49.151 and 49.166. We have then addressed the limitation imposed by the court ruling (i.e., that the rules will only apply in non-reservation areas of Indian country where there is a demonstration by a tribe or the EPA acting on behalf of a tribe of tribal jurisdiction over such area) in the program overview sections, which are more appropriate provisions in which to address this issue. These changes do not alter the substance of the revisions the EPA had proposed to address the ODEQ v. EPA ruling. Instead, they simply move the needed revisions to more appropriate locations in the rules, and, thus, avoid confusion about the applicable definition of Indian country as a general matter. Further, the EPA notes that the regulatory revisions finalized today to address the ODEQ v. EPA decision apply solely to the Federal Indian Country Minor NSR rule – and, thus, the FIP in today's action – and the Federal Indian Country Nonattainment Major NSR rule. They are not intended to apply to any other matter outside the scope of these rules.

In addition, while the EPA acknowledges the commenter's statement that an Indian tribe's jurisdiction should not need to be demonstrated to exist, the EPA notes that, consistent with the ODEQ v. EPA decision, a demonstration of tribal jurisdiction (either by the EPA or by an Indian

[9] *Oklahoma Dept. of Environmental Quality v. EPA*, 740 F.3d 185 (D.C. Cir. 2014).

tribe) would need to be made to support application of the Federal Indian Country Minor NSR rule in non-reservation areas of Indian country.

The EPA notes that the distinction between reservations and other areas that may be under an Indian tribe's jurisdiction (i.e., non-reservation areas of Indian country) is derived from a CAA tribal-related provision (CAA section 301(d)(2)(B)). This provision includes a delegation of authority from Congress to eligible Indian tribes over their reservations, but expressly distinguishes other areas within a tribe's jurisdiction. For this reason, tribes seeking to administer their own CAA-regulatory programs would need to demonstrate their jurisdiction over any non-reservation area included in their application.[10] By virtue of the ODEQ v. EPA decision, such a demonstration of tribal jurisdiction must also be made (by a tribe or by the EPA) to support application of the Federal Indian Country Minor NSR rule in such non-reservation areas of Indian country.

Comment #3: Further, concerning the definition of Indian country, one commenter (0039) disagreed with the EPA's distinction between "on-reservation" and "off-reservation" Indian country and contended that tribes exercise jurisdiction over these lands through existing tribal sovereignty and in accordance with numerous federal programs that affirm tribal authorities and tribal self-determination over these lands and areas. The commenter contends that the distinction was not intended in the CAA and is not consistent with how tribes exercise authority over their lands. Nonetheless, the commenter generally supports the fourth paragraph added to the definition of Indian country, stating that the rule would apply to "all Indian reservation lands where no EPA-approved program is in place and all other areas of Indian country where no EPA-approved program is in place and over which an Indian tribe, or the EPA, has demonstrated that a tribe has jurisdiction." However, the commenter does not believe that a tribe's jurisdiction has to be "demonstrated" to exist.

Response #3: Regarding the comment on the EPA's distinction between "on-reservation" and "off-reservation" Indian country, the EPA disagrees with the suggested changes. The EPA's revisions reflect the holding in ODEQ v. EPA. The decision acknowledges that either a tribe or the EPA can make such a demonstration of tribal jurisdiction over a non-reservation area of Indian country. Although the EPA is not typically called upon to assess tribal jurisdiction in the context of implementing a federal rule, it is appropriate for the EPA to make such determinations where required. The EPA has experience reviewing tribal jurisdiction in other contexts, most notably where tribes apply to administer regulatory programs under the EPA's statutes. In light of the ODEQ v. EPA decision, such jurisdictional assessments are also relevant for implementing federal permitting under the Federal Indian Country Minor NSR rule in non-reservation areas of Indian country.

Comment #4: One commenter (0039) acknowledged the EPA's intent in the proposed rulemaking to protect the reservation airsheds, while allowing for streamlined permitting of minor oil and natural gas sources, and requested that the EPA achieve this goal by developing and implementing the rule in a manner that promotes tribal sovereignty, authority, self-

[10] For more information go to: "Indian Tribes: Air Quality Planning and Management," U.S. Environmental Protection Agency, 63 FR 7254, February 12, 1998, http://www.gpo.gov/fdsys/pkg/FR-1998-02-12/pdf/98-3451.pdf.

determination and a tribe's ability to develop resources. The commenter emphasized that the EPA should develop the proposed rule in a manner that recognizes that Indian lands are not public lands.

Another commenter (0027) noted that the EPA appears in the proposed rule to understand the concern for the oil and natural gas industry to be on tribal lands without tribal authorities having the ability to properly regulate the industry on their own. The commenter encouraged the EPA to recognize this potential situation while maintaining the tribe's choice on who to do business with, as well as retaining the tribe's relative autonomy to create their own pollution plans. The commenter acknowledged that the EPA's intentions in the proposed rule would likely provide better protections than any TIP.

Response #4: The EPA acknowledges that Indian country lands are not public lands and has solicited tribal feedback on the development of a streamlined permitting process that allows for tribes to develop resources on their lands. In doing so, the EPA seeks to protect air quality in Indian country, while also recognizing the importance of oil and natural gas activity as an important source of revenue for tribes, and has developed the FIP accordingly. Moreover, the development of this FIP does not preclude tribes from requesting to assist the EPA with administration of the FIP through a delegation agreement or from developing TIPs, which could include different or additional pollution control plans that tribes feel are needed to preserve air quality given the unique characteristics of their lands. No changes will be made in response to this comment.

2.0 Comments Related to Implementation Issues

Southern Ute (0031): The Tribe requests that EPA clarify how numerical VOC emission limitations will be applied through compliance with Subpart HH when the subpart has numerous compliance options which often do not contain specific numerical emission limitations. The proposed FIP would create enforceable VOC emission reductions for glycol dehydrators through compliance with the emission limitations, monitoring, and testing requirements of 40 CFR 63, Subpart HH (Subpart HH) using HAPs as a surrogate for VOCs. The Tribe seeks clarification on how compliance with Subpart HH will fulfill the EPA's requirement in 40 CFR 49.154(c)(2) to require a numerical emission limitation on the quantity, rate, or concentration for each regulated NSR pollutant emitted by each affected emission unit for which such a limit is technically and economically feasible.

Southern Ute (0031): The Tribe requests that EPA clarify how the proposed FIP will provide practical enforceability when several of the six incorporated standards, such as 40 CFR 63, Subpart HH, do not contain practically enforceable requirements. Rather than a FIP that will force many sources to obtain site-specific permits (because of the lack of practically enforceable requirements in the FIP's standards), the best permitting approach for Indian country is a general permit or permit by rule. The FIP proposes to provide a streamlined, alternative approach to satisfy the NSR permitting requirements through compliance with six incorporated EPA standards while also ensuring air quality protection through requirements that are unambiguous and legally and practically enforceable. However, because several of the standards do not contain practically enforceable requirements, sources who wish to restrict their potential to emit will be

forced to obtain a site-specific permit. In this way, EPA's proposed FIP fails to accomplish an important objective. A streamlined approach to obtain legal and practical enforceable emission limitations protective of the NAAQS, such as a general permit or permit by rule mechanism, is necessary to allow efficient and responsible economic development in Indian Country.

National Tribal Air Association (0032): The NTAA approves generally of the Proposed Rule. The oil and natural gas industry is causing millions of tons of methane, volatile organic compounds (VOCs), and hazardous air pollutants (HAPs) to be emitted into the air that are harming human health and the environment, and speeding up climate change. The oil and natural gas industry must be held accountable for these emissions. The Proposed Rule helps create this accountability and helps to move the Obama Administration closer to its goal of reducing oil and natural gas sector methane emissions 40-45% below 2012 levels by 2025.

Ute Indian Tribe (0039): The Tribe has a substantial interest in commenting on the ANPR because energy development spurs job creation and generates revenue that funds the tribal government and the services provided to tribal members on the second largest reservation in the United States. The tribal government manages the Reservation through 60 tribal departments and agencies including natural resources, land, fish and wildlife management, housing, education, emergency medical services, public safety, and energy and minerals management. The Tribe is also a major employer and engine for economic growth in northeastern Utah. Governmental programs and tribal enterprises employ approximately 450 people, 75% of whom are tribal members. Each year the Tribe generates tens of millions of dollars in economic activity in northeastern Utah.

Ute Indian Tribe (0039): The Tribe serves as one of the most representative examples of how a tribe has been able to use energy production to lift itself out of poverty and improve the lives and well-being of its members through the revenues generated from its resources. The benefit of having significant natural resources enables the Tribe to supplement shortfalls in federal funding with revenues generated from oil and gas development to fund these vital tribal government programs. These benefits have helped the Tribe improve its governmental efficiency and effectiveness. Development also benefits the Tribe by stimulating economic development on the Reservation, creating both jobs and tribal businesses. Many of these jobs are in the oil and gas industry.

Ute Indian Tribe (0039): The Tribe takes an active role in the development of its resources as the owner of Ute Energy Exploration & Marketing LLC. The Tribe is a working interest owner in its oil and gas business as opposed to taking a passive role and only collecting royalties. Ute Energy Exploration & Marketing LLC jointly owns, with Anadarko Petroleum Corporation, the Chipeta gas processing and delivery plant in the Uintah Basin. Ute Energy Exploration & Marketing LLC also has ownership interests in other midstream assets in the Uintah Basin.

American Petroleum Institute (API) (0046): API stated that the proposed oil and natural gas FIP falls short in meeting several core objectives for permitting oil and gas sector facilities. Successful resolution of these issues in the final rule will be needed to allow affected facilities to use the FIP to satisfy permitting requirements on Indian lands. Otherwise, they would have to revert to the burdensome and time-consuming case-by-case permitting process

American Petroleum Institute (API) (0046): Each of the proposals (NSPS OOOOa, Control Techniques Guidelines, Source Determination), including this one, has potentially significant impacts on our industry's operations and, collectively, they have the potential to hinder our ability to continue providing the energy our nation demands. These cumulative impacts must be considered in conjunction with the impacts of the lowered ozone standards and the pending Bureau of Land Management (BLM) methane rule, which has not yet been proposed and will likely require costly methane controls for some of the very same emission sources. Our organizations have collaborated well in the past and API remains committed to working with EPA and the Administration to identify emission control opportunities that are both cost-effective and, when implemented, don't impact safety or hinder our ability to provide the energy our nation will continue to demand for many years to come. Attached are our comments on the "Review of New Sources and Modifications in Indian Country: Federal Implementation Plan for Managing Air Emissions from True Minor Sources Engaged in Oil and Natural Gas Production" as well as an executive summary.

American Petroleum Institute (API) (0046): The foundation of the proposed O&G FIP is still based on site-specific reviews, which by definition will inhibit its streamlining capabilities. Left unresolved, the air permitting obstacles mentioned in this comment package could place future oil and natural gas development in Indian Country at a disadvantage to other options under state jurisdiction where there are established programs to streamline air permitting for the industry.

American Petroleum Institute (API) (0046): We have prepared the following comment package for the proposed O&G FIP. We note that API also submitted comments on the proposed standards of performance for 40 CFR Part 60 New Source Performance Standards (NSPS) Subpart OOOOa and the Source Determination rules. EPA should take into consideration how the three separate rules will interact to ensure a workable regulatory structure for the oil and gas sector going forward.

American Petroleum Institute (API) (0046): On July 1, 2011, the EPA established the federal minor new source review (NSR) program in Indian Country designed to promote economic development in Indian Country, while meeting air quality objectives.[11] The federal minor NSR permitting program is codified under 49 CFR 49.151 et seq. As part of this rulemaking, the EPA established a permitting and registration deadline of March 2, 2016 for oil and natural gas sources [§49.151(c)(iii)(B)]. Acknowledging the need to develop a streamlined permitting process for the oil and natural gas sector, the EPA issued an Advance Notice of Proposed Rulemaking (ANPR) on June 5, 2014 requesting input on the most efficient way to implement the federal minor NSR program for oil and natural gas sources in Indian Country.

Many state regulatory agencies throughout the United States have developed minor NSR programs designed to streamline air permitting for oil and natural gas sources. At the core of all streamlined state minor NSR air permitting programs are the following objectives:

1. Minimize the time required to obtain authorization to construct and operate facilities;
2. Reduce the burden of application processing by the permitting agencies for similar sources;

[11] FR 38748 dated 7/1/11.

3. Provide certainty and consistency of air permit conditions for similar sources;
4. Facilitate routine process changes without imposing permitting delays, and;
5. Provide a mechanism to obtain federally enforceable limits to limit emissions below major source permitting requirements.

API emphasized the importance of these elements in previous comments[12] on the Tribal NSR rulemaking and the Petitions for Reconsideration dated August 30, 2011, November 4, 2011, March 17, 2014, and August 20, 2014.

State of Utah, Office of Energy Development (0047): The oil and gas industry plays a vital role in the high quality of life enjoyed in the Uinta Basin. As the main driver of economic development in the Basin's Tribal and rural communities, the oil and gas industry provides crucial revenues to support local government services as well as thousands of high paying jobs. The majority of the roughly 33 million barrels of oil and 360 billion cubic feet of natural gas produced annually in the Uinta Basin occurs in Indian Country. Recent shifts in commodity prices and market conditions have created significant challenges for the oil and gas industry. These conditions have created a particularly sensitive period for investment in the oil and gas industry, and recent declines are expected to accelerate. The State of Utah asks the EPA to make the following changes to its Indian Country Minor New Source Review (ICMNSR) Nationwide Federal Implementation Plan (FIP) for oil and gas that will allow for meaningful reductions in emissions without placing unnecessary and costly new burdens on the oil and gas industry.

We are committed to working with the EPA to create a more workable, cost effective and flexible ICMNSR and FIP that will facilitate significant emissions reductions without unnecessarily encumbering the oil and gas industry operating in Tribal jurisdiction airsheds. Oil and gas development in the Uinta Basin provides crucial government revenues, high-paying jobs and economic opportunities. In order to establish permitting tools under the ICMNSR and FIP that are practical, effective, and avoid unnecessary costs or delays, we request the EPA adopt the recommendations outlined above.

The ICMNSR and FIP should also provide industry more flexible compliance options that are more cost effective without compromising significant emissions reductions. For example, the ICMNSR and FIP should include an early action program, as well as an option for portfolio-wide emissions compliance. Considering the uncertainty surrounding ozone standard designations in the Uinta Basin, an early action program would de-risk industry investments in emission reductions by ensuring appropriate credit for those investments. A portfolio-wide approach would provide many operators the needed flexibility to more efficiently and cost-effectively achieve system-wide emission reductions that met regulatory goals.

Industrial Commission of North Dakota (0049): The proposed rule could have significant impacts on North Dakota's ability to administer its oil and gas regulatory program. The State of North Dakota intends to defend its sovereign jurisdiction over oil and gas regulation in any manner necessary. The impacts of the proposed rule on North Dakota's ability to administer its oil and gas regulatory program are explained below:

[12] Footnote 1: See Docket No. EPA-HQ-OAR-2011-0151 and EPA-HQ-OAR-2003-0076.

Conflict with existing agreements between Three Affiliated Tribes and North Dakota: North Dakota regulations for natural gas capture have been enforced on the Fort Berthold Reservation under multiple tax and regulatory agreements between the state and tribes. The proposed rule will increase the number and complexity of conflicts with North Dakota regulations and the existing negotiated agreements.

The North Dakota Industrial Commission (NDIC) recommends that the proposed rule recognize and give deference to existing state and tribal agreements for natural gas permitting and regulation.

The EPA's summary of the above comments and the EPA's responses to these comments on the proposed amendments to the Federal Indian Country Minor NSR rule are as follows:

Comment #5: One commenter (0031) requested that the EPA clarify how numerical Volatile Organic Compound (VOC) emission limitations will be applied through compliance with 40 CFR part 63, subpart HH, when the subpart has numerous compliance options that often do not contain specific numerical emission limitations. The commenter noted that the proposed FIP would create enforceable VOC emission reductions for glycol dehydrators through the requirements of 40 CFR part 63, subpart HH, using HAPs as a surrogate for VOCs.

Response #5: The FIP does not impose a separate VOC limit for glycol dehydration units that are subject to 40 CFR part 63, subpart HH (*i.e.,* independently of the FIP, the source will have to comply with the HAP control requirements, which also effectively control VOC and may or may not involve numerical emissions limitations). While the EPA recognizes that 40 CFR part 63, subpart HH, specifies several different control requirements depending on several factors (*e.g.,* major/area source status of the facility, actual natural gas throughput of the dehydrators, urban/rural location), any dehydrators subject to those standards will satisfy compliance with the FIP for those units by fully complying with the Maximum Achievable Control Technology (MACT) standard. We have not made any changes in response to this comment.

Comment #6: One commenter (0046) stated that the proposed oil and natural gas FIP falls short in meeting several core objectives for permitting oil and natural gas sector facilities. The commenter stated that the foundation of the proposed FIP is still based on site-specific reviews, which by definition will inhibit its streamlining capabilities, and that this poses an obstacle to permitting. This could place future oil and natural gas development in Indian country at a disadvantage compared to more streamlined options available under state jurisdictions.

Response #6: The EPA disagrees that the foundation of the proposed FIP is based on source-specific permit reviews. While source-specific permits remain an option available to sources that do not wish to comply with the FIP, apart from addressing threatened and endangered species and historic properties, those sources that do wish to comply with the FIP need only register in accordance with the provisions of §49.160(c)(1)(iv). This streamlined permitting mechanism allows for sources to begin construction 30 days after submittal of the Part 1 registration information. We have not made any changes in response to this comment.

Comment #7: One commenter (0031) requested that the EPA clarify how the proposed FIP will provide practical enforceability when several of the six rules included in the proposed FIP, such as 40 CFR part 63, subpart HH, do not contain practically enforceable requirements. The commenter noted that, because several of the standards do not contain practically enforceable requirements, sources that wish to restrict their PTE will be forced to obtain a source-specific permit. The commenter stated that the proposed FIP would fail to achieve the objective of providing sources a streamlined approach for obtaining legal and practically enforceable emission limitations.

Response #7: A source has to be a true minor source to use the FIP. The FIP is not intended to provide a mechanism for establishing synthetic minor sources. We have not made any changes in response to this comment.

Comment #8: One commenter (a state agency) (0049) noted that North Dakota regulations for natural gas capture have been enforced on the Fort Berthold Indian Reservation under multiple tax and regulatory agreements between the state and tribes. The commenter stated that the proposed rule will increase the number and complexity of conflicts with North Dakota regulations and the existing negotiated agreements. One commenter stated that the proposed rule could have significant impacts on their ability to administer their oil and natural gas regulatory program, and recommended that the proposed rule recognize and give deference to existing state and tribal agreements for natural gas permitting and regulation.

Response #8: The FIP adopted through this final action only applies to sources locating in Indian country and does not impose any requirements on sources located on state lands. The EPA also notes that the State of North Dakota has not been approved by the EPA to administer any program under the federal CAA on the Fort Berthold Indian Reservation. The EPA notes that there are no new requirements included as part of the FIP, only those rules already applicable to oil and natural gas sources under existing federal NSPS and NESHAP rules are included. We have not made any changes in response to this comment.

Comment #9: One commenter (0047) stated that the Federal Indian Country Minor NSR rule and the FIP should provide industry more flexible compliance options that are cost effective without compromising significant emissions reductions. The commenter suggested that the Federal Indian Country Minor NSR rule and the FIP should include an early action program, noting that, considering the uncertainty surrounding ozone standard designations in the Uinta Basin, an early action program would remove the risk for industry investments in emission reductions by ensuring appropriate credit for those investments. The commenter also suggested that the Federal Indian Country Minor NSR rule and the FIP should include an option for portfolio-wide emissions compliance, noting that a portfolio-wide approach would provide many operators the needed flexibility to more efficiently and cost-effectively achieve system-wide emission reductions that meet regulatory goals.

Response #9: Ozone Advance is the early action program that the EPA is offering to promote local efforts aimed at reducing ozone.[13] The program, which began in 2012, is available to states, local governments, and tribes that are interested in working proactively and collaboratively with

[13] For more information, go to: www.epa.gov/advance.

the EPA to select and implement measures and programs that may reduce ozone air quality levels in attainment areas. Other stakeholders, such as industry, are encouraged to become actively involved in these efforts. Ozone Advance will continue to be available in conjunction with the Federal Indian Country Minor NSR rule, this FIP and any future, final FIPs developed for specific areas. As appropriate, such FIPs could consider portfolio-wide options allowing operators to reduce their emissions across entire tribal areas. We have not made any changes in response to this comment at this time.

Concerning "credit", the EPA cannot pre-approve State Implementation Plan (SIP)/TIP "credit" for emission reductions in areas that are not the subject of a nonattainment designation. However, early actions to improve air quality can both serve to prevent areas from becoming nonattainment and better position an area to comply with the requirements associated with an eventual nonattainment designation. For example, early emission reduction actions could potentially receive "credit" in future SIPs/TIPs if an area is eventually designated nonattainment with a Moderate or higher classification, either in terms of reflecting a lower baseline from which additional reductions are needed to meet reasonable further progress goals or, if they occur after the baseline year, as a measure that shows progress toward attainment.

If emission reductions occur after the baseline year, the area may take credit for those reductions subject to Clean Air Act (CAA) requirements, such as demonstrating that the reductions are surplus, quantifiable, enforceable, and permanent. The state or tribe would also need to meet any other relevant requirement in CAA section 110 and/or section 172, and if the measure is voluntary, the state or tribe would need to make an enforceable commitment to ensure that the estimated emission reductions are achieved. Credit earned in this manner means that fewer additional emission reductions will be needed to meet reasonable further progress goals and to demonstrate attainment, thereby bringing the finish line of attainment with the ozone National Ambient Air Quality Standards (NAAQS) closer.

2.1 Comments on Requirements Relating to Threatened or Endangered Species and Historic Properties

QEP Resources, Inc. (0038): QEP is concerned about the jurisdictional overreach of the EPA regarding requirements relating to threatened or endangered species and historic properties in the proposed National FIP. As recognized in the proposal, an operator is required to obtain an Application to Drill ("APD") on federal lands or lands held in trust by the federal government in order to conduct any oil and gas production activities. In order to obtain the APD, the operator must work with both the Bureau of Indian Affairs and Bureau of Land Management ("BLM") to conduct the necessary consultations required under the Endangered Species Act ("ESA") and National Historic Preservation Act ("NHPA") through the National Environmental Policy Act ("NEPA") process. However, where there is no federal nexus, the EPA has no jurisdiction to require ESA or NHPA consultations. Therefore, QEP objects to 40 CFR § 49.104 in the National FIP where operators would be required to conduct a screening process for ESA and NHPA review before the operator can begin construction under the proposed FIP on lands with no federal nexus. EPA is not a surface management agency and furthermore, EPA does not have jurisdiction on State and private lands to require such consultations where a federal nexus does not exist.

Moreover, QEP is concerned that EPA's requirements for additional analysis under the ESA and NHPA pursuant to the National FIP will lead to additional lengthy permitting delays. As EPA states in the proposal preamble, "[a] FIP ... has the advantage of not requiring a source to initiate advance review and obtain approval of coverage from the Reviewing Authority before beginning construction ... and it would reduce the resource burden on reviewing authorities associated with processing the potentially large volume of requests ... ". 80 FR 56568. Through the requirement to assess threatened and endangered species and historic properties under the FIP, EPA is compromising the very benefits of a FIP. It is counterproductive to develop a nationwide FIP for permitting and include site-specific individual determinations for each permitted (or registered) location. A redundant, secondary layer of approval proposed by EPA will add delay and expense without improving protection of species and cultural resources.

Federal actions trigger ESA consultation and NHPA review. Compliance with the FIP itself is not a federal action triggering ESA and NHPA review. Many of the new sources and modifications undertaken in reliance on this FIP will have already been authorized by another federal action that complied with ESA and NHPA. Compliance with the FIP, by these new sources and modifications, is not the federal action. Furthermore, for those few projects in Indian Country that have not undergone some earlier or concurrent federal authorization process, again, compliance with the FIP is not the federal action. The NESHAPs and NSPS present an analogous situation-- sources complying with NESHAPs and NSPS across the country do not trigger ESA and NHPA review.

Gas Processors Association (GPA) (0040): At the same time, however, GPA respectfully requests EPA make a number of enhancements to the program to make it more effective. Specifically, EPA should:

- Clarify when sources can rely on prior National Environmental Policy Act (“NEPA”) reviews to establish compliance with the Endangered Species Act (“ESA”) and National Historic Preservation Act (“NHPA”) reviews

Gas Processors Association (GPA) (0040): GPA agrees with EPA that the streamlined processes included in the proposed FIP will generally allow affected facilities to ensure compliance with pre-construction permitting requirements with limited additional burdens. As new or modified sources, each affected facility would already be subject to the substantive NSPS and NESHAP requirements that EPA is including in the proposed FIP. As a result, the sources would not be subject to any additional air quality-related requirements beyond those already applicable to new and modified sources. In fact, as EPA explains, even those six programs are only applicable if a source falls within each program’s regulatory requirements. See, e.g., 80 FR 56560 (“In cases where a facility may have VOC emissions above 5 tpy but below 6 tpy, owners or operators would not be subject to the storage vessel provisions ….”). However, GPA is concerned about the potential burdens associated with ESA and NHPA compliance provisions and urges EPA to clarify (and potentially expand) when an affected facility is permitted to rely on a prior NEPA analysis to fulfill is ESA and NHPA requirements.

In the proposed rule, EPA provides two options for complying with ESA and NHPA requirements. First, an affected facility can rely on a prior NEPA analysis that incorporated ESA

and/or NHPA compliance. 80 FR 56567. Second, as an alternative, an affected facility can conduct its own screening process for ESA and NHPA compliance and submit documentation to EPA. Id. However, under this second option, a source cannot commence construction until EPA has reviewed and approved of the screening process. Id. ("[O]nce an owner/operator completes the screening procedures, they would submit documentation to the EPA Regional Office and receive written verification of completion before beginning construction."). For sources subject to the screening process under the second option, the screening process itself represents a substantial and time consuming burden, and the requirement to obtain EPA approval prior to commencing construction is contrary to the FIP's focus on providing a streamlined preconstruction review process and could substantially delay projects. This is particularly problematic for GPA's members who often have to respond quickly to changing demands from producers and can ill afford significant preconstruction delays.

To avoid these concerns, GPA urges EPA to clarify and, if necessary expand, when a facility can comply with ESA and NHPA requirements by referencing prior NEPA reviews. Specifically, GPA urges EPA to clarify that the prior NEPA review need not be conducted simultaneously with the construction or modification of the affected facility. In many cases BIA or BLM may complete an applicable NEPA review well in advance of the specific construction activity that may trigger preconstruction review. This is particularly true when an existing facility is modified in a manner that does not expand the footprint of the existing facility or modify the types of activities that will take place at the site. In such circumstances, the BIA or BLM may conclude that the proposed changes to not require further NEPA review. (In contrast, if a proposed change at an existing facility would expand the facility's footprint or otherwise include new and unique activities, a new NEPA review may be required.) GPA urges EPA to clarify that if a site-specific NEPA review has been conducted in the past and the new construction or modification project does not trigger additional NEPA review, the operator can continue to rely on the prior NEPA review for ESA and NHPA compliance, regardless of when that NEPA review occurred. Without such clarification, operators may be forced to conduct a screening process and delay construction pending EPA approval in situations where BIA or BLM concluded that additional NEPA review was not necessary. As long as a prior site-specific NEPA review has occurred, GPA urges EPA to defer to these land use agencies when they conclude that new construction or modification projects will not produce new environmental impacts that require additional NEPA review. In addition, GPA urges EPA to consider whether programmatic EISs can satisfy the relevant ESA and NHPA requirements. Programmatic EISs can address both ESA and NHPA issues on a reservation-by-reservation basis in a manner that addresses both the historic resources and endangered species that may be present in a given area. Allowing individual sources to rely on the ESA and NHPA analyses in a programmatic EIS can provide further streamlining benefits that will reduce the costs of implementation while ensuring that environmental goals are met.

Earthjustice et al. (0044): Environmental and Tribal Commenters commend EPA for ensuring compliance with its ESA and NHPA responsibilities. However, we request that EPA provide a procedure for reviewing the ESA and NHPA analysis conducted by other agencies to ensure that it is adequate. EPA must ensure that emissions from a proposed project do not adversely impact threatened or endangered species or their habitat. [16 U.S.C. § 1536(a)(2).] For example, emissions of ozone precursors can have significant negative impacts on plant species. As EPA explains in the preamble to the 2015 Ozone NAAQS, ozone is causally linked to visible foliar

injury, decreased photosynthesis, changes in reproduction, decreased growth, decreased ecosystem productivity, decreased crop yield, and changes in ecosystem composition. [80 FR 65369–410.] EPA also noted that several tribes have indicated that many ozone sensitive species are culturally significant. [Id. at 65379.] EPA must use its expertise in ozone's impacts to ensure that the BLM and BIA provide adequate analysis to ensure that threatened and endangered plants are not harmed by oil and gas-related air pollution. In particular, EPA can review the accuracy and adequacy of air quality modeling and other analysis conducted by the surface management agencies to ensure that it accurately conveys whether and how new and modified sources will adversely impact air quality in already-polluted regions.

Earthjustice et al. (0044): EPA should also ensure that the NHPA analysis conducted by the BIA and BLM is sufficient. There are many sensitive cultural sites and areas of special cultural and spiritual significance to tribes and their members located within Indian Country, and it is crucial that these areas receive the full protection they deserve under the law. In particular, EPA should ensure that particulate matter emissions do not cause soot damage to cliff paintings and other cultural artifacts that can be harmed by soot deposition.[14]

Western Energy Alliance (0045): The National FIP Must Be Revised to Remove the Jurisdictional Overreach Regarding the Endangered Species Act and National Historic Preservation Act - We are concerned that EPA's requirements for additional analysis under the Endangered Species Act (ESA) and National Historic Preservation Act (NHPA) in the National FIP will lead to additional lengthy permitting delays. It is counterproductive to develop a nationwide FIP for permitting that includes site-specific individual determinations for each permitted location. Operators must already contemplate impacts to threatened and endangered species as well as cultural resources in development plans. This added, secondary layer of approval proposed by EPA will add delay and expense while duplicating existing protections for species and cultural resources.

As EPA states in the proposal preamble, "[a] FIP…has the advantage of not requiring a source to initiate advance review and obtain approval of coverage from the Reviewing Authority before beginning construction…and it would reduce the resource burden on reviewing authorities associated with processing the potentially large volume of requests…". [80 FR 56568.] Through the requirement to assess threatened and endangered species and historic properties under the FIP, EPA is compromising the very benefits of a FIP.

The Alliance is also concerned with the jurisdictional overreach of EPA regarding requirements related to threatened and endangered species and historic properties in the proposed regulations. As recognized in the proposed rule, an operator is required to obtain an Application to Drill (APD) on federal lands or lands held in trust by the federal government in order to conduct any oil and natural gas production activities. In order to obtain an APD, the operator must work with both the Bureau of Indian Affairs (BIA) and Bureau of Land Management (BLM) to conduct the

[14] See, e.g., Krista Deal et al., Wildland Fire In Ecosystems: Effects of Fire On Cultural Resources and Archaeology 18 (2012) (describing impacts of particulate deposition on cultural resources) (Appx. at 2244); BLM, Final EIS West Tavaputs Plateau Natural Gas Full Field Development Plan at 4-239 to 4-244 & App. G at 14–18, 35–40 (2010), www.blm.gov/ut/st/en/fo/price/energy/Oil_Gas/wtp_final_eis.html (Appx. at 1673) (describing impacts of dust and other pollutants related to oil and gas development on cultural resources, including rock art, in Utah).

necessary consultations required under the Endangered Species Act (ESA) and National Historic Preservation Act (NHPA) through the National Environmental Policy Act (NEPA) process. However, where there is no federal nexus, the EPA has no jurisdiction to require ESA or NHPA consultations. Therefore, Western Energy Alliance has concerns with the section in the proposed rule requiring operators to conduct a screening process for ESA and NHPA review before beginning construction under the proposed FIP on lands with no federal nexus. EPA is not a surface management agency and does not have jurisdiction under the ESA and NHPA on state and private lands.

American Petroleum Institute (API) (0046): While the O&G FIP acknowledges several practical considerations for permitting oil and natural gas sources, the proposed program falls short of many of the streamlining permitting objectives mentioned above that are found in corresponding state programs including:

- The proposed O&G FIP contains a screening step for the Endangered Species Act and the National Historic Preservation Act that could cause substantial delay in projects for a review that is unnecessary and not required under the law.

American Petroleum Institute (API) (0046):

Proposed Language
49 CFR §49.104 of the proposed O&G FIP establishes requirements for ensuring compliance with the federal Endangered Species Act (ESA) and National Historic Preservation Act (NHPA).

Issue
The proposed rule would require affected sources to satisfy one of two alternative provisions addressing the Endangered Species Act (ESA) and the National Historic Preservation Act (NHPA). If the proposed source or modification already had undergone review under these laws (e.g., in connection with approvals issued by the Bureau of Land Management), then documentation of that prior review must be submitted to EPA and the relevant Tribe as a condition of using the FIP. The source also must show it is in compliance with any relevant requirements flowing from that prior review. [Proposed § 49.104(a)(1).]
If the proposed source or modification has not undergone prior ESA or NHPA review, then the source must conduct ESA and NHPA screening using a specified procedure, the screening must be submitted to EPA and the relevant Tribe, and the source must obtain written confirmation from EPA that it has satisfied the screening requirements before the FIP may be used. [Proposed § 49.104(a)(2).]

In the preamble to the proposed rule, EPA provides the following rationale for these requirements: "Although the individual coverage of each source that would operate under the FIP would not constitute a separate triggering action for ESA or NHPA purposes, we believe that the proposed FIP's procedures relating to listed threatened or endangered species and historic properties provide an appropriate site specific means of addressing issues regarding potential impacts on those resources in connection with sources that could be covered under the FIP." [80 FR 56566.]

Imposition of these ESA and NHPA requirements as conditions of using the FIP is unlawful and unreasonable. It is unlawful because the ESA and NHPA are triggered only when a federal action is taken. As EPA acknowledges in the preamble, the use of the FIP by an affected source does not require any federal action. Therefore, there is no need or justification for imposing ESA or NHPA requirements when an affected source avails itself of the FIP.

These requirements are unreasonable because they stand to frustrate the entire purpose of the FIP. EPA stresses in the preamble that the purpose of the FIP is to provide a "streamlined" approach to permitting minor O&G sources on Indian lands, which would be accomplished in part by imposing "unambiguous" requirements on affected sources. [Id. at 56557.] EPA further explains that the FIP is intended to "reduce burden for sources and the Reviewing Authority and prevent delays in new construction due to the minor NSR permitting obligation." [Id.] None of these goals would be realized if the proposed ESA and NHPA requirements are finalized. The FIP would not be a "streamlined" permitting alternative when ESA and NHPA review had not previously been conducted because the FIP could not be used until screening was completed, the screening was submitted to EPA, and EPA reviewed and approved in writing the results of the screening. In the best of situations, this process will impose significant delay on the use of the FIP. While that is bad enough, this process is ripe for abuse because it invites third parties to use the process as a mechanism for opposing O&G projects. In the face of objections, EPA will have no choice but to stop the process for the time needed to assess and respond to the comments. Even meritless objections will slow permitting to a crawl.

Moreover, under these procedures, the FIP would certainly not impose "unambiguous" requirements. Case-specific ESA and NHPA review is the antithesis of an unambiguous process. Also, these procedures certainly would not "reduce the burden" of permitting for affected sources and EPA. Injecting ESA and NHPA review into the FIP process has the opposite effect of substantially increasing permitting burdens and disadvantage development in Indian Country. In short, the proposed approach to implementing the ESA and NHPA would unreasonably interfere with all of the purposes EPA describes as the basis for this rule.

Notably, the approach taken here is unique to the proposed FIP as compared to any other directly applicable substantive CAA rule. For example, EPA recently proposed changes to NSPS Subpart OOOO, which also applies to affected sources that would be covered by the FIP (indeed, NSPS OOOO is incorporated by reference into the FIP). There is no mention whatsoever of ESA or NHPA in the NSPS OOOOa proposal. Yet, like the FIP, NSPS OOOO (and the proposed NSPS OOOOa) effectively authorizes the construction of new sources and modification of existing sources. And, like the FIP, NSPS OOOO applies directly to affected sources without any need or requirement for case-specific authorization or decision-making. The difference in approach between the proposed FIP and other directly applicable CAA substantive rules is unexplained and unexplainable. Therefore, there is no justification for imposing ESA and NHPA requirements under the FIP.

Recommendation

API proposes that EPA remove section §49.104 from the proposed FIP, as the FIP does not trigger ESA or NHPA review.

The EPA's summary of the above comments and the EPA's responses to these comments on the proposed amendments to the Federal Indian Country Minor NSR rule are as follows:

Comment #10: Two commenters (0038, 0045) expressed concern about the EPA's authority to impose requirements relating to threatened or endangered species and historic properties in the proposed national FIP. These commenters stated that where there is no federal nexus, the EPA has no jurisdiction to require Endangered Species Act (ESA) or National Historic Preservation Act (NHPA) consultations. These commenters also noted that the EPA is not a surface land management agency and does not have jurisdiction on state and private lands to require such consultations where a federal nexus does not exist. Another commenter claimed that imposition of these ESA and NHPA requirements as conditions of using the FIP is unlawful and unreasonable. The commenter stated that it is unlawful because the ESA and NHPA are triggered only when a federal action is taken, and that as the EPA acknowledges in the preamble, the use of the FIP by an affected source does not require any federal action. Therefore, the commenter believes that there is no need or justification for imposing ESA or NHPA requirements when an affected source avails itself of the FIP.

Response #10: We disagree with the commenters' statement that the EPA lacks authority to require assessments of potential impacts on these resources as sources are covered under the FIP. Consistent with the EPA's authority under the CAA, the EPA has built the screening procedures into the FIP as an adequate and appropriate means of addressing potential impacts on these resources. Given the intended scope of the FIP, it would be very difficult, if not impossible, for the EPA to evaluate such potential impacts in all areas where the FIP might apply. As a result, the EPA has concluded that the only way to address potential impacts on these resources in conjunction with the FIP, which is intended to provide a streamlined mechanism for complying with the Federal Indian Country Minor NSR rule, is to require the owners/operators to do it. Although the EPA is not a land management agency, the EPA is the federal agency promulgating the FIP, which will cover sources irrespective of whether they locate on federal or non-federal land. The EPA understands that completing the screening procedures will impose some burden on covered sources. However, the EPA has attempted to streamline these procedures to the extent practicable while ensuring appropriate consideration of the resources. We have not made any changes to the ESA/NHPA procedures as a result of these comments.

Comment #11: Four commenters (0038, 0040, 0045, 0046) expressed concern that the FIP's requirements for additional analysis addressing listed species and historic properties where a prior assessment by another federal agency has not been completed will lead to lengthy permitting delays. One commenter stated that the added secondary layer of listed species and historic property approval proposed by the EPA will add delay and expense, while duplicating existing protections for species and cultural resources. One commenter stated that the inclusion of site-specific reviews for listed species and historic properties contradicts the EPA's statement in the preamble that the purpose of the FIP is to provide a "streamlined" approach to permitting minor oil and natural gas sources on Indian lands, which would be accomplished in part by imposing "unambiguous" requirements on affected sources. The commenter asserted that case-specific listed species and historic property review is the antithesis of an unambiguous process.

Response #11: The EPA has promulgated the FIP to streamline the NSR permitting process to allow sources to avoid potential delays associated with individual source permitting. In connection with issuance of the FIP – which provides the relevant CAA authorization for sources to construct – the EPA has also added the threatened and endangered species and historic property screening procedures as an appropriate means of addressing potential impacts on these resources as sources are covered under the FIP. As indicated below, the EPA does not view coverage of individual sources under the FIP as separate ESA or NHPA triggering events. However, given the intended scope of the FIP, it would be very difficult, if not impossible, for the EPA to evaluate the potential impacts on the relevant resources in all areas where the FIP might apply. As a result, the EPA has concluded that the only way to address these impacts in conjunction with issuing this FIP, which is intended to provide a streamlined mechanism for complying with the Federal Indian Country Minor NSR rule, is to require the owners/operators to do it.. The EPA has, however, provided significant streamlining opportunities in this process by providing an avenue for covered sources to rely on prior listed species/historic property assessments done in connection with other federal agency permits or authorizations, and the EPA anticipates that many of the covered sources will have undergone such prior assessments and, thus, will require no further analysis. If analysis is required in those few cases where no prior assessment is available, the EPA has provided straightforward procedures for sources to complete their own assessments.[15] No changes were made as a result of this comment.

Comment #12: Two commenters (0038, 0040) stated that, while federal actions trigger ESA consultation and NHPA review, compliance with the FIP itself is not a federal action triggering ESA and NHPA review. One of these commenters noted that the EPA acknowledged in the preamble that the use of the FIP by an affected source does not require any federal action. The other commenter stated that many of the new sources and modifications undertaken in reliance on this FIP will have already been authorized by another federal action that complies with ESA and NHPA, and that compliance with the FIP by these new sources and modifications is not the federal action. The commenter added that for projects that have not undergone some earlier or concurrent federal authorization process, compliance with the FIP is not the federal action. The commenter further indicated that NESHAPs and NSPS present an analogous situation – sources complying with NESHAPs and NSPS across the country do not trigger ESA and NHPA reviews.

Another commenter (0046) noted that the approach the EPA is taking with the FIP is unique as compared to any other directly applicable substantive CAA rule. For example, the EPA recently proposed changes to 40 CFR part 60, subpart OOOO, which also applies to affected sources that would be covered by the FIP (40 CFR part 60, subpart OOOO, is included in the proposed FIP). The commenter noted that there is no mention of ESA or NHPA in the 40 CFR part 60, subpart OOOOa, proposal. In the commenter's view, like the FIP, 40 CFR part 60, subpart OOOO (and the proposed 40 CFR part 60, subpart OOOOa), effectively authorize the construction of new sources and modification of existing sources. And, like the FIP, 40 CFR part 60, subpart OOOO applies directly to affected sources without any need or requirement for case-specific authorization or decision-making. The commenter asserts that the difference in approach between the proposed FIP and other directly applicable CAA substantive rules is unexplained and unexplainable and that there is no justification for imposing ESA and NHPA requirements under the FIP.

[15] To find these procedures, go to: https://www.epa.gov/tribal-air/tribal-minor-new-source-review/.

Response #12: The EPA agrees that each separate coverage under the FIP does not constitute an action that triggers ESA/NHPA. However, the EPA disagrees that the listed species and historic property screening procedures included in the FIP impose ESA or NHPA compliance requirements on covered sources. These screening procedures are intended to be an appropriate means of addressing potential impacts on the relevant resources in connection with the EPA's issuance of the FIP, which provides CAA authorization for sources to construct in lieu of individual or other permitting under the Federal Indian Country Minor NSR rule.

The screening procedures are requirements of the FIP – not of the ESA or NHPA – and are consistent with the EPA's authority under the CAA. These requirements are appropriate for the FIP, which, as noted above, provides CAA authorization for sources to construct without the need for separate NSR permitting. By contrast, NSPSs and NESHAPs impose emission reduction requirements on sources, but are not separate authorizations for construction. We have not made any changes as a result of these comments.

Comment #13: One commenter (0040) expressed concern about the potential burdens associated with the listed species and historic property compliance provisions and urged the EPA to clarify when an affected facility is permitted to rely on a prior National Environmental Policy Act (NEPA) analysis to fulfill these requirements. This commenter asked the EPA to clarify that the prior NEPA review need not be conducted simultaneously with the construction or modification of the affected facility, referring to cases where the Bureau of Indian Affairs (BIA) or Bureau of Land Management (BLM) may have completed an applicable NEPA review well in advance of the specific construction activity. This commenter also requested that the EPA consider whether programmatic environmental impact statements (EISs) can satisfy the relevant requirements, noting that programmatic EISs can address both ESA and NHPA issues on a reservation-by-reservation basis in a manner that addresses both the historic resources and endangered species that may be present in a given area. This commenter stated that allowing individual sources to rely on prior ESA and NHPA analyses in a programmatic EIS can provide further streamlining benefits that will reduce the costs of implementation, while ensuring that environmental goals are met.

Response #13: The EPA has added regulatory text to the final rule to clarify the documentation that needs to be submitted with the Part 1 Registration Form, what the documentation must show, and the process by which it must be submitted. The documentation must demonstrate that, for the project site operating under the FIP, another Federal agency (*e.g.*, BLM or BIA) had met its applicable statutory obligations under the ESA and NHPA in connection with its involvement with the project. An example of acceptable documentation would be a letter from the FWS (for ESA) or a historic preservation office (for NHPA) stating that the project has been reviewed, and the relevant statutes have been satisfied by the agency conducting the review, that any impacts of the project have been assessed, and any appropriate mitigation included. Such letters may, for instance, include a concurrence from FWS that a project will have no likely adverse effects on listed species or critical habitat.

Comment #14: One commenter (0044) requested that the EPA provide a procedure for reviewing the ESA and NHPA analyses conducted by other agencies (*e.g.*, BIA and BLM) to ensure that it

is adequate and sufficient. The commenter stated that the EPA must ensure that emissions from a proposed project do not adversely impact threatened or endangered species or their habitat. The commenter added that the many sensitive cultural sites and areas of special cultural and spiritual significance to tribes and their members must receive the full protection they deserve under the law.

Response #14: The EPA appreciates the commenter's concern that listed species and historic properties, including properties of specific interest to Indian tribes, receive appropriate consideration and protection. The EPA believes as a general matter that the agencies with relevant resource expertise[16] (*e.g.*, the U.S. Fish and Wildlife Service and Tribal and State Historic Preservation Officers) are best qualified to ensure that the considerations the commenter is raising related to threatened and endangered species and cultural resources are addressed. The EPA has thus included appropriate screening procedures in the FIP to ensure that a complete assessment of covered projects occurs, either as part of a separate federal agency's prior compliance with the ESA and NHPA in connection with a source, or during a source's screening review under the FIP if no such prior assessment is available. In either scenario, the expert resource agencies will be appropriately involved in the consideration of any impacts on the resources and in the development of any relevant mitigation measures. The EPA will then ensure that sources have successfully completed the assessment process, that the documentation is available, and that the sources are in compliance with the FIP's requirements, including requirements with adequate measures to address air quality issues.

By way of example, the EPA envisions the process could work as follows: an oil and natural gas owner/operator submits a request to drill to BLM or BIA; BLM/BIA initiate a comprehensive review of the project's potential impacts on the protected resources and engage in any required consultations with the expert resource agencies prior to approving new oil and natural gas activity; these consultations and assessments address direct and indirect effects of the action on the protected resources; the process concludes with relevant concurrences or other final decisions regarding the project's impacts and identification of any mitigation measures; and the source submits required information to the EPA under the FIP to demonstrate compliance with the ESA and NHPA as part of the prior review. The EPA notes that this process may occur as part of a review by the other federal agency under NEPA, in which case the EPA may be involved as one of the reviewing agencies of the NEPA assessment. In light of the degree of involvement of the land management federal agencies in project oversight and the expertise of the resource agencies, the EPA anticipates that this process will result in appropriate consideration of any impacts on the protected resources and that additional involvement by the EPA in that review would not provide meaningful additional input. The EPA has revised the regulatory text to specify what documentation relating to another Federal agency's compliance with ESA and NHPA is acceptable to demonstrate that these requirements are met.

3.0 Comments on the Rationale for the Proposed FIP

[16] These experts possess the knowledge – and, under their statutes and regulations, the authority and responsibility – necessary to assess impacts on protected resources and to judge the adequacy of any mitigation measures needed to protect those resources.

Marrs (0027): Targeting new true minor sources of harm to citizens through the natural gas and oil industries would better protect American Indians living in Indian Country through a broader protection plan from the EPA, building off of pre-existing tribal laws regarding regulation where they exist.

Marrs (0027): A "true minor source" under the Federal Indian Country Minor NSR rule is a source that emits, or has the potential to emit, regulated NSR pollutants in amounts less than a major source threshold under the PSD Program of 40 CFR 52.21, or the Federal Major NSR Program for Nonattainment Areas in Indian Country at 40 CFR 49.166- 49.173, but equal to or greater than the minor NSR thresholds in 40 CFR 49.153. Essentially, any minor source is an emissions production source that emits under 100ppm, thus not qualifying as a major emissions source.

Under the new rule, a FIP would cover the oversight of minor source emitters in Indian country, rather than the tribal government issuing Tribal Implementation Plan (TIP) to regulate minor source emissions. The FIP coming from the EPA would seek to streamline the process and provide additional protections under federal statutes and regulations in order to benefit the health and safety of a tribe from air pollution. However, the rule does leave open the opportunity for permits that are issued by the tribe that would cover specific sites and minor sources, or existing TIPs could be approved by the EPA if they have not been already.

Under most circumstances, the Federal Indian Country Minor NSR rule would specify the process and requirements for using general permits to authorize the construction of new emission sources or modifications of true minor sources. The EPA issues general permits to streamline the approval of minor source emissions rather than site-specific permits for each emission source. A permit by rule, however, is a standard set of requirements that would also, like a general rule, allow for minor sources to be under the same category, given that they do not overstep emission standards, when they are similar in nature.

The authority the EPA has in both altering the tribal regulations, as well as the regulation of the oil and natural case industry itself in this scenario, stems from discretionary authority under sections 301(a) and 301(d)(4) of the Clean Air Act (CAA) and 40 CFR 49.11(a)—which gives the authority to create a FIP to fix a regulatory gap under the CAA regarding oil and natural gas production in Indian country.[17]

Marrs (0027): Implementation aside, as well as the issue of reorganizing regulation under an FIP, the goal of the EPA in the creation of this rule should be fairly obvious. According to the WHO ambient outdoor air pollution in both cities and rural areas was estimated to cause 3.7 million premature deaths worldwide in 2012, due to numerous environmental risks such as particulate matter (PM), ozone (O3), nitrogen oxide (NO2), and sulfur dioxide (SO2) leading to various respiratory and circulatory diseases. In reduced quantities, as the EPA proposals seek to furnish by creating an FIP to reduce minor source emissions of these categories, the WHO

[17] Many tribes do not have existing Tribal Implementation Plans, thus leaving a "no-man's land" of regulatory authority.

estimates that these risks to those in these areas would be significantly diminished.[18] Mirroring low-income areas in other parts of the world, the history of American Indian hardship as a result of broken treaties and forced relocation to reservations predominately in the American West has created health issues stemming from poverty. Similarly, this has also created a high risk for air pollution problems and the health risks associated with it among populations in Indian country, namely from the rich natural resources that lie under reservation and other tribal lands.[19, 20]

The Tribal Energy and Environmental Information Clearinghouse highlights some of the issues associated with air pollution from oil and natural gas industries looking to tap into previously underutilized resources on tribal lands, with tribes seeking to capitalize on potential economic gains. Tribal sources further note that "emissions generated during the drilling/development phase include vehicle emissions; diesel emissions from large construction equipment and generators, storage/dispensing of fuels, and, if installed at this stage, flare stacks; small amounts of carbon monoxide, nitrogen oxides, and particulates from blasting activities; and dust from many sources, such as disturbing and moving soils (clearing, grading, excavating, trenching, backfilling, dumping, and truck and equipment traffic), mixing concrete, and drilling. During windless conditions (especially in areas of thermal inversion), project-related odors may be detectable at more than a mile from the source. Excess increases in dust could decrease forage palatability for wildlife and livestock and increase the potential for dust pneumonia."[21] Many of these health hazards specifically fall under the category of emissions from a minor source according to the EPA, which would be regulated under the application of this rule to new true minor sources.

Another major issue facing these tribal communities is the lack of infrastructure and staff to successfully implement plans that control air pollution sources that interfere with tribal lands. There is a desire to harness economic opportunities when they present themselves in the form of natural resource wealth, however, a lack of expertise in the environmental impact of plans, the fact that not all tribes have proper implementation plans, the existing political/scientific infrastructure to properly regulate emission sources, the use of land-based economies.[22]

Here, the EPA seeks to create an FIP to attempt to remedy this situation, covering the gaps left open by the lack of a TIP, which many tribes have not created. The EPA's plan would likely streamline the process for creating protections for tribes, which in effect would give the tribes more assured federal protection for these highlighted issues, much of which are covered by the EPA's proposed rule itself. While economic self-determination would largely be shifted to the control of the EPA except in areas where tribes have existing TIPs or exclusive dominion over

[18] World Health Organization, Ambient (outdoor) Air Quality and Health, (March 2014). Available at http://www.who.int/mediacentre/factsheets/fs313/en/.
[19] $168 Million Settlement between Navajo Coal Plant and EPA, Indian Country Today Media Network, (June 25, 2015).
[20] The settlement was against the Four Corners Power Plant, a high-pollution power plant on Navajo land resulting in respiratory illness and disease to a large number of tribe members, largely stemming from unregulated upgrades that were implemented by the plant.
[21] Oil and Gas Drilling/Development Impacts, Tribal Energy and Environmental Clearinghouse, Available at http://teeic.indianaffairs.gov/er/oilgas/impact/drilldev/.
[22] Lauren Wenzel, Environmental Risk in Indian Country, U.S. EPA National Network for Environmental Management Studies, 21, 22 (2004). Available at http://nepis.epa.gov/Adobe/PDF/400007NV.PDF.

environmental affairs, it could be argued that the health benefits to tribal members outweigh the natural resource exploits.

QEP Resources, Inc. (0038): QEP also supports EPA's strategy to align the FIP with existing federal standards. As stated in the proposal, there is value in relying on regulations that have been vetted through the public comment process and that operators have already committed to complying with. [See 80 FR 56569.]

***Gas Processors Association (GPA) (0040)*:** GPA strongly supports EPA's proposal to develop a streamlined preconstruction review process for sources in the oil and natural gas sector. A streamlined permitting process, such as the proposed federal implementation plan ("FIP"), offers a number of important benefits that will allow cost effective and efficient development of oil and natural gas resources in Indian Country while at the same time ensuring continued environmental protection in accordance with EPA's obligations under the national ambient air quality standards ("NAAQS") program and industry's commitment to be environmental stewards when engaged in industrial activities. Because sources within the oil and natural gas production and processing sectors share many design attributes, site-specific permitting is not necessary in many cases. A streamlined preconstruction review process that incorporates uniform requirements across the entire sector is in the best interests of federal permit writers and of the regulated community.

***Earthjustice et al. (0044)*:** The Proposed FIP would allow minor oil and gas sources to forego preconstruction review and permitting and instead simply certify that they will comply with six air quality regulations ("six regulations") that already apply within Indian Country: (1) current and future NSPS for new and modified sources in the oil and natural gas sector, 40 CFR Part 60, Subpart OOOO and OOOOa (proposed); (2) NSPS for fuel storage tanks, 40 CFR Part 60 Subpart Kb' (3) NSPS for compression ignition internal combustion engines, 40 CFR Part 60, Subpart IIII; (4) NSPS for spark ignition internal combustion engines, 40 CFR Part 60, Subpart JJJJ; (5) national emission standards for hazardous air pollutants ("NESHAPs") for oil and natural gas production facilities, 40 CFR Part 63, Subpart HH; and (6) NESHAPs for process heaters, 40 CFR Part 63, Subpart DDDDD. [80 FR 56558.] However, EPA has provided no assurance that these six regulations will adequately address the air quality problems in Indian Country and ensure compliance with all applicable standards including the National Ambient Air Quality Standards ("NAAQS"), Prevention of Significant Deterioration ("PSD") Program, and the Visibility Protection program. [See 42 U.S.C. §§ 7602(y), 7470–71, 7473, 7491.]

Earthjustice et al. (0044): As EPA explained in the tribal NSR rule, preconstruction permitting procedures are designed to "demonstrate that [sources] will be operating in a manner that is protective of air resources and the NAAQS" and that "any economic growth occurring in Indian Country will be in harmony with the preservation of Clean Air Act resources."[23] Permit applications inform the regulatory authority about the amount of emissions anticipated from a new or modified source. [76 FR 38759.] Each permit is subject to two types of technical review: (1) control technology review; and (2) review of the probable impact on air quality of the proposed new source. [Id. at 38760–61.]

[23] 76 FR 38753; see also id. at 38760 (stating that the minor source permitting program is "primarily designed to assure that the NAAQS are achieved and to prohibit any minor source from emitting any air pollutant in amounts that would contribute to nonattainment or interfere with maintenance of the NAAQS").

The control technology review includes consideration of "local air quality needs, typical control technology used by similar sources in surrounding areas, anticipated economic growth in the area and cost-effective control alternatives." [Id. at 38760.] This case-by-case analysis "provides the reviewing authority with the flexibility to create requirements that protect public health and the environment, but also takes into consideration the needs of the area in question based on its current air quality situation, the potential air quality impacts from the growth associated with the source and the technological and economic feasibility of the control technology as well as the control technologies in use in the surrounding states." [Id. at 38761.] The permitting authority also considers the impact of the source on air quality. If there is any concern that a minor source could "cause or contribute to a NAAQS or PSD increment violation," the permitting authority may require dispersion modeling. [Id.]

Although EPA offers the Proposed FIP as a substitute for this permitting process, EPA did not conduct any control technology review, air quality impacts analysis, or dispersion modeling for the Proposed FIP. In the ANPR, EPA seemed to acknowledge that such analysis was necessary. EPA stated that if it adopted a uniform set of control technology requirements, it would undertake a "control technology review" similar to that provided in the Indian minor source rule. [79 FR 32519.] As part of that review, EPA indicated that it would consider a list of potential control technology options such as requirements currently applicable or under consideration by federal, state, and local agencies and recommendations in the CTGs. [Id.] EPA also planned to weigh the energy, environmental, and economic impacts of those controls. [Id.] However, EPA conducted no such analysis for the Proposed FIP. An analysis of existing state regulations, such as those adopted in Colorado, and recommendations in the CTGs would have revealed that controls for existing sources are available at reasonable costs and being implemented. [See infra p. 19.]

Earthjustice et al. (0044): Many areas of Indian Country are already exceeding federal public health standards. EPA provided a table in the ANPR which shows that, among counties where Indian Country exists, six are designated as nonattainment for the 1997 annual PM2.5 NAAQS, seventeen are designated as nonattainment for the 2006 24-hour PM2.5 NAAQS, fifteen are designated as nonattainment for the 1987 PM10 NAAQS, and twenty-one are designated as nonattainment for the 2008 8-hour ozone NAAQS. [79 FR 32510–11.] The same data table also shows that eighteen counties where Indian Country exist are exceeding the 2008 8-hour ozone NAAQS based on 2010-12 design values. [Id. at 32511.] And, according to EPA's website, fifty-three tribes have jurisdiction over parts of Indian Country that are designated nonattainment with the 2008 8-hour ozone standard.[24]

Current ozone nonattainment designations under the old 75 parts per billion ("ppb") standard are not the best indicator for whether ozone levels pose a danger to public health. After several years of delay, EPA recently strengthened the 8-hour ozone NAAQS to 70 ppb.[25] However, under the American Thoracic Society ("ATS") guidelines and EPA's own Clean Air Scientific Advisory

[24] EPA, Tribal Final Designations, http://www3.epa.gov/ozonedesignations/2008standards/final/tribalf.htm.
[25] See EPA, National Ambient Air Quality Standards for Ozone, 80 FR 65292, 65292 (Oct. 26, 2015) (2015 Ozone NAAQS).

Committee's ("CASAC") advice, sensitive populations experience adverse health impacts when exposed to ozone concentrations down to 60 ppb.[26, 27]

As shown in Table 1, many counties that include Indian Country have both significant oil and gas production (>10,000 barrels oil and/or >1,000,000 thousand cubic feet (mcf) gas per year) and 2012-14 design values which either exceed the 2015 ozone NAAQS or are at levels that pose a threat public health and the environment. Three counties have 2012-14 design values that exceed the NAAQS, seven counties have 2012-14 design values above 60 ppb, and two counties have 2012-14 design values above 50 ppb.[28]

TABLE 1

State	County	2014 DV (ppm)	Reservations, Rancherias (CA), and/or Pueblos (NM) Located in County
CA	Tehama	0.075	Paskenta Band of Nomlaki
CO	La Plata	0.068	Southern Ute; Ute Mountain Ute

[26] See Comments of Am. Lung Ass'n et al. on EPA's Proposed Revisions to the National Ambient Air Quality Standards for Ozone at 46 (Mar. 17, 2015) (Docket No. EPA-HQ-OAR-2008-0699) (Ozone NAAQS Revisions Comments) (Appx. at 55).

[27] CASAC found that there were "adverse effects, including clinically significant lung function decrements and airway inflammation, after exposures to 60 ppb ozone in healthy adults with moderate exertion." Ozone NAAQS Revisions Comments at 54 (citing Letter from CASAC Chair Dr. H. Christopher Frey to U.S. EPA Administrator Gina McCarthy re: Second Draft Policy Assessment for the Review of the Ozone National Ambient Air Quality Standards (EPA-CASAC-14-004) at 7 (June 26, 2014)). CASAC further advised EPA "there is a scientific basis to anticipate that adverse effects for [sensitive] subgroups [such as children with asthma] are likely to be more significant at 60 ppb than for healthy adults." Id. Thus, EPA's Children's Health Protection Advisory Committee ("CHPAC") concluded that a 60 ppb standard was requisite to protect children's health and advised EPA to adopt a 60 ppb ozone NAAQS in order to adequately protect children's health with a sufficient margin of safety. Id. at 55–56 (citing Letter from CHPAC Chair Dr. Sheela Sathyanarayana to CASAC Chair Dr. Christopher Frey (May 19, 2014)). And the ATS has long supported a 60 ppb ozone NAAQS because of the strong scientific evidence showing relationships between ozone exposure down to the 60 ppb level and adverse health effects like hospital admissions for asthma, chronic obstructive pulmonary disorder in children and adults, lung function deficits in healthy adults, and increased mortality for the elderly and patients with chronic diseases. Id. at 56–57 (citing M.B. Rice, T.L. Guidotti, & K.R. Cromar on behalf of the ATS Environmental Health Policy Committee, Scientific Evidence Supports Stronger Limits on Ozone, AM. J. CRITICAL CARE MED. (2014)).

[28] Sources for Table 1: EPA, 2014 Design Value Reports: Ozone (July 20, 2015), http://www3.epa.gov/airtrends/pdfs/Ozone_DesignValues_20122014_FINAL_08_03_15.xlsx (county level data is available at tab four of the spreadsheet); Bureau of Indian Affairs, Indian Reservations in the Continental United States, www.nps.gov/nagpra/DOCUMENTS/RESERV.PDF; Cal. Div. of Oil, Gas, and Geothermal Res. (DOGGR), Online Production and Injection Query for the State of California, http://opi.consrv.ca.gov/opi/opi.dll (search by "County" and "Get Sums" for county level data); DOGGR, Well Finder, http://maps.conservation.ca.gov/doggr/#close (search by "PLSS" and "all wells" for Rancheria level data); Colo. Oil and Gas Conservation Comm'n, COGIS – Production Data Inquiry, https://cogcc.state.co.us/cogis/ProductionSearch.asp (search by "County"); N.M. Oil Conservation Div., County Production and Injection Summary by Month, wwwapps.emnrd.state.nm.us/ocd/ocdpermitting//Reporting/Production/CountyProductionInjectionSummaryReport.aspx; N.D. OIL AND GAS DIV., OIL IN NORTH DAKOTA: 2014 at 1404 (2015), www.dmr.nd.gov/oilgas/stats/AnnualProduction/2014AnnualProductionReport.pdf; Utah Div. of Oil, Gas & Mining, Utah Oil Production by County, http://oilgas.ogm.utah.gov/Statistics/PROD_Oil_county.cfm; Wyo. Oil and Gas Conservation Comm'n, Download Production by County and Year, http://wogcc.state.wy.us/productioncountyyear.cfm (search by "county" and "year").

CO	Montezuma	0.067	Southern Ute; Ute Mountain Ute
NM	Sandoval	0.063	Jicarilla Apache; Cochiti Pueblo; Jemez Pueblo; Laguna Pueblo; San Felipe Pueblo; Sandia Pueblo; Santa Ana Pueblo; Kewa (f/k/a Santo Domingo) Pueblo; Zia Pueblo
NM	San Juan	0.068	Navajo; Ute Mountain Ute
ND	Dunn	0.057	Fort Berthold Reservation (Mandan, Hidatsa, Arikara)
ND	McKenzie	0.057	Fort Berthold Reservation (Mandan, Hidatsa, Arikara)
UT	Carbon	0.068	Uintah & Ouray Reservation (Ute)
UT	Duchesne	0.077	Uintah & Ouray Reservation (Ute)
UT	San Juan	0.067	Navajo; Ute Mountain Ute (White Mesa)
UT	Uintah	0.076	Uintah & Ouray Reservation (Ute)
WY	Fremont	0.064	Wind River Reservation (E. Shoshone & N. Arapaho)

Counties for which EPA has published 2012-14 8-hour ozone Design Values which include Indian Country and which produced more than 10,000 barrels oil and/or 1,000,000 McF gas in most recent year for which data is available from relevant state agency. California Rancherias and reservations are included only if DOGGR data reveals existing wells located on tribal lands. See supra and infra nn. 9–10.[29]

The Coalition ANPR Comments provided extensive detail about the ozone pollution problems in the Uinta and San Juan Basins, which have substantial oil and gas development within portions of Indian Country. [See Coalition ANPR Comments at 4-12.] Oil and gas development in the Uinta Basin also contributes to visibility issues in Dinosaur National Monument. [See infra pp. 13–14.] In the ANPR, EPA cited a Western Regional Air Partnership study that concluded that oil and gas sources account for the majority of ozone precursor emissions in the Uinta Basin and Northern San Juan Basins.[30] A recent study in the Uinta Basin concluded that oil and gas sources contribute 98 to 99% of emissions of volatile organic compounds ("VOCs"), an ozone precursor. [See Coalition ANPR Comments at 7.] Up to 90% of the development in the Uinta Basin is

[29] Because EPA publishes design values and generally designates attainment at the county level, counties, rather than reservations, are the geographic units used in Table 1. See, e.g., Treasure State Res. Indus. Ass'n v. EPA, No. 13-1263, slip op. at 14 (D.C. Cir. Nov. 3, 2015). Several counties in Oklahoma may also belong on Table 1. Canadian, Caddo, Cleveland, Comanche, Creek, Dewey, Kay, McClain, Oklahoma, and Tulsa Counties all include Tribal Jurisdictional Areas, have 2012-14 design values above 70 ppb, and had 2012 annual production of either >10,000 barrels of oil or >1,000,000 mcf of gas. Okla. Corp. Comm'n, Monthly Oil and Gas Production by County (year to date) (2012), http://www.occeweb.com/og/ogmonthytd.pdf. However, following the court's decision in Oklahoma Department of Environmental Quality v. EPA, it is unclear whether Oklahoma Tribal Jurisdictional Areas qualify as "Indian country." 740 F.3d 185, 189 (D.C. Cir. 2014) ("ODEQ"), In the final rule, EPA should clarify whether its revised definition of Indian Country includes Tribal Jurisdictional Areas in Oklahoma, as well as other areas with jurisdictional issues, such as allotted lands on the eastern edge of the Navajo Reservation. Environmental and Tribal commenters encourage EPA to interpret its definition so as to maximize tribal sovereignty and clarify that the final rule covers allotted lands.

[30] 79 FR 32508 (citing A. Bar-Ilan et al., A Comprehensive Emissions Inventory of Upstream Oil and Gas Activities in the Rocky Mountain States (2013)).

occurring within Indian Country. [Id. at 8.] Since 2009, the Uinta Basin has experienced wintertime ozone pollution levels that exceed those in some of the most polluted cities in the U.S. [See id. at 5–6.]

Additional data released since the Coalition submitted its comments on the ANPR demonstrates that the Uinta Basin continues to suffer from severe ozone pollution. According to the 2013-14 wintertime ozone season report, the nineteen monitors in the basin collectively measured eight-eight exceedances of the 2008 ozone standard, and ten of the monitors had overall daily maximum values above 70 ppb.[31] The highest 8-hour average ozone concentration of the season was 104 ppb. [Id. at 2-7.]

There are similar alarming trends in the San Juan Basin. Much of the San Juan Basin is located within Indian Country, including portions of the Navajo, Southern Ute, Ute Mountain Ute, and Jicarilla Apache Reservations. The estimated 22,000 natural gas wells in the Basin are a source of concern for tribal members, including Diné CARE members, who are already impacted by air pollution from several coal-fired power plants located in the Basin.[32] However, not all of the San Juan Basin is Indian Country. Nevertheless, as noted above, several thousands of these wells are located on the Navajo Nation, Southern Ute, and Jicarilla Apache Reservations. [See supra p. 5.] The Four Corners region has been referred to as a "national sacrifice area" due to the concentration of energy development and related pollution there, creating significant environmental justice concerns for the area's tribal and rural communities.[33]

Air quality in the San Juan Basin is already poor, partially as a result of the high concentration of oil, gas, and coalbed methane development in the region. [See Coalition ANPR Comments at 11–12.] According to a June 2014 Southern Ute report, all eight ozone monitors on and near the tribe's reservation registered ozone levels exceeding 65 ppb in 2013.[34] Data from EPA's published 2012-14 design values similarly show that all ozone monitors in the region for which 2012-14 design values are available exceed 65 ppb.[35]

Although there is much evidence that oil and gas development in Indian Country is causing likely public health problems, without adequate monitoring, EPA cannot ensure that it is protecting public health from the emissions associated with oil and gas development. As EPA recognized in the ANPR,

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[31] Seth Lyman et al., Utah State University, Final Report: 2013-14 Uintah Basin Winter Ozone Study 6 (Oct. 31, 2014), http://rd.usu.edu/files/uploads/2014_ubos_final_report.pdf (Appx. at 341).

[32] See Laura Paskus, On the Front Lines: Diné Women Stand Firm Against Increased, Unfettered Oil Development, INDIAN COUNTRY TODAY (Mar. 8, 2015), http://indianCountrytodaymedianetwork.com/2015/03/08/front-lines-dine-women-stand-firm-against-increased-unfettered-oil-development-159512.

[33] Rebecca Tsosie, Indigenous People and Environmental Justice: The Impact of Climate Change, 78 U. COLO. L. REV. 1625, 1630 (2007) (Appx. at 370).

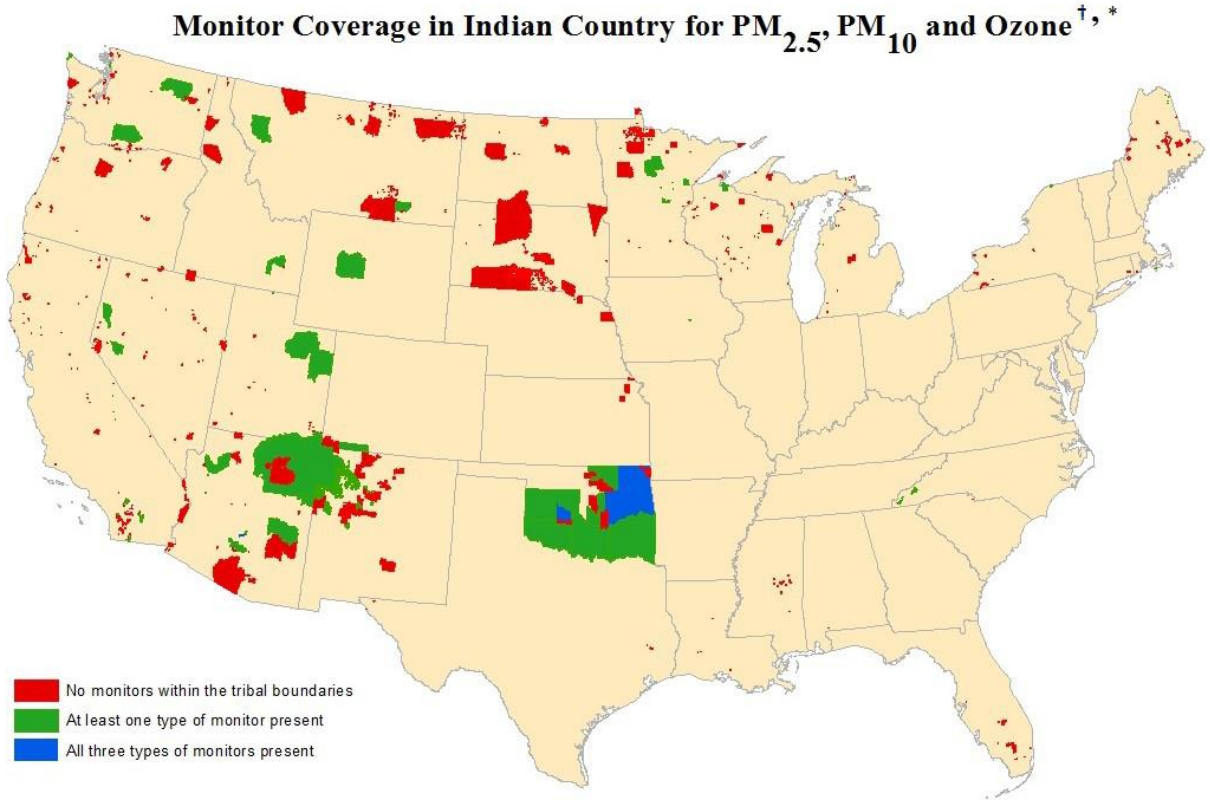
[34] Southern Ute Tribe, Environmental Programs Division, Air Quality Program, Southern Ute Indian Tribe Ambient Air Monitoring Data/NAAQS Comparison (2001–2014) at 3 (June 25, 2014), www.southernute-nsn.gov/wp-content/uploads/2013/05/La-plata-2014.pdf (Appx. at 403).

[35] EPA, 2014 Design Value Reports: Ozone (July 20, 2015), http://www3.epa.gov/airtrends/pdfs/Ozone_DesignValues_20122014_FINAL_08_03_15.xlsx (monitor level data is available at tab five of the spreadsheet).

> *[O]ur understanding of the oil and natural gas sector's impact on ambient air quality in Indian country is incomplete at this time given the absence of ambient air quality monitoring sites in many areas of Indian country. At the same time, with the prospect of continued significant growth in emissions from the oil and natural gas sector, it may be necessary or appropriate to impose emissions control requirements on existing emissions units. More detailed information on the air quality in a region would help us better understand whether emission reductions from existing sources are necessary or appropriate to accommodate emissions growth while still protecting public health.*[36]

EPA provided a map (excerpted as Figure 1 below and attached, Appx. at 407), which shows that most areas of Indian Country lack any monitoring coverage. As shown on Figure 1, several reservations in oil and gas producing areas also lack monitors, including the Jicarilla Apache, Ute Mountain Ute, FBIR, and Crow Reservations.

FIGURE 1



Earthjustice et al. (0044): In response to the ANPR, there were extensive comments detailing EPA's authority to expand monitoring, why additional monitoring is necessary, monitoring programs that EPA could implement in Indian Country. [EDF ANPR Comments at 11, 13–14; Coalition ANPR Comments at 29–30.] Environmental and Tribal Commenters hereby incorporate our ANPR monitoring comments by reference, and ask EPA to consider them in the

[36] 79 FR 32519; see also id. at 32508 ("These uncertainties are due in part to the scarcity of ambient air monitoring in some areas of Indian country."); id. at 32511 ("[A] number of areas of Indian country lack a robust monitoring network.").

current rulemaking. More detailed comments on specific ways that EPA should improve monitoring requirements in the final rule are included below. [See infra pp. 30–31.]

As discussed above, see supra pp. 8–9, in the ANPR, EPA recognized that the lack of monitors in Indian Country poses a significant barrier to implementing the regulations necessary to protect public health. The agency sought comments on "whether and how we might use our CAA section 114 or other CAA authority to require oil and natural gas sources in Indian Country to install and operate ambient air monitors." [Id.] Despite this earlier recognition, the Proposed FIP does not contain increased monitoring requirements. In fact, the agency makes no reference to the lack of monitoring in Indian Country. EPA briefly references monitoring requirements by noting that some of the elements of the six regulations implemented by the FIP include monitoring requirements.[37] But the Proposed FIP does not include any additional monitoring requirements to remedy the lack of monitors in Indian Country.

This lack of monitors is especially concerning because, in the Proposed FIP, EPA states that it will address nonattainment in Indian Country by implementing reservation-specific FIPs when necessary. [80 FR 56570.] But as EPA itself observed in the ANPR, many reservations lack monitors, or lack sufficiently detailed or robust monitors to demonstrate that an area is in nonattainment. In EPA's own words, "[u]sing design values or attainment status to identify areas in need of enhanced environmental protection may yield results that are not 28 equitable and/or fully protective of air quality, due to the scarcity of monitoring in Indian Country." [79 FR 32517.]

The most efficient and expedient method of providing such a monitoring network is requiring operators to install and operate monitors. [See Coalition ANPR Comments at 29; EDF ANPR Comments at 11.] Monitoring data must also be made readily available to tribes, tribal members, and the public. Monitoring options are available at very reasonable costs. For example, EPA recently certified inexpensive, portable ozone monitors as a federal equivalent method for monitoring ambient ozone concentrations. [75 FR 22126, 22,126 (Apr. 27, 2010).] Such "Model 202" monitors are commercially available and require only a power adapter plugged into a vehicle's cigarette lighter. [Id. at 22126-27.]

Earthjustice et al. (0044): EPA has authority under CAA § 114 to require operators to install and operate air quality monitors. [Coalition ANPR Comments at 29; EDF Comments at 11.] Section 114 authorizes EPA, for the purpose of "carrying out any provision of [the CAA]," to "require any person who owns or operates any emission source" to "install, use, and maintain such monitoring equipment" and "provide such other information as [EPA] may reasonably require." [42 U.S.C. § 7414(a)(1)(C), (G).] This gives EPA authority to require operators to install and operate ambient air quality monitors at emissions sources. EPA recently relied on § 114 to require oil and gas sector sources to monitor and report their methane emissions. [75 FR 74458 (Nov. 30, 2010).]

[37] See 80 FR 56563 ("The proposed FIP requirements cover . . . monitoring . . . ."); 56569 ("The rationale supporting the . . . monitoring . . . for each of the six federal rules is found in the preambles and background documents for those rulemakings.").

Two industry ANPR commenters questioned EPA's § 114 authority to require operators to install monitors.[38] Both commenters claim that § 114 only authorizes EPA to create source-specific monitoring requirements, and that ambient air quality monitoring is beyond the scope of § 114. However, nothing in the language of § 114(a) limits EPA's authority to source-specific monitoring. Although the subsections of § 114(a)(1) that GPA quotes are focused on source-specific monitoring, GPA conveniently omitted other subsections which give EPA authority to require operators to "provide such other information as [EPA] may reasonably require." [42 U.S.C. § 7414(a)(1)(G).]

Additionally, EPA has authority to require monitoring "[f]or the purpose of developing or assisting in the development of any implementation plan under section 7410 or section 7411(d) of this title." [42 U.S.C. § 7414(a).] Accordingly, EPA has explicit authority to require monitoring to develop a FIP.

GPA also argues the CAA's 1970 legislative history, which discussed EPA's authority to enter the premises of a regulated entity, indicates that EPA only has authority to conduct source-specific monitoring under § 114. [GPA Comments at 10.] Although EPA's authority to enter premises for inspection is discussed in both the 1970 legislative history and the statute itself, 42 U.S.C. § 7414(a)(2), Congress did not preclude EPA from also requiring ambient monitoring. The two forms of monitoring can provide synergistic information to the agency to aid it in developing rules that appropriately regulate emissions at the source-specific level while simultaneously protecting air quality on a broader scale.

Earthjustice et al. (0044): When EPA requires operators to install monitors, it should also ensure that that the monitors are operated in the appropriate season. Meteorology and geography make some parts of Indian Country—notably the Uintah and Ouray Reservation in Utah and the Wind River Reservation in Wyoming—susceptible to thermal inversions that result in significant wintertime ozone formation. Recognizing this phenomenon, the 2015 Ozone NAAQS rule extends the ozone monitoring season in states that are potentially subject to wintertime ozone formation, including Utah, Wyoming and Colorado. [80 FR 65416.] EPA should similarly ensure that monitors installed in Indian Country operate during the appropriate season. If they are located in geographically-confined basins with winter snowpack, monitors should operate in the winter in addition to the traditional summertime ozone season.[39]

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[38] QEP, Specific Responses to EPA Request for Comments tbl. at 8 (Aug. 27, 2014); Comments of Gas Processors Association on Managing Emissions from Oil and Natural Gas Production in Indian Country; Docket ID Number EPA-HQ-OAR-2011-0151 at 9–10 (Aug. 20, 2014) ("GPA Comments") (citing 42 U.S.C. § 7414(a)(1)(A)–(D)).

[39] See, e.g., Samuel Oltmans et al., Anatomy of a Wintertime Ozone Associated with Oil and Natural Gas Extraction Activity in Wyoming and Utah, 2 ELEMENTA 24, 24 (2014) (Appx. at 2220) (describing how geographic and meteorological differences between the Upper Green River Basin and Uinta Basin contribute to differential ozone formation patterns in the two regions); D. Helmig et al., Highly Elevated Atmospheric Levels of Volatile Organic Compounds in the Uintah Basin, Utah, 48 ENVTL. SCI. & TECH. 4707, 4714 (2014) (Appx. at 2235) (describing how multi-day inversions can contribute to extreme ozone buildup in intermountain valleys); Marc Mansfield & Courtney Hall, The Potential for Ozone Production in the Uintah Basin: A Climatological Analysis, in Utah Dep't Envtl. Quality, 2012 Uintah Basin Winter Ozone & Air Quality Study: Final Report 251, 253 (Seth Lyman & Howard Shorthill eds., 2013) (describing how thermal inversions form in intermountain basins during the winter) (Appx. at 1597); P.M. Edwards et al., Ozone Photochemistry in Oil and Natural Gas Extraction Region During Winter: Simulations of a Snow-Free Season in the Uintah Basin, Utah, 13 Atmospheric Chemistry & Physics

Earthjustice et al. (0044): In the Proposed FIP, EPA notes that during consultation with the Mandan, Hidatsa, and Arikara Nations of FBIR, Ute Tribe of the Uintah and Ouray Reservation, and Crow Nation, the tribes "expressed a need for greater resources so that they can implement their own environmental programs as they determine in their own lands." [80 FR 56572.] In its ANPR comments, the Southern Ute Tribe expressed support for requiring larger emission sources to install monitors, and stated that it "strongly supports any actions taken to increase the presence of air quality monitoring stations in Indian Country that are maintained by an appropriate governmental or regulatory agency to ensure proper quality assurance and quality control checks are performed, siting criteria are met, and these data are un-biased."[40] Providing additional monitors which tribes can use to implement environmental programs on their own lands is one source of such resources. Requiring operators to install monitors, and ensuring that tribal governments have access to data from them, would provide tribal governments with resources they can use to apply for Treatment as a State status, develop TIPs, and enforce federal and tribal environmental laws.

Earthjustice et al. (0044): The Proposed FIP provides few, if any, enforcement tools. Although EPA notes that citizens (and EPA itself) can initiate enforcement suits against operators that violate the terms of the FIP, such post hoc enforcement strategies likely involve lengthy and costly lawsuits well after the harm from increased air pollution has been suffered. [See 80 FR 56570.] EPA should clarify and expand enforcement requirements in the final rule.

For example, § 113 provides mechanisms for EPA to enforce non-compliance with SIPs, which involve notifying states. [See 42 U.S.C. § 7413(a)(1)-(2).] EPA should specify in the final rule how this will apply on tribal lands, and whether and how tribal governments will be notified of violations. EPA should also provide guidance about the role of tribal governments in enforcing the six regulations that make up the FIP. Many of these regulations already involve operators submitting information to the EPA. [See, e.g., 40 CFR § 60.5420.] But some contemplate roles for states. For example, a section of the current NSPS regulations, 40 CFR § 60.5423(e), provides that EPA can delegate and approve state compliance programs as an alternative to operators reporting excess emissions directly to EPA. EPA should specify whether tribes can similarly apply for delegation of compliance authority.

Earthjustice et al. (0044): EPA should also add enforcement requirements to the final rule. In the ANPR, EPA solicited comments about Next Generation Compliance techniques. [79 FR 32519–20.] However, EPA makes no reference of Next Generation Compliance in the Proposed FIP. ANPR comments identified Next Generation Compliance techniques that EPA can

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Discussions 8955, 8967–68 (2013) (Appx. at 2125) (explaining how snow-cover albedo contributes to ozone formation and describing potential for multi-day ozone precursor buildup because VOCs do not disperse at night); William P.L. Carter & John H. Seinfeld, Winter Ozone Formation and VOC Incremental Reactivities in the Upper Green River Basin of Wyoming, 50 ATMOSPHERIC ENVT. 255, 255 (2012) (Appx. at 1628) (explaining how geography of walled-in intermountain basins contributes to ozone buildup); John H. Seinfeld & Spyros N. Pandis, Atmospheric Chemistry & Physics: From Air Pollution To Climate Change 721–22, 729–30 (2d ed. 2006) (describing how thermal inversions contribute to ozone formation).

[40] Comments of Clement J. Frost, Chairman, Southern Ute Indian Tribal Council on Docket No. EPA-HQ-OAR-2011-0151 – Managing Emissions from Oil and Natural Gas Production in Indian Country at 6 (Aug. 18, 2014).

implement in Indian Country.[41] Environmental and Tribal Commenters incorporate these comments by reference and encourage EPA to implement Next Generation Compliance techniques in the final rule. However, any Next Generation Compliance techniques that are chosen must actually reduce emissions. Adopting Next Generation Compliance options should not sacrifice emissions reductions in order to lessen the burden on industry.

Earthjustice et al. (0044): Beyond innovative compliance strategies, EPA should also robustly pursue standard enforcement procedures in Indian Country. The agency should ensure that Regional Offices have sufficient personnel dedicated to enforcing the FIP. Because Indian Country is geographically large, dispersed, and remote, EPA should explain how it plans to enforce the FIP nationwide, including intra-agency delegation of responsibility and methods for tribes and citizens to report violations. Moreover, EPA should provide tribes with resources, training, and legal authority to initiate their own enforcement actions. Although some tribes have robust environmental agencies and ample legal support to enforce environmental laws, most tribes do not.[42] In the final rule, EPA should identify training sessions, publish guidelines, and offer contact information for agency staff who can support tribal governments that wish to take a more active role in enforcing the FIP.

Finally, EPA should add provisions to the final rule that govern how EPA enforcement staff will cooperate with other federal agencies, tribal officials, state officials, and local government authorities. In areas like the San Juan Basin, development occurs on a patchwork of tribal trust, federal, state, allotted, and privately-owned lands. Air pollution moves readily across these jurisdictional boundaries, and any successful enforcement strategy must involve cooperation and coordination between government officials from all levels of government.

Earthjustice et al. (0044): The Proposed FIP should also include requirements to improve air quality monitoring and modeling within Indian Country. As EPA recognized in the ANPR, "our understanding of the oil and natural gas sector's impact on ambient air quality in Indian Country is incomplete at this time given the absence of ambient air quality monitoring in many areas of Indian Country." [79 FR 32519.] Furthermore, increased monitoring will be critical for determining whether reservation- or area-specific FIPs are necessary. EPA should also conduct modeling, especially in the process of developing reservation- or area-specific FIPs, in order to improve understanding of how oil and gas sources contribute to air quality issues in Indian Country.

Earthjustice et al. (0044): Without preconstruction review, robust enforcement is necessary to ensure that regulated entities comply with the Proposed FIP and all applicable requirements. But the Proposed FIP does not provide for any additional and needed enforcement measures. EPA should remedy this shortcoming in the final rule by increasing enforcement capacity. It is critical that EPA provides for cooperation between federal, state, and tribal enforcement actions so as to ensure that the patchwork of jurisdictions that characterize many areas of Indian Country do not create a barrier to robust enforcement.

[41] See EDF ANPR Comments at 14–15 (self-certification and photographic verification); Coalition ANPR Comments at 30-–31 (optical gas imaging, LDAR, and cavity ring-down spectroscopy).
[42] See Jana B. Milford, Out in Front? State and Federal Regulation of Air Pollution Emissions from Oil and Gas Production Activities in the Western United States, 55 NAT. RES. J. 1, 13–14 (2014) (Appx. at 1640).

Coalition ANPR Comments - referenced by Earthjustice et al. (0044): The damage to air quality and climate from leaks and other types of emissions associated with oil and gas development is clear. Environmental Commenters recognize that the oil and gas industry presents unique compliance challenges, and that resources to ensure compliance are finite. We therefore support the use of innovate technologies that allows the more rapid and efficient reporting of emissions. For example, we strongly support the use of OGI, which reduces the cost of inspecting facilities for leaks, making frequent LDAR surveys possible across the industry. Moreover, this is an essential means of reducing emissions of VOC and HAPs that are degrading air quality.

But we must note that any preference for Next Generation Compliance must reduce emissions; the choice of such options cannot sacrifice much needed emissions reductions in order to lessen the burden on industry. We are aware of no innovative monitoring technologies that are currently able to ensure facilities do not have leaks or excessive emissions. Very sensitive technologies, such as cavity ring-down spectroscopy, are able to quantify methane concentration at low levels, but the calculation of concentration measurements is not always straightforward. Work remains to make such technologies operational with methods that are able to assure regulators and the public that excess emissions are not occurring.

EDF ANPR Comments – referenced by Earthjustice et al. (0044): We respectfully recommend that EPA incorporate next generation compliance measures into the compliance and enforcement provisions of the FIP. Next generation compliance measures may include advanced pollution monitoring, electronic reporting, increased transparency, innovative enforcement strategies, and manufacturer certification of control technologies.[43] Subpart OOOO provides several examples of next generation compliance measures that EPA could consider incorporating into this rulemaking.[44] We urge the agency to consider the following next generation compliance measures:

- Self-certification. Under Subpart OOOO, all owners and operators are required to submit annual reports detailing any deviation from well completion and re-completion requirements. [See 40 CFR §§ 60.5420(b)(1)(iv), 63.775(e)(2)(xiv); 77 FR 49509.] The reports must contain documentation of compliance with the standards, such as through records of installation of no-bleed devices, and documentation that a reduced emission completion was utilized. [40 CFR § 60.5420(b).] A responsible, senior company official must certify the "truth, accuracy, and completeness" of these reports. [40 CFR § 60.5420(b)(1)(iv)] Rigorous notification and reporting procedures should be incorporated into a FIP in order to reduce reliance on physical inspections or audits and hold accountable those in the

[43] For a discussion of EPA's next generation compliance and enforcement, see Cynthia Giles, Assistant Administrator EPA Office of Compliance and Enforcement, Next Generation Compliance, Environmental Forum 22 (Sept.–Oct. 2013). For further detail and examples of next generation compliance measures, see EPA, Office of Enforcement and Compliance Assurance (OECA), Appendix: Annotations and References, EPA Article: Next Generation Compliance, available at http://www2.epa.gov/sites/production/files/2013-08/documents/giles-next-gen-article-forum-eli-sept-oct-2013-appendix.pdf (last visited July 15, 2014).

[44] See Oil and Natural Gas Sector: New Source Performance Standards and National Emissions Standards for Hazardous Air Pollutants Reviews, 77 FR 49490 (Aug. 16, 2012).

best position to assure compliance. Because of the remoteness and large number of affected sources, it is also important to couple self-certification with sufficient penalties for knowingly submitting false statements.

- Photographic Verification. In Subpart OOOO, EPA also took advantage of new technologies to provide improved assurance of compliance with key requirements. For example, Subpart OOOO requires operators to file a streamlined, self-certified report that lists all gas well completions and contains time- and location-stamped electronic or hard copy photographs documenting required reduced emission completions. [Id.] Similarly, modern optical gas imaging (OGI) instruments, which allow for rapid and cost-effective leak detection at a variety of oil and gas facilities, are equipped with recording functions that would help regulators verify the completeness and integrity of leak detection surveys. These requirements would provide better information concerning potential violations and increase EPA oversight, with minimal administrative burden.

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): The oil and gas industry is responsible for substantial emissions of air pollutants that harm public health and the environment. Emission sources include drilling, hydraulic fracturing and completion activities, well operation and maintenance, transport and distribution of oil and gas, and road, well pad, and pipeline construction. [79 FR 32505-08] The oil and natural gas industry is unique in that it is comprised of numerous, geographically dispersed sources that may individually contribute a relatively small amount of pollution, but that collectively lead to serious air pollution problems. Pollutants emitted include volatile organic compounds (VOCs) and nitrogen oxides (NOx), which react in the atmosphere to form ground-level ozone or smog. Ozone is a dangerous air pollutant that impairs breathing, aggravates asthma, increases emergency room visits, and may lead to premature deaths. [73 FR 16436, 16476 (Mar. 27, 2008).] Newborns, asthmatic children, and outdoor workers are at increased risk from ozone pollution. Ozone pollution also harms plants and important ecosystems, including national forests and parks, wildlife refuges, and wilderness areas.[45] In fact, ozone pollution causes more damage to plants than all other air pollutants combined.[46] Ozone also contributes substantially to climate change over the short term. According to the United Nations Environment Program (UNEP), behind carbon dioxide and methane (discussed below), ozone is now the third most significant contributor to human-caused climate change.[47]

EDF ANPR Comments – referenced by Earthjustice et al. (0044): Absent adequate air pollution controls, emissions on tribal lands will increase due to rapid development of oil and natural gas reserves. EPA notes in the ANPR that "[m]any areas of Indian country are located in

[45] See EPA, Ground-Level Ozone, Ecosystem Effects, available at http://www.epa.gov/groundlevelozone/ecosystem.html.
[46] See USDA, Effects of Ozone Air Pollution on Plants, available at http://www.ars.usda.gov/Main/docs.htm?docid=12462.
[47] United Nations Environment Programme and World Meteorological Organization, Integrated Assessment of Black Carbon and Tropospheric Ozone: Summary for Decision Makers (2011), ("UNEP Report") available at http://www.unep.org/dewa/Portals/67/pdf/Black Carbon.pdf.

shale basins with potentially recoverable reserves."[48] Areas with significant reserves include the Jicarilla Apache, Navajo, Southern Ute, Fort Berthold, and Uintah Reservations. Below, we supplement the information in the ANPR and show that emissions from oil and gas development will continue to worsen if not comprehensively addressed.

Moreover, oil and natural gas production on tribal lands is already a major source of emissions that warrants prompt regulatory protections. Indian country accounts for the majority of oil- and gas-producing areas in the Uinta and North San Juan Basins, and is significant in the South San Juan and Wind River Basins. Portions of the Powder River and Williston Basins in Montana are also composed of tribal lands. Data from the U.S. Energy Information Administration ("EIA") shows that, in 2013, natural gas sales of production from Indian lands amounted to 239 bcf, and crude oil and lease condensate sales of production from Indian lands amounted to 267 trillion Btu.[49] Further, as the information EPA presents in the ANPR indicates, Indian lands with oil and gas deposits are experiencing significant growth in the production segment. [ANPR, 79 FR 32509–13.] According to the EIA's June 2014 report on fossil fuel production from federal and Indian lands, tribal oil production has boomed to 46 million barrels in 2013, a 48% increase over the last year and more than quadruple the level of production seen in 2009. [EIA 2014.] Meanwhile, sales of gas produced on tribal lands have actually decreased by 5% in the last year and 10% since 2009. [Id.] The EIA also projects that shale gas production will more than double between 2012 and 2040, and, by 2040, shale gas will account for 53% of total domestic natural gas production, which will have significant impacts in Indian country.[50]

Data suggest emissions associated with these activities are also significant. According to a recent Western Regional Air Partnership emissions inventory, oil and natural gas production sources contribute the majority of NOx emissions and a large portion of VOC emissions in the region composed of New Mexico, Colorado, Utah, Wyoming, Montana, and North Dakota.[51] In North Dakota, EPA's recent FIP for the Fort Berthold Indian Reservation concluded that a typical, uncontrolled well pad in the area produces 4,330 tons of VOCs per year.[52] Figures 1 and 2, below, show the estimated VOC emissions from oil and gas development on tribal areas within the Uintah and South San Juan Basins in 2008. [See EPA-HQ-OAR-2011-0151-DRAFT for Figures 1 and 2.]

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[48] Managing Emissions From Oil and Natural Gas Production in Indian Country, 79 FR 32502, 32,508 (proposed June 5, 2014).

[49] U.S. Energy Info. Admin., Sales of Fossil Fuels Produced From Federal And Indian Lands, FY 2003 Through FY 2013 at 3 (June 2014), available at http://www.eia.gov/analysis/requests/federallands/pdf/eia-federallandsales.pdf.

[50] U.S. Energy Information Administration, Annual Energy Outlook 2014 at MT-23 (April 2014), available at http://www.eia.gov/forecasts/aeo/pdf/0383(2014).pdf.

[51] ENVIRON International Corp. & Western Energy Alliance, A Comprehensive Emissions Inventory of Upstream Oil and Gas Activities in the Rocky Mountain States, prepared for the Western Regional Air Partnership (July 2013), available at http://www.epa.gov/ttnchie1/conference/ei19/session8/barilan.pdf; Institute of Arctic and Alpine Research ("INSTAAR") & University of Colorado, Boulder, Highly Elevated Atmospheric Levels of Volatile Organic Compounds in the Uintah Basin, Utah, ENVTL. SCI. TECH. (accepted for publication, Mar. 13, 2014), available at http://pubs.acs.org/doi/pdf/10.1021/es405046r.

[52] Approval and Promulgation of Federal Implementation Plan for Oil and Natural Gas Well Production Facilities; Fort Berthold Indian Reservation, 77 FR 48878 (Aug. 15, 2012).

EDF ANPR Comments – referenced by Earthjustice et al. (0044): Air quality in tribal areas with oil and natural gas development is worsening, and rapid development of oil and gas resources is already having a significant impact on public health and the environment in tribal areas. Wintertime ozone concentrations in Utah's Uinta Basin exceeded federal air quality standards almost 70 times in the first three months of 2010 and have sometimes reached levels almost twice as high as the federal standard.[53] Utah determined that oil and gas operations contribute 98–99 percent of VOC emissions and 57–61 percent of NOx emissions in the Uintah Basin.[54] Similarly, Wyoming attributes 94 percent of VOC emissions and 60 percent of NOx emissions to oil and gas activities.[55] And Figures 3 and 4, below, show ozone concentrations at various Southern Ute Tribe air quality monitoring stations in Colorado. Many of the monitors have exceeded or have come close to exceeding the current ozone NAAQS of 75 ppb. [See EPA-HQ-OAR-0151-DRAFT for Figures 3 and 4].

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): The Uinta Basin in northeastern Utah and western Colorado suffers from severe ozone pollution caused largely by oil and gas development. Ozone normally is associated with urban pollution centers during the hot summer months, but the Basin's ozone concentrations occur during winter when snow is on the ground. Over the past several winters, the Uinta Basin has repeatedly experienced 8-hour ozone episodes above 0.075 parts per million (ppm) — the federal threshold for healthy air.[56] In fact, under the federal standard, EPA should classify the Uinta Basin as a nonattainment area for ozone. Monitors within the Uinta Basin have also recorded elevated levels of fine particulate pollution. [79 FR 32510.] According to Utah Department of Environmental Quality (DEQ), approximately 85% of existing development is within the Uintah and Ouray Indian Reservation, where the Ute Tribe and EPA have regulatory authority.[57] According to EPA, there are currently around 7,000 wells located on the Ute reservation. [79 FR 32509.] Studies have shown that existing development is largely responsible for the ozone pollution in the Basin. There is also ample evidence that oil and gas development is leading to ozone pollution, visibility impairment, and nitrogen deposition at Dinosaur National Monument as well as some of Colorado's and Utah's iconic national parks.

Monitoring data compiled in EPA's Air Quality System demonstrates a long record of exceedances of the 2008 ozone standard of 0.075 ppm in the Uinta Basin (Uintah and Duchesne counties).[58] Monitors maintained by the tribe as well as state and federal monitors have

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[53] Scott Streater, Air Quality Concerns May Dictate Uintah Basin's Natural Gas Drilling Future, N.Y. TIMES, Oct. 1, 2010, available at http://www.nytimes.com/gwire/2010/10/01/01greenwire-air-quality-concerns-may-dictate-uintah-basins-30342.html?pagewanted=1 (last visited Sept. 28, 2011).
[54] See Utah Dept. of Envtl. Quality, Ozone in the Uintah Basin (Sept. 2013), available at http://www.deq.utah.gov/Topics/FactSheets/docs/handouts/ozone2013.pdf.
[55] Wyo. Dept. of Envtl. Quality, State of Wyoming Technical Support Document I for Recommended 8-Hour Ozone Designation for the Upper Green River Basin, WY (March 2009), available at http://www.epa.gov/groundlevelozone/designations/2008standards/rec/letters/08_WY_rec.pdf.
[56] The federal standard is a 3-year average of the annual 4th highest 8-hour average, which cannot be greater than 0.075 ppm.
[57] Utah Division of Air Quality, Cracking the Ozone Code: Scientists and Policymakers Search for Solutions, available at http://www.deq.utah.gov/locations/U/uintahbasin/ozonecode.htm.
[58] Available at http://www.epa.gov/airdata/.

repeatedly recorded pollution levels well above the federal standard set to protect public health and welfare.

For example, in 2010, the Redwash and Ouray monitors in Uintah County measured 30 and 38 exceedances of the ozone NAAQS, respectively.[59] The highest daily 8-hour concentrations at these monitors were 0.105 and 0.123 ppm. The fourth highest values were 0.098 and 0.117 ppm. In 2011, the Redwash and Ouray monitors each measured more than 20 exceedances of the ozone NAAQS. The highest monitored levels reached 0.125 and 0.139 ppm, respectively. Two other monitors in Uintah County also measured NAAQS exceedances, including the monitor within Dinosaur National Monument (discussed in more detail below). The highest monitored value at Dinosaur reached 0.106 ppm. Also in 2011, the Myton monitor in Duchesne County measured 19 exceedances, with a high value of 0.124 ppm.

A Utah Division of Air Quality (DAQ) study conducted between December 2010 and March 2011 confirmed the extreme ozone levels in the Uinta Basin.[60] In conjunction with Utah State University and the Energy Dynamics Laboratory, the Utah DAQ compiled data from six existing monitors and installed ten new monitors throughout the Uinta Basin to determine the extent and severity of the ozone problem.[61] In total, the monitors measured 186 ozone exceedances.[62] With respect to the highest 8-hour concentrations, seven sites exceeded 0.115 ppm, with three of those sites measuring between 0.120 ppm and 0.134 ppm, and two sites exceeding 0.134 ppm. With respect to the fourth-highest, 8-hour concentrations, seven sites exceeded 0.100 ppm, with three sites exceeding 0.115 ppm, and one site exceeding 0.120 ppm.[63] Ozone monitoring data from 2013 further underscores the extent and severity of ozone pollution within the Uinta Basin. In fact, the winter of 2013 appears to have been one of the worst recorded ozone seasons in the Uinta Basin. Six monitors recorded exceedances of the ozone NAAQS. At four monitors, more than 20 exceedances were recorded. Peak 8-hour ozone concentrations reached as high as 0.126 ppm, nearly 70% higher than the NAAQS. For the majority of monitors, the fourth highest readings were above 0.100 parts per million. The table below summarizes the data from 2013.

[See pg. 6 of EPA-HQ-OAR-2011-0151-0109-A1 for Table "Certified Ozone Monitoring Data from 2013 in Duchesne and Uintah Counties, Utah"]

For comparison, the highest ozone level monitored in Los Angeles County in 2013 was 0.104 ppm. The exceedances are not limited to the Utah portion of the Uinta Basin. The Rangely

[59] Through a series of consent decrees that resulted from a series of EPA enforcement actions against oil and gas companies operating in the Uinta Basin, EPA has required private companies to install and operate ambient air quality monitors in the Basin. The two monitors, known as the Redwash and Ouray monitors, located within Indian country, have been monitoring ozone levels since 2009. See U.S. v. Kerr-McGee Corp., No. 07-CV-01034-EWNKMT, 2008 WL 863975, at *2 (D. Colo. Mar. 26, 2008); see also United States v. Kerr-McGee Corp., Case 1:07-cv-01034-EWN-KMT, 80–82 (D. Colo. May 17, 2007) ("KM Decree"); United States v. Colo. Interstate Gas Co., Case 2:09-cv-00649-TS, 11–14 (D. Utah, July 23, 2009) ("CIG Decree"); United States v. Miller, Dyer & Co., LLC, Case 2:09-cv-00332-DAK, 42 (D. Utah, Sept. 23, 2009) ("MD Decree").
[60] Energy Dynamics Foundation, Final Report, Uinta Basin Winter Ozone Study (2011), available at http://rd.usu.edu/files/uploads/ubos_2010-11_final_report.pdf.
[61] Id. at 19.
[62] See id. at 42.
[63] Id. at 42, 97.

monitor, located at the eastern edge of the Uinta Basin in Rio Blanco County, Colorado, has also recorded ozone exceedances. For example, in 2013, the monitor measured a maximum 8-hour concentration of 0.106 ppm, and a fourth highest concentration of 0.91 ppm. Using the procedures established in 40 CFR § 50, Appendix P, the three-year average of the fourth highest values for the Rangely monitor from 2010 to 2013 is 0.077.

[See pg. 6 of EPA-HQ-OAR-2011-0151-0109-A1 for Table "8-Hour Ozone Monitoring Data and 2011-2013 Design Value for Rio Blanco County Monitor"]

Given the high measured ozone concentrations in the Uinta Basin, this area should be, but is not currently, designated as a nonattainment area. The Colorado Department of Public Health has acknowledged that the design value at the Rangely monitor is above the NAAQS.[64] Monitors in Utah are also noncompliant with the 2008 standard. For example, the three-year average of the fourth-highest values from 2009 to 2011 for the Redwash monitor was 0.088 ppm and for the Ouray monitor was 0.100 ppm.[65] However, EPA has yet to designate the Uinta Basin as a nonattainment area.

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): Recent studies demonstrate that (1) ozone in the Uinta Basin forms primarily from VOC emissions, (2) oil and gas operations in the Uinta Basin are the most significant source of VOC emissions, and (3) oil and gas VOC emissions are largely responsible for wintertime ozone in the Uinta Basin. As EPA recognized in the ANPR, a recent study found that oil and gas operations in the Uinta Basin released 98 to 99% of all VOC emissions and 57 to 61% of all NOx emissions. [79 FR 32510]. Another recent study published in the journal, Environmental Science and Technology found, among other things, that:

- Oil and gas development in the Uinta Basin releases as much VOC pollution as 100 million passenger vehicles;
- There is a strong causal link between oil and gas emissions, including emissions of methane and VOCs, and production of wintertime ozone; and
- Snow cover in the wintertime enhances the formation of ozone.[66]

Likewise, the latest report in the ongoing Uinta Basin Ozone Study prepared by the Utah Division of Air Quality, which was released in early April of 2014, found:

- Wintertime pollutant concentrations measured at Ouray reached 142 ppb during the December 2012 to March 2013 study period, exceeding the NAAQS limit of 75 ppb by 89 percent. In 2013, wintertime exceedances of ozone standards occurred at 17 of

[64] Colorado Department of Public Health, Air Quality Control Commission, October 17, 2013 Meeting Materials, Review of the 2013 Ozone Season, slides 5-6, 12-13, available at http://www.colorado.gov/cs/Satellite?c=Page&childpagename=CDPHEAQCC%2FCBONLayout&cid=1251646397663&pagename=CBONWrapper.
[65] Comment by WildEarth Guardians to EPA Regarding Ozone Designation Recommendations for the 2008 Ozone NAAQS, Doc. # EPA-HQ-OAR-2008-0476-0440, at 14–16.
[66] Helmig et al., Highly Elevated Atmospheric Levels of Volatile Organic Compounds in the Uintah Basin, Utah, 48 Environ. Sci. Technol. 4707-15 (2014), available at http://pubs.acs.org/doi/abs/10.1021/es405046r.

20 monitoring sites in the Uinta Basin, with 22 days of exceedances reported in Vernal and 29 days in Roosevelt. There also were seven multi-day ozone episodes above NAAQS levels.

- Wintertime ozone episodes in the Uinta Basin are linked to high levels of methane, VOC, and NOx, emissions and that the oil and gas industry is the predominant source of these ozone precursor emissions; and
- Reductions in all VOC emissions will be beneficial in reducing ozone.[67]

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): Monitors in Uintah County and Duchesne County have measured wintertime PM2.5 concentrations above federal standards.[68] These elevated PM2.5 levels have been linked to oil and gas activities in the Uinta Basin.[69] Modeling also shows that road traffic associated with energy development is elevating PM10 levels.[70]

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): There is substantial existing oil and gas development within the Uinta Basin. According to Utah DEQ, 90% of the existing development is within Indian country.[71] As EPA acknowledges, development within the Uinta Basin is only expected to increase, resulting in additional pollution.[72] The U.S. Bureau of Land Management (BLM) anticipates that "reasonably foreseeable" development in just the southern half of the Uinta Basin will include more than 21,000 wells.[73]

Likewise, the Ute Tribe anticipates significant portions of this additional development to occur within the boundaries of its reservation. [79 FR 32509.] Indeed, Federal land managers have already approved thousands of additional wells, and EPA notes that BLM has approved construction of more than 5,000 new wells in the Uinta Basin and "even more projects are anticipated for future NEPA review." [Id. at 32508.] For example, on May 8, 2012, BLM approved drilling of up to 3,675 oil and gas wells as part of Greater Natural Buttes Project.[74] The project is anticipated to increase NOx emissions by 2,213 tons per year and VOC emissions by 6,617 tons per year (representing emissions increases from existing levels of 22% and 4% respectively). [Greater Natural Buttes Final EIS, Chapter 4, at 4-12.] BLM modeled a predicted a

[67] Environ, Final Report 2013 Uinta Basin Ozone Study (Mar. 2014), available at http://www.deq.utah.gov/locations/U/uintahbasin/studies/UBOS-2013.htm; see also Utah Division of Air Quality, Uinta Basin Ozone Study, "Summary of Findings from the Uintah Basin Ozone Study: Preliminary Update from 2013 Field Study," Utah State University, University of Utah, National Oceanic and Atmospheric Administration, ENVIRON, University of Colorado, Utah Department of Environmental Quality and EPA 2013, available at http://www.westernenergyalliance.org/sites/default/files/ SummaryFindings _UBSO2013_23Sep2013.pdf.
[68] 79 FR 32510; BLM, Gasco Energy Inc. Field Development Final Environmental Impact Statement (Gasco FEIS"), at 3-13, available at http://www.blm.gov/ut/st/en/fo/vernal/planning/nepa_.html.
[69] West Tavaputs FEIS at 3-20.
[70] Gasco FEIS at 4-33.
[71] See http://www.deq.utah.gov/locations/U/uintahbasin/regulation.htm.
[72] 79 FR 32508 ("Another area of increasing oil and natural gas development is the Uintah and Ouray Indian Reservation in northeast Utah, within the Uinta Basin."
[73] BLM, Greater Natural Buttes Final Environmental Impact Statement (FEIS), Chapters 5-9, at 5-1, 5-9 (defining the cumulative impacts analysis area as the southern half of the Uinta Basin and estimating 21,293 wells as a result of "reasonable foreseeable projects"), available at http://www.blm.gov/ut/st/en/fo/vernal/planning/nepa_.html.
[74] BLM, Greater Natural Buttes Record of Decision (ROD), at 3-1 (May 2012), available at http://www.blm.gov/ut/st/en/fo/vernal/planning/nepa_.html.

2.4 parts per billion (ppb) increase in ozone levels as a result of the project, although the model did not allow for predictions of extreme wintertime events when the highest emissions typically occur. [Id. at 4-9.] Accordingly, as BLM concedes, this project standing alone will increase regional ozone levels. [Id. at 4-12.]

Despite these shortcomings, on June 18, 2012, BLM approved the drilling of as many as 1,298 new gas wells on BLM, state, and private land in the Uinta Basin as part of the Gasco Energy Uinta Basin Natural Gas Development Project.[75] The project will increase NOx emissions in the area by 1,931 tons per year and VOC emissions by 2,574 tons per year, making the existing ozone pollution worse. Assuming mitigation measures are fully implemented, BLM predicts an increase of 0.4 ppb of ozone as a result of the project.[76] In December 2013, BLM issued a draft environmental impact statement (DEIS) for yet another project – the Monument Butte Project – located on federal, state, and private land within the Uinta Basin.[77] Newfield Exploration Company has proposed to drill 5,750 wells over 16 years. The project will further increase ozone precursor emissions in the project area.[78]

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): Oil and gas development in the Uinta Basin is having detrimental impacts to Dinosaur National Monument. The monument's cultural treasures now rest in a region plagued by some of the dirtiest air in the country. The increasing emissions as a result of oil and gas development have a variety of detrimental impacts on the air quality at Dinosaur NM, including ozone pollution, visibility impairment and nitrogen deposition. Emissions from Utah, including those from oil and gas development, cause or contribute to visibility impairment in at least 8 Class I areas in close proximity to the Uinta Basin, including Capitol Reef, Canyonlands, Arches and Black Canyon of the Gunnison national parks. Dinosaur is among the parks most impacted by nearby existing and increasing oil and gas development in the Uinta Basin; modeled impacts from a recent analysis of oil and gas development in the nearby White River Field Office Resource Management Area "would 'cause visibility impairment' at Dinosaur NM" and the same is almost certainly true of the existing – and increasing – emissions from oil and gas development on Indian country land.[79] Pursuant to the Clean Air Act's regional haze program, Utah – and any other state where human-induced pollution contributes to visibility impairments at Class I areas – must analyze what controls are needed to restore natural visibility conditions by the year 2064. [40 CFR § 51.308(d)(1)(i)(B).] The state may only reject those controls if it affirmatively demonstrates they are unreasonable based on "the costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any potentially affected sources…." [Id. § 51.308(d)(1)(i)(A); see also id. § 51.308(d)(1)(ii) (establishing demonstration requirement).] Yet no such controls have been imposed on the oil

[75] BLM, Record of Decision for the Gasco Energy Project, at 3 (Jun. 2012), available at http://www.blm.gov/ut/st/en/fo/vernal/planning/nepa_.html.
[76] Gasco Final EIS, Chapter 4, at 4-440 to 441.
[77] BLM, Monument Butte Oil and Gas Development Project DEIS, ES-5, available at http://www.blm.gov/ut/st/en/fo/vernal/planning/nepa_.html.
[78] See id. App. G (Air Quality Technical Support Document).
[79] January 25, 2013 Memorandum from the National Park Service Regional Director, Intermountain Region to the Planning and Environmental Coordinator, Bureau of Land Management, re National Park Service comments on DES-12/0027, White River Field Office Oil and Gas Development, Draft Environmental Impact Statement, Resource Management Plan, Amendment.

and gas sources in the Uinta Basin that contribute to visibility impairment at Dinosaur and the other impaired Class I areas.

In addition to contributing to visibility impairment, emissions from oil and gas influence the park's ability to meet ambient air quality standards. Monitors at Dinosaur routinely document high-pollution days in the park and surrounding region. Although EPA designated the area "unclassifiable" for federal ozone standards, as discussed above, recent measurements do not paint a healthy picture for the region's air quality.

Monitors in Dinosaur National Monument show that the park is heavily impacted by oil and gas development. The graph below shows the maximum daily 8-hour ozone average at two collocated monitors in Dinosaur National Monument. During the 2012-2013 winter, Dinosaur experienced significantly elevated ozone levels — with a maximum daily 8-hour peak of 136 ppb and exceedances on 26 days. While these wintertime exceedances have not occurred every year, the 2012-2013 winter ozone levels by no means represent a rare occurrence. Exceedances are also clearly marked during the winter of 2010-2011, the summer of 2012, and the winter of 2013-2014.[80] These include an 8-hour daily maximum ozone spike measuring at 125 ppb documented in January 2013 — nearly two times higher than NAAQS standards.[81] Again on Dec. 19, 2013, Dinosaur National Monument reached a peak ozone concentration of over 100 ppb for over five hours — well above EPA's threshold of 75 ppb.[82]

[See pg. 11 of DCN EPA-HQ-OAR-2011-0151-0109-A1 for Chart, "Maximum Daily 8 Hour Ozone at Dinosaur National Monument.]

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): In addition to elevated ozone levels, the damaging effects of nitrogen deposition—another byproduct of energy development emissions—have been documented in Dinosaur National Monument, as well as at Arches and Canyonlands National Parks. The National Park Service noted these concerns, among others related to air quality impacts, to the Bureau of Land Management when commenting on proposed permitting of oil and gas wells in the nearby White River Field Office Resource Management Area, just south of the monument and east of the Uinta Basin:

> There is an existing body of evidence, including evidence from ecosystems similar to those at Dinosaur NM and Arches National Park, which suggest that nitrogen deposition is a significant concern in these parks. A risk assessment evaluating the sensitivity of NPS areas to nutrient enrichment effects from nitrogen deposition ranked ecosystems in Dinosaur NM and Arches and Canyonlands NPs as highly sensitive to nitrogen

[80] Data downloaded from the National Park Service Access to Gaseous Pollutant and Meteorological Data Export site, operated by Air Resource Specialists, available at http://ard-request.air-resource.com/data.aspx#.
[81] National Park Service, Dinosaur National Monument Data Timelines, available at http://www.nature.nps.gov/air/data/current/data_DIPT_timelines.cfm (last visited July 18, 2013).
[82] Nicholas Dummer, "Dinosaur National Monument Ground Level Ozone at High-Risk Levels due to Proximity to Drilling Operations," My Town Colorado, available at http://www.mytowncolorado.com/forum/topics/dinosaurnational-monument-ground-level-ozone-at-high-risk-levels (last visited March 26, 2014).

impacts…NPS concluded that the current cumulative nitrogen deposition impacts are a substantial concern in Dinosaur NM.[83]

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): Oil and Gas development in the San Juan Basin in the Four Corners region along with several coal-fired power plants in the region are contributing to unhealthy ozone levels. This area is home to large areas of Indian country. As EPA recognizes, WRAP inventories have identified oil and natural gas production sources as the source of the majority of the emissions of NOx and a large portion of the VOC emissions in the Northern San Juan Basin. [79 FR 32508.] Recent Colorado inventories show that oil and gas sources are responsible for approximately 85% of the anthropogenic VOC emissions and 56% of the NOx emissions in Montezuma County. [Attachment 1] In La Plata County, Colorado estimates that oil and gas sources are responsible for 25% of VOC emissions and 70% of NOx emissions. [Id.] Five monitors in the Four Corners region have design values above 0.065 ppm for the period from 2010 through 2012.[84] These three-year "design values" represent the three-year average of the fourth highest maximum ozone concentration—not the highest level recorded in the region. There are days where 8-hour ozone concentrations are substantially higher than 0.075 ppm. For example, according to EPA monitoring data, in 2011 three monitors in La Plata County measured 8-hour ozone concentrations of 0.086, 0.090, and 0.088 ppm, respectively.[85] The New Mexico Department of Public health has documented increased emergency room visits associated with high ozone levels in San Juan County.[86]

Although the Four Corners region is not designated nonattainment for ozone, it still suffers from elevated ozone levels that are harmful to public health. The NAAQS level is 0.075 ppm, but EPA has long recognized that severe adverse health effects occur at levels below this standard, especially for children and adults with asthma.[87] The Clean Air Scientific Advisory Committee (CASAC), the independent scientific group that provides technical advice to EPA with respect to NAAQS, unanimously found that the current 0.075 ppm standard "fails to satisfy the explicit stipulations of the Clean Air Act [to] ensure an adequate margin of safety for all individuals, including sensitive populations" and has recommended an ozone standard somewhere between 0.060 and 0.070 ppm. [75 FR 2992.] Though EPA ultimately refused to promulgate a standard between the levels recommended by CASAC, the public is at risk for serious health effects due to current ozone levels in the Four Corners region.

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[83] January 25, 2013 Memorandum from the National Park Service Regional Director, Intermountain Region to the Planning and Environmental Coordinator, Bureau of Land Management, re National Park Service comments on DES-12/0027, White River Field Office Oil and Gas Development, Draft Environmental Impact Statement, Resource Management Plan, Amendment.

[84] See AQCC, Review of the 2103 Ozone Season, Oct. 17, 2013 Commission Meeting, slides at 5, 11, available at https://www.colorado.gov/pacific/sites/default/files/ T1_AQCC_Ozone-Combined-22-pages.pdf; see also The Southern Ute Indian Tribe, 2012 Air Monitoring Update, slides at 6, available at https://www.southernutensn.gov/wpcontent/uploads/2013/05/Air_Monitoring_update_for_Env_Commission_Mgt_01082013_rev_011513.pdf.

[85] Monitor Values Report, La Plata County (2011), generated using EPA monitoring data available at http://www.epa.gov/airdata/.

[86] Meyers et al., The Association Between Ambient Air Quality Ozone Levels and Medical Asthma.

[87] See National Ambient Air Quality Standards for Ozone, 75 FR 2938, 2,944 (Jan. 19, 2010).

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): Due to the scarcity of monitoring within Indian country and the level of existing development and anticipated growth, EPA should take immediate steps to increase air quality monitoring for criteria and other pollutants, including HAPs, in Indian country.

As stated in the ANPR, EPA's "understanding of the oil and natural gas sector's impact on ambient air quality in Indian country is incomplete at this time given the absence of ambient air quality monitoring sites in many areas of Indian country." [79 FR 32519.] For example, EPA regulations governing state monitoring networks only require ozone monitoring in very populated areas in the summertime. [40 CFR § 58.2(a)(5), App. D, Tables D-1 & D-2.] This excludes large areas in and around Indian country, as well as areas suffering from wintertime ozone. Site-specific monitoring is critical because emissions vary based on geologic formation and operator practice. Monitoring also helps to improve air quality modeling used to demonstrate the impact of emissions.

To remedy this problem, EPA should immediately install monitors in oil and gas hotspots.

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): EPA should also use its substantial authority under CAA section 114 and other provisions to require oil and natural gas sources to install and operate ambient air quality monitors for ozone and other pollutants. We incorporate by reference a petition submitted on December 19, 2012 by a broad coalition of environmental, conservation and children's health groups explaining EPA's section 114 authority and seeking source monitoring for ozone (hereinafter "Ozone Monitoring Petition").[88]

There are cost effective air quality monitors that can easily be employed at oil and gas sites. For example, EPA has certified inexpensive, portable ozone monitors as a federal equivalent method.[89]

Indeed, source monitoring was important in recognizing the severe ozone problem in the Uinta Basin. Through a series of consent decrees that resulted from EPA enforcement actions against oil and gas companies operating in the Uinta Basin, EPA required private companies to install and operate ambient air quality monitors in the Basin to monitor ozone, NO_x and $PM_{2.5}$ concentrations. The two monitors, known as the Redwash and Ouray monitors, are located on tribal lands and have been monitoring ambient air quality since 2009.[90]

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[88] In Re Petition for the U.S. Environmental Protection Agency to 1) Promptly Require Oil and Gas Owners and Operators to Monitor for Ozone and 2) To Issue Control Techniques Guidelines for Oil and Natural Gas Operations in Nonattainment Areas (Dec. 19, 2012), available at http://www.edf.org/sites/default/files/Ozone_Monitoring_and_Oil_and_Natural_Gas-Petition.pdf.

[89] Ozone Monitoring Petition at 24.

[90] See U.S. v. Kerr-McGee Corp., No. 07-CV-01034-EWN-KMT, 2008 WL 863975, at *2 (D. Colo. Mar. 26, 2008); see also United States v. Kerr-McGee Corp., Case 1:07-cv-01034-EWN-KMT, 80–82 (D. Colo. May 17, 2007) ("KM Decree"); United States v. Colo. Interstate Gas Co., Case 2:09-cv-00649-TS, 11–14 (D. Utah, July 23, 2009) ("CIG Decree"); United States v. Miller, Dyer & Co., LLC, Case 2:09-cv-00332-DAK, 42 (D. Utah, Sept. 23, 2009) ("MD Decree"). There monitors were the first to record the significantly elevated wintertime ozone levels in the Uinta Basin.

Furthermore, EPA should consider revisions to its monitoring network regulations to ensure adequate monitoring in oil and gas development areas, including Indian country. EPA proposed revisions in 2009, in part, in response to its recognition of wintertime ozone problems in rural areas of Wyoming and Utah. But it never finalized any changes.[91] These revisions are long overdue.

Environmental Commenters recognize the cost of installing and maintaining air monitors and suggest EPA consider passing monitoring costs on to permittees. This could be achieved as a permit holders' fee, which in the case of existing sources could be applied retroactively.

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): While we take issue with the lack of an adequate air quality monitoring network to assess the breadth and depth of emissions related to oil and gas development, we note that sufficient information exists through the existing monitoring network to justify and support a FIP structure to address new and existing sources. The rapid expansion of the industry into new areas that are unsupported by a monitoring network, coupled with the documented, extensive impacts, warrant better data on air quality in these areas.

EDF ANPR Comments – referenced by Earthjustice et al. (0044): Any proposed rule to address pollution from oil and gas operations on tribal lands should ensure rigorous air quality monitoring on tribal lands. Installation of air quality monitors would help address the lack of reliable information regarding air quality on tribal lands, which EPA identifies as a key problem in the ANPR [79 FR 32509], and monitoring is important for protecting public welfare.

The Clean Air Act authorizes EPA to act to ensure that air quality monitors are installed on tribal lands. Under Section 114 of the Clean Air Act, EPA has manifest authority to require owners and operators of oil and gas facilities to install and operate air quality monitors, arising from EPA's responsibilities under the Act to protect air quality, public health, and welfare. Under that provision, the Administrator can require regulated sources to provide information "[f]or the purpose (i) of developing or assisting in the development of any implementation plan under section 7410 [such as the plan contemplated in the ANPR] . . . [or] (ii) determining whether any person is in violation of . . . any requirement of such a plan." [42 U.S.C. § 7414(a)(1).] To this end, Section 114 authorizes the Administrator to "require any person who owns or operates any emission source" to "install, use, and maintain such monitoring equipment, and use such audit procedures or methods; sample such emissions; . . . and provide such other information, as [s]he may reasonably require." [Id. § 7414(a)(1)(C)-(G)] EPA has exercised this authority broadly,[92] and courts have recognized EPA's authority to require sources to monitor a wide range of pollutants and to enforce nearly every provision of the Clean Air Act. This broad, protective authority clearly applies to facilities in the oil and natural gas production sector,[93] and EPA has

[91] 78 FR 34178, 34,203 (June 6, 2013) (stating that the schedule for finalizing any changes ("remains unclear at this time").

[92] Mandatory Reporting of Greenhouse Gases; Proposed Rule, 74 FR 16448, 16,454 (Apr. 10, 2009).

[93] Along with other harmful pollutants, oil and gas sources emit significant amounts of ozone precursors, including VOCs and methane, and therefore clearly fall within Section 114's expansive focus on "any emission source." 42 U.S.C. § 7414(a)(1); see Massachusetts v. EPA, 549 U.S. 497, 529 n.25 (2007) (observing that "'any' . . . has an expansive meaning, that is, one or some indiscriminately of whatever kind") (citing Department of Housing and Urban Development v. Rucker, 535 U.S. 125, 131 (2002)).

recently used Section 114 to require these sources to monitor and report their methane emissions. [See 40 CFR § 98.230; see also 75 FR 74458 (Nov. 30, 2010).]

Further, strengthening monitoring networks on tribal lands is consistent with EPA's responsibility to ensure adequate monitoring networks in any Section 110 Federal Implementation Plan. Congress clearly intended that implementation plans include air quality monitoring when it set out the minimum requirements for SIPs that are enumerated in section 110. Section 110(a)(2)(B) provides that "each such plan shall . . . provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) *monitor, compile, and analyze data on ambient air quality*, and (ii) upon request, make such data available to the Administrator." [42 U.S.C. §7410(a)(2)(B)(i) (emphasis added).] Thus, any FIP promulgated by EPA to regulate emissions from oil and gas sources on tribal lands should include provisions for installing and maintaining sufficient air quality monitors to ensure that air quality is being protected.

EDF ANPR Comments – referenced by Earthjustice et al. (0044): A rigorous FIP should also be coupled with a program to increase air quality monitoring on tribal lands. The National Tribal Air Association's recently released Status of Tribal Air Report stated that "an increase in representative analyses (data obtained from air monitors) combined with health-based studies is necessary so that all Tribes know the condition of the air quality of their air sheds and its impact upon Tribal health."[94] In the ANPR, EPA further recognized the uncertainty surrounding the impacts of gas and oil operations on tribal lands, "due in part to the scarcity of ambient air monitoring in some areas of Indian country," and "incomplete emissions information."[95]

The vast majority of Indian lands are located in areas labelled by the EPA as "Unclassifiable/Attainment," and which lack 2010–2012 NAAQS design values.[96] This lack of data highlights the difficulties of ensuring adequate protections for tribal communities.

According to EPA, "there are uncertainties about the extent of environmental impacts from oil and natural gas production. Given the environmental impacts from oil and natural gas production in various states . . . air quality in Indian country may likewise be at risk of reaching unhealthy levels." [Id. at 32511.] The map provided by EPA in the docket for this rulemaking highlights the lack of adequate air quality information on tribal lands. Accordingly, EDF respectfully urges EPA to take immediate and comprehensive action to remedy the lack of accurate information on the air quality of Indian lands.

The EPA's summary of the above comments and the EPA's responses to these comments on the proposed amendments to the Federal Indian Country Minor NSR rule are as follows:

Comment #15: One commenter (0044) stated that the EPA has provided no assurance that the regulations included in the FIP will adequately address air quality problems in Indian country

[94] Nat'l Tribal Air Ass'n, Status of Tribal Air Report (2014), available at http://www.wrapair2.org/calendar/attachments/1301/2097/NTAA-2014StatusTribalAirReport.pdf.
[95] ANPR, 79 FR 32508.
[96] Id. at 32510–11 (Table 1).

and ensure compliance with all applicable standards, including the NAAQS, Prevention of Significant Deterioration (PSD) Program, and the visibility protection program. The commenter noted that, although the EPA proposes a FIP to streamline the permitting process, the proposed FIP does not achieve the goals of the case-by-case permitting the EPA established in the Federal Indian Country Minor NSR rule—namely adequate protection of public health and the environment. The proposed FIP would allow minor oil and natural gas sources to forego pre-construction review and permitting altogether and instead simply self-certify that they will comply with the six regulations that already apply within Indian country. The EPA has provided no analysis of whether these six regulations will adequately address the air quality problems in Indian country or ensure compliance with the NAAQS, PSD Program, and the visibility protection program.

Response #15: The EPA believes that the eight regulations included in the final rule represent a robust set of control measures that are adequate to protect air quality in Indian country in attainment, attainment/unclassifiable and unclassifiable areas. The EPA can require source-specific permits where needed to further protect air quality in these areas.

In addition, the Federal Indian Country Minor NSR rule does not require an air quality analysis in all instances for minor source permits even in the context of a source-specific permit. While §49.154(c)(1)(i) indicates that we will consider "[l]ocal air quality" in determining whether to issue a source-specific permit, it does not require an air quality analysis and in fact §49.154(d) establishes specific circumstances in which the Reviewing Authority can require the owner/operator to conduct an air quality impacts analysis (AQIA). Air quality factors are just one consideration with a source-specific permit. We have not made any changes as a result of this comment.

Comment #16: One commenter (0044) stated that the EPA did not conduct any control technology review, air quality impacts analysis, or dispersion modeling for the proposed FIP.

Response #16: The EPA's analysis and review consisted of establishing a set of requirements that we believe are sufficient to protect the NAAQS and PSD increments in attainment, attainment/unclassifiable and unclassifiable areas with the caveat that the EPA can require source-specific permits where needed to further protect air quality in a given area. Moreover, all eight regulations included in this FIP are based on the EPA's analyses of available control technologies. The FIP requires compliance with the most current version of these regulations. So, the control requirements in this FIP will stay up to date, as these rules are based on the most current technologies. Finally, as noted above, the Federal Indian Country Minor NSR rule does not require an air quality analysis in all instances when a permit is issued even with a source-specific permit. No changes were made as a result of this comment.

Comment #17: One commenter (0044) expressed concern about the lack of any requirements in the proposed FIP for air quality monitoring and modeling, and recommended that the proposed FIP include requirements to improve air quality monitoring and modeling within Indian country. This commenter noted that the air quality in many areas of Indian country with oil and natural gas development exceeds federal public health standards for ozone and particulates. The commenter expressed concern that, without adequate monitoring, the EPA cannot ensure that it

is protecting public health from the emissions associated with oil and natural gas development. This commenter stated that the most efficient and expedient method of providing such a monitoring network is requiring operators to install and operate monitors. The commenter noted that the EPA has authority under CAA section 114 to require operators to install and operate ambient air quality monitors.

Response #17: With respect to monitoring, the EPA works closely with tribes, as well as state and local partners to implement and maintain a national ambient air monitoring program. In many cases, ambient networks include more monitors than are required by minimum requirements in the EPA's monitoring regulations. The EPA Regional Administrators have the authority to require additional monitoring in a variety of situations; such authority is specifically noted throughout the language in Appendix D to 40 CFR part 58, Network Design Criteria for Ambient Air Quality Monitoring. Accordingly, the EPA believes that the current authority to require monitoring above minimum requirements is sufficient to support this final rule and the need to employ additional air quality monitoring in areas of Indian country where the air quality may not be fully characterized. As the commenter points out, the EPA has the authority under section 114 of the CAA to require air quality monitoring if it determines that this is necessary in a particular areas. For these reasons, we do not believe that including monitoring requirements in this rule is necessary. Additionally, the EPA is exploring alternative sensor technology that can be used to compliment traditional compliance-based monitoring based on Federal Reference Method or Federal Equivalent Method monitoring equipment. The EPA anticipates that alternative sensor technology may be used in the future as a screening tool to determine, if longer term monitoring with more specialized equipment is needed.

Regarding modeling, as noted above, the Federal Indian Country Minor NSR rule does not require an air quality analysis (and the modeling that would accompany it) in all instances when a permit is issued even with a source-specific permit. With respect to the final FIP, we do not believe that modeling is necessary; rather, we believe that the suite of eight federal regulations that constitute the FIP's set of control requirements are sufficent to protect air quality in areas of Indian country designated attainment, attainment/unclassifiable and unclassifiable. We have not made any changes in response to this comment.

With respect to air quality in areas of Indian country with oil and natural gas development, currently we are not seeing widespread air quality problems. Based on air quality data for 2012-2014,[97] (outside of Oklahoma) there are only two counties that meet three criteria: have Indian country present; have design values (DVs) above the level of the current ozone NAAQS (70 parts per billion (ppb)); and have oil and natural gas activity. The two counties that meet these three criteria are in Utah and are: Duchesne and Uintah Counties.[98] The majority of the land area in both of these counties is on the Uintah and Ouray Reservation. For the Uintah and Ouray Reservation, we have sufficient concerns about the air quality impacts from existing sources that we plan to propose a separate reservation-specific FIP.

[97] The EPA will not designate areas as nonattainment based on these data, but likely based on 2014 - 2016 data.
[98] Supporting information can be found in: Docket ID No. EPA-HQ-OAR-2014-0606.

For areas designated nonattainment for NAAQS (2008 ozone NAAQS, 2006 and 2012 $PM_{2.5}$ NAAQS), based on air quality DVs for 2012-2014, there are not any areas that meet three criteria: have Indian country present; have DVs above the level of the NAAQS; and have oil and natural gas activity.[99]

Comment #18: One commenter (0044) expressed concern about the lack of enforcement requirements in the FIP. The commenter noted that the proposed FIP provides few, if any, enforcement tools, and requested that the EPA clarify, add, and expand enforcement requirements in the final rule. The commenter encouraged the EPA to implement Next Generation Compliance techniques (such as self-certification and photographic verification, per 40 CFR part 60, subpart OOOO) in the final rule, and recommended that the EPA should also robustly pursue standard enforcement procedures in Indian country.

Response #18: Since the EPA is relying on the monitoring, recordkeeping and reporting requirements in the nine rules underlying this final FIP to be comprehensive in ensuring compliance, we do not feel that additional, separate compliance measures are needed. The requirements in the eight rules are independently enforceable under those rules as well as being enforceable under the FIP. An owner/operator is responsible for correctly permitting its sources. If it is later determined that the source is not complying with the emission limitations and standards prescibed in the eight rules as required by the FIP, the EPA can take enforcement action to bring a source into compliance. The EPA can also enforce major source requirements in situations where it is determined that a source emitted or has the potential to emit pollutants in major source amounts. We have not made any changes as a result of this comment.

4.0 Comments Related to the FIP as an Alternative to Site-Specific Permits, General Permits, and Permits-by-Rule

Southern Ute (0031): The Tribe maintains that the best permitting approach for Indian Country is a general permit or permit by rule developed through ambient impact modeling to ensure protection of the NAAQS, while still providing legally and practically enforceable emission limitations, enabling sources to receive credit for emission reduction efforts.

National Tribal Air Association (0032): The Proposed Rule's use of a FIP to regulate true minor sources engaged in oil and natural gas production fails to provide Indian Tribes or any of their members with an opportunity to provide comments to EPA about a facility's coverage under the FIP, unlike the comment process available under a general permit. EPA acknowledges this, but indicates that the FIP contains requirements for emissions controls, compliance monitoring, and reporting that would help prevent a facility from causing or contributing to national ambient air quality standard (NAAQS) or prevention of significant deterioration (PSD) increment violation. Further, EPA indicates that any citizen can enforce the provisions of a FIP by commencing a civil action in the district court in the judicial district in which the source is located. However, a Tribe or individual might have other concerns about a facility, beyond NAAQS or PSD increment violations, about which they might want to provide comments, and a civil action is intended to address a FIP violation, not issues that might cause concern to a Tribe or its members prior to a facility being covered by a FIP. The NTAA recommends that EPA provide a clear

[99] Ibid.

means by which Indian Tribes, their members, or any member of the public can provide comments to EPA about a facility's coverage under the FIP.

National Tribal Air Association (0032): Need to Support Tribal Implementation Plans - Title 40 CFR § 49.11(a) provides that EPA shall promulgate FIP provisions as are "necessary or appropriate to protect air quality." The NTAA finds that there is a need to protect air quality in Indian Country that is jeopardized currently by the growing number of true minor sources classified as oil and natural gas facilities. The Proposed Rule offers full regulatory coverage of such facilities in Indian Country by its requirements involving emissions limitations and standards, monitoring, and testing and recordkeeping and reporting. However, EPA must provide Indian Tribes with the requisite resources to develop and implement tribal implementation plans (TIPs) to assume regulatory control over the true minor sources located within their jurisdictions that are engaged in oil and natural gas production.

The Proposed Rule's FIP "one size fits all" approach fails to account for the different conditions of the Tribal lands on which true minor sources engaged in oil and natural gas production will be located. Tribal lands can be located geographically along coastal areas, in arid and wet regions, on plains, among mountainous areas, and within valleys. The meteorological conditions for such lands vary as well such as differing wind directions and speeds, and the susceptibility to air inversions. Further, the oil and natural gas reserves located under Tribal lands can influence the number and type of oil and natural gas facilities that locate on such lands. Ultimately, Indian Tribes are the best governmental entities to regulate true minor sources within their jurisdictions that are engaged in oil and natural gas production and to effectuate the best possible air quality for their members and natural environment.

The NTAA recommends that EPA provide Indian Tribes with an affirmative commitment under the Proposed Rule that it will provide such Tribes with the resources necessary to develop and implement TIPs for regulating true minor sources engaged in oil and natural gas production, and to also provide similar resources for the future regulation of true existing minor sources engaged with such production.

QEP Resources, Inc. (0038): QEP commends EPA on a number of aspects of the Agency's proposal. While we continue to believe a Permit by Rule would have been the cleanest path forward for regulatory certainty, we agree with EPA's stated sentiment that "[t]he FIP would reduce burden for sources and the Reviewing Authority and prevent delays in new construction due to the minor NSR permitting obligation." [80 Federal Register 56557 (Sept. 18, 2015).]

QEP Resources, Inc. (0038): QEP is concerned with EPA's proposal to require minor site-specific permits on a case-by-case basis, in lieu of the streamlined registration process provided in the National FIP. The proposal grants EPA with overly broad and unrestricted discretion to require site-specific permits. Proposed 40 CFR § 49.101(b)(3) provides that EPA may require owners and operators of oil and natural gas production facilities to obtain a site-specific permit "to ensure protection of the NAAQS." [80 FR 56564, 56573 (Sept. 18, 2015).] EPA further expands on its discretion in the preamble stating, "the Reviewing Authority may determine that the source is not sufficiently controlled under the proposed FIP to protect the NAAQS in the area of the proposed project (e.g., if the measured design value for the area is close to or above the

level of the NAAQS). In that circumstance, the Reviewing Authority can require the minor source to obtain a site-specific permit." [80 FR 56564.] The authority laid out in this proposal to require site-specific permitting is too broad.

We question EPA's authority to impose site-specific permitting requirements in areas that have not yet been officially designated out of attainment of the NAAQSs for any criteria pollutant standards.

Further, in light of the recently lowered NAAQS for ozone of 70 ppb, a substantial number of areas in Indian country may now be deemed "close to" the standard, triggering EPA's discretion to require site specific permits. Site-specific permitting in areas "close to" the standard will disadvantage development in Indian country as it relates to development in state airsheds. While Indian country development will be stifled by site-specific permitting timelines, development in the state airshed will be supported through existing, state-created general permitting schemes for minor sources. For example, areas of Indian country in the Uinta Basin of Utah that are close to or above the 2015 ozone NAAQS, where QEP has significant operations, may be vulnerable to significant delays from site-specific permitting while development in neighboring state lands in the Basin will be supported through existing state programs.

Note that states have set parameters around the state discretion to impose source-specific obligations, including air quality impact analyses, for minor sources. For example, Arizona limits discretion as follows:

> The Director shall make such a request [for an air quality impact assessment], if there is reason to believe that a source or minor NSR modification could interfere with attainment or maintenance of a standard. In making that determination, the Director shall take into consideration: 1. The source's emission rates. 2. The location of emission units within the facility and their proximity to the ambient air. 3. The terrain in which the source is or will be located. 4. The source type. 5. The location and emissions of nearby sources. 6. Background concentrations of regulated minor NSR pollutants.[100]

EPA has proposed no limits on EPA discretion nor described any objective parameters or the factual basis for exercising such discretion.

EPA's proposal preamble further provides, "[t]he agency recommends at the time of registration, the owner/operator of all new sources or all sources scheduled for modification contact the Reviewing Authority for a review of the air quality status of that area, and the possibility of a requirement for a site specific permit." [80 FR 56564.] Such a recommended practice slows down the permitting process, creates uncertainty for the regulated community, calls on additional agency resources, and runs counter to the principles of a streamlined registration process.

QEP implores EPA to honor one of the core benefits of the National FIP - a streamlined registration scheme for minor emission sources- and not eclipse such a benefit by declaring the right to require site-specific permitting in a broad and unrestricted manner. Accordingly, we urge EPA to remove the language cited above in the preamble and National FIP, granting the Agency

[100] Arizona Administrative Code Title 18, Chapter 2, Section R18-2- 334(E)(1)-(6).

unlawful authority to require site-specific permitting simply to "ensure attainment of the NAAQS," in areas where the measured design value is "close to" the relevant NAAQS and based on a case-by-case "review of the air quality in that area.

Ute Indian Tribe (0039): The Ute Indian Tribe encourages EPA to use a FIP as an approach for its Indian Country Minor New Source Review program. A FIP would streamline the permitting approach, eliminate the need for unnecessary delays such as preconstruction approval, and apply requirements directly to sources subject to the regulation. But it is important that the FIP not apply the same standards to all of Indian Country, as the variations in state minor source permitting rules and concerns of Indian tribes cannot be adequately represented or addressed in a uniform national rule. Holding operators on the Reservation to standards EPA based off of California, for example, would unnecessarily obstruct development on the Uintah and Ouray Reservation. Therefore, EPA should develop reservation or region-specific FIPs that account for issues and concerns particular to that location. Through a reservation-by-reservation approach, EPA can protect tribal interests by regulating emissions in a fair yet effective manner.

Ute Indian Tribe (0039): The Tribe opposes any attempt to implement a nationwide FIP that does not take into account the unique characteristics of the Uintah and Ouray Reservation. After all, the goal is to develop a rule that would achieve somewhat equal standards between tribal land and federal, state, fee lands. The disparity in state regulation makes a nationwide FIP impractical to level the playing field between tribes located in different regions. A regional or reservation-specific FIP, however, could level the playing field by accounting for particular air quality concerns and permitting requirements of surrounding jurisdictions.

Consistency is a good thing. But an overly burdensome national FIP would lack both the flexibility and streamlining that is apparent in many state permitting programs. The national applicability of the Tribal Minor NSR Review Program would not reflect the many variations in state minor source permitting. EPA recognized in the Fort Berthold FIP the importance of maintaining consistency with state minor source programs.[101] Attempting to apply a "one-size-fits-all" approach at a national level would certainly be at odds with state programs that are mature, and that may more readily accommodate unique air quality concerns and producing basin characteristics. Just as EPA addressed the unique issues that arose for sources operating in the Bakken formation, EPA's Indian Country Minor New Source Review program must be based on a reservation or region-specific basis.

Ute Indian Tribe (0039): A uniform nationwide Indian Country Minor New Source Review Program that applies both to new and existing sources would further slow review and approval of oil and gas permits, impact the Tribe's ability to expand operations, and decrease the revenue the Tribe is able to earn from tribal lands. Despite the progress the Tribe has made, the ability to benefit from its resources is limited by multiple federal agencies overseeing oil and gas development on the Reservation. Delays in the federal oil and gas permit approval process are causing energy companies to limit their activities on the Reservation. Companies operating on

[101] FR 48878, 48881 ("Finally, this rule is important in that while not identical to, the rule is consistent with the regulations approved into North Dakota's SIP ... this rule ensures that consistent requirements apply to activities both inside of and within the" Fort Berthold Indian Reservation).

the Reservation will only commit as many resources as can be supported by the pace of permit approvals.

The oil and gas companies operating on the Reservation often tell the Tribe that the federal oil and gas permitting process is the single biggest risk factor to their operations. If the risks become so great, drilling rigs will leave the Reservation for private or state lands. This would be even worse than companies limiting their operations because drilling rigs that leave the Reservation usually do not come back. The Tribe is concerned that if EPA used an approach that applied the same standards nationwide, rather than regulations designed specifically for the Uintah and Ouray Reservation, companies would limit their operations or leave the Reservation. This would lead to job cuts and significantly diminish revenue used to fund our tribal government and provide services to tribal members.

Ute Indian Tribe (0039): The EPA should not use a general permit because such an approach would cause unnecessary delays such as pre-construction review. This would create a significant administrative burden for EPA regional offices and has the potential to create new permitting backlogs, slowing production, delaying jobs, and diminishing tribal revenue. It undermines the Tribe's goal to streamline this process and introduces a new element of uncertainty into company drilling schedules. The limited staffing resources available at the Division of Air Quality would create additional permitting delays, with commensurate financial risk for companies contemplating investment on the Reservation. A general permit will create other delays by enabling the public to challenge a particular source receiving coverage at the administrative level. Enabling public participation at this level would allow individuals who live hundreds or thousands of miles away, and without any affiliation to the Tribe, to prevent the Tribe from realizing the benefits of its trust resources. For these reasons, the Tribe opposes a general permit as a means to address existing sources in Indian Country.

Ute Indian Tribe (0039): The Tribe prefers a FIP over a permit-by-rule because the FIP can also regulate certain classes of existing minor sources.

The Tribe opposes a final rule that utilizes a permit-by-rule approach. Such an approach would be limited to addressing emissions from new and modified sources. A permit-by-rule provides many advantages over a general permit. For example, a permit-by-rule produces a standard set of requirements that may apply to multiple sources with similar emissions and other characteristics. This streamlined approach enables operators to notify the EPA that an individual source meets all eligibility criteria for coverage. Other benefits are that preconstruction approval is not required and the public may only object to a particular source receiving permit coverage though judicial challenge. A permit-by-rule would be far less resource-intensive than general permits. Nevertheless, the Tribe recommends that EPA consult with tribes to develop a reservation-specific FIP, which is preferable to a permit-by-rule.

Gas Processors Association (GPA) (0040): At the same time, however, GPA respectfully requests EPA make a number of enhancements to the program to make it more effective. Specifically, EPA should:

- Eliminate the agency’s ability to require site-specific permits on a case-by-case basis

- Develop a uniform process to address preconstruction permitting in areas where design values exceed the NAAQS despite being designated attainment or unclassified.

Gas Processors Association (GPA) (0040): GPA is also concerned that the effectiveness of the streamlined FIP program may be diminished by the risk that, at any time prior to construction, EPA could inform an operator that a site-specific permit is required. [See 80 FR 56564.] Under the proposed FIP, a facility is only required to provide notice 30 days before construction. [Id. at 56576.] Operators incur significant, non-refundable expenses within the 30 days prior to construction, as materials must be ordered and delivered and contractors must be retained to perform the work. Thus, a last minute decision by EPA to require a site-specific permit would impose a substantial burden on an operator. As a result, GPA opposes this provision and urges EPA to eliminate any option to require a site-specific permit, particularly with so little notice.

Earthjustice et al. (0044): According to EPA, recent advances in unconventional oil and natural gas production techniques have resulted in a "sizeable increase" in development throughout Indian Country, including areas in North Dakota, Montana, South Dakota, Nebraska, Kansas, Oklahoma, Michigan, Wisconsin, New York, Utah, New Mexico, Colorado, and Wyoming. [79 FR 32508.] The Energy Information Administration ("EIA") reports that Indian Country produced 241 billion cubic feet (bcf) of natural gas and 324 trillion Btu of crude oil in 2014 alone.[102]

Indeed, EPA Region 8—which covers Colorado, Utah, Wyoming, Montana, North Dakota, and South Dakota and twenty-seven tribal nations—has already received more than 6,400 registrations from existing oil and gas minor sources in Indian Country. [79 FR 32509.] Sources were required to register in response to EPA's Tribal NSR Rule.[103] According to EPA Region 8 staff, 5,216 of the registrations were from the Uintah and Ouray Reservation, 757 were from the Ft. Berthold Indian Reservation, and 378 were from the Southern Ute Reservation.[104, 105] Region 8 staff also reported that they received several registrations from the Blackfeet Reservation, Ute Mountain Ute Reservation, Wind River Reservation, and Fort Peck Reservation. [Id.] There is overall less oil and gas development in Indian Country within EPA Region 9, which covers Arizona, California, Hawai'i, Nevada, the Pacific Islands, and 148 tribal nations. As of November 2015, Region 9 reported having received about 155 registrations from oil and gas sector sources on the Navajo Reservation alone.[106, 107]

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[102] EIA, Sales of Fossil Fuels Produced from Federal and Indian lands, FY 2003 through FY 2014 at 3 (July 2015), www.eia.gov/analysis/requests/federallands/pdf/eia-federallandsales.pdf.
[103] 40 CFR § 49.151(c)(1)(iii); see also 76 FR 38748, 38772–73 (July 1, 2011)) (codified at 40 CFR §§ 49.151–65) (establishing registration requirement); 79 FR 34231, 34234 (June 16, 2014) (extending registration period).
[104] Email from Claudia Young Smith, Environmental Scientist, EPA Region 8, to Joel Minor, Associate Attorney, Earthjustice (Nov. 25, 2015) (Appx. at 50).
[105] Footnote 6: Region 8 staff informed us that approximately 95% of these registrations were from oil and gas sector minor sources.
[106] Email from Lisa Beckham, Environmental Engineer, EPA Region 9, to Joel Minor, Associate Attorney, Earthjustice (Nov. 24, 2015) (Appx. at 52).
[107] We assume that Region 9's reference to the number of registrations received for the Navajo Nation is a reference to facilities on tribal trust lands, not on allotted lands.

EPA's registration data may underreport the number of existing sources, as some operators may be unaware of registration requirements, unsure if their operations are required to register, or unwilling to comply with registration requirements. Additionally, confusion over EPA's definition of Indian Country for the purposes of the Tribal NSR rule may have resulted in existing sources on allotted lands and other jurisdictionally complex areas being unsure whether they were required to register. Thus, although the thousands of registrations that EPA has already received demonstrates that there are significant and largely unregulated emissions from existing sources in Indian Country, registration data paints an incomplete picture of the magnitude of emissions from existing sources in Indian Country.

In the ANPR, EPA provided additional information about the number of current and projected emission sources on several reservations. EPA reported that the Ute Tribe of the Uintah and Ouray Reservation in Utah had 7,000 wells. [79 FR 32509.] EPA also reported that the Ute Tribe plans to open up an additional 150,000 acres to mineral development, and that the Bureau of Land Management ("BLM") has approved 5,000 new wells in the Uinta Basin, where the Uintah and Ouray Reservation is located. [79 FR 32508–09.] In the San Juan Basin in the Four Corners region, EPA reported that the Jicarilla Apache Nation has nearly 3,000 existing active and plugged wells and nearly 2,000 miles of pipelines and roads. [79 FR 32509.] In North Dakota, EPA estimated that 2,000 additional wells will be drilled on the Fort Berthold Indian Reservation ("FBIR"). [79 FR 32508.] Therefore, there is substantial information before the agency demonstrating the magnitude of existing and projected oil and gas development in Indian Country.

Additionally, for the purposes of air quality, the number of facilities located in Indian country is not the only important metric. In areas like the San Juan Basin, there is significant development adjacent to tribal lands on a patchwork of state, federal, allotted, and privately-owned lands. Oil and gas development occurring near Indian Country can have just as much impact on tribal air quality as development that actually occurs within Indian Country. This reinforces the need for strong regulations nationwide as well as strong regulations within Indian Country.

Earthjustice et al. (0044): In addition to exposing tribal members to dangerous levels of ozone, oil and gas operations in Indian Country also expose tribal members to Hazardous Air Pollutants (HAP). HAPs, also known as air toxics, are pollutants which "present . . . a threat of adverse human health effects (including but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects." [42 U.S.C. § 7412(b)(2).]

Several HAPs emitted by the oil and gas sector, including benzene, toluene, ethyl benzene, and xylene (collectively, "BTEX"), are known or suspected carcinogens, to which there is no safe

level of exposure.[108, 109] The oil and gas sector also emits several other HAPs, including acrolein, methylene chloride, arsenic, polycyclic aromatic hydrocarbons, mercury, formaldehyde, and n-hexane.[110, 111]

Some of these HAPs are persistent in the environment and bioaccumulate, building up in fish and the soil, which can cause significant harms to environmental resources that tribes and tribal members rely on for subsistence, cultural, recreational, aesthetic, and other values.[112]

A growing body of scientific literature has documented the human health risks from exposure to oil and gas sector air toxics.[113] Four studies in Colorado have identified adverse impacts of exposure to oil and gas sector air toxics. One study found elevated cumulative cancer risks for people living within 0.5 miles of wells of 10 per million people, as well as likely chronic non-cancer health impacts.[114] Another more comprehensive public health study found elevated cancer rates of up to 100 cases per million people near wells in Garfield County, likely due to benzene exposure, and identified oil and gas operations as the likely source of the benzene.[115] A third study found higher rates of congenital heart defects and neural tube defects among babies born to

[108] EPA, Regulatory Impact Analysis: Final New Source Performance Standards and Amendments to the National Emission Standards for Hazardous Air Pollutants for the Oil and Natural Gas Industry at 4-14 (Apr. 2012) (Appx. at 408); see also NRDC, Drilling Down: Protecting Western Communities From The Health And Environmental Effects of Oil and Gas Production at v-vi (2007) (Appx. at 632).

[109] EPA notes in the Proposed FIP that "[b]ecause the individual HAPs pollutants regulated from glycol dehydrators by the NESHAP (and to some degree from process heaters, as well) for oil and gas production sources are also VOC, which are regulated NSR pollutants, the proposed FIP would create enforceable VOC reduction requirements for glycol dehydrators and process heaters." 80 FR 56569. EPA is thus aware that oil and gas sector HAPs emissions can also be regulated through programs designed to target other pollutants.

[110] Petition to EPA from California Communities Against Toxics et al. for Listing and Rulemaking Under Section 112 of the Clean Air Act to Establish an Area Source Category for Oil and Gas Production Wells and Associated Equipment and to Set National Emission Standards for Hazardous Air Pollutant Standards at 35–37 (May 13, 2014), http://earthjustice.org/sites/default/files/files/OilGasToxicWellsPetition51314.pdf ("HAPs Rulemaking Petition") (Appx. at 638) (describing these HAPs and their adverse human health impacts).

[111] Footnote 12: EPA regulates new and existing sources of air toxics by establishing Maximum Achievable Control Technology ("MACT") standards. 42 U.S.C. § 7412(d)(2), (d)(3). EPA regulates air toxics emissions from the oil and gas sector through NESHAP rules. 40 CFR §§ 63.760–779 & Appx. This rule and the NESHAPs rule for industrial boilers and process heaters are two of the six regulations that EPA proposes to apply in Indian Country through the Proposed FIP. 80 FR 56557–58 (listing 40 CFR pt. 63 subparts HH & DDDDD).

[112] See, e.g., Nat'l Park Serv., The Fate, Transport, and Ecological Impacts of Airborne Contaminants In Western National Parks at 4-8 to 4-42, 5-1 to 5-21, 5-61 to 5-67 (2008), http://www.nature.nps.gov/air/studies/air_toxics/docs/2008FinalReport/WACAP_Report_Volume_I_Main.pdf (Appx. at 2324).

[113] See Bernard D. Goldstein et al., The Role of Toxicological Science in Meeting the Challenges and Opportunities of Hydraulic Fracturing, 139 TOXICOLOGICAL SCI. 271, 275–77 (2014) (Appx. at 750); Miriam Rotkin-Ellman, NRDC, More Fracking Fumes: Studies Repeatedly Find Unsafe Levels of Air Pollution Near Fracking Sites (Dec. 16, 2014), http://switchboard.nrdc.org/blogs/mrotkinellman/more_fracking_fumes_studies_re.html; HAPs Rulemaking Petition 37-43.

[114] Lisa M. McKenzie et al., Human Health Risk Assessment of Air Emissions from Development of Unconventional Natural Gas Resources, 424 SCI. TOTAL ENV'T 79, 80–83 (2012) (Appx. at 763).

[115] Raj Goyal, Colo. Dep't of Pub. Health & Env't, Garfield County Air Toxics Inhalation; Screening Level Human Health Risk Assessment 22–23, 29–30, 39–40, 56 (2010) (Appx. at 772).

mothers living within a ten mile radius and near higher densities of natural gas wells.[116] Finally, a study by NOAA scientists found emissions of benzene, a known carcinogen, at levels seven times greater than reflected in a state inventory.[117]

Evidence from oil and gas producing basins that include portions of Indian Country has also revealed concerning health impacts from exposure to air toxics. For example, a study conducted in several oil and gas basins nationwide—including Fremont County, Wyoming, where part of the Wind River Reservation is located—found benzene levels twenty-two times higher than EPA's 1/10,000 IRIS cancer risk level.[118]

Other evidence indicates that more studies on exposure to oil and gas emissions are warranted. A Utah Department of Health study has concluded "the incidence of stillbirths in the [Uinta Basin] area during the 2012-2013 time period was higher than historically observed for that region."[119] The study found that the Tri-County Uinta Basin area as a whole, in which there were 11,110 active oil and gas wells at the time of the study, had a statistically significant elevation above baseline levels in: (1) low-birth-weight infants in 2005-07; (2) premature births in 2008-09; and (3) small-for-gestational age infants in 2008-09.[120] The study also found statistically significant elevations in adverse birth outcomes in several of the three counties individually during various time periods, most notably in the risk of infant death in Duchesne County in 2000-07.[121] The study cautioned that the methodology it used was not capable of linking the increased rate of adverse birth outcomes to any specific risk factors, such as exposures to air pollutants.[122] However, the study provides strong support for further research into potential links between exposure to emissions from the over 11,000 active oil and gas wells in the Uinta Basin and the observed adverse birth outcomes.

Earthjustice et al. (0044): Oil and gas sector emissions contribute not only to deteriorating air quality in Indian Country, but also to climate change. In the ANPR, EPA acknowledged that reducing methane from the oil and gas sector is a key part of the Obama Administration's President's Climate Action Plan. [79 FR 32504-05.] According to the Intergovernmental Panel on Climate change (IPCC), more than one-third of anthropogenic warming is due to short-lived climate pollutants such as methane, which is 87 times more powerful a greenhouse gas than

[116] Lisa M. McKenzie et al., Birth Outcomes and Maternal Residential Proximity to Natural Gas Development in Rural Colorado, 122 ENVTL. HEALTH PERSPS. 412, 412–16 (2014) (Appx. at 844); see also Miriam Rotkin-Ellman, NRDC, New Study Finds Worrisome Pattern of Birth Defects in Fracking Communities (Feb. 4, 2014), http://switchboard.nrdc.org/blogs/mrotkinellman/new_study_finds_worrisome_patt.html.
[117] Gabrielle Pétron et al., A New Look at Methane and Non-methane Hydrocarbon Emissions from Oil and Natural Gas Operations in the Colorado Denver-Julesburg Basin, 119 J. GEOPHYS. RES. ATMOS. 6836, 6836 (2013) (Appx. at 856).
[118] Gregg P. Macey et al., Air Concentrations of Volatile Compounds Near Oil and Gas Production: A Community-based Exploratory Study, 13 ENVTL. HEALTH 82, 88 (2014) (Appx. at 873).
[119] Sam Lefevre et al., Utah Dep't of Health, Envtl. Epidemiology Prg., Adverse Birth Outcomes Statistical Review Investigating Tricounty Health Department Study Area (Daggett, Duchesne and Uintah Counties), Utah, 1991-2013 at 22 (2015), http://health.utah.gov/enviroepi/appletree/TriCountyABO/TriCounty_ABO.pdf (Appx. at 891).
[120] Id. at 6, 42–44.
[121] Id. at 45.
[122] Id. at 21.

carbon dioxide over a twenty-year period.[123] EPA's own Greenhouse Gas Inventory shows that the oil and gas industry is the largest source of anthropogenic methane pollution in the United States.[124] To reach the Obama Administration's goal of reducing greenhouse gas emissions 17% by 2020, significant methane emissions reductions will be necessary, and the most obvious source for reducing those emissions is the oil and gas sector, including sources in Indian Country.[125]

Satellite imagery indicates that the San Juan Basin, despite being relatively sparsely populated with rural and tribal communities, has the highest concentration of methane emissions in the country, a phenomenon known as the "Four Corners Methane Hot Spot."[126, 127] According to a recent NASA study, space-based observations between 2003 and 2009 reveal that emissions unaccounted for in EPA's methane emissions inventory from the Four Corners region account for 10% of EPA's estimated methane emissions nationwide, due to natural gas and coalbed methane development.[128] Over seventy-five researchers from NOAA, NASA, and partner organizations have converged on the Four Corners region to study the hot spot.[129] The results of their research will provide more information about the contributions of individual sources to the hot spot.

But even without further research, many indicators suggest that the source of the hotspot is the booming oil and gas development in the region. As shown in Table 2, EPA's Greenhouse Gas Emissions Inventory shows that the oil and gas sector contributes a significant quantity of methane emissions to the Four Corners region.[130] Based on the Greenhouse Gas Emissions Inventory data, EPA has already identified the San Juan Basin as one of the top five basins for reported greenhouse gas emissions nationwide, and the largest source of greenhouse gas emissions from pneumatic devices nationwide.[131]

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[123] EDF ANPR Comments at 2 (citing Climate Change 2013: The Physical Science Basis, Contribution of Working Group 1 to The Fifth Assessment Report of The Intergovernmental Panel On Climate Change (Thomas F. Stocker et al., eds. 2013)).

[124] Coalition ANPR Comments at 3 (citing A.R. Brandt et al., Methane Leaks from North American Natural Gas Systems, 343 SCIENCE 733 (2014), http://www.novim.org/images/pdf/ScienceMethane.02.14.14.pdf).

[125] See White House, Climate Action Plan: A Strategy to Reduce Methane Emissions 1 (March 28, 2014), https://www.whitehouse.gov/sites/default/files/strategy_to_reduce_methane_emissions_2014-03-28_final.pdf (Appx. at 954).

[126] Jonathan Thompson, Unlocking the Mysteries of the Four Corners Methane Hot Spot, HIGH COUNTRY NEWS (Aug. 31, 2015), http://www.hcn.org/issues/47.15/in-the-southwests-four-corners-methane-has-a-dark-side; Jonathan Thompson, NASA Finds Methane Hot Spot Over Four Corners, HIGH COUNTRY NEWS (Oct. 12, 2014), http://www.hcn.org/articles/nasa-finds-methane-hot-spot-over-four-corners.

[127] As noted above, the San Juan Basin is home to the Navajo, Southern Ute, Ute Mountain Ute, and Jicarilla Apache Reservations. See supra p. 8.

[128] Eric A. Kort, et al., Four Corners: The Largest US Methane Anomaly Viewed from Space, 41 GEOPHYS. RES. LETTERS 6898, 6898-6900, 6902 (2014) (Appx. at 969).

[129] See Peter Marcus, What's Causing the Hot Spot?, DURANGO HERALD (June 3, 2015), http://www.durangoherald.com/article/20150603/NEWS01/150609907/What--x2019-s-causing-the-hot-spot--.

[130] EPA, 2014 Greenhouse Gas Emissions from Large Facilities (Aug. 16, 2015), http://ghgdata.epa.gov/ghgp/main.do (search for Data Year 2014, All Emitters, and filter by Greenhouse Gas = methane and county level data).

[131] EPA, 2011-2014 GHGRP Industrial Profiles: Petroleum & Natural Gas Systems at 10, 13 (2015), http://www2.epa.gov/sites/production/files/2015-11/documents/subpart_w_2014_data_summary_10-12-15_508_km.pdf (Appx. at 975).

TABLE 2	
County	Petroleum and Natural Gas Systems 2014 Methane Emissions (MT CO2e)
San Juan, NM	264101
La Plata, CO	59914
San Juan, UT	1537
Apache, AZ	23489

Mitigating the severity of climate change as a result of oil and gas development is especially important because Indian Country is disproportionately impacted by climate change.[132]

Earthjustice et al. (0044): EPA has an obligation to protect visibility in Class I areas such as national parks and wilderness areas.[133] As discussed extensively in the Coalition ANPR Comments, emissions from oil and gas sector sources in Indian country, especially in the Uinta and San Juan Basins, contribute to impairment of visibility in several Class I areas.[134] Specifically, emissions from oil and gas development on the Uintah and Ouray Reservation cause or contribute to visibility impairment in at least eight Class I areas near the Uinta Basin, including Dinosaur National Monument and Capitol Reef, Canyonlands, Arches, and Black Canyon of the Gunnison National Parks. As the National Park Service noted, modeled impacts from a recent analysis of oil and gas development in the nearby White River Field Office Resource Management Area concluded that additional oil and gas activity "would 'cause visibility impairment' at Dinosaur National monument."[135] Oil and gas development in the San Juan Basin may also contribute to visibility impairment in Class I areas, including Mesa Verde National Park.[136]

Earthjustice et al. (0044): Although EPA proposes a FIP to streamline the permitting process, the Proposed FIP does not achieve the goals of the case-by-case permitting EPA established in the tribal NSR rule—namely adequate protection of public health and the environment. The Proposed FIP would allow minor oil and gas sources to forego preconstruction review and permitting altogether and instead simply self-certify that they will comply with the six regulations that already apply within Indian Country.

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[132] See, e.g., Jamie Kay Ford & Erick Giles, Climate Change Adaptation in Indian Country: Tribal Regulation of Reservation Lands and Natural Resources, 41 WM. MITCHELL L. REV. 519, 524-26 (2014) (Appx. at 1001); Sarah Krakoff, American Indians, Climate Change, and Ethics for A Warming World, 85 DENV. U. L. REV. 865, 865 (2008) (Appx. at 1023); accord Press Release, U.S. Dep't of the Interior, Secretary Jewell Announces New Tribal Climate Resilience Program (July 16, 2014), https://www.doi.gov/news/pressreleases/secretary-jewell-announces-new-tribal-climate-resilience-program.

[133] 42 U.S.C. §§ 7491, 7492(e); see also 40 CFR § 81.000 (listing areas in which visibility has been determined to be an important value).

[134] Coalition ANPR Comments at 9–11.

[135] Memorandum from Reg'l Dir., Intermountain Region, Nat'l Park Serv., to Planning and Envt'l Coordinator, BLM 9 (2013), (Appx. at 1049).

[136] See Marco A. Rodriguez, Michael G. Barna & Tom Moore, Regional Impacts of Oil and Gas Development on Ozone Formation in the Western United States, 59 J. Air &Waste Mgmt. Ass'n 1111, 1111 (2009) (Appx. at 1061).

EPA has provided no analysis of whether these six regulations will adequately address the air quality problems in Indian Country or ensure compliance with the NAAQS, Prevention of Significant Deterioration Program, and the Visibility Protection program. [42 U.S.C. §§ 7602(y), 7470–71, 7473, 7491.] Given the existing air quality concerns and growing development within Indian Country, EPA should do more, including regulating existing sources.

Earthjustice et al. (0044): EPA offers no explanation for how requiring operators to simply self-certify that they will comply with existing regulations is sufficient to ensure air quality is protected. Nor does EPA provide any analysis of how the six regulations will ensure protection of the NAAQS or adequately protect public health and the environment. Without any analysis, EPA simply states "we believe that the proposed oil and natural gas FIP contains a robust set of emission control requirements and compliance monitoring and reporting provisions that will help ensure that a new or modified true minor source would not cause or contribute to a NAAQS or PSD increment violation." [80 FR 56568.] Given the existing air quality concerns in Indian Country—including existing violations of the NAAQS standards—and the expected growth in development, EPA cannot make this assumption. [See infra pp. 5–8.]

In support of the Six Regulation approach, EPA notes that the emissions standards encapsulated in the Six Regulation reflect the Best System of Emission Reduction ("BSER"), MACT, and Generally Available Control Technology ("GACT") for various pollutants and/or emissions sources. [80 FR 56569.] However, these are not necessarily sufficient. As discussed above, the purpose of the minor source permitting program is to ensure protection of the NAAQS and prevent deterioration of air quality. Likewise, EPA's regulations state that the agency "shall promulgate without unreasonable delay such Federal implementation plan provisions as are necessary or appropriate to protect air quality."[137] EPA cannot demonstrate that these regulations are all that is necessary and appropriate to protect air quality in Indian Country. Given the growth of oil and gas activity in Indian Country and the existing air pollution in many parts of Indian Country, without going beyond the six regulations, the Proposed Rule will be inadequate to protect public health and the environment in Indian Country.

Furthermore, as demonstrated in comments on the Proposed Amended NSPS Rule, EPA's proposed subpart OOOOa NSPS standards, which are among the six regulations, represent a good step forward, but omit certain important elements from the scope of coverage. When finalizing the OOOOa rule, EPA must strengthen the LDAR requirements and controls for pneumatic devices and compressors, and expand coverage to include well site compressors, storage tanks, and liquids unloading events. See Proposed Amended NSPS Comments.

Similarly, as past comments and petitions have demonstrated, the NESHAPs for oil and gas sector sources also do not necessarily represent MACT or GACT. The existing NESHAPs rules are themselves inadequate to protect public health. As a 2014 rulemaking petition explains, EPA's area source category for the oil and gas sector covers only glycol dehydrators, and does not cover any other equipment. HAPs Rulemaking Petition at 24-25. Because emissions from oil

[137] 40 CFR § 49.11(a); see also 42 U.S.C. § 7602(y); Ariz. Pub. Serv. Co. v. EPA, 562 F.3d 1116, 1126 (10th Cir. 2009) ("[T]he key criterion in determining the adequacy of any [FIP] is attainment and maintenance of the national air standards.").

and gas sector sources typically fall below the threshold for regulation as a major source under CAA § 112, by failing to regulate HAPs emissions from other emissions sources in the oil and gas sector, EPA is allowing a significant volume of air toxics to harm public health.[138] According to EPA's own analysis, the 2012 NESHAPs revisions only reduced annual oil and gas sector HAPs emissions by 12,000 to 20,000 tons per year ("tpy"), leaving over 100,000 tpy unregulated.[139] Given this shortfall, a coalition of environmental and public health groups requested that EPA regulate HAPs emissions from all sources in the oil and gas sector in order to adequately protect public health in Indian country and nationwide.[140] Public health and environmental organizations provided further evidence that the current regulations do not represent MACT by proving that EPA should regulate storage tanks without the potential for flash emissions, which it proposed to do, but chose not to do in the final 2012 NESHAPs rule.[141] Additionally, the current regulations do not represent MACT because EPA should regulate non-BTEX HAPs emissions from small glycol dehydrators.[142, 143]

In sum, EPA's decision to streamline permitting without ensuring protection of public health violates the CAA. Existing rules have neither been sufficient to preserve healthy air in Indian Country nor do they necessary represent MACT, and GACT. There are also important gaps in the proposed OOOOa NSPS that EPA must address. In the FBIR FIP, EPA rebutted a comment suggesting that streamlining was the purpose which animated the rule by explaining that "our primary purpose for developing rules to regulate air emissions is to meet the requirements of the CAA to protect the public health and the environment by providing those living on the Reservation the same level of air quality and health protection as people living outside the Reservation." [78 FR 17839.] That should be the goal here as well.

Earthjustice et al. (0044): EPA should similarly provide criteria for when site-specific permits will be required for new sources and increase opportunities for public and tribal engagement around site-specific permits. EPA states that it "may require owners or operators to obtain a site-specific permit in lieu of complying with the proposed FIP to ensure protection of the NAAQS." [Id.] Environmental and Tribal Commenters support EPA retaining the flexibility to require site-

[138] See 42 U.S.C. § 7412(a)(1)-(2); see generally Comments of Earthjustice et al. on Source Determination for Certain Emission Units in the Oil and Natural Gas Sector, Dkt. ID No. EPA-HQ-OAR-2013-0685 (Dec. 4, 2015) ("Source Determination Comments") (discussing how EPA's source determination procedures prevent most oil and gas sector sources from being regulated as major sources).

[139] HAPs Rulemaking Petition at 25 (citing 77 FR 49490, 49,533-34 (Aug. 10, 2012).

[140] See Comments of Sierra Club et al., Comments on National Emission Standards for Hazardous Air Pollutants Review, Dkt. ID No. EPA-HQ-OAR-2010-0505 at 14 (Nov. 30, 2011) ("NESHAPs Comments") (Appx. at 1129); Earthjustice et al., Petition for Reconsideration of Oil and Natural Gas Sector: National Emission Standards for Hazardous Air Pollutants Review, Dkt. ID No. EPA-HQ-OAR-2010-0505 at 6 (Oct. 15, 2012) ("NESHAPs PFR") (Appx. at 1324).

[141] NESHAPs Comments at 96; NESHAPs PFR at 40.

[142] NESHAPs Comments at 95; NESHAPs PFR at 42-44.

[143] EPA has undertaken a process to gather more information about oil and gas sector HAPs emissions. On November 4, 2015, EPA released a notice of publication in the federal register of a request for information related to HAPs emissions from the oil and gas sector. EPA, Oil and Natural Gas Sector: National Emission Standards for Hazardous Air Pollutants; Request for Information (Docket No. EPA-HQ-OAR-2015-074) (Nov. 4, 2015), http://www3.epa.gov/airquality/oilandgas/pdfs/20151104fr.pdf. EPA specifically requested data about HAPs emissions from storage tanks without potential flash emissions, a source category which it proposed to regulate, but chose not to regulate in the final 2011 NESHAPs rule. Id. at 9-12. EPA also requested data about non-BTEX HAPs emissions from small glycol dehydrators. Id. at 12–15.

specific permitting prior to a nonattainment designation, but recommend that EPA provide additional criteria for when this will occur.

EPA states that "the Reviewing Authority may determine that the source is not sufficiently controlled under the proposed FIP to protect the NAAQS in the area of the proposed project (e.g. if the measured design value for the area is close to or above the level of the NAAQS)." [80 FR 56564.] Rather than these vague and undefined criteria, we recommend that EPA require site-specific permitting under similar scenarios as FIPs. For example, EPA should require site-specific permitting when two years of monitoring data establishes average fourth-highest values above 60 ppb. As with reservation-specific FIPs, EPA should rely on all reliable monitoring data in the region. EPA should also provide tribes, tribal members, and members of the public with a means to request site-specific permits. Finally, EPA should implement procedures to ensure that tribes and members of the public receive sufficient notice and opportunity to comment on any future site-specific permits that will be issued.

Earthjustice et al. (0044): Modeling is also useful outside of the reservation-specific FIP process. EPA should consider requiring operators to conduct modeling to determine whether and how proposed new and modified sources will contribute to degradation of air quality as part of the site-specific permitting process.

EDF ANPR Comments – referenced by Earthjustice et al. (0044): EPA appropriately acknowledges that there is currently a gap in regulation of air quality in Indian country, where until recently, there have been limited means to address pollution threats from minor sources.[144] This gap remains especially glaring in light of air quality threats from the existing and burgeoning oil and gas industry on tribal lands, documented above. [See supra, Section I.] The lack of minor source regulatory programs in Indian country denies tribal communities the protections that Congress intended in enacting Section 110(a)(2)(A) of the CAA, which requires states such pollution control measures "as may be necessary or appropriate" to meet the requirements of the CAA, including the maintenance of air quality standards. [Id. § 7410(a)(2)(A).] Accordingly, EPA action to address this gap is needed to comply with "the basic requirement that the Agency will promulgate a FIP for affected tribal areas within some reasonable amount of time" where tribal efforts have not produced an approved implementation plan. [TAR, 40 CFR § 49.11(a)]

EDF ANPR Comments – referenced by Earthjustice et al. (0044): A protective FIP is the best method of regulating emissions from oil and gas production on tribal lands because it would allow the agency to comprehensively and consistently address emissions from the oil and gas sector. A FIP should address both new and existing sources, be uniform across regions to provide adequate public health protections and administrative efficiency, and include reasonable flexibility to accommodate innovative and effective pollution control strategies. EPA has demonstrated through the Fort Berthold FIP that this method is an effective and workable tool to address oil and gas emissions on tribal lands.

[144] See Review of New Sources and Modifications in Indian Country, 76 FR 38748, at 38749–50 (July 1, 2011) ("Prior to this action there has been no Federal permitting mechanism for minor sources in Indian country…").

EDF ANPR Comments – referenced by Earthjustice et al. (0044): We respectfully urge EPA to adopt a uniform FIP that requires bedrock public health protections in tribal lands across the country. EPA acknowledged in the ANPR that "uniform standards that apply to all sources are less complex to establish and implement than requirements that vary." [Id. at 32517] Further, all of the control technologies discussed below and in the appendix to these comments are broadly applicable and would not require site-specific permitting. A consistent FIP would also increase regulatory certainty for operators on tribal lands. Alternatively, EPA notes that "[i]nconsistent regulations could also be more difficult and complicated for the regulated community to understand and comply with, especially for companies with operations in multiple areas." [Id.] To write a rule that varies by region or basin, EPA would need additional time for the rulemaking process, which would delay compliance schedules, the time required to achieve emissions reductions, and the corresponding public health benefits.

EDF ANPR Comments – referenced by Earthjustice et al. (0044): EPA should broadly apply the protective measures of a FIP to all tribal lands where significant oil and gas development is taking place, and not just areas that are not in attainment for ozone. When EPA promulgates a FIP under its gap-filling authority, EPA has both the authority and the responsibility to craft a program that is fully protective of public health and takes into account the multi-pollutant benefits that result from controlling oil and gas emissions. In its Federal Minor NSR Rule, also a FIP, EPA laid the groundwork to protect tribal lands from emissions of a group of pollutants that included criteria pollutants and their precursors, such as particulate matter, sulfur dioxide, and nitrogen oxides, but also included other pollutants of concern, such as hydrogen sulfide and municipal waste combustor emissions. [See 40 CFR § 49.153 table1] Here too, EPA should issue standards that ensure that modern technologies and practices will be used to minimize the full suite of harmful emissions from the oil and gas sector, including but not limited to those areas that are in nonattainment or on the verge of nonattainment with the ozone NAAQS.

Comprehensive and uniform emission standards for oil and gas sources are also consistent with the basic purposes of NSR, which include "protect[ing] public health and welfare from any actual or potential adverse effect which . . . may reasonably be anticipate[d] to occur from air pollution." [Id. § 7470(1).] In addition, it is a basic principle of the CAA that states – and EPA, when standing in the shoes of a state, can issue standards that go beyond the minimum requirements of the CAA in protecting public health. As one federal appellate court has recognized, "there is no requirement that a gap-filling federal plan be only as strict as necessary to meet national air standards."[145]

EDF ANPR Comments – referenced by Earthjustice et al. (0044): EPA has broad legal authority and responsibility to protect air quality in Indian country, and in particular to do so by issuing a comprehensive FIP that protects tribal communities from the full suite of harmful pollutants from existing oil and gas sources as well as new and modified sources—as EPA suggests it is considering in the ANPR. EPA's authority to promulgate a comprehensive FIP for

[145] Ariz. Public Service Co. v. EPA, 562 F.3d 1116, 1130 (10th Cir. 2009) (upholding a source-specific FIP on tribal land that surpassed the minimum requirements of the Clean Air Act). See also S. Terminal Corp. v. EPA, 504 F.2d 646, 668 (1st Cir. 1974) (The CAA's "statutory scheme would be unworkable were it read as giving to EPA, when promulgating an implementation plan for a state, less than those necessary measures allowed by Congress to a state to accomplish federal clean air goals." (emphasis added)).

minor oil and gas sources on tribal lands derives from Section 301(d) of the CAA. [42 U.S.C. § 7601] Section 301(d) provides that EPA "may provide, by regulation, . . . means by which the Administrator will directly administer" CAA programs when the Administrator determines that is "inappropriate or administratively infeasible" for tribal authorities to implement them. [42 U.S.C. § 7601(d)(4)] When acting pursuant to its section 301(d) authority, EPA may administer a CAA program "in the shoes of a tribe" and establish protections under the Clean Air Act.[146]

EPA's authority to issue a protective FIP for the oil and gas sector derives from section 301(d) and the Tribal Authority Rule (TAR), in which EPA delineated the CAA provisions for which EPA would treat tribes in the same manner as states.[147] The TAR specified that EPA would not treat tribes as states with respect to statutorily prescribed deadlines for submitting State Implementation Plans ("SIPs") and FIPs. In doing so, EPA recognized that the agency "is not relieved of its general obligation under the CAA to ensure the protection of air quality throughout the nation, including throughout Indian Country." [TAR, 63 FR 7265] Further, in fulfilling this general obligation "EPA may act to protect air quality pursuant to its 'gap-filling' authority under the Act as a whole," even "in the absence of an express statutory requirement" to promulgate a FIP. [Id. (citing CAA Section 301(a)).] Where a gap in protection of air quality exists, EPA has broad authority to act to protect air quality, and discretion to determine what rulemaking is necessary and appropriate to protect air quality.[148]

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): National uniform requirements for new and existing sources across all areas of Indian country are necessary to protect public health and welfare and are cost-effective to implement. Even with baseline controls, however, certain regions may need additional attention. Therefore, EPA's approach must also be flexible enough to account for regional variation and industry growth over time. We recommend an approach that includes baseline FIP for new and existing sources, regional FIPs for areas that are at or approaching air quality standards, and opportunities for increased public input where sensitive resources are at stake.

EDF ANPR Comments – referenced by Earthjustice et al. (0044): A FIP could incorporate mechanisms to promote technological innovation. A company could apply for alternative site-specific controls if it demonstrates that the proposed measures would exceed the FIP's requirements. In this way, a FIP can incorporate flexibility to encourage industry to experiment with new monitoring and emissions control technology. This structure would help limit the number of permit applications while advancing other important policy goals.

EDF ANPR Comments – referenced by Earthjustice et al. (0044): Promulgating rigorous emissions controls through a FIP is consistent with economic development. For instance, several of the cost effective control measures highlighted by the ICF Report have been successfully applied to new, existing, and modified sources through the Fort Berthold FIP, at a cost

[146] Michigan v. EPA, 268 F.3d 1075, 1082 (D.C. Cir. 2001).
[147] Indian Tribes: Air Quality Planning and Management, 63 FR 7254 (Feb. 12, 1999) [hereinafter TAR]; see Arizona Public Service Co. v. EPA, 211 F.3d 1280 (D.C. Cir. 2000) (upholding the TAR in its entirety).
[148] Arizona Public Service Co. v. EPA, 562 F.3d 1116, 1125 (10th Cir. 2009).

effectiveness of less than $15 per ton VOC reduced.[149] The Fort Berthold FIP requires control measures such as VOC reductions from well completions and recompletions and control of casing head emissions.[150]

States that have implemented robust emissions control regulations have experienced more growth in oil and gas production than states without similar regulations. For example, despite promulgating more stringent emissions control requirements, Colorado's operational rig count grew 21 percent annually between 2000 and 2010, a rate higher than Texas, Oklahoma, New Mexico and Louisiana, and higher than the overall U.S. growth rate of 12 percent.[151] After Colorado's green completion requirement was promulgated in April 2009, horizontal well permit approvals increased 126 percent from 2009 to 2010, and 147 percent in 2011.[152] Similarly, Wyoming implemented green completion requirements in March 2010, and horizontal drilling permit approvals increased over 900 percent in two years. [Id.]

Lastly, emission controls that capture previously vented, flared, or leaked natural gas will lead to increased royalty payments for tribal communities.[153]

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): EPA must ensure opportunities for meaningful tribal and public comment. The streamlined approaches proposed by EPA, including FIP, general permit, and permit by rule, do not provide for sufficient public input. A FIP or a permit by rule approach would provide only a one-time opportunity for public comment. Although a general permit allows for public input when a source applies to be covered under the general permit, this input is limited to whether the source qualifies for the relevant source category. This limited public input is insufficient where sources are located near homes, schools, otherwise occupied building, and recreational areas, or are likely to impact sensitive receptors, like national parks, wilderness areas, or important tribal resources. Under these circumstances, we urge EPA to provide additional opportunities for public and tribal input. EPA could do this by requiring compliance with the Indian Country Minor NSR permitting procedures or, at a minimum, requiring additional opportunities for tribal and public participation as part of a FIP.

Western Energy Alliance (0045): Western Energy Alliance supports a number of components proposed in the National FIP. First, we support EPA's decision to use a FIP as the regulatory mechanism for this program. We agree with EPA's stated sentiment that "[t]he FIP would reduce burden for sources and the Reviewing Authority and prevent delays in new construction due to the minor NSR permitting obligation." [80 Federal Register 56557 (Sept. 18, 2015).]

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[149] Fort Berthold FIP, 78 FR 17849, 17851 (applying to new, existing and modified sources with a well completion or re-completion initiated by August 12, 2007).
[150] Id. at 17853.
[151] EIA, Natural Gas Data, http://www.eia.gov/dnav/ng/ng_pri_sum_dcu_nus_a.htm.
[152] Baird Equity Research, Energy Policy: Upstream, Unconventional Drilling Regulations—Quarterly Update 11 (Mar. 16, 2012), https://baird.bluematrix.com/docs/pdf/70b8e0c5-7762-49ca-be28-3d8b3bcc12ba.pdf?co=Baird&id=jpolson@bloomberg.net&source=mail.
[153] 25 CFR § 212.41; see also 25 CFR § 211.41; 30 CFR § 1206.52–53. A GAO report estimates that $58 million in federal royalty payments was lost in 2008 nationwide due to natural gas venting and flaring, 40 percent of which could be captured economically. GAO, at 24–25.

Western Energy Alliance (0045): EPA's Site-Specific Permitting Authority under the Proposed National FIP Is Overly Broad and Potentially Exceeds Agency Authority - Western Energy Alliance is concerned with EPA's proposal to require minor site-specific permits on a case-by-case basis, in lieu of the streamlined registration process provided in the National FIP. The proposal grants EPA with overly broad and unrestricted discretion to require site-specific permits. Proposed 40 CFR Section 49.101(b)(3) provides that EPA may require owners and operators of oil and natural gas production facilities to obtain a site-specific permit "to ensure protection of the NAAQS." [80 Federal Register 56564, 56573 (Sept. 18, 2015).] EPA further expands on its discretion in the preamble stating, "the Reviewing Authority may determine that the source is not sufficiently controlled under the proposed FIP to protect the NAAQS in the area of the proposed project (e.g., if the measured design value for the area is close to or above the level of the NAAQS). In that circumstance, the Reviewing Authority can require the minor source to obtain a site-specific permit." [80 FR 56564.] The authority laid out in this proposal to require site-specific permitting is too broad.

American Petroleum Institute (API) (0046): While the O&G FIP acknowledges several practical considerations for permitting oil and natural gas sources, the proposed program falls short of many of the streamlining permitting objectives mentioned above that are found in corresponding state programs including:

- The proposed O&G FIP is based on a pre-construction registration process rather than a post-project notification process.
- The proposed O&G FIP gives EPA overly broad discretion to mandate source-specific permitting for minor sources and modifications.

American Petroleum Institute (API) (0046):

Proposed Language

> *(3) Owners and operators of facilities that meet the criteria specified in paragraph (b)(1) of this section that the Reviewing Authority requires to obtain a site-specific permit to ensure protection of the NAAQS as specified in 40 CFR §49.155 before beginning construction are not required to comply with §§49.101 to 49.105 [§49.101(b)(3)].*

Issue

This provision appears to allow the permitting authority to require case-by-case permitting of an affected source when needed "to ensure protection of the NAAQS." API does not object to this provision in concept and we understand that the FIP should not be available as an alternative to case-by-case permitting in situations where compliance with the FIP would not prevent a NAAQS violation.

Due to the long lead times for obtaining site-specific permits, if EPA rejects the registration and requests a site-specific permit, it can result in significant impacts to energy development and considerable uncertainty for enforcement risk to operators. The language in §49.101(b)(3) provides no criteria for which EPA intends to pursue this authority. Accordingly, different permit writers could employ this authority inconsistently thereby disadvantaging one company from another. Costs associated with oil and gas development accrue on a daily basis and open-ended

delays from arbitrary criteria can result in significant economic impacts to oil and gas companies who met the criteria outlined in the O&G FIP for registering their source under the streamlined permitting program.

The rule should include additional criteria to make sure this provision is limited to situations where the affected source contributes to an air quality violation. For example, it is often the case in PSD permitting that modeling predicts the existence of a NAAQS exceedance, but the proposed source or modification is determined not culpable for the predicted exceedance because its contribution to the predicted exceedance is too small. In other words, a PSD permit can and should be issued for a proposed source or modification – even when modeling predicts a NAAQS exceedance – when it is determined that the source or modification does not cause or contribute to the predicted exceedance.

The O&G FIP should include similar limits on the ability of a permitting authority to require case-by-case permitting for an affected source otherwise eligible for the FIP.

American Petroleum Institute (API) (0046):

Recommendation

With the inclusion of a transition policy allowing the proposed O&G FIP to be available for use in marginal and moderate nonattainment areas, the authority to require site-specific permitting to ensure protection of the NAAQS pursuant to §49.101(b)(3) should no longer be required.
If EPA believes it must maintain this authority, the Agency must specify in the Rule specific criteria for which it will use its authority. EPA should provide supporting documentation justifying any rejection of an oil and gas source to utilize the O&G FIP registration process that otherwise meets the qualifying criteria outlined in the Rule. Due to the considerable costs associated with project delays, the Agency should notify the operator of such a determination within 15 calendar days of receipt of registration package.
API suggests the following changes to §49.101(b)(3):

> *(3) If sufficient evidence is provided on the record that a proposed source would cause or contribute to a NAAQS exceedance, the Reviewing Authority may require a site-specific permit as specified in 40 CFR §49.155 before beginning construction. Under this scenario, the Reviewing Authority will notify the owner or operator of the requirement to obtain a site-specific permit and provide the corresponding evidence for contributing to a NAAQS exceedance within 15 calendar days of receipt of the registration package [§49.101(b)(3)].*

American Petroleum Institute (API) (0046):

Proposed Language

> *Owners and operators of new true minor oil and natural gas sources or minor modifications at existing true minor oil and natural gas sources as determined pursuant to 40 CFR 49.153(a) that meet the criteria specified in paragraphs (b)(1)(i) through (b)(1)(v) of this section, shall comply with the requirements of §§49.104 and 49.105,*

unless the owner or operator obtains a site-specific permit as specified in paragraph (b)(2) or (b)(3) of this paragraph [§49.101(b)(1)].

Issue

As API explained in its petition for reconsideration, emission sources, such as internal combustion engines, often are relocated on short notice, and, on occasion relocation must be changed with little advance warning to prevent significant operational disruption such as well shut-ins. Given these realities, a 30-day advance notice requirement is incompatible with relocation practices in the oil and gas sector.

It is common practice in the oil and gas sector to maintain a pool of engines so that when an engine in the field needs repairs or maintenance that engine can be removed and immediately replaced with an engine from the pool. The removed engine is then taken to another location for the needed repairs or maintenance to be performed. This practice avoids the delays and potential safety hazards associated with on-site maintenance. To minimize production disruptions and align with state permitting programs for oil and gas such as Colorado, Wyoming, North Dakota, and Utah, the proposed FIP for oil and gas operations should authorize such engine swaps.

Recommendation

API recommends that the proposed O&G FIP clarify that the following routine changes do not constitute a "modification" subject to the registration process. These changes should be allowed without requiring pre-registration or notification prior to making the change as long the change does not impact the facility's minor source status:

1. Replacement-in-kind of internal combustion engines and temporary engines
2. Control device additions, removals, and replacements (as allowed by federal rules)

Within 60 calendar days of completing of one of the authorized equipment changes, owners or operators can provide an updated registration package identifying any changes to the emission units provided in the existing registration package.

Owners and operators of new true minor oil and natural gas sources or minor modifications at existing oil and natural gas sources as determined pursuant to 40 CFR 49.153(a) that meet the criteria specified in paragraphs (b)(1)(i) through (b)(1)(v) of this section, shall comply with the requirements of §§49.104 and 49.105, unless the owner or operator obtains a site-specific permit as specified in paragraph (b)(2) or (b)(3) of this paragraph [§49.101(b)(1)].

…

(vi) For purposes of Federal Implementation Plan for oil and natural gas production sources located in Indian Country, the following activities are not considered to constitute "modifications" subject to the pre-construction process described in 40 CFR 49.160:

A. Replacement-in-kind of internal combustion engines and temporary engines
B. Control device additions, removals, and replacements (as allowed by federal rules)

American Petroleum Institute (API) (0046): The CAA provision mandating minor NSR programs is section 110(a)(2)(C). It provides significant flexibility to permitting agencies as to how they structure their permitting programs for the construction and operation of minor sources. Courts have ruled that states have wide discretion in the design of their programs.[154] Given the difficulties in quantifying emissions for oil and gas production operations prior to production, several states have used the available flexibility to implement oil and gas-specific programs to customize the process in order to take advantage of the flexibility provided in the Act and ensure accurate information is provided during the initial permitting process to avoid unnecessary burden to the permitting agencies to update information submitted before emissions data is available. In addition to creating agency processing burden, the submittal of inaccurate information can create confusion for operators, inspectors, and the public. EPA should follow the examples of the states that have addressed oil and gas sources in streamlined minor NSR programs. This will ensure oil and gas development on Indian lands is not disadvantaged as compared to pursuing development on non-Indian lands with established state streamlined permitting processes.

The EPA's summary of the above comments and the EPA's responses to these comments on the proposed amendments to the Federal Indian Country Minor NSR rule are as follows:

Comment #19: One commenter (0031) proposed that a general permit or permit by rule would be the best permitting approach for Indian country and could allow for legally and practically enforceable limits. They further suggested that ambient air quality impact modeling could be used to develop the general permit or permit by rule to ensure protection of the NAAQS.

Response #19: In the Advanced Notice of Propose Rulemaking (ANPR), the EPA committed to developing an alternative to source-specific permits primarily to avoid delays in new construction due to our inability to process potentially thousands of true minor oil and natural gas source permits in an acceptable timeframe. Comments received on the ANPR and on the proposed FIP were generally supportive of a FIP approach, which we are finalizing. As indicated above, we continue to believe that the FIP approach can best protect air quality in attainment, attainment/unclassifiable and unclassifiable areas, while providing streamlined permitting. We do not believe that modeling is necessary to ensure air quality protection in attainment, attainment/unclassifiable and unclassifiable areas given the comprehensive nature of the requirements in the eight standards underlying this FIP.

Comment #20: Several commenters (0032, 0039, 0044, 0045) expressed concern that a FIP would not provide an opportunity for comment about a specific facility's coverage under a FIP. In particular, commenters noted that there may be concerns specific to particular sites that are not addressed within the existing FIP. One commenter noted that under a FIP, tribes and the public

[154] See Train v. NRDC, 421 U.S. 60, 79 (1975) ("The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110 (a) (2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards.").

are only provided a one-time opportunity to provide feedback on the proposed rule and would not be provided the opportunity to comment on individual sources proposed in their tribal area.

Response #20: The EPA agrees with the importance of providing opportunity for comment on the FIP. The EPA held three public hearings across the country[155] to solicit comments on the proposed FIP and also extended the public comment period on the proposed FIP by 21 days from November 14, 2015 until December 4, 2015. If the EPA requires a source-specific permit or develops an area-specific FIP, there will be additional opportunity for public comment on those specific permitting actions at that time.

In addition, new and modified sources under the FIP will have to register and provide source information and emissions. Each completed registration will be added to the EPA Regional Office web sites.[156] If a citizen has information that a particular source may not be complying with the FIP, or that compliance with the FIP may not be sufficient due to air quality concerns in a particular area, the information could be brought to the EPA's attention.

Comment #21: One commenter (0032) requested a commitment from the EPA to provide funding to tribes for the development of TIPs to regulate minor oil and natural gas sources specific to areas under their jurisdiction, including the potential future regulation of existing minor sources. One commenter expressed an interest in developing a TIP. The commenter noted that the EPA promulgated the "Tribal Authority Rule" in 1998 to provide more detailed criteria and procedures for tribes to be treated as states under the CAA if they seek CAA program approval, and that tribes are authorized to develop a comprehensive TIP and to seek full authority to monitor and enforce the NAAQS within their reservation. The commenter expressed interest in exploring the possibility of working toward a TIP so that it may one day assume primacy over certain regulatory functions and gradually expand its authority.

Response #21: The EPA supports tribes developing their own air programs and, as desired, TIPs. The EPA has historically provided funding and other technical support towards this goal, and we will continue to seek tribal air funding and support. In particular, we anticipate proactively supporting development of TIPs, especially in areas with air quality DVs above the NAAQS.

Comment #22: Several commenters (0038, 0039, 0045, 0046) expressed concern about provisions in the proposed FIP allowing the EPA the discretion to require source-specific permitting to "ensure attainment of the NAAQS" on a case-by-case basis. This might particularly affect areas in Indian country where design values are close to the current ozone NAAQS of 70 ppb. In addition, commenters expressed concern that given the 30-day notice provided for under the FIP, the notification that a facility has been denied coverage under the FIP and will be

[155] The dates and locations of the hearings were as follows: Denver, Colorado, September 23, 2015; Dallas, Texas, September 23, 2015; and Pittsburgh, Pennsylvania, September 29, 2015. "Source Determination for Certain Emission Units in the Oil and Natural Gas Sector; Oil and Natural Gas Sector: Emission Standards for New and Modified Sources; and Review of
New Sources and Modifications in Indian Country: Federal Implementation Plan for Managing Air Emissions From True Minor Sources Engaged in Oil and Natural Gas Production in Indian Country," U.S. Environmental Protection Agency, 80 FR 51991, August 27, 2015, https://www.gpo.gov/fdsys/pkg/FR-2015-08-27/pdf/2015-21255.pdf.
[156] For example, for EPA Region 8, the following web site will be used to provide the completed registration forms: https://www.epa.gov/caa-permitting/tribal-nsr-permitting-region-8.

required to obtain a source-specific permit might be received only at the last minute, causing financial burden on operators that have already initiated procurement of construction materials and labor. The commenters explained that the EPA should provide the criteria by which they will require source-specific permits, and should consider including modeling demonstrations as part of source-specific permitting. One commenter objected to the broad and unrestricted manner under which the FIP allows the EPA to require a source to obtain a source-specific permit, and requested that the EPA provide more definitive language on what critieria it would use to disallow a source to construct under the FIP and to require a source-specific permit.

Response #22: The EPA continues to believe that this FIP will be protective of air quality in attainment, attainment/unclassifiable and unclassifiable areas of Indian country, provided we retain the ability to require source-specfic permitting as needed to protect air quality. The EPA intends to make those determinations on a case-by-case basis. Factors we will consider include: levels of measured air quality relative to the NAAQS and rates of growth in oil and natural gas production activity and associated changes in emissions. Any decision to require source-specific permitting will apply to the entire area in question and to all sources planning to locate or expand in such area and we will provide advance notice to owners/operators and tribes in the affected area prior to a programmatic, area-wide imposition of source-specific permitting.

Comment #23: Several commenters (0039, 0040, 0044) encouraged the EPA to develop reservation-specific or region-specific FIPs that account for particular air quality concerns and that are consistent with the permitting rules and requirements of the surrounding states. This will help level the playing field between neighboring permitting jurisdictions and ensure that oil and natural gas development on tribal lands is not disadvantaged solely due to permitting differences. One commenter (0039) specifically referred to the Uintah and Ouray Indian Reservation, which is a tribal area at risk of nonattainment designation under the lowered ozone standard. The commenter noted that revenue generated from oil and natural gas development in this area is an important part of the tribal and regional economy. One commenter suggested that the EPA not wait until certain areas are re-designated as nonattainment to develop area-specific FIPs, but that the EPA should develop area-specific FIPs for areas in danger of re-designation immediately, notably the Uinta Basin and the San Juan Basin.

One commenter (0044) stated that the EPA should define "necessary or appropriate" by identifying more specific criteria for when reservation-specific FIPs will be issued. The commenter suggested that one such criterion would be ozone concentrations close to the NAAQS. The commenter further recommended that the EPA should base its decision on the availability of two years of valid monitoring data, considering data from all available, reliable monitors, regardless of whether the EPA has certified them as regulatory monitors.

Response #23: The EPA continues to believe that this FIP will be protective of air quality in attainment, attainment/unclassifiable and unclassifiable areas of Indian country. We, nevertheless, have the authority to promulgate reservation-specfic FIPs if we determine that it is necessary or appropriate to protect air quality. The EPA intends to make those determinations on a case-by-case basis. Factors we will consider include: levels of air quality the area in question is experiencing relative to the NAAQS, rates of growth in oil and natural gas production activity, and associated changes in emissions in the area in question. We will work with tribes in

developing any area-specific FIP that we determine is necessary or appropriate to protect air quality and will provide notice and an opportunity for comment prior to the promulgation of an area-specific FIP.

Comment #24: One commenter (0044) noted that tribal areas across the country currently include thousands of wells, and that there are thousands more forthcoming. Accordingly, all of this activity gives rise to ever-increasing emissions, exposes tribal members to harmful air toxics and impacts visibility in Class I areas such as national parks and wilderness areas. In addition, oil and natural gas sector emissions include large quantities of methane, which contributes to climate change. The commenter encourages the EPA to develop national uniform requirements to protect public health and welfare and to mitigate the severity of climate change.

Response #24: The EPA agrees with the commenters that oil and natural gas development in tribal areas results in emissions of harmful air toxics and other pollutants of concern. To mitigate these impacts, the proposed FIP included a uniform set of requirements from six current federal rules that apply in all tribal areas. In addition to these six, the EPA is adding two additional rules to the final FIP: 40 CFR part 60, subpart KKKK, and 40 CFR part 63, subpart ZZZZ. This suite of eight federal rules ensures: (1) comprehensive application of the latest control technologies and unit processes found in the oil and natural gas sector; and (2) that the sector is controlled under the FIP. In addition, as needed to protect air quality, the EPA will continue to develop area-specific FIPs and/or utilize source-specific permitting for areas with poor or degraded air quality. The Federal Indian Country Minor NSR rule is not intended to address climate change per se; however, compliance with a number of the included rules will lead to co-reductions in emissions of methane, which is a potent greenhouse gas (GHG).

Comment #25: One commenter (0046) requested to have certain activities not considered modifications, including in-kind replacement of internal combustion and temporary engines, as well as control device additions, removals, and replacements as allowed by federal rules. This would allow operators to move equipment off site to perform needed repairs or maintenance to avoid production delays and to mitigate potential hazards associated with on-site maintenance.

Response #25: On May 30, 2014, the EPA finalized revisions to the Federal Indian Country Minor NSR rule that exempted certain internal combustion engines from the permitting requirements under the rule.[157] These included certain emergency generators and stationary engines with a horsepower rating less than 50. The final rule also provided guidance to industry specifically in response to a comment regarding the relocation or replacement of single pieces of equipment (*e.g.*, an internal combustion engine) in the oil and natural gas sector. The source owner/operator should verify with its Reviewing Authority that the "matching" situation described in the preamble to the final May 30, 2014 rule, and its stated outcome, applies to its case. Concerning control device additions, removals, and replacements, a broad exclusion for consideration as a modification cannot be given. Changes regarding control devices have the potential to increase emissions, and, thus, the potential emissions impact would have to be assessed by the owner/operator. To the extent that these changes result in emissions increases

[157] "Review of New Sources and Modifications in Indian Country – Amendments to the Federal Indian Country Minor New Source Review Rule," U.S. Environmental Protection Agency, 79 FR 31035, May 30, 2014, https://www.gpo.gov/fdsys/pkg/FR-2014-05-30/pdf/2014-11499.pdf.

that fall below the minor NSR thresholds or satisfy the criteria under the definition of modification in §49.152, there would be no requirement to register the unit(s) or to make a change to a prior registration. Under §49.152, the following exemptions to modifications apply:

- A physical or operational change does not include routine maintenance, repair or replacement.
- An increase in the hours of operation or in the production rate is not considered an operational change unless such change is prohibited under any permit condition that is enforceable as a practical matter.
- A change in ownership at a stationary source.
- The emissions units and activities listed in §49.153(c).

4.1 Synthetic Minor Sources and Minor Modifications at Major Sources

Ute Indian Tribe (0039): The proposed FIP does not provide a streamlined approach for the Tribe's industry partners to obtain synthetic minor permits for oil and natural gas operations. By excluding synthetic minor sources from the FIP, operators must obtain synthetic minor permits through the complex and specific case-by-case permitting process established in §49.158. The absence of a streamlining mechanism would place oil and natural gas development on the Reservation at a distinct disadvantage when competing for development opportunities with adjacent state lands. To promote competition and reduce delays, EPA should consider including synthetic minor sources in its streamlining mechanism. Such an inclusion would both facilitate and streamline compliance with the minor NSR in Indian Country.

Ute Indian Tribe (0039): Minor modifications should not be subject to source-specific permitting and more burdensome review than the same size new source or modifications at minor sources. The Tribe is concerned about the applicability of the FIP if the Uinta Basin is designated nonattainment. Although EPA has provided streamlined minor NSR in nonattainment areas for other source categories, it has excluded oil and gas sources in nonattainment areas from streamlined minor NSR. As a result, source-specific minor NSR will apply to all minor source emission increases from oil and gas sources above 2 tons per year. Such a requirement will certainly limit oil and gas activity on the Reservation.

To both facilitate and encourage development on the Reservation, the FIP should be available for minor modifications at major sources and modifications at synthetic minor sources. Both of these modifications can be of the same size and type as modifications at a true minor source. Through the proposed rule, EPA limits the FIP to modifications at true minor sources. Requiring source-specific permitting for major sources and synthetic minors seems both inefficient and excessively burdensome.

QEP Resources, Inc. (0038): EPA must treat synthetic minor sources the same as true minor sources in the National FIP. EPA's decision to disregard synthetic minor sources in this proposal is problematic and significantly restricts the overall utility of the program.

The FIP does not establish a mechanism to limit the PTE for synthetic minor sources or synthetic minor modifications. A number of emission sources common in the oil and gas production sector are not subject to the six federal standards incorporated in the National FIP and therefore, there is

no mechanism to obtain federally enforceable limits for such sources outside of site-specific permitting. Please note the following examples:

- Storage vessels not subject to NSPS;
- Flares burning separator/treater gas (no NSPS/NESHAP applies to separators) that, without enforceable controls, may exceed major source thresholds in and of itself;
- Heaters not located at major sources of HAP and not subject to NESHAP DDDDD;
- Engines grandfathered from NSPS and not subject to control requirements under NESHAP ZZZZ;
- Area source glycol dehydration units not subject to controls under NESHAP HH; and
- Pneumatic pumps grandfathered from the forthcoming NSPS OOOOa.

QEP Resources, Inc. (0038): Longstanding EPA policy recognizes that general permits, permits by rule and FIPs are appropriate tools for creating synthetic minor sources. Take, for example, the FBIR FIP. [78 FR 17836 (Mar. 22, 2013).] As explained in the preamble of the National FIP, "The FBIR FIP does provide legal and practical enforceability for the use of VOC emission controls" [80 FR 56567.] These FBIR FIP controls provide operators with a predictable and reasonable timeline to permit new development. QEP requests these same types of legal and practically enforceable emission control options in the National FIP and supports the specific regulatory solution proposed by WEA in its comment letter filed with Docket 10 No. EPA-HQ-OAR-2014-0606.

Without specific limitations within the National FIP to limit the PTE for synthetic minor sources and synthetic minor modifications, an overwhelming number of operators in Indian country will have to obtain site-specific permits for future development. As a result, EPA will receive an overwhelming number of individual permit applications that will create an undue burden on the Agency and its resources. Furthermore, development efforts in Indian country will experience lengthy permitting delays and interruption in new construction, thereby disadvantaging production from Indian country compared to state lands.

Gas Processors Association (GPA) (0040): At the same time, however, GPA respectfully requests EPA make a number of enhancements to the program to make it more effective. Specifically, EPA should:

- Expand the scope of the proposed FIP to include both synthetic minor sources and gas processing plants as well as to allow voluntary participation for existing sources
- Include a self-certification in the registration to voluntarily limit emission rates below regulatory limits, similar to state programs

Gas Processors Association (GPA) (0040): While the proposed FIP would provide much-needed benefits to true minor sources that would otherwise be required to comply with site-specific preconstruction permitting requirements, it does not go far enough to ensure the continued competitiveness of oil and natural gas development in Indian Country. Therefore, GPA urges EPA to expand the scope of the FIP to include synthetic minor sources, as well as natural gas processing facilities. Streamlined permitting processes are commonplace in state-administered preconstruction review programs. Unlike the proposed FIP, however, state-administered

programs typically include both true minor and synthetic minor sources and also extend to both gathering and processing facilities. As proposed, the FIP would result in a more burdensome site-specific permitting approach for synthetic minor sources and gas processing plants than that used by most states. Under such an approach, oil and natural gas production in Indian Country would be at a competitive disadvantage due to higher permitting costs and longer permit lead-times. To avoid this situation and fulfill the federal government's fiduciary duties, the proposed FIP should be expanded as described below.

Gas Processors Association (GPA) (0040): GPA agrees with EPA that a streamlined process for approving new and modified sources in Indian Country can provide important benefits from both an environmental and business perspective. However, to fully realize EPA's goals and promote oil and gas development with appropriate environmental protections, it is critical that EPA expand the proposed FIP to incorporate synthetic minor sources.

As proposed, the FIP would apply only to true minor sources with a potential to emit that is below major source thresholds. [80 FR 56572.] Including synthetic minor sources in this streamlined permitting process would alleviate uncertainty for owners and operators in the oil and natural gas sector and provide necessary consistency with other preconstruction review programs administered by EPA and the states.

First, expanding the proposed FIP to include synthetic minor sources will provide regulatory certainty to GPA's members while also realizing the strongest environmental protection. Due to constantly changing conditions in oil and natural gas production, there is often some uncertainty about calculating a source's potential to emit at the time of construction. While GPA's members operate many sources that are true minor sources, the ability to operate as a synthetic minor source can often provide regulatory and operational certainty because the binding emissions limitations established in a synthetic minor permit ensure that a facility will remain a minor source as changes in demand for gathering lines and associated equipment occur. In addition, expanding the streamlined FIP to synthetic minor sources will reduce the administrative burden on both EPA and the regulated community by eliminating the need to prepare, review, and issue site-specific preconstruction permits for sources seeking to operate as synthetic minor sources. Further, while a synthetic minor option provides operators with consistency, predictability, and efficiency, it also provides important environmental benefits by creating an incentive for operators to reduce emissions below major source thresholds in order to avoid more onerous requirements associated with site-specific and/or major source PSD permitting, such as long permit lead times and complicated best available control technology ("BACT") demonstrations. Thus, providing an option for streamlined preconstruction review for synthetic minor sources will provide benefits for operators, for EPA, and for the environment.

Second, providing a streamlined preconstruction review process for synthetic minor sources is consistent with state permitting programs for the oil and natural gas sector and with EPA's precedent for other preconstruction review programs in Indian Country. Most states with significant oil and natural gas production have implemented general permits, permits by rule, or other streamlined permitting processes for preconstruction review that apply to both true minor and synthetic minor sources. Attachment 1 contains a table showing the state-level permit options commonly used by oil and gas sites. These programs are extremely effective, protect air

quality, and allow the continued development of oil and natural gas production without the risk of unnecessary delays caused by preconstruction review. As shown in Attachment 1, the median time to obtain construction approvals under these state-level permit options is approximately 30 days. In stark contrast, EPA is currently afforded one year after an application for a synthetic minor permit has been deemed complete to grant or deny the permit. [See 40 CFR § 49.158(b)(7).] Moreover, application of streamlined permitting to synthetic minor sources reduces the burden on state regulators that would otherwise strain their limited resources. For the same reasons, expanding the proposed FIP to include synthetic minor sources would ease the burden imposed on EPA's permit review staff.

Gas Processors Association (GPA) (0040): [The commenter attached a table on pages 11-14 of their written comments entitled "Attachment 1: COMPARISON OF COMMONLY USED STATE LEVEL PERMIT OPTIONS FOR OIL AND GAS SITES". This table compared fifteen "permit(s) commonly used by O&G sites" from ten state agencies, their construction approval timelines, and whether the permit contained federally-enforceable limit options.]

Gas Processors Association (GPA) (0040): EPA has previously used a FIP on the Fort Berthold Indian Reservation ("FBIR") to create federally and practicably enforceable synthetic minor source restrictions such that a site's potential to emit ("PTE") does not exceed PSD major source thresholds. [See 78 FR 17836, 17839-51 (Mar. 22, 2013).] EPA notes in the preamble to the FBIR FIP the benefits of this approach below:

> [P]preconstruction PSD permits are one mechanism available to the EPA to assure that emissions increases associated with economic development do not threaten the NAAQS. Under the Federal Tribal NSR rule, sources located on the FBIR may also obtain synthetic minor NSR permits to limit their emissions below major source levels. Either of these options would require that the EPA review and issue several hundred air permits to emissions limitations similar to those required by this FIP. We determined, therefore, that issuing this FIP, and imposing emission limitations for these sources at one time was a more efficient and streamlined mechanism than issuing individual permits. We believe that this is the best way to address the potential harm that these previously unregulated VOC emissions would create, and ensure that we are not inhibiting the growth of oil and natural gas due to the permitting process, which could put the Tribe at an economic disadvantage. Finally, while actual emissions for some sources may be lower than potential emissions, there are no federally and practicably enforceable emission control requirements for the affected equipment limiting the potential to emit. This rule imposes emission limitations that are federally and practicably enforceable. [Id. at 17839 (emphasis added).]

EPA offers no explanation in the proposal as to why it is excluding synthetic minor sources here.[158] Given this precedent and the successful implementation of streamlined permitting programs for synthetic minor sources at the state and federal level, there is simply no reason to limit the proposed FIP to true minor sources.

[158] See Dillmon v. NTSB, 588 F.3d 1085, 1089-90 (D.C. Cir. 2009) (citing FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1811 (2009)) ("Reasoned decision making … necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent.").

Furthermore, EPA has several options available to expand the scope of the proposed FIP to include synthetic minor sources while ensuring that all of the Clean Air Act's requirements for synthetic minor sources are met. EPA could look to existing state programs, including the many examples provided in Attachment 1 that currently administer a streamlined permitting process for the types of facilities that would be covered under the Proposed FIP. As GPA suggested in its comments on EPA's Advance Notice of Proposed Rulemaking, EPA could impose federally enforceable emissions limits through a self-certification process and/or sending a response letter to synthetic minor sources confirming authorization under the streamlined program. Both approaches are very common in states that use streamlined permitting programs. For example, many oil and gas sites in Texas are authorized under a permit by rule, and the Texas Commission on Environmental Quality's ("TCEQ's") rules specify federally-enforceable emission limitations for PBRs. [See 30 TAC §§ 106.4 and 106.6.] In addition, a site can submit a Form APD-CERT to the TCEQ to self-certify voluntary federally-enforceable emission limitations below any limits in a rule or permit for that source type. The TCEQ lists several purposes of this self-certification, including avoiding applicability of state and Federal major source rules, NSR major source permitting, and Title V major source permitting. Oklahoma offers several General Permits for oil and gas sources and allows federally-enforceable emission limitations to be established in the Authorization confirmation letter from the Oklahoma Department of Environmental Quality ("DEQ") or by the permittee in a Notice of Modification Form. Arkansas primarily authorizes compressor stations under a General Air Permit (1868-AGP-000). Sites requesting coverage under Arkansas' General Permit provide emissions on a Notice of Intent Form, and emission limitations are established through a Confirmation Letter from the Arkansas Department of Environmental Quality ("ADEQ"). [See ADEQ Permit #1868-AGP-000, Section III.3 and ADEQ Reg. 19.501.]

Gas Processors Association (GPA) (0040): [The commenter attached a table on pages 11-14 of their written comments entitled "Attachment 1: COMPARISON OF COMMONLY USED STATE LEVEL PERMIT OPTIONS FOR OIL AND GAS SITES". This table compared fifteen "permit(s) commonly used by O&G sites" from ten state agencies, their construction approval timelines, and whether the permit contained federally-enforceable limit options.]

Based on these examples and EPA's past practice, we urge EPA to include an option for operators to self-certify voluntary emission limits in order to construct a synthetic minor source under the FIP when the rule is finalized. Under such an approach, the operator would be able to certify emission limits below minor source thresholds and would then be legally bound by such limits. Because the proposed FIP is based on existing NSPS and NESHAP requirements, we urge EPA to further streamline the process by allowing such sources to demonstrate compliance with self-certified emissions limits by referencing existing monitoring, recordkeeping, and reporting requirements already established in those NSPSs and NESHAPs for these sources.

Gas Processors Association (GPA) (0040): While GPA supports EPA's efforts to provide a streamlined process for true minor sources in the oil and natural gas production sector, the proposed FIP does not go far enough and, unless changes are made, will disadvantage oil and gas development in Indian Country. As explained above, the vast majority of states with oil and natural gas resources have streamlined permitting programs that go beyond the scope of the

proposed FIP by including synthetic minor sources and natural gas processing plants. Because these state permitting programs offer more flexibility to both oil and natural gas producers, gatherers, and processors by increasing the types of sources that can qualify for streamlined preconstruction permitting, most companies would prefer to site their sources on non-tribal lands that are subject to state permitting instead of the more time-consuming, complicated, and costly site-specific permitting requirements that will apply to sources that do not qualify for the proposed FIP.

For example, consider a gathering company that is evaluating two sites for a new compressor station which will be a synthetic minor source, Site A in Indian Country and Site B in a nearby state. Since gathering pipelines often span several miles, it is common for a gathering company to have several siting options for a compressor station. Under the proposed FIP, the permitting process for Site A would likely take well over a year and the resultant permit conditions would be unknown in advance, creating equipment design uncertainties. On the other hand, Site B qualifies for a state-level streamlined permitting approach with known permit conditions and a prescribed 30-day issuance timeline. Absent other factors, a company would select Site B due to its efficiency and certainty. Indeed, compressor stations can be conceived, designed, installed, and put into operation in less than one year. Streamlined state-level permitting programs accommodate the fast-moving nature of the oil and gas industry, whereas EPA's proposed approach would be the limiting factor in starting construction for synthetic minor sources. This puts tribes at a significant economic disadvantage in attracting new investments in the oil and natural gas sector.

Therefore, it is imperative that EPA level the playing field between tribal and non-tribal land by adopting streamlined permitting programs that are similar in scope to those in competing states. As discussed above, EPA must include both synthetic minor sources and natural gas processing plants in its streamlined preconstruction review program. Indeed, EPA arguably has an obligation to do so here. As a trustee for tribal resources, the federal government has a fiduciary duty to protect and promote tribal resources.[159] A permitting program that creates systemic barriers to the development of oil and natural gas resources in Indian Country is inconsistent with that mandate. Thus, EPA has an obligation to develop regulatory programs for Indian Country that allow tribes to compete with other landowners with respect to oil and gas development. To ensure the competitiveness of oil and gas production in Indian Country, EPA must expand the FIP to include both synthetic minor sources and gas processing plants.

Enerplus (0041): The proposed FIP only covers true minor sources and does not establish any method to limit potential emissions for synthetic minor sources. Enerplus respectfully requests the EPA amend the proposed FIP to allow operators the option of requesting synthetic minor status during registration of facilities. The operator would request federal enforceability for limitations on production, throughput, or hours of operation for designated emission units. Operators would request synthetic minor status, identify the emission unit, identify the means of limitation (e.g. production limitation), and provide the numerical limitation. Operators would

[159] Two Shields v. United States, 119 Fed. Cl. 762 (Ct. Fed. Claims 2015) ("The BIA has a fiduciary duty to ensure that the Indians' mineral resources 'will be developed in a manner that maximizes their best economic interests and minimizes any adverse environmental impacts or cultural impacts resulting from such development'" (quoting 25 CFR § 212.1(a))).

then have an obligation to create records of the chosen limitation on a monthly basis and provide those records to EPA upon request.

By example, an operator could designate a wellsite facility in its application to EPA as requesting synthetic minor status with a limitation on annual oil production. Operators would be required to designate the numeric annual oil production limitation and track oil production on a monthly basis. The oil production limitation would then become federally enforceable.
This proposal provides a streamlined approach to limiting EPA's burden to process site specific permits through a practically enforceable means.

QEP Resources, Inc. (0038): EPA proposes to incorporate the definitions of "Potential to emit" and "Enforceable as a Practical matter" from 40 CFR § 49.152 into the National FIP. [See 40 CFR § 49.102 as proposed in 80 FR 56573.] 40 CFR § 49.152 defines "Potential to emit" as:

> the maximum capacity of a source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is enforceable as a practical matter. Secondary emissions, as defined at§ 52.21(b)(18) of this chapter, do not count in determining the potential to emit of a source.

Section 49.152 further defines "Enforceable as a Practical Matter" (used in the definition above) to mean enforceable by the "Reviewing Authority"- or, in other words, EPA or a tribe delegated to implement the FIP.

EPA's definition of "Enforceable as a Practical Matter" in 40 CFR § 49.152 conflicts with the D.C. Court ruling in National Mining Ass'n v. EPA, 59 F.3d 1351(D.C. Cir. 1995). It is important to be able to account for other enforceable limits because (1) EPA source-specific permitting for new sources and modifications can be burdensome and time-consuming; (2) NSPS and NESHAPs are not sufficient to limit PTE for some sources (as discussed below) and (3) EPA has not created synthetic minor limits in this FIP nor created a mechanism in this FIP to obtain limits in a streamlined manner. Other limits include limits imposed by the BLM or a Tribal authority. EPA's definition of "Enforceable as a Practical Matter" would not allow consideration of those limits. The D.C. court ruled that EPA must consider those other enforceable limits.

Accordingly, EPA must revise 40 CFR § 49.152 "Enforceable as a practical matter" by adding the bold words to read:

> Enforceable as a practical matter means that an emission limitation or other standard is both legally and practicably enforceable as follows:
> (1) An emission limitation or other standard is legally enforceable if **a government authority, federal or tribal,** has the right to enforce it.

Western Energy Alliance (0045): EPA Must Allow Other Federal Standards and Tribal Standards to Limit PTE - The National FIP states at 40 CFR § 49.102 Definitions: “As used in

§§ 49.101 through 49.105, all terms not defined herein shall have the meaning given them in the Clean Air Act, in subpart A, and subpart OOOOa of 40 CFR part 60, in the Prevention of Significant Deterioration regulations at 40 CFR 52.21, or in the Federal Minor NSR Program in Indian Country at 40 CFR 49.152." The Alliance understands this incorporation to mean that EPA proposes to include the definitions of "Potential to emit" and "Enforceable as a Practical Matter" in 40 CFR 49.152 into the National FIP. 40 CFR Section 49.152 defines "Potential to emit" as:

> the maximum capacity of a source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is enforceable as a practical matter. Secondary emissions, as defined at § 52.21(b)(18) of this chapter, do not count in determining the potential to emit of a source.

The definition above refers to limitations that are "enforceable as a practical matter." Section 49.152 separately defines "Enforceable as a Practical Matter" to mean enforceable by the "Reviewing Authority" or, in other words, EPA or a tribe delegated to implement the FIP. EPA's definition of "Enforceable as a Practical Matter" in Section 49.152 conflicts with the D.C. Court ruling in *National Mining Ass'n v. EPA*, 59 F.3d 1351(D.C. Cir. 1995). It is important to be able to account for other enforceable limits because (1) EPA source-specific permitting for new sources and modifications can be burdensome and time-consuming; (2) NSPS and NESHAPs may not limit PTE in some instances (as discussed below) and (3) EPA has not created synthetic minor limits in this FIP nor created a mechanism in this FIP to obtain limits in a streamlined manner. Other limits include limits imposed by the BLM or a Tribal authority. EPA's definition of "Enforceable as a Practical Matter" would not allow consideration of those limits. The D.C. court ruled that EPA must consider those other enforceable limits.

Accordingly, EPA should revise 40 CFR 49.152 "Enforceable as a practical matter" to read: Enforceable as a practical matter means that an emission limitation or other standard is both legally and practicably enforceable as follows:

> (1) An emission limitation or other standard is legally enforceable if a government authority, federal or tribal, has the right to enforce it.

Western Energy Alliance (0045): The National FIP Should Fill Existing Gaps in the Permitting Program for True Minor and Synthetic Minor Sources in Indian Country - The FIP as proposed does not provide any means for owners and operators to voluntarily obtain enforceable emission limitations on potential to emit (PTE). Owners and operators of stationary sources located within Indian country will be forced to seek such limitations via the existing synthetic minor permitting process. Furthermore, a number of emission sources common in the oil and natural gas production sector are not subject to the six Federal standards adopted in the National FIP and therefore, there is no mechanism to obtain federally enforceable emission limits for such sources outside of site-specific permitting or the synthetic minor permitting process. Please note the following examples:

- Storage vessels not subject to NSPS
- Flares burning separator/treater gas (no NSPS/NESHAP applies to separators) that, without enforceable controls, may exceed major source thresholds in and of itself
- Heaters not located at major sources of HAP and not subject to NESHAP DDDDD
- Engines grandfathered from NSPS and not subject to control requirements under NESHAP ZZZZ
- Area source glycol dehydration units not subject to controls under NESHAP HH
- Pneumatic pumps grandfathered from the forthcoming NSPS OOOOa

EPA has set precedent with policies to develop general permits, permits by rule and FIPs for common types of emissions units and minor sources to streamline the permitting process. Take, for example, the Fort Berthold Indian Reservation (FBIR) FIP. [78 FR 17836 (Mar. 22, 2013).] EPA promulgated a reservation-specific FIP "to establish enforceable control requirements for reducing VOC emissions from oil and natural gas production activities on the FBIR in North Dakota." [Id. at 17838.]

The FBIR FIP interim final rule provides a helpful explanation for the FBIR FIP's utility and value:

> "[O]wners and operators of oil and natural gas operations producing from the Bakken Pool on the FBIR are potentially subject to the Federal preconstruction permitting requirements found in the Federal rules at 40 CFR 52.21 (Prevention of Significant Deterioration of Air Quality), and 40 CFR 49.151 through 49.161 (Federal Tribal NSR Rule). However, on the FBIR only NSPS OOOO and NESHAP HH provide legally and practicably enforceable VOC control requirements outside of the Federal pre-construction permitting requirements. Further, NSPS OOOO only applies to new and modified facilities and only to the oil storage tanks being utilized in the Bakken Pool operations. Thus, most owners and operators of oil and natural gas activities producing in the Bakken Pool must obtain preconstruction permits before production can begin, or if they are not obligated to obtain a permit face no control obligations whatsoever." [77 FR 48878, 48882 (Aug. 15, 2012).]

Owners and operators of production facilities within areas of Indian country outside of the FBIR face a similar regulatory gap. Only NSPS OOOO and NESHAP HH provide legally and practicably enforceable VOC control requirements outside of the Federal pre-construction permitting requirements. Similarly, only certain NSPS and NESHAP standards provide legally and practicably enforceable control requirements for regulated NSR pollutants other than VOC that are or may be emitted from stationary internal combustion engines and other sources commonly used within the industry.

As explained in the preamble of the National FIP, "The FBIR FIP does provide legal and practical enforceability for the use of VOC emission controls…" 80 FR 56567. These FBIR FIP control mechanisms provide operators with a predictable and reasonable timeline to permit new development. We request the option for these same types of legal and practically enforceable

emission controls in the National FIP. Accordingly, we propose that EPA consider the following provisions:

Insert new section 49.106 to the National FIP providing:

> (a) Sources not subject to NSPS or NESHAPs may elect to comply with a NSPS or NESHAP under this FIP as a mechanism to establish enforceable conditions on the source's potential to emit. Once the source elects to be subject to the NSPS or NESHAP, the NSPS or NESHAP are enforceable against the source under this FIP.
>
> (b)(i) Sources may elect to be subject to one or more facility-wide emission limits listed below.
> a. 249 tons per year of any NSR regulated pollutant in an attainment area;
> b. 99 tons per year of any NSR regulated pollutant in any nonattainment area;
> c. 24 tons per year of total hazardous air pollutants;
> d. 9 tons per year of any single hazardous air pollutant;
> e. 99 tons per year of any regulated pollutant;
>
> (ii) The facility-wide emission limits are 12-month rolling limits. Once a source elects coverage under this paragraph, the source must demonstrate compliance every month based on emissions of the prior 12 months.
>
> (iii) Sources subject to this paragraph shall demonstrate compliance and determine emissions based on the monitoring and recordkeeping dictated in any NSPS or NESHAP for the types of equipment covered under the facility-wide emissions limit.
>
> (iv) Sources subject to this paragraph shall monitor emissions and emissions-related data and keep records consistent with NSPS or NESHAP monitoring and recordkeeping for the types of equipment covered by the emissions limit for the purposes of compliance with this paragraph, even if such equipment is not subject to the NSPS or NESHAP.

The facility-wide emission limit proposed here is the preference for many operators. Additionally, the Alliance encourages EPA to offer flexibility to operators so they can select an approach best suited to their individual needs to fill the gaps identified in this section. Thus, the Alliance strongly encourages EPA to offer a menu of options to operators in order to ensure that the FIP contains robust yet flexible control measures, rather than a prescriptive, one-size-fits-all approach.

For some operators, limitations based on throughput, production, or hours of operations may be a useful approach. The Alliance suggests that in addition to the facility-wide emission limits proposed above, EPA also allow operators the opportunity to request synthetic minor status during registration of facilities in the form of requesting federal enforceability for limitations on production, throughput, or hours of operation for designated emission units. Operators would request synthetic minor status, identify the emission unit, identify the means of limitation (e.g. production limitation), and provide the numerical limitation. Operators would then have an

obligation to maintain records of the chosen limitation on a monthly basis and provide those records to EPA upon request.

By example, an operator could designate a well site facility in its registration to EPA as requesting synthetic minor status with a limitation on annual oil production. The operator would be required to designate the numeric annual oil production limitation and track oil production on a monthly basis. The oil production limitation would then become federally enforceable.

Without emission limits or limits on production, throughput and/or hours of operation within the National FIP to serve to limit the PTE for synthetic minor sources and synthetic minor modifications, an overwhelming number of operators in Indian country will have to obtain site-specific permits for future development. As a result, EPA will receive an overwhelming number of individual permit applications that will create an undue burden on the Agency and its resources. Furthermore, development efforts in Indian country will experience lengthy permitting delays and interruption in new construction, thereby disadvantaging production from Indian country compared to state and fee lands.

Western Energy Alliance (0045): Minor Modifications at Major Sources Need the FIP Streamlined Process - The FIP should be available also for minor modifications at major sources and modifications at synthetic minor sources. EPA does not explain why the FIP is limited only to new and modified true minor sources. Minor modifications at major sources can be of the same size and type as modifications at minor sources. Similarly, modifications at synthetic minor sources can be the same as a modification at a true minor source. EPA unreasonably limits the FIP to modifications at true minor sources. Major sources and synthetic minors that might have already undergone the burden of source-specific permitting should not continue to be disadvantaged with source-specific permitting for minor modifications. EPA must revise language throughout the rule that refers modifications to true minor sources by removing "true" and allow the FIP to be used for modifications at any existing minor source and allowing the FIP to be used for minor modifications at any existing major source.

EPA must also revise paragraph A under the applicability section; 40 CFR §49.153(a)(1)(ii)(A) should state:

> For the pollutant being evaluated, determine whether your proposed modification is subject to review under the applicable major NSR program. If the modification at your existing major source does not qualify as a major modification under that program based on the actual-to-projected-actual test, it is considered a minor modification and is subject to the minor NSR program requirements, if the net emissions increase from the actual-to-projected-actual test is equal to or exceeds the minor NSR threshold listed in Table 1 of this section, except that modifications at oil and natural gas production sources shall instead comply with the requirements of the Federal Implementation Plan at §§ 49.101 to 49.105, unless you opt-out of the Federal Implementation Plan pursuant to § 49.101(b)(2) in which case you are subject to the preconstruction requirements of this program for that pollutant or are required by the EPA to obtain a minor source permit pursuant to § 49.101(b)(3). For a modification at your existing minor source, go to Step 2 (paragraph (a)(1)(ii)(B) of this section).

American Petroleum Institute (API) (0046): Issue 2 – Minor Modifications at Major Sources
The FIP should be available for minor modifications at major sources as it is allowed in the general minor NSR rule. [49 CFR 49.151 et al.] Minor modifications at major sources can be of the same size and type as modifications at minor sources and should be afforded the same flexibilities as their true minor source counterparts. Major sources that might have already undergone the burden of source-specific permitting should not continue to be disadvantaged with source-specific permitting for minor modifications.

In the proposed rule, EPA refers to "minor modifications at true minor sources"; however, EPA has not defined "minor modification" for true minor sources. EPA should not use the term "minor modification" in reference to minor sources as all modifications at a minor source fall under minor NSR, unless the modification qualifies as a major source by itself.

Recommendation 2 – Minor Modifications at Major Sources
API recommends replacing all references in the proposed O&G FIP for "minor modifications at existing true minor oil and natural gas sources" with "minor modifications at existing oil and natural gas sources".

EPA should revise paragraph A under section 40 CFR §49.153(a)(1)(ii)(A) to include the language in red below.

For the pollutant being evaluated, determine whether your proposed modification is subject to review under the applicable major NSR program. If the modification at your existing major source does not qualify as a major modification under that program based on the actual-to-projected-actual test, it is considered a minor modification and is subject to the minor NSR program requirements, if the net emissions increase from the actual-to-projected-actual test is equal to or exceeds the minor NSR threshold listed in Table 1 of this section, except that modifications at oil and natural gas production sources shall instead comply with the requirements of the Federal Implementation Plan at §§ 49.101 to 49.105, unless you opt-out of the Federal Implementation Plan pursuant to § 49.101(b)(2) in which case you are subject to the preconstruction requirements of this program for that pollutant or are required by the EPA to obtain a minor source permit pursuant to § 49.101(b)(3). For a modification at your existing minor source, go to Step 2 (paragraph (a)(1)(ii)(B) of this section).

American Petroleum Institute (API) (0046): While the O&G FIP acknowledges several practical considerations for permitting oil and natural gas sources, the proposed program falls short of many of the streamlining permitting objectives mentioned above that are found in corresponding state programs including:

- The proposed O&G FIP lacks any streamlined mechanism to obtain voluntary restrictions to limit potential to emit (PTE) and obtain synthetic minor status for either Title V, major NSR, and/or hazardous air pollutants (HAP).

Proposed Language

Owners and operators of new true minor oil and natural gas sources or minor modifications at existing true minor oil and natural gas sources as determined pursuant to 40 CFR 49.153(a) that meet the criteria specified in paragraphs (b)(1)(i) through (b)(1)(v) of this section, shall comply with the requirements of §§49.104 and 49.105, unless the owner or operator obtains a site-specific permit as specified in paragraph (b)(2) or (b)(3) of this paragraph [§49.101(b)(1)(iii)].

…

(iii) The oil and natural gas production facility is a new true minor source or minor modification of an existing true minor source as determined under §49.153;

Issue

The proposed O&G FIP does not provide a streamlined mechanism to obtain synthetic minor permits for oil and natural gas sources. Oil and natural gas sources appear to only be able to obtain synthetic minor permits through the complicated and time-consuming case-by-case permitting process established in §49.158. The delays associated with case-by-case permitting are a significant obstacle to projects involving construction or modification, as well as a significant drain on agency resources.

The absence of a streamlining mechanism would place oil and natural gas development in Indian Country at a distinct disadvantage to development on adjacent areas under state authority, which include streamlined permitting programs for oil and natural gas sources. This disproportionately disadvantages oil and gas sources. EPA provides streamlined permitting mechanisms for Bundle 1 sources such as gasoline dispensing in both attainment and nonattainment areas (see §49.164). Despite API driving the need for EPA to establish streamlined permitting mechanisms for obtaining synthetic minor status, no mechanism was provided for oil and gas sources while mechanisms were created for other sources.

The O&G FIP should enable the owner/operator of an oil and gas source to voluntarily (and at the owner/operator's sole discretion) certify emission rates (including necessary emission calculations and representations) to EPA (or a delegated permitting authority) for the purposes of obtaining legally and practically enforceable synthetic minor emissions limitations for both criteria pollutants and HAPs. Such limitations should be effective under all programs under the CAA with emissions-based applicability, including the prevention of significant deterioration ("PSD") permitting program, the Title V operating permit program, NSPS rules, and NESHAP requirements. The efficacy of such an approach has been demonstrated in numerous states with oil and gas development such as Texas, Colorado, Wyoming, Ohio, Utah, and Oklahoma.

Recommendation

API proposes to create a new section, 49 CFR §49.106, in the O&G FIP with pre-defined emission standards and associated monitoring, recordkeeping, and reporting (MRR) requirements to obtain synthetic minor status. Similar to the concept of the proposed O&G FIP registration process, operators would be able to voluntarily elect to comply with emission standards as an alternative to applying for a source-specific synthetic minor permit under §49.158. The emission standards would include MRR to ensure practical enforceability and similar to the FBIR apply upon startup for those sources electing to use the streamlined synthetic minor permitting option.

§49.106

(a) Sources not subject to NSPS or NESHAPs may elect to comply with a NSPS or NESHAP and make the NSPS or NESHAP enforceable conditions on the source's potential to emit. Once the source elects to be subject to the NSPS or NESHAP, the NSPS or NESHAP are enforceable against the source under this FIP.

(b) (i) Sources may elect to be subject to one or more facility-wide emission limits listed below.

a. 249 tons per year of any criteria pollutant in attainment areas (NAAQS pollutant or precursor);

b. 99 tons per year of any criteria pollutant in any marginal or moderate nonattainment area (NAAQS pollutant or precursor);

c. 24 tons per year of total hazardous air pollutants;

d. 9 tons per year of any single hazardous air pollutant;

e. 99 tons per year of any regulated NSR pollutant;

(ii) The facility-wide emission limits are 12-month rolling limits. Once a source elects coverage under this paragraph, the source must demonstrate compliance every month based on calculated emissions of the prior 12 months.

(iii) Sources subject to this paragraph shall demonstrate compliance and determine emissions based on the monitoring and recordkeeping dictated in any NSPS or NESHAP for the types of equipment covered under the facility-wide emissions limit.

(iv) Sources subject to this paragraph shall monitor emissions and emissions-related data and keep records consistent with NSPS or NESHAP monitoring and recordkeeping for the types of equipment covered by the emissions limit for the purposes of compliance with this paragraph, even if such equipment is not subject to the NSPS or NESHAP.

Part 2 of the 2-part registration process will provide a box allowing the operator to affirmatively register the source as opting-in to the synthetic minor FIP provisions in §49.106 as well as identifying the relevant NSPS and/or NESHAP monitoring and recordkeeping the facility will use to verify compliance with the emission caps identified under Option (b).

SLR International Corporation and Ultra Resources, Inc. (0051): The National FIP Should Fill Existing Gaps in the Permitting Program for True Minor and Synthetic Minor Sources in Indian Country - EPA should provide a streamlined mechanism for owners and operators to voluntarily obtain limitations on potential to emit volatile organic compounds (VOC), other regulated NSR pollutants and hazardous air pollutants (HAP) that are legally and practically enforceable in order to avoid major source permitting (PSD and Title V) and major source National Emission Standards for Hazardous Air Pollutants for Source Categories (NESHAP).

The current Federal Minor New Source Review Program in Indian Country ("Tribal Minor NSR Program"), at 40 CFR §49.158, provides a means for owners and operators to obtain legally and practically enforceable limitations through the synthetic minor permitting process, but that process in unworkable for the oil and natural gas industry, given the difficulty in obtaining a pre-construction permit in a timely manner after submittal of a complete application.

The FIP, as proposed at 40 CFR §§49.101-49.105, does not provide any means for owners and operators to voluntarily obtain enforceable emission limitations on potential to emit (PTE). Owners and operators of stationary sources located within Indian Country will be forced to seek such limitations via the existing synthetic minor permitting process, resulting in unnecessary delays and administrative burden to EPA permitting authorities. The proposed FIP does not fill this important gap in the existing Tribal Minor NSR Program.

EPA states that the FIP would be used instead of site-specific permits to fulfill the EPA's obligation under the Tribal Minor NSR rule to issue minor NSR preconstruction permits. Under section 302(y) of the CAA, the term "Federal implementation plan" means

> ". . . a plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a SIP, and which includes enforceable emission limitations or other control measures, means or techniques (including economic incentives, such as marketable permits or auctions of emission allowances), and provides for attainment of the relevant national ambient air quality standard." [80 FR 56562.]

EPA has interpreted the reference to a "gap" in a SIP to include circumstances, for example in areas of Indian Country, where a SIP does not apply and the relevant tribe has not implemented an EPA-approved plan. In these circumstances, CAA §§ 301(a) and 301(d)(4) and 40 CFR 49.11(a) authorize the EPA to promulgate FIPs as are necessary or appropriate to protect air quality." [80 FR 56562.]

EPA states that the proposed FIP would

> "adopt legally and practicably enforceable requirements to control and reduce air emissions from oil and natural gas production." EPA has determined that "it is necessary or appropriate to exercise our discretionary authority under sections 301(a) and 301(d)(4) of the CAA and 40 CFR 49.11(a) to promulgate a FIP to remedy an existing regulatory gap under the CAA with respect to oil and natural gas production operations in areas covered by the Federal Indian Country Minor NSR rule where there is no EPA-approved plan in place." [80 FR 56562.]

A regulatory gap does currently exist in the Tribal Minor NSR rule that EPA has not addressed: There is currently no mechanism for owners and operators to voluntarily establish legally and practicably enforceable control requirements to reduce emissions of regulated NSR pollutants in order to avoid regulation under major source NSR permitting or other federal Clean Air Act programs. The FIP, as proposed, would not provide such a mechanism.

The proposed FIP adopts six federal rules that are independently applicable and enforceable. EPA notes that "[t]his FIP does not change the applicability of the specified standards, nor does it relieve sources subject to the standards from complying with them, independently of this FIP." [80 FR 56563.] Adoption of federal rules that are limited in scope and applicability to oil and gas production sources does not fill the regulatory gap described above. Moreover, those sources that

are subject to the adopted standards would be obligated to comply with those standards, and the emission limitations thereof would inherently be legally and practicably enforceable, whether or not a FIP is in place.

Many emitting units are not and will not be subject to any of the six adopted federal rules, including for example:

> Storage vessels that are "existing facilities" (defined in §60.2) or not otherwise subject to NSPS Subpart OOOO or the forthcoming Subpart OOOOa;
>
> Nonemergency flares burning separator/treater gas (no NSPS/NESHAP applies to separators) that, without enforceable controls, may exceed major source thresholds in and of itself;
>
> Process heaters located at area sources of HAP that are not subject to NESHAP DDDDD (the vast majority of sites in the oil and gas sector are not major sources for purposes of NESHAP DDDDD);
>
> Stationary engines that are "existing facilities" for purposes of NSPS (defined in §60.2) and not subject to control requirements for existing sources under NESHAP ZZZZ;
>
> Area source triethylene glycol dehydration units not subject to controls under NESHAP HH; and
>
> Pneumatic pumps grandfathered from the forthcoming NSPS OOOOa.

To fill this important regulatory gap and establish a mechanism for owners and operators to obtain legally and practicably enforceable control requirements to reduce emissions of regulated NSR pollutants, EPA should establish voluntary standards for controlling emissions from certain oil and gas production sources not already subject to the adopted FIP standards (as stated above, sources subject to an NSPS or NESHAP adopted by the FIP would be required to comply with those standards regardless). A suite of standards that owners and operators could opt for could be provided in a General Permit (GP) pursuant to §49.156 or incorporated through other means as a voluntary option. In addition to being voluntary, any oil and gas-specific mechanism must meet four important criteria. First, an initial period after first production must be provided to allow operators to quantify production rates and surface equipment needs. For example, a registration application could be required within 90 days after first production. Second, qualifying facilities should be able to operate in accordance with terms and conditions of the GP or other provisions without delay. Third, the limitations on PTE should be legally and practically enforceable. Finally, any compliance provisions, including inspection, monitoring, recordkeeping and reporting, should effectively demonstrate proper operation of vapor collection and controls systems, but not be so burdensome so as to present a disincentive for owners and operators to select the streamlined option.

EPA stated in the preamble:

> "[b]oth a general permit and a permit by rule provide a more streamlined approach for authorizing construction and modification of a source compared to site-specific permitting. A FIP, however, has the advantage of not requiring a source to initiate advance review and obtain approval of coverage from the Reviewing Authority before beginning construction (as would a general permit), and it would reduce the resource burden on reviewing authorities associated with processing the potentially large volume of requests from true minor sources in the oil and natural gas production segment for coverage under a general permit. So, from those standpoints a FIP is preferable to a general permit." [80 FR 56568.]

Owners and operators of production facilities within areas of Indian Country outside of the FBIR face a similar regulatory gap. Only NSPS OOOO and NESHAP HH provide legally and practicably enforceable VOC control requirements outside of the Federal pre-construction permitting requirements. Similarly, only certain NSPS and NESHAP standards provide legally and practicably enforceable control requirements for regulated NSR pollutants other than VOC that are or may be emitted from stationary internal combustion engines and other sources commonly used within the industry.

The four NSPS rules that would be adopted by the FIP, only apply to certain new, reconstructed or modified facilities. Existing facilities are not regulated. EPA has stated they "believe that the most appropriate means for addressing impacts from existing sources is through area- or reservation-specific FIPs and not through this proposed, national FIP." [80 FR 56570.]

However, by providing a voluntary mechanism (GP or other means) now to control those sources not subject to a NSPS or NESHAP under the FIP would close a potential regulatory gap for the time between promulgation of this proposed FIP and a future area- or reservation-specific FIP.

NESHAP Subpart DDDDD only applies to certain boilers and process heaters located at major sources of HAP. Subpart DDDDD is not widely applicable to the upstream oil and gas industry, as the vast majority of sites are area source of HAP for purposes of the rule – see definition of "major source" at 40 CFR §63.7575. Subpart HH does not require controls for area source triethylene glycol dehydration units.

EPA should develop source-specific oil and gas GPs or other mechanism(s) that owners and operators can opt for to limit emissions from oil and gas production operations not otherwise regulated by CAA standards. Separate GPs or other mechanism(s) could for example be developed for: Tanks and tank batteries; glycol dehydration unit process vents; flaring gas from separators and treaters, stationary internal combustion engines; and other sources. The standards and requirements for reducing VOC emissions could be similar in nature to those in the FBIR FIP. For stationary spark-ignition engines that are "existing facilities" for purposes of NSPS, the control standards could mirror those in NSPS JJJJ for the older tier engines.

We urge EPA to fill an important gap in the Tribal Minor NSR Program by providing a streamlined mechanism for owners and operators of sources within Indian Country to voluntarily

obtain limitations that are legally and practically enforceable in order to avoid major source permitting (PSD and Title V), NESHAP applicability and NSPS OOOO/OOOOa regulation for storage vessels.

Anadarko Petroleum Corporation (0058): Finally, for the Federal New Source Review on Indian Country: As written, this particular rule has no utility, will not allow for a streamlined permitting mechanism for Utah, in which we operate, in the tribal area shale, due to the inability to use the federal implementation process for synthetic minors and in nonattainment areas or areas that are anticipated to be nonattainment.

The EPA's summary of the above comments and the EPA's responses to these comments on the proposed amendments to the Federal Indian Country Minor NSR rule are as follows:

Comment #26: Several commenters (0039, 0040, 0045, 0046, 0051, 0058) requested that the EPA provide a mechanism for obtaining synthetic minor permits under the FIP. One commenter noted that there are a number of emission units common at oil and natural gas facilities that are not subject to the six federal regulations included in the proposed FIP, and that, therefore, would not be eligible for federally enforceable limits that are available for units covered under the six other rules. The commenter stated that unless such provisions were included, an overwhelming number of operators in Indian country will have to obtain source-specific permits. One commenter noted that most states with significant oil and natural gas production have streamlined permitting mechanisms (*e.g.*, general permits or permits by rule) in place for synthetic minor sources, as does the Fort Berthold Indian Reservation FIP. Another commenter noted that this would disadvantage oil and natural gas development on tribal lands because companies may prefer to locate where streamlined synthetic minor permitting options are available. It was also suggested that other limits, such as those imposed by tribal authorities or the BLM, be considered "enforceable as a practical matter" when considering the PTE and permit level. One commenter suggested insertion of the following language to allow for federally enforceable limits for emission units not subject to the six other rules:

"(a) Sources not subject to NSPS or NESHAPs may elect to comply with a NSPS or NESHAP under this FIP as a mechanism to establish enforceable conditions on the source's potential to emit. Once the source elects to be subject to the NSPS or NESHAP, the NSPS or NESHAP are enforceable against the source under this FIP.

(b)(i) Sources may elect to be subject to one or more facility-wide emission limits listed below.

a. 249 tons per year of any NSR regulated pollutant in an attainment area;

b. 99 tons per year of any NSR regulated pollutant in any nonattainment area;

c. 24 tons per year of total hazardous air pollutants;

d. 9 tons per year of any single hazardous air pollutant;

e. 99 tons per year of any regulated pollutant;

(ii) The facility-wide emission limits are 12-month rolling limits. Once a source elects coverage under this paragraph, the source must demonstrate compliance every month based on emissions of the prior 12 months.

(iii) Sources subject to this paragraph shall demonstrate compliance and determine emissions based on the monitoring and recordkeeping dictated in any NSPS or NESHAP for the types of equipment covered under the facility-wide emissions limit.

(iv) Sources subject to this paragraph shall monitor emissions and emissions-related data and keep records consistent with NSPS or NESHAP monitoring and recordkeeping for the types of equipment covered by the emissions limit for the purposes of compliance with this paragraph, even if such equipment is not subject to the NSPS or NESHAP."

The commenter suggested that the EPA allow for flexibility in synthetic minor limits in terms of production, throughput, or hours of operation. One commenter suggested that the EPA provide a general permit, or separate general permits for different unit types, pursuant to §49.156 with a suite of standards that would allow for federally enforceable limits on units not subject to the six other rules included in the proposed FIP. Several commenters suggested that self-certification could be included in provisions allowing for synthetic minor limits, and that this would reduce the burden on the EPA to have to issue synthetic minor limits under a source-specific permit.

Response #26: The current Federal Indian Country Minor NSR rule only allows the permitting of synthetic minor sources on a source-specific basis. The EPA's review is necessary to establish synthetic minor limits because without the verification that the required controls and associated compliance provisions will accomplish their objective, the source is a major source. Due to the streamlined nature of the oil and natural gas FIP, such review is not part of the FIP's process, which only requires source registration. Synthetic minor sources are more appropriately permitted under source-specific permits as they provide an opportunity for case-specific, Reviewing Authority evaluation.

Moreover, the EPA's Reviewing Authorities in our Regional Offices have seen no evidence of a high volume of requests for synthetic minor permits from oil and natural gas sources. Nor did commenters provide information on the volume of synthetic minor status requests to support the need for a synthetic minor option. Sources subject to the FIP are free to seek a source-specific sythetic minor permit pursuant to §49.158.

No changes will be made as a result of this comment.

Comment #27: Several commenters (0038, 0039, 0045, 0046) requested that the EPA provide a mechanism under the FIP to allow for construction of minor modifications at major sources, as well as modifications at synthetic minor sources. One commenter noted that modifications occurring at major sources may be of the same type and size as a modification at a true minor source, yet these situations would be treated differently under the proposed FIP as they would require time-consuming source-specific permits. One commenter noted that the EPA should not use the term "minor modifications at true minor sources" in the rule because all modifications at a true minor source are covered under minor NSR. One commenter requested that the EPA replace references to "minor modifications at existing true minor oil and natural gas sources" with "minor modifications at existing oil and natural gas sources." In addition, the commenter requested that the FIP allow for minor modifications at major sources as such modifications are allowed under the Federal Indian Country Minor NSR rule (§49.151). The proposed verbiage revisions would reflect that such modification at major sources were covered under the FIP.

Response #27: The July 2011 Federal Indian Country Minor NSR rule provided for the streamlining of the permitting of true minor sources through the use of general permits (and eventually permits by rule), with the permitting of minor modifications at major sources requiring source-specific permitting. As indicated above in the discussion of the general permits and permits by rule that the EPA has already issued under the Federal Indian Country Minor NSR rule, this FIP is not a permitting option available for minor modifications at major sources. Major sources are more complicated than minor sources, and modifications at major sources are likely to be as well. Such sources require the in-depth review of source-specific permits. By streamlining less significant actions (*i.e.*, true minor sources), we are freeing up resources for the EPA to address actions at the larger, more complex sources. As this FIP is limited to true minor sources (see response to comments above), the suggested change is not necessary and no change will be made as a result of this comment.

Comment #28: Two commenters (0038, 0045) requested that the EPA amend the Federal Indian Country Minor NSR rule to expand the definition of enforceability to allow limits to be considered "enforceable as a practical matter" to mean that a limit or standard is legally and praticably enforceable if a government authority, federal or tribal, has the right to enforce it. In particular, the commenter suggested that such limits could be imposed by the BLM or a tribal authority.

Response #28: The definition of "enforceable as a practical matter" in §49.152 states that an emission limitation or other standard is legally enforceable if the Reviewing Authority has the right to enforce it. Under this FIP, the EPA is the reviewing authority. Therefore, limits or other standards that are not enforceable by the EPA cannot be considered and no change will be made to the definition as a result of this comment.

4.2 Nonattainment Areas

QEP Resources, Inc. (0038): As proposed, the National FIP does not cover nonattainment areas. "It [the FIP] would not apply to new and modified true minor sources that are located or expanding in referenced areas of Indian country designated nonattainment." [80 FR 56557.] Further, EPA fails to provide a transition for when an area goes from an attainment or unclassified designation to a nonattainment designation.

Given the recently lowered ozone standard, this scenario is likely to play out in several areas of Indian country, most notably the Uinta Basin. Once a nonattainment designation is made, the only apparent registration/permitting mechanism is site-specific permitting for all minor sources of emissions.

Moreover, the CAA does not mandate any attainment planning for areas designated marginal nonattainment. Even for areas designated moderate nonattainment, attainment plans are not due until three years after the official designation. During this delay associated with any area-specific minor NSR nonattainment program, the source-specific permitting burden will increase for both major sources and minor sources, as outline below.

As stated by EPA itself, it is not viable for EPA to deny coverage of this FIP for nonattainment areas "due to our inability to process hundreds of true minor source permits in an acceptable timeframe." [80 FR 56568.] For example, note EPA Region 8's receipt of over 6,000 oil and gas minor source registrations to date. In the other minor NSR streamlined permitting rules for Bundle 1, EPA included provisions that would allow continued use of streamlined permitting in nonattainment areas. [See 80 FR 25068 (May 1, 2015).] EPA has provided no nonattainment options for oil and gas sources. Streamlined minor NSR in many states are available in nonattainment areas. By denying a FIP option for minor sources in nonattainment areas, EPA disadvantages oil and gas sources in Indian country.

EPA's 2011 Indian country NSR Rule has lower minor NSR thresholds for nonattainment areas; for VOCs the threshold is 2 tpy rather than the 5 tpy for attainment areas. [76 FR 38748, 38758 (July 1, 2011).] Thus, in nonattainment areas, the Indian country minor NSR program applies to sources that would be exempt if they were in attainment areas. With the lower threshold, EPA's Indian country minor NSR program covers more sources than it covers in attainment areas and more than other states' minor NSR programs for attainment and nonattainment areas. New Mexico and South Dakota exempt sources below 25 tpy and Utah and Oklahoma exempt sources below 5 tpy. Furthermore, other states also apply the streamlined minor NSR program for oil and gas sources in nonattainment areas. Oklahoma's oil and gas PBR covers sources below 40 tpy of any regulated pollutant (except HAPs) and 10/25 tpy of HAPs.[160] Wyoming allows all sources with potential emissions below 100 tpy of criteria pollutants and 10/25 tpy of HAPs to begin construction or undertake a modification before obtaining a permit under Wyoming's Oil and Gas Presumptive BACT Permitting Guidance.[161]

To remedy these gaps, EPA may determine that utilization of an expedited permitting mechanism for nonattainment areas warrants one or more of the following: (1) limiting eligibility to locations with emissions limits lower than the major source thresholds of, for example, 100 tpy of VOC or NOx (see Oklahoma and Wyoming examples above); (2) additional monitoring, recordkeeping and/or reporting; and/or (3) requiring a more robust registration process. EPA should allow operators use of the National FIP for nonattainment permitting until a basin specific new minor source permitting program becomes effective under the implementation planning process to achieve attainment. An expedited permitting scheme for nonattainment areas in the National FIP would provide regulatory certainty for oil and gas operators, limit emissions, as necessary, during the transitional phase of designation and implementation planning and eliminate any disadvantage to the further, responsible development of oil and gas resources in Indian country.

QEP Resources, Inc. (0038): By denying coverage under the FIP for all sizes of minor sources and modifications, EPA imposes source-specific permitting for all emission increases without regard for their potential contribution or any reasonably available emission controls; for VOCs, this source specific permitting would apply to increases between 2 tpy and 99 tpy. As described above, states and EPA have acknowledged that even in nonattainment areas, there are certain, acceptable emission increases related to new development. QEP urges EPA to ensure some

[160] See Oklahoma Administrative Code, Title 252, Chapter 100, Subchapter 7-60.5(a)(1).
[161] Wyoming Department of Environmental Quality's Oil and Gas Production Facilities, Chapter 6, Section 2 Permitting Guidance (last revised September 2013).

streamlined permitting approach in nonattainment areas. We are confident there is a mechanism to allow for development in nonattainment areas under the National FIP that will simultaneously ensure new emissions do not cause or contribute to NAAQS violations.

Ute Indian Tribe (0039): The Tribe has serious concerns about the applicability of the FIP to nonattainment areas. In its current form, the FIP would not cover areas designed as nonattainment: "[The FIP] would not apply to new and modified true minor sources that are located or expanding in referenced areas of Indian country designated nonattainment." [80 FR 56557.] Given the very real likelihood of a nonattainment designation for the Uinta Basin in light of new ozone standards, the Tribe wants to see a rule that will facilitate a smooth transition for when EPA designates an area as nonattainment that was previously attainment or unclassified designation. What we cannot afford is a lengthy delay for attainment plans to be developed that would be just another reason for operators to focus their resources elsewhere.

Ute Indian Tribe (0039): While the Tribe appreciates the decision of the EPA to develop a FIP for minor sources, the Tribe maintains the position that EPA should develop a FIP specifically tailored to the unique air quality issues on the Uintah and Ouray Reservation. A nationwide FIP will not address the problems of a nonattainment designation, which will likely result in EPA attempting to process hundreds of true minor source permits within a relatively short timeline. If a reservation-specific FIP would lessen the inevitable administrative burden-both administratively and practically that will result from a nonattainment designation, EPA should consider a final rule that provides for streamlined minor NSR in nonattainment areas so as not to disadvantage development on the Uintah and Ouray Reservation. Such a region-specific FIP would not only promote certainty in the Uinta Basin, but it would help transition operations under nonattainment requirements.

As expected, the proposed FIP does not cover areas that are currently or will in the near future have to transition from attainment to nonattainment, such as the Uinta Basin. Therefore, the FIP will likely have relatively limited efficacy on our Reservation. Given the amount of resources that have been devoted toward implementation of this rule, the Tribe would like to see a FIP that accommodates the Tribe's thoroughly documented concerns. Such a reservation-specific FIP would not only have many practical effects, it would also accommodate state requirements for minor source permitting. EPA recognized in the Fort Berthold FIP the importance of maintaining consistency with state requirements. Attempting to apply a "one-size-fits-all" approach at a national level would compromise unique concerns about the Uinta Basin's air quality. Just as EPA addressed the unique issues that arose for sources operating in the Bakken formation, EPA's Indian Country Minor New Source Review program must be based on a reservation or region-specific basis.

The Tribe cannot afford to lose the jobs or the revenue that funds essential government services if and when Utah develops its plan. A reservation-specific FIP would also have other benefits.

Ute Indian Tribe (0039): The Ute Indian Tribe recommends that EPA use a Federal Implementation Plan ("FIP") as the approach for its Indian Country Minor New Source Review program. First, EPA should consult with tribes to make sure that the rule addresses tribal concerns. For the Ute Indian Tribe, EPA should consult at least with the Ute Tribal Business

Committee, the Energy and Minerals Department, and the Ute Air Quality Division to learn about oil and gas activities on our Reservation and the best way to regulate minor sources. A reservation-specific FIP would streamline the permitting approach while also addressing issues unique to the Uintah and Ouray Reservation. For this reason, the Tribe opposes a nationwide FIP, which would apply the same standards to all tribes and not account for the specific concerns of the Ute Indian Tribe.

Any final rule proposed by EPA must also account for the Tribe's dependence on the development of oil and gas on our Reservation. Energy development has long been an important part of the Tribe's Reservation and regional economy. The Tribe leases about 400,000 acres for oil and gas development, including about 7,000 wells that produce 45,000 barrels of oil a day. We also produce about 900 million cubic feet of gas per day. The Tribe relies on revenues from oil and gas development as the primary source of funding for governmental services provided by numerous tribal departments and agencies including natural resources, land, fish and wildlife management, housing, education, emergency medical services, public safety and energy and minerals management to name a few. In addition, revenues from oil and gas development promote employment and economic growth in northeastern Utah including many tribally owned businesses. The Tribe fears that a nationwide approach would compromise the Tribe's interests.

Ute Indian Tribe (0039): Ozone levels in the Uintah Basin are among the worst in the nation. Winter ozone levels increase in the Basin when there is snow cover and a strong temperature inversion that concentrates pollution emissions close to the ground. Under these conditions, volatile organic compounds (VOCs) and oxides of nitrogen (NOx) rapidly react to form ozone. Compounding the air quality problems, fugitive carbonyl emissions, especially formaldehyde, are released from oil and gas sources. This has also been shown to be an important contributor to ozone formation in the Basin. When these conditions occur, tribal members must endure poor air quality for weeks at a time.

The Tribe recommends a final rule that regulates emissions in a manner that still allows the Tribe to continue the development of its natural resources. Therefore, the Tribe recommends that EPA utilize a reservation-specific Federal Implementation Plan ("FIP") as an approach to address emissions from minor sources. While it may be difficult for EPA to develop a FIP for each Indian reservation, EPA should at least develop unique FIPs for major oil and gas producing tribes such as the Ute Indian Tribe. In doing so, EPA should balance the Tribe's need to continue economic development on the Reservation with improving air quality for the wellbeing of tribal members. The reservation-specific FIP would also take into account, though not imitate, the surrounding state's oil and gas regulations, making it less likely for operators to move operations to non-Indian and fee land. Such an approach would protect air quality while preserving essential revenue, jobs, and opportunities for economic development for Indian tribes.

Ute Indian Tribe (0039): The Tribe's concerns are unique to the Uintah and Ouray Reservation and the Uintah Basin. Other tribes, in areas such as California, Washington, and Oregon do not share the same air quality concerns as the Ute Indian Tribe. Accordingly, it does not make sense for EPA to apply the same standards to all Indian tribes. Instead, EPA should address the individual concerns for each tribe's reservation or region. Such a localized FIP would account for, but not adopt, state rules and regulations to ensure that operators are not punished for on-

reservation activities or rewarded for abandoning tribal operations in favor of fee or state land. To function as a solution rather than a barrier to development, the approach must take into account each reservation's unique characteristics. Although the Fort Berthold FIP is fundamentally different, EPA should use this FIP as a model.

A FIP developed solely for the Ute Indian Tribe is necessary to account for ozone problems unique to the Uintah Basin. Here, a nonattainment designation for ozone seems inevitable. Nonattainment areas have levels of pollutants that make air quality fall below national standards.[162] Due to these deficiencies, the CAA requirements impose more stringent technology requirements on nonattainment areas in order to bring those areas within the national standards over time. [42 U.S.C. §§ 7501-7503.] Both Uintah and Duchesne Counties are designated as "unclassifiable." [77 FR 30110, 30151 (May 21, 2012).] Should EPA declare the Basin as nonattainment to reduce ozone pollution in the region, operators will be required to modify their technologies accordingly.

States usually take the lead in ensuring that regions or sources do not violate the NAAQS.[163] If EPA designates an area as nonattainment, then the state must develop a plan to bring the area back into attainment within a limited period of time. The applicable regulations impose strict emissions controls and other measures on sources operating or proposing to operate in nonattainment areas. [See generally, 42 U.S.C. §§ 7502, 7503; 40 CFR §§ 51.165-.166.] Fully aware of the strict emissions controls, the Tribe has been working with its oil and gas industry partners to identify emission reduction strategies that could improve public health and could also reduce future regulatory requirements that would occur if the area is designated as nonattainment.

However, episodic and voluntary seasonal controls are not enough to effectively reduce emissions in the area. The Tribe would like to see oil and gas operators take steps now, rather than after the nonattainment designation, to address emissions that cause or contribute to a NAAQS or PSD increment violation. Because oil and gas development is so essential to the Tribe, it is important to preserve the Tribe's ability to continue development. The Tribe cannot afford to lose the jobs or the revenue that funds essential government services. Further, steps to improve air quality should not be delayed until EPA designates the Basin as nonattainment for ozone. Delayed action compromises the health and safety of tribal members and non-Indians throughout the Basin. Here, the Tribe would like to see EPA establish air quality controls to address the air quality concerns in a matter that is neither excessively expensive nor unnecessary.[164] For this reason, a reservation-specific FIP is preferred.

Gas Processors Association (GPA) (0040): At the same time, GPA appreciates EPA's concern that the requirements in the FIP may not be appropriate in all cases, particularly in near-nonattainment areas or other locations where air emissions are not adequately controlled. [See 80 FR 56564.] However, rather than addressing those concerns on a case-by-case basis after an operator has already made significant and irreversible investments in a new project, GPA urges

[162] 42 U.S.C. § 7407(d); see also Great Basin Mine Watch v. EPA, 401 F.3d 1094, 1096 (9th Cir. 2005) (describing the three classifications of air quality).
[163] See North Carolina v. EPA, 531 F.3d 896, 902 (D.C. Cir. 2008); see also 42 U.S.C. § 7410.
[164] See, e.g., Sierra Club v. US. EPA, 99 F.3d 1551, 1556 (10th Cir. 1996).

EPA to provide advance notice of specific areas where the general FIP would not be applicable and where an area-specific FIP and/or site-specific permits would be required. To ensure notice to the regulated community and a sufficient public process for such changes to the scope of the FIP's applicability, GPA urges EPA to publish any decisions to exclude certain areas from the FIP in the Federal Register and provide the public with an opportunity to comment. Such an approach would ensure both the uniformity and advance notice that are necessary to ensure that operators can make investments in new construction in reliance on the FIP.

Gas Processors Association (GPA) (0040): In the preamble to the proposed FIP, EPA suggests that this streamlined permitting process may not be appropriate for sources located in near-nonattainment areas where ambient pollutant concentrations approach or exceed NAAQS design values. [80 FR 56564.] Such areas are at risk of being designated nonattainment in the future, which would potentially subject sources to different and more stringent emissions limits through a nonattainment FIP. The threat of a looming nonattainment designation could have a chilling effect on oil and gas development in such an area because sources would lack certainty about applicable permit conditions and how they may change over time if the area's attainment status changes.

To provide certainty to the regulated community, GPA urges EPA to allow this proposed FIP to bridge the gap between attainment and nonattainment area requirements in the event that current attainment areas are re-designated in the future due to NAAQS revisions. Specifically, we urge EPA to specify that this FIP and its streamlined NSR review provisions will remain in effect for near-nonattainment areas and areas re-designated to nonattainment until EPA takes further action for that area. If EPA later adopts a FIP specific to a nonattainment area or near-nonattainment area in Indian Country, that later FIP would then supersede the requirements of the currently proposed FIP. An area-specific FIP would undergo a notice and comment rulemaking process that would provide affected sources with an opportunity to shape the FIP and adjust their future development plans accordingly. Including such an approach in the proposed FIP would give sources certainty about the future regulatory requirements of conducting business in near-nonattainment areas, thereby allowing them to make informed business decisions about where to invest.

Earthjustice et al. (0044): Rather than address the air pollution caused by existing oil and gas operations in Indian Country on a systematic basis nationwide, EPA proposes to address them as needed in "area- or reservation-specific FIPs." [80 FR 56570.] EPA plans to prepare reservation-specific FIPs when "necessary or appropriate." [Id.] Beyond these two vague criteria EPA states only that "[a]t a minimum, the EPA or tribes will need to develop area-specific plans if and when areas of Indian Country become nonattainment for ozone or other NAAQS pollutants." [Id.] Environmental and Tribal Commenters support EPA's authority to issue reservation-specific FIPs to cover existing sources.

However, designation of a nonattainment area is a poor criterion to guide EPA's discretion about when issuing a FIP is "necessary or appropriate." Waiting for a nonattainment designation can

take years, leaving public health unnecessarily at risk.[165] Indeed, many areas are already suffering from unhealthy levels of air pollution. As EPA acknowledges in the ANPR, a nonattainment trigger is problematic given the lack of monitoring in Indian Country.[166] Even in areas of Indian Country that have monitors, nonattainment designations may not be forthcoming if monitors are not considered "regulatory" monitors.[167] A better approach would be for EPA to exercise its well-established legal authority to implement technologically feasible regulations for existing sources located in Indian Country nationwide, through a single, nationally applicable FIP. This would reduce uncertainty, prevent EPA from undergoing unnecessary regulation, and most importantly protect the health of tribal members and others immediately, rather than waiting additional years before putting pollution reduction rules in place. Even with a nationally applicable FIP covering existing sources, certain areas may need more attention, like the Uinta Basin and the San Juan Basin.

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): Though Environmental Commenters do not comment here on EPA's efforts to streamline permitting for new sources, we do note that EPA must ensure that any streamlined approach (1) ensures compliance with all applicable standards, even in the face of industry growth, and (2) provides for adequate tribal and public input when sensitive resources are at stake. As to the first point, EPA states that it "envisions" that a facility that complies with any applicable FIP or other streamlined procedure would not be "likely" to cause or contribute to a NAAQS or PSD increment violation. [79 FR 32514-15]. However, EPA does not explain how it would ensure that these standards are met and will continue to be met for all regions of the country.[168] EPA must ensure compliance before it can provide a "blanket exemption" from the Indian Country Minor NRS permitting program or even allow a source to choose whether to apply the streamlined process or site-specific permitting. [79 FR 32515-16.]

Accordingly, for areas—like the Uinta Basin—that are already exceeding air quality standards, EPA must develop emission inventories, model the impacts of new and existing sources, and adopt control measures necessary to ensure compliance. EPA must then develop a regional FIP that will ensure compliance with all relevant standards. Depending on the severity of the problem, control measures may include more stringent controls than those described below, caps on emissions, or offsets. EPA should also include requirements to revisit the FIP on a regular basis to ensure continued compliance. Only then could EPA allow minor sources in these regions to avoid the Indian Country Minor NSR permit review. Environmental Commenters further recommend that EPA establish specific triggers, such as a certain percentage of the NAAQS, to identify areas that are in danger of exceeding air quality standards, and commit to developing regional FIPs if certain conditions are met. Due to the scarcity of regulatory monitoring in Indian

[165] See Memorandum from Janet G. McCabe, EPA Acting Assistant Administrator to EPA Regional Administrators, Regions 1-10 at 5 (Oct. 1, 2015), http://www3.epa.gov/ozonepollution/pdfs/20151001memo.pdf (Appx. at 2111) (setting deadline to finalize designations at October 1, 2017).
[166] See 79 FR 32517 ("Using design values or attainment status to identify areas in need of enhanced environmental protection may yield results that are not equitable and/or fully protective of air quality, due to the scarcity of monitoring in Indian Country.").
[167] See Miss. Comm'n on Envtl. Quality v. EPA, 790 F.3d 138, 154–56 (D.C. Cir. 2015).
[168] See 79 FR 32517 (EPA recognizing that "uniform standards would need to ensure a sufficient level of protection for all areas in which they would apply despite difference in air quality issues in different areas").

Country, EPA should base its decision to develop a regional FIP on all reliable monitoring and modeling data, and not just design values at regulatory monitors.

Western Energy Alliance (0045): We question EPA's authority to impose site-specific permitting requirements in areas that have not yet been officially designated out of attainment of the National Ambient Air Quality Standards (NAAQS) for any criteria pollutant standards. Further, in light of the recently lowered NAAQS for ozone of 70 ppb, a substantial number of areas in Indian Country may now be deemed "close to" the standard, triggering EPA's discretion to require site-specific permits. Site-specific permitting in areas "close to" the standard will disadvantage development in Indian country as it relates to development in state airsheds. While Indian country development will be stifled by site-specific permitting timelines, development in the state airshed will be supported through existing, state-created general permitting schemes for minor sources.

Note that states have set parameters around the state discretion to impose source-specific obligations, including air quality impact analysis for minor sources. For example, Arizona limits discretion as follows "The Director shall make such a request [for an air quality impact assessment], if there is reason to believe that a source or minor NSR modification could interfere with attainment or maintenance of a standard. In making that determination, the Director shall take into consideration: 1. The source's emission rates. 2. The location of emission units within the facility and their proximity to the ambient air. 3. The terrain in which the source is or will be located. 4. The source type. 5. The location and emissions of nearby sources. 6. Background concentrations of regulated minor NSR pollutants."[169] EPA has proposed no limits on EPA discretion nor described any objective parameters or the factual basis for exercising such discretion.

EPA's proposal preamble further provides, "[t]he agency recommends at the time of registration, the owner/operator of all new sources or all sources scheduled for modification contact the Reviewing Authority for a review of the air quality status of that area, and the possibility of a requirement for a site specific permit." [80 FR 56564.] Such a recommended practice slows down the permitting process, calls on additional agency resources, and runs counter to the principles of a streamlined registration process.

We implore EPA to honor one of the core benefits of the National FIP – a streamlined registration scheme for minor emission sources – and not eclipse such a benefit by declaring the right to require site-specific permitting in a broad and unrestricted manner.

Accordingly, we urge EPA to remove the language cited above in the preamble and National FIP, granting the Agency unlawful authority to require site-specific permitting simply to "ensure attainment of the NAAQS," in areas where the measured design value is "close to" the relevant NAAQS and based on a case-by-case "review of the air quality in that area."

Western Energy Alliance (0045): The National FIP Must Provide for Streamlined Permitting for Nonattainment Areas - As proposed, the National FIP does not cover nonattainment areas. "It [the FIP] would not apply to new and modified true minor sources that are located or expanding

[169] Arizona Administrative Code Title 18, Chapter 2, Section R18-2- 334(E)(1)-(6).

in referenced areas of Indian country designated nonattainment." [80 FR 56557.] Further, EPA fails to provide a transition for when an area goes from an attainment or unclassified designation to a nonattainment designation. Given the recently lowered ozone standard, this scenario is likely to play out in several areas of Indian country, most notably the Uinta Basin. Once a nonattainment designation is made, the only apparent registration/permitting mechanism is site-specific permitting for all minor sources of emissions.

Moreover, the Clean Air Act does not mandate any attainment planning for areas designated marginal nonattainment. Even for areas designated moderate nonattainment, attainment plans are not due until three years after the official designation. During this delay associated with any area-specific minor NSR nonattainment program, the source-specific permitting burden will increase for both major sources and minor sources. The major source threshold reduces from 250 tpy to 100 tpy and the minor source threshold decreases for VOCs from 5 tpy to 2 tpy. The number of source-specific permits will increase under any scenario for EPA simply based on the lower major source threshold.

As stated by EPA itself, it is not viable for EPA to deny coverage of this FIP for nonattainment areas "due to our inability to process hundreds of true minor source permits in an acceptable timeframe." [80 FR 56568.] For example, note EPA Region 8's receipt of over 6,000 oil and natural gas minor source registrations to date. In the other minor NSR streamlined permitting rules for Bundle 1, EPA included provisions that would allow continued use of streamlined permitting in nonattainment areas. [See, 80 FR 25068 (May 1, 2015).] EPA has provided no nonattainment options for oil and natural gas sources. Streamlined minor NSR in many states are available in nonattainment areas. By denying a FIP option for minor sources in nonattainment areas, EPA disadvantages oil and natural gas sources in Indian country.

EPA's Indian Country Minor NSR rule has lower minor NSR thresholds for nonattainment areas; for VOCs the threshold is 2 tpy rather than the 5 tpy for attainment areas. Thus, in nonattainment areas, the Indian Country minor NSR program applies to sources that would be exempt if they were in attainment areas. With the lower threshold, EPA's Indian Country minor NSR program covers more sources than it covers in attainment areas and more than other western states' minor NSR programs for attainment and nonattainment areas. Arizona exempts sources from minor NSR that have emissions below 20 tpy of VOCs, New Mexico and South Dakota exempt sources below 25 tpy, Utah and Oklahoma exempt sources below 5 tpy. The proposed Indian Country oil and natural gas minor NSR FIP would not exempt from minor NSR any sources with emissions above the minor NSR thresholds and the Alliance is not asking EPA to revise the exemption threshold. However, the oil and natural gas minor NSR FIP should extend its streamlined authorization for new and modified minor sources and minor modifications at major sources to similarly sized sources in nonattainment areas.

Other western states apply the streamlined minor NSR program for oil and natural gas sources in nonattainment areas. Oklahoma's oil and gas PBR covers sources below 40 tpy of any regulated pollutant (except HAPs) and 10/25 tpy of HAPs.[170] Wyoming allows all sources with potential emissions below 100 tpy of criteria pollutants and 10/25 tpy of HAPs to begin construction or

[170] See Oklahoma Administrative Code, Title 252, Chapter 100, Subchapter 7-60.5(a)(1).

undertake a modification before obtaining a permit under Wyoming's Oil and Gas Presumptive BACT Permitting Guidance.[171] Colorado also has streamlined minor NSR programs that can be used in areas of nonattainment. By way of example see the following General Construction Permit examples in Colorado. They contain additional requirements for applications in nonattainment areas, so one can infer that they are accepted for use in the Denver-Julesburg Basin in Colorado's Front Range nonattainment area.

To remedy these gaps, Western Energy Alliance urges EPA to provide for an expedited permitting mechanism for minor sources in nonattainment areas in the National FIP. EPA should allow owners/operators use of the National FIP for nonattainment permitting until a basin specific new minor source permitting program becomes effective under the implementation planning process to achieve attainment. An expedited permitting scheme for nonattainment areas in the National FIP would provide regulatory certainty for oil and natural gas operators, limit emissions, as necessary, during the transitional phase of designation and implementation planning and eliminate any disadvantage to the further, responsible development of oil and natural gas resources in Indian Country.

By denying coverage under the FIP for all sizes of minor sources and modifications, EPA imposes source-specific permitting for all emission increases without regard for their potential contribution or any reasonably available emission controls; for VOCs, this source specific permitting would apply to increases between 2 tpy and 99 tpy. As described above, states and EPA have acknowledged that even in nonattainment areas, there are levels of emissions that can be deemed insignificant even for nonattainment areas. The Alliance does not ask that EPA exempt all small sources from minor NSR but asks EPA to ensure some streamlined permitting approach in nonattainment areas. The Alliance is confident there is a mechanism to allow for development in nonattainment areas under the National FIP that will simultaneously ensure that new emissions do not cause or contribute to a NAAQS violation.

American Petroleum Institute (API) (0046): While the O&G FIP acknowledges several practical considerations for permitting oil and natural gas sources, the proposed program falls short of many of the streamlining permitting objectives mentioned above that are found in corresponding state programs including:

- The proposed O&G FIP lacks a transition policy for regions in Indian Country to streamline permitting during a transition from attainment to nonattainment status.

American Petroleum Institute (API) (0046):

Proposed Language

> *(1) Owners and operators of new true minor oil and natural gas sources or minor modifications at existing true minor oil and natural gas sources as determined pursuant to 40 CFR 49.153(a) that meet the criteria specified in paragraphs (b)(1)(i) through (b)(1)(v) of this section, shall comply with the requirements of §§49.104 and 49.105,*

[171] Wyoming Department of Environmental Quality's Oil and Gas Production Facilities, Chapter 6, Section 2 Permitting Guidance (last revised September 2013).

unless the owner or operator obtains a site-specific permit as specified in paragraph (b)(2) or (b)(3) of this paragraph.
…
(v) The oil and natural gas production facility is not located in a designated nonattainment area.
[49.101(b)(1)(iv)]

Issue

Having said that, API is very concerned that the proposed FIP does not include a mechanism for permitting new minor sources and minor modifications in nonattainment areas. With the new, lower ozone NAAQS and the likelihood of future downward adjustments to other NAAQS, it is reasonable to expect that certain areas with O&G operations that currently are in attainment with NAAQS will be designated as nonattainment with the new standards. If a mechanism for permitting new and modified minor sources does not exist in such areas, a nonattainment designation can be tantamount to a construction moratorium for O&G sources. This outcome would completely frustrate the whole purpose of promulgating a FIP as the means for ensuring quick and streamlined permitting of minor sources on Indian lands.

During the delay associated with any area-specific minor NSR nonattainment program, the source-specific permitting burden will increase for both major sources and minor sources. As stated by EPA itself, it is not viable for EPA to deny coverage of this FIP for nonattainment areas "due to our inability to process hundreds of true minor source permits in an acceptable timeframe." [80 FR 56568.] For example, note EPA Region 8's receipt of over 6,000 oil and gas minor source registrations to date.

In the other minor NSR streamlined permitting rules for Bundle 1, EPA included provisions that would allow continued use of streamlined permitting in nonattainment areas. [See, 80 FR 25068 (May 1, 2015).] EPA has provided no nonattainment options for oil and gas sources.
To avoid this problem, API recommends that applicability of the FIP should be extended to areas that are newly designated nonattainment for any applicable NAAQS. We recommend that the FIP should be available at least for the period between nonattainment designation and the point at which a nonattainment minor source permitting program is established. Under this approach, the FIP would serve as a temporary "bridge" that would allow continued development and operation of O&G sources under the FIP if nonattainment designation occurs, but only until area-specific attainment plans can be developed and, if determined to be necessary and appropriate, new permitting rules are put in place. API recognizes that attainment plans are not mandated for marginal nonattainment areas. API recommends that the FIP should stay in place for oil and gas sources until any attainment plan that is required is developed and if such plan includes a different minor NSR program to replace the FIP for oil and gas sources in the nonattainment area.

This approach would protect air quality in new nonattainment areas because new minor O&G sources could be developed only under the stringent rules incorporated into the FIP. So, at most, only nominal additional emissions would be added to the new nonattainment area. Also, as needed for purposes of developing an effective nonattainment SIP for a given area, EPA and the Tribes would have to holistically evaluate all emissions, stationary and mobile, to determine the

appropriate solution for achieving attainment, which may not be limited to oil and gas sources. EPA and the Tribes always have authority to impose additional obligations on sources covered by the FIP (but, only as needed to demonstrate that attainment will be achieved by the applicable deadline and that reasonable progress will be made in the meantime). Therefore, appropriate regulatory "tailoring" could be done to make sure that use of the FIP ultimately would not unreasonably interfere with nonattainment planning or eventual NAAQS attainment.
In the absence of providing this flexibility, new sources or modifications in Indian Country that transitions to nonattainment under the new ozone standard will be required to obtain site-specific permits after October 1, 2017. Based on historic performance of issuing permits, it will be difficult, if not impossible, for all affected sources to obtain case-by-case permits in a timely manner because of the substantial increase in permit burden on the agency for both major and minor sources, as described above. Accordingly, oil and gas sources in nonattainment areas face the prospect of ceasing development in Indian Country that is designated as nonattainment.

American Petroleum Institute (API) (0046):

Recommendation
API suggests that the FIP should apply in attainment areas and during the transition from when an area is designated nonattainment and when a regional attainment FIP can be finalized and if that specific attainment FIP changes the minor NSR program for oil and gas sources. Registration will be required if facility emissions are greater than the Minor NSR thresholds for nonattainment areas. Facilities could only utilize the FIP in the transition period if emissions are less than major NSR thresholds.

> *(1) Owners and operators of new ~~true~~ minor oil and natural gas sources or minor modifications at existing ~~true minor~~ oil and natural gas sources as determined pursuant to 40 CFR 49.153(a) that meet the criteria specified in paragraphs (b)(1)(i) through (b)(1)(v) of this section, shall comply with the requirements of §§49.104 and 49.105, unless the owner or operator obtains a site-specific permit as specified in paragraph (b)(2) or (b)(3) of this paragraph.*
>
> *…*
>
> *(v) The oil and natural gas production facility is not located in a ~~designated~~ nonattainment area with an approved attainment TIP/FIP that supersedes requirements for new and modified sources and the facility' is less than major NNSR thresholds. [49.101(b)(1)(iv)]*

American Petroleum Institute (API) (0046): On September 18, 2015, the EPA proposed a federal implementation plan to streamline air permitting for true minor sources in the oil and natural gas sector located in Indian Country (O&G FIP).

API supports the concept of the proposed O&G FIP with the ability to maintain consistency with existing federal regulations. API also supports the approach of addressing existing sources in nonattainment areas at a regional level.

State of Utah, Office of Energy Development (0047): The ICMNSR and FIP should provide timely permitting of new wells in Tribal jurisdiction airsheds that addresses both attainment and nonattainment designations. As proposed, the ICMNSR and FIP would require site-specific

permitting in EPA designated nonattainment areas after designations are made in the fall of 2017. Site-specific permitting would create unnecessary costs, delays and uncertainty for oil and gas permitting.

Considering the EPA's recent lowering of the ozone standard, the oil and gas industry must prepare for the possibility of operating under nonattainment scenarios. Unfortunately, the EPA's national FIP does not cover nonattainment areas. [80 FR 56557.] The EPA also does not provide a pathway for oil and gas permitting that addresses a transition from attainment or unclassified to a nonattainment designation. The EPA has acknowledged that it lacks the experience and staff resources to administer a site-specific program. [80 FR 56568.] In other minor NSR rules, the EPA has extended streamlined permitting options to non-oil and gas sources in nonattainment areas.[172] It is crucial that the ICMNSR and FIP provide timely and cost-effective permitting solutions that do not unfairly disadvantage oil and gas sources. Accordingly, the EPA should not finalize its ICMNSR and FIP until it has a regulatory solution in place, such as a permit by rule program, to allow for streamlined permitting of oil and gas development under nonattainment scenarios.

Anadarko Petroleum Corporation (0058): Finally, for the Federal New Source Review on Indian Country: As written, this particular rule has no utility, will not allow for a streamlined permitting mechanism for Utah, in which we operate, in the tribal area shale, due to the inability to use the federal implementation process for synthetic minors and in nonattainment areas or areas that are anticipated to be nonattainment.

The EPA's summary of the above comments and the EPA's responses to these comments on the proposed amendments to the Federal Indian Country Minor NSR rule are as follows:

Comment #29: Several commenters (0038, 0039, 0040, 0045, 0046, 0047, 0058) requested that the EPA include provisions in the FIP to allow for streamlined permitting of minor oil and natural gas sources in nonattainment areas, including permitting in areas during the transition period between the time an area is designated as nonattainment and the time a FIP to control emissions adequately in such nonattainment area is in place. One commenter noted that with the lowered ozone standard, this issue may become particularly problematic in certain areas, most notably the Uinta Basin. Commenters requested that the FIP continue to provide for minor source permitting in such areas until a basin-specific permitting program becomes effective under the implementation planning process. Because an attainment plan is not due until three years after an area becomes nonattainment, the absence of a vehicle to allow for continuing minor source permitting would require source-specific permits during this transition period and would disadvantage oil and natural gas development in Indian country. One commenter suggested that the FIP continue as the permitting vehicle during the transition period, and that the EPA develop area-specific FIPs for re-designated areas that would supersede the national FIP upon issuance.

Response #29: The EPA recognizes to the potential for certain tribal areas to be designated as nonattainment for the new ozone standard. Currently, the permitting mechanism in place under

[172] 40 CFR Part 4.164.

the Federal Indian Country Minor NSR rule for oil and natural gas sources wishing to locate in nonattainment areas is limited to source-specific permits. We believe that this FIP as designed will be protective of air quality in attainment, attainment/unclassifiable and unclassifiable areas but will not necessarily be protective in nonattainment areas without further action to reduce emissions from existing sources. Therefore, we are stating our intent to potentially apply this national FIP's requirements as appropriate to nonattainment areas where the EPA has established a separate, area-specific FIP action. In that separate, area-specific action we would propose – and seek comment on – the application of this FIP's requirements to new and modified true minor sources in those certain areas designated nonattainment.

It is important to note that the geographic scope of this FIP cannot be extended to cover any nonattainment areas without the EPA first proposing to apply its requirements to such an area through a separate rulemaking subject to notice and an opportunity to comment. We are here merely expressing our intent to use the approach described above in the future to provide coverage for new and modified true minor sources in Indian country nonattainment areas, should such areas exist, where the EPA believes that the FIP, or some variation thereof, in combination with an area-specific FIP, is sufficient to protect air quality.

Our expression of intent to consider adopting this FIP in nonattainment areas as an accompaniment to an area-specific FIP addressing existing sources is in direct response to comments requesting that this FIP be extended to tribal nonattainment areas at least for a period of time after designation and until it is replaced by another FIP that addresses new and modified sources. A factor in considering whether to extend the coverage of this FIP is if we believe that existing source emissions will be reduced to a great enough extent to allow room for further growth of the industry in the area, while also protecting air quality. As noted above, the public will have an opportunity to comment on any such expansion of coverage of this FIP in the separate, area-specific action.

5.0 Comments Related to How the EPA Selected Equipment Included in the Proposed FIP

Southern Ute (0031): The Tribe recommends adding language to 40 CFR 49.101 and 40 CFR 49.105 expressly requiring installation of equipment subject to the six-incorporated standards. The FIP proposes to satisfy the Indian Country New Source Review (NSR) requirements through compliance with six incorporated EPA standards as written at the time of construction, but does not change the applicability of the standards or relieve sources subject to the standards from complying with them independently of the FIP. In the absence of a FIP condition expressly requiring installation of equipment subject to the six incorporated EPA standards a source could utilize second-hand equipment with no applicable NSPS or NESHAP requirement and thus, no control technology requirements or emission limitations as required by 40 CFR 49.154(c). The Tribe recommends EPA clarify that the intent of the FIP is to require new and modified sources be constructed utilizing only equipment subject to the six incorporated EPA standards.

National Tribal Air Association (0032): The Proposed Rule will apply solely to true minor sources engaged in the production segment of the oil and natural gas sector. However, this leaves unregulated the natural gas production process, natural gas transmission and storage, and natural

gas distribution segments. EPA indicates the reason for not regulating these latter three segments is that the production segment includes the majority of true minor sources in the oil and natural gas sector that would need to obtain a minor source permit in areas covered by the Federal Indian Country Minor NSR Rule. This reason does nothing to address the other unregulated segments nor does the Proposed Rule indicate if or when such segments will ever be regulated, meaning that they will continue to pollute freely without consequence and continue to do harm to the health and natural environments of Indian Tribes.

The NTAA recommends that the Proposed Rule provide for the regulation of the natural gas production process, natural gas transmission and storage, and natural gas distribution segments of the oil and natural gas sector. Alternatively, the NTAA asks that EPA indicate whether it intends to regulate any or all of these three segments in the future, and if so, what is EPA's projected timetable for doing so.

Gas Processors Association (GPA) (0040): At the same time, however, GPA respectfully requests EPA make a number of enhancements to the program to make it more effective. Specifically, EPA should:

- Expand the scope of the proposed FIP to include both synthetic minor sources and gas processing plants as well as to allow voluntary participation for existing sources

Gas Processors Association (GPA) (0040): While the proposed FIP would provide much-needed benefits to true minor sources that would otherwise be required to comply with site-specific preconstruction permitting requirements, it does not go far enough to ensure the continued competitiveness of oil and natural gas development in Indian Country. Therefore, GPA urges EPA to expand the scope of the FIP to include synthetic minor sources, as well as natural gas processing facilities. Streamlined permitting processes are commonplace in state-administered preconstruction review programs. Unlike the proposed FIP, however, state-administered programs typically include both true minor and synthetic minor sources and also extend to both gathering and processing facilities. As proposed, the FIP would result in a more burdensome site-specific permitting approach for synthetic minor sources and gas processing plants than that used by most states. Under such an approach, oil and natural gas production in Indian Country would be at a competitive disadvantage due to higher permitting costs and longer permit lead-times. To avoid this situation and fulfill the federal government's fiduciary duties, the proposed FIP should be expanded as described below.

Gas Processors Association (GPA) (0040): GPA also urges EPA to expand the proposed FIP to include natural gas processing plants. The vast majority of natural gas processing plants are operated as minor sources and thus would benefit from a streamlined preconstruction review process for the same reasons as sources in the oil and natural gas production sector. As an initial matter, drawing a line between gathering and processing sources is arbitrary. Operators typically employ the same types of equipment at both compressor station sites for gathering lines and at gas processing plants. For example, compressor engines, dehydrators, and tanks are commonly used at both types of sites. Moreover, this same equipment is commonly found at well sites, too. As a result, both compressor station sites and gas processing plants produce similar types of air emissions and emissions from both types of sources can be controlled in the same manner. Thus,

extending the FIP to include natural gas processing plants would help to ensure uniformity and consistency within the natural gas sector. While there are some types of equipment, such as turbo expanders, refrigeration equipment, and mole sieve dehydration units that are unique to natural gas processing plants, these types of equipment are not significant enough sources of emissions to justify a separate site-specific permitting program for gas processing plants in Indian Country.

Further, state regulators who are responsible for the vast majority of minor source preconstruction permitting do not distinguish between the gathering and processing sources within the natural gas sector. Instead, they typically develop a single streamlined permitting program that applies broadly to sites in the oil and natural gas industry. For example, the Oklahoma DEQ has developed a General Permit for Oil and Gas Facilities1 that is not limited to one sector of the industry:

> This permit is limited to air pollutant emitting sources located at [oil and gas facilities] that are designed and operated for the production, gathering, processing, storage, or transportation of crude oil, refined petroleum products, natural gas, and natural gas liquids (NGL), including condensate.

In addition, the TCEQ's permit by rule for Oil and Gas Handling and Production Facilities, 30 TAC § 106.352, is not limited to one sector of the industry:

> Applicability. This section applies to all stationary facilities, or groups of facilities, at a site which handle gases and liquids associated with the production, conditioning, processing, and pipeline transfer of fluids or gases found in geologic formations on or beneath the earth's surface including, but not limited to, crude oil, natural gas, condensate, and produced water with the following conditions.

Several other states take similar approaches. The collective experience of these states demonstrates that gas processing plants can be effectively regulated under the same streamlined permitting process as compressor station sites and other sources in the production sector. Thus, there is ample support for EPA to expand the proposed FIP to include gas processing plants without jeopardizing air quality in Indian Country. Further, the many state permitting programs referenced in Attachment 1 can serve as a template for EPA if it chooses to extend the streamlined permitting process to include gas processing plants.

Gas Processors Association (GPA) (0040): In addition, GPA recommends that EPA clarify the definition of natural gas processing plant by revising it to be consistent with the definition in other air rules. In particular, EPA should specifically note that a Joule-Thompson valve, dew point depression valve, or an isolated or standalone Joule-Thompson skid does not make a site a natural gas processing plant. GPA recommends that EPA reference or incorporate the definition of a natural gas processing plant contained in NSPS OOOO. [See 40 CFR 60.5430.]

Gas Processors Association (GPA) (0040): While GPA supports EPA's efforts to provide a streamlined process for true minor sources in the oil and natural gas production sector, the proposed FIP does not go far enough and, unless changes are made, will disadvantage oil and gas development in Indian Country. As explained above, the vast majority of states with oil and

natural gas resources have streamlined permitting programs that go beyond the scope of the proposed FIP by including synthetic minor sources and natural gas processing plants. Because these state permitting programs offer more flexibility to both oil and natural gas producers, gatherers, and processors by increasing the types of sources that can qualify for streamlined preconstruction permitting, most companies would prefer to site their sources on non-tribal lands that are subject to state permitting instead of the more time-consuming, complicated, and costly site-specific permitting requirements that will apply to sources that do not qualify for the proposed FIP.

For example, consider a gathering company that is evaluating two sites for a new compressor station which will be a synthetic minor source, Site A in Indian Country and Site B in a nearby state. Since gathering pipelines often span several miles, it is common for a gathering company to have several siting options for a compressor station. Under the proposed FIP, the permitting process for Site A would likely take well over a year and the resultant permit conditions would be unknown in advance, creating equipment design uncertainties. On the other hand, Site B qualifies for a state-level streamlined permitting approach with known permit conditions and a prescribed 30-day issuance timeline. Absent other factors, a company would select Site B due to its efficiency and certainty. Indeed, compressor stations can be conceived, designed, installed, and put into operation in less than one year. Streamlined state-level permitting programs accommodate the fast-moving nature of the oil and gas industry, whereas EPA's proposed approach would be the limiting factor in starting construction for synthetic minor sources. This puts tribes at a significant economic disadvantage in attracting new investments in the oil and natural gas sector.

Therefore, it is imperative that EPA level the playing field between tribal and non-tribal land by adopting streamlined permitting programs that are similar in scope to those in competing states. As discussed above, EPA must include both synthetic minor sources and natural gas processing plants in its streamlined preconstruction review program. Indeed, EPA arguably has an obligation to do so here. As a trustee for tribal resources, the federal government has a fiduciary duty to protect and promote tribal resources.[173] A permitting program that creates systemic barriers to the development of oil and natural gas resources in Indian Country is inconsistent with that mandate. Thus, EPA has an obligation to develop regulatory programs for Indian Country that allow tribes to compete with other landowners with respect to oil and gas development. To ensure the competitiveness of oil and gas production in Indian Country, EPA must expand the FIP to include both synthetic minor sources and gas processing plants.

Earthjustice et al. (0044): EPA should expand the scope of the Proposed FIP to include sources outside of the production segment and methane emissions.

The Proposed FIP regulates only sources in the production segment of the oil and gas sector. [80 FR 56562.] EPA's only rationale for limiting the scope is that it "believe[s] the oil and natural gas production segment includes the majority of the true minor sources in the sector." Id. But

[173] Two Shields v. United States, 119 Fed. Cl. 762 (Ct. Fed. Claims 2015) ("The BIA has a fiduciary duty to ensure that the Indians' mineral resources 'will be developed in a manner that maximizes their best economic interests and minimizes any adverse environmental impacts or cultural impacts resulting from such development'" (quoting 25 CFR § 212.1(a))).

there are other minor sources that can potentially create significant emissions in Indian Country, including compressor stations in the transmission segment and non-major gas processing plants. [See Coalition ANPR Comments at 17.] In order to fill the "gap" in the CAA, EPA should regulate these sources in the final rule. Otherwise, these pollution sources and their health impacts will be concentrated in Indian Country.

Earthjustice et al. (0044): We incorporate by reference the comments of several environmental and public health organizations on the Proposed Source Determination Rule. [See Source Determination Comments.] Given the number of rulemakings that have the potential to affect oil and gas emissions in Indian Country, including the Source Determination Rule, we expect that EPA will take the effect of the other rules into account as it considers which sources will be affected by the Proposed FIP.

EDF ANPR Comments – referenced by Earthjustice et al. (0044): The FIP can use the NSPS Subpart OOOO as a model for determining applicability for existing sources. Subpart OOOO defines "facilities" to consist of individual pieces of equipment (such as pneumatic controllers and compressors), rather than attempting to define facilities according to physical boundaries or emission thresholds. This approach has advantages for facilities in the oil and gas sector, which vary significantly in size and complexity and comprise a large number of relatively small sources. As EPA recognized in the ANPR, "[t]he contribution of any individual emission point to the total emissions inventory may be comparatively small. But collectively, the cumulative emissions of numerous existing emissions point could exceed that of large, new major sources, and result in adverse air quality impacts." [Id. at 32518.] Because the oil and gas sector is made up of many different small sources and there is significant diversity in how facilities are composed, a method like the one employed in Subpart OOOO would be most effective. EPA also notes that this approach "could ensure that all existing sources meet cost-effective emissions reduction requirements, and avoid potential disputes related to stationary source boundaries." [Id.]

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): EPA should consider expanding the scope of the Indian Country minor source permitting program to include compressor stations in the transmission segment and non-major gas processing plants. The stated rationale for focusing only on the production phase is that the bulk of the minor sources that would be covered under either the FIP or general permit approach are in the production segment. [79 FR 32505.] Under either approach (though, as stated elsewhere in these comments, we recommend a FIP-based approach), however, other potentially minor sources can be significant sources of emissions. While gas processing plants may tend to be potentially major sources, EPA should address those plants that do not meet the "major source" criteria, whether through actual or "synthetic" potential emissions (i.e., permit limits setting emission levels below the major source threshold), in whatever approach it ultimately takes here. Additionally, compressor sources that are located in the transmission segment can emit significant amounts of both VOC and NOx. In order to truly fill the gap in the existing regulations to comply with the Clean Air Act's purpose of "protect[ing] and enhanc[ing] the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population" [42 U.S.C. § 7401(b)(1).], EPA should expand the coverage of its oil and gas minor NSR permitting program

in Indian Country to cover minor gas processing plants and compressor stations in the transmission segment.

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): We agree that drill rigs are important sources that warrant regulation under a FIP. At this time, we simply note that drill rig control requirements include ignition timing retard, exhaust gas recirculation, selective catalytic reduction (SCR), replacement of Tier 2 engines with those that comply with Tier 4 requirements, and diesel oxidation catalysts. We anticipate providing further comments on the control requirements for this source when EPA publishes its proposal.

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): Relatively simple control requirements exist for both reciprocating and centrifugal compressors at reasonable cost. For reciprocating compressors, the control requirements we recommend for existing sources is the same as what is currently required by the new source performance standards for the oil and natural gas sector (Oil and Gas NSPS): good maintenance practices. [See 40 CFR § 60.5385(a).] Emissions from reciprocating compressors occur primarily due to worn-out packing seals surrounding connector rods that transmit motion into high-pressure cylinders. Over time, the seal (or "rod packing") wears down. If not regularly replaced, the emissions that result from this breakdown can become very large. The Oil and Gas NSPS addresses these emissions, requiring the rod packing to be replaced every 36 months or 26,000 hours of operation. [40 CFR § 60.5385(a).] However, this requirement only applies to reciprocating compressors that were constructed after August 23, 2011, despite there being no difference in requiring this control on those "new" sources and the existing sources that are allowed to operate without any maintenance requirements on the rod packing. In fact, maintaining an existing reciprocating compressor costs the same as maintaining a new compressor, less than $460 per ton of avoided VOC emissions.[174]

The Oil and Gas NSPS' gap in coverage between new and existing sources signals how important the FIP approach is over a general permit approach. It simply does not make sense to require operators to only keep good maintenance practices for newer reciprocating compressors while allowing them to ignore the older compressors when the same practices are cost-effective regardless of age. In fact, based on the Technical Support Document from the Oil and Gas NSPS, wellpad compressor emissions could be reduced by eighty percent by extending this requirement to existing sources nationwide.[175] Moreover, emissions from existing gathering and boosting reciprocating compressors – which are located before a gas processing plant – would decline by more than half if the standards for new compressors were extended to existing compressors. [Id.] Accordingly, we recommend that EPA promulgate a FIP that requires owners or operators to replace the rod packing of existing reciprocating compressors every 36 months or 26,000 hours of operation.

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[174] Calculated from data from EPA, Regulatory Impact Analysis for Proposed New Source Performance Standards and Amendments to the National Emissions Standards for Hazardous Air Pollutants for the Oil and Natural Gas Industry (July 2011) at 3-16, Table 3.3, available at http://www.epa.gov/ttn/ecas/regdata/RIAs/oilnaturalgasfinalria.pdf.

[175] See EPA, Oil and Natural Gas Sector: Standards of Performance for Crude Oil and Natural Gas Production, Transmission, and Distribution: Background Technical Support Document for Proposed Standards (July 2011) (hereafter, "2011 TSD") at 6-10, Table 6-5; 6-15, Table 6-6.

Emissions from centrifugal (turbine) compressors also originate from seals, but in a different manner. Centrifugal compressors are generally configured with one of two types of seal for the main shaft of the compressor: wet or dry. Dry (i.e., oil-free) seals are designed in a way that minimizes leaks across the seal. Wet seals, in contrast, use oil to seal a narrow gap between the shaft and its housing. This oil absorbs significant amounts of the high-pressure natural gas, which must be removed from the oil before it is re-circulated into the seal. Typically, the gas removed from the seal oil is vented, and these emissions can be substantial: a typical wet-seal centrifugal compressor vents nearly 32 metric tons of VOC per year.[176]

Environmental Commenters recommend that EPA require existing centrifugal compressors to either replace their wet seal configuration with one that utilizes dry seals, or that it requires owners or operators to capture the emissions from the oil degassing unit (which are otherwise vented) to the natural gas inlet of the compressor. This is an approach that the Oil and Gas NSPS took for new centrifugal compressors. [See 40 CFR § 5380(a).] According to the EPA's 2012 NSPS, retrofitting oil degassing emissions from wet seal centrifugal compressors to a vapor recovery unit can reduce venting by 95 percent. [See 2011 TSD, Section 6.4.4.2.] EPA has estimated that the capital cost to route seal oil degassing emissions to fuel gas or compressor suction is $22,000,[177] and due to the substantial amount of gas captured, the payback period for this option is 3 months.[178]

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): Liquids unloading represents a significant source of VOC emissions. The need for reductions from this source is even more prescient after EPA's decision to not address these emissions in the Oil and Gas NSPS. Fortunately, it is possible to control these emissions through the use of plunger lifts.

Almost every well that is drilled will experience the need for liquids unloading at some point during its life. Such a need occurs when water and other liquids accumulate in a mature well, slowing (or stopping) gas production for that well. In order to maintain production, operators remove, or "unload", these liquids through a variety of methods, many of which vent gas to varying degrees. These methods include: installing pumps to lift liquids; injecting soaps or other additives into the well to foam the liquids or installing smaller diameter production tubing in a well to increase the velocity of gas up the well to enable the gas flow to better entrain liquids;

[176] See EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2012, Annex 3, Table A-128 available at http://epa.gov/climatechange/Downloads/ghgemissions/US-GHG-Inventory-2014-Annex-3-Additional-Source-or-Sink-Categories.pdf ("Inventory) (51,370 scfd of methane per compressor = 18,750 mcf/y). Using an assumed methane content by weight of 87 percent, we calculated a typical centrifugal compressor to emit 356.3 metric tons of methane per year. Converting that to VOC, using a conversion factor of 0.09, see 2011 RIA at 3-16, Table 3-3, we estimate a typical centrifugal compressor to emit 32 metric tons of VOC per year.

[177] EPA, Oil and Natural Gas Sector: Standards of Performance for Crude Oil and Natural Gas Production, Transmission, and Distribution, Background Technical Support Document for the Final New Source Performance Standards, (April 2012, 2011), at Section 6.2 (hereafter "2012 TSD"), available at http://www.epa.gov/airquality/oilandgas/pdfs/20120418 tsd.pdf)

[178] Calculated based on a 90% abatement from initial 19,000 mcf emissions, and a $4/mcf price for gas.

and installing a plunger lift, a simple device that efficiently lifts a column of liquid out of a well and significantly reduces the amount of vented gas.[179] Whatever method the operator chooses, there is ample time to plan for the control of emissions resulting from liquids because, as stated above, almost every well will need to undergo it at some point.

Unfortunately, many operators forego these proven, affordable approaches to liquids unloading and crudely "blow down" the well by allowing it to vent to the atmosphere. Since atmospheric pressure is lower than the pressure in gathering pipelines, this can increase the flow rate in the well, allowing some portion of the liquids to reach the surface entrained with the high gas flow. However, the "blow down" approach is extremely wasteful, as it vents large quantities of gas while only removing a small portion of the liquids in the well.[180]

Environmental Commenters recommend that EPA require the use of plunger lifts on new and existing wells that need to undertake a liquids unloading event. While plunger lifts may be configured to vent some gas while unloading wells, the quantity of venting will generally be much less for a given well if a plunger lift is used than if the well is unloaded using a crude blow down approach. Additionally, avoiding or minimizing wasteful venting from liquids unloading via a plunger lift is very low-cost. According to Natural Gas STAR documentation, capital costs for a relatively routine plunger lift installation can range from $1,900 to $10,400 per well [Lessons Learned – Plunger Lifts, pp. 3-4.], and can reduce venting of natural gas 70-90 percent. [Lessons Learned – Options, p. 5.] Smart automation of plunger lifts can reduce venting more than 90 percent from baseline emissions with no plunger lift, at total capital costs of $7,600 to $28,000 per well. [Lessons Learned – Options, Exhibit 9.] Because the gas that would otherwise be wasted is being recovered instead, the operator will see increased revenue from the sale of that recovered gas.

Moreover, there are additional benefits. A "blow down" requires operational costs in the form of labor costs from manual blow downs and workover costs as a result of remediating poor conditions from liquids build-up. Installing plunger lifts will not only reduce these costs, but they will also increase the productivity of the well more effectively (and in a more timely manner) than blow-downs. [Lessons Learned – Plunger Lifts, p. 9.] Accordingly, the up-front costs of plunger lifts can be quickly recouped through reduced maintenance associated with blow downs as well as increased revenue from increased gas production and minimizing (or eliminating) wasteful venting. As a result, plunger lift installations typically have payback periods of 9 months or less. [Lessons Learned – Plunger Lifts, p. 1.]

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): Colorado recently updated regulations covering glycol dehydrators at production facilities, compressor stations and gas processing plants. [See 5 C.C.R. 1001-9 § XVII.D (2014).] The Colorado regulations will require all existing glycol dehydrators (those built prior to May 1, 2015) that have uncontrolled

[179] See USEPA, Lessons Learned from Natural Gas STAR Partners, Options for Removing Accumulated Fluid and Improving Flow in Gas Wells." hereafter "Lessons Learned – Options," available at http://www.epa.gov/gasstar/documents/ll_options.pdf).

[180] See USEPA, Lessons Learned from Natural Gas STAR Partners, Installing Plunger Lift Systems in Gas Wells," hereafter "Lessons Learned – Plunger Lifts," p. 1, available at http://epa.gov/gasstar/documents/ll_plungerlift.pdf).

actual emissions greater than or equal to 6 tons VOC per year to achieve hydrocarbon emissions reductions of 95 percent by installing either a condenser or air pollution control equipment. [Id. § XVII.D.3.] For new glycol dehydrators and existing dehydrators located near buildings or other designated outside activity area, the applicability threshold is actual uncontrolled emissions of 2 tons VOC per year. [Id. § XVII.D.4.] The Colorado Department of Public Health and the Environment calculated abatement costs to be between $632 and $786 per ton VOC abated.[181]

Environmental Commenters therefore recommend that the appropriate control requirements for both new and existing glycol dehydrators be established as VOC emission reductions of 95% via a condenser.

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): Oil storage tanks at well production facilities, compressor stations, and gas processing plants emit large amounts of VOCs. Under the Oil and Gas NSPS, storage tanks are separated into Group 1 (those constructed, modified, or reconstructed after August 23, 2011 and on or before April 12, 2013) and Group 2 (those constructed, modified, or reconstructed after April 12, 2013). [40 CFR § 60.5430.] Each tank that has the potential to emit 6 tons per year of VOC must achieve 95 percent reduction of those emissions. [Id. § 60.5395(d)(1).] Group 1 was required to comply by April 15, 2014, [id. § 60.5395(d)(1)(i)], while Group 2 is required to comply with 60 days of the startup of the storage vessel, [id. § 60.5395(d)(1)(ii)] by routing such emissions via a closed vent system that meets the requirements of 40 CFR § 60.5411 to either a control device or a beneficial use. [Id. § 60.5395(e)(1).] If the owner or operator is able to maintain the uncontrolled emissions below 4 tons per year, the 95 percent reduction requirement does not apply unless the storage tank receives liquids from a newly fractured or refractured well. [Id. § 60.5395(d)(2).]

Colorado recently updated its control requirements for petroleum storage tanks to include both new and existing storage vessels. Colorado's rule follows the Oil and Gas NSPS requirements closely, except that if a combustion device is used the operator must achieve 98 percent reductions. [See 5 C.C.R. 1001-9 § XVII.C.1.b (2014).] The CDPHE estimated that this requirement would affect 588 tanks that emit over 6 tons VOC emissions over six tons per year per year and would reduce VOC emissions in the state by 5,162 tons per year. [Id. at 8.] It calculated an average VOC abatement cost of $716 per ton VOC reduced. [Id. at 9.] Environmental Comments therefore recommend that EPA require new and existing storage vessels to capture VOC emissions via a closed vent system and route those emissions to a beneficial use. If EPA does allow the use of a combustion device to reduce VOC emissions, we recommend following Colorado's approach or requiring a destruction efficiency of 98 percent.

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): We agree that truck loadout is an important source that warrants regulation under a FIP. We anticipate providing further comments on the control requirements for this source when EPA publishes its proposal.

[181] CDPHE, Cost Benefit Analysis for Proposed Revisions to AQCC Regulations No. 3 and 7. at 34-35, available at ftp://ft.dphe.state.co.us/apc/aqcc/COST%20BENEFIT%20ANALYSIS%20&%20EXHIBITS/CDPHE%20Cost-Benefit%20Analysis_Final.pdf).

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): We agree that phase separation is an important source that warrants regulation under a FIP. We anticipate providing further comments on the control requirements for this source when EPA publishes its proposal.

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): EPA greatly limited the use of high-bleed controllers for new installations as part of NSPS Subpart OOOO (high-bleed controllers may only be newly installed "based on functional needs, including but not limited to response time, safety and positive actuation"). [40 CFR § 60.5390(a).] However, Federal rules do not affect the hundreds of thousands of existing high bleed controllers that were installed before August 23, 2011, the effective data for these provisions of Subpart OOOO. [Id. § 60.5365(d).] Colorado, on the other hand, required operators to replace existing high-bleed controllers in the urban portions of the Denver-Julesberg (D-J) basin in 2009,[182] and in early 2014 it required operators to replace all high-bleed controllers statewide by May 1, 2015. [5 C.C.R. § 1001-9 XVIII.C.2.b (2014).] Colorado found that replacement of a high-bleed controller with a low-bleed controller pays for itself, from the value of the conserved gas, in fourteen months.[183] It is notable that Colorado's existing rule for the urban parts of the D-J basin contained provisions allowing operators to keep high-bleed controllers in service, if they showed that doing so was necessary for "safety and/or process purposes." [5 C.C.R. § 1001-9 XVIII.C.3 (2009).] No operator requested such an exemption,[184] and there is no evidence in the record that these requirements have caused any operational problems. Pneumatic controllers emitting less than 6 scfh (both continuous- and intermittent-bleed) can serve many of the functions of higher-emitting intermittent devices, which thus could be replaced with low-bleed controllers. Clearly, replacing high-bleed controllers with equipment that vents less natural gas is very low cost and quite feasible.

Environmental Commenters recommend that EPA use a FIP approach to prohibit the use of any new or existing pneumatic valve controller that emits more than 6 scfh, except when technically necessary. For new pneumatic controllers that are at facilities connected to the grid, the FIP should require zero-bleed pneumatics that have no emissions. For new sources that are not connected to the grid, the FIP should prohibit pneumatics with a bleed rate averaged over time of more than 6 scfh (whether continuous- or intermittent-bleed). Finally, the FIP should require that existing high-bleed devices (whether continuous- or intermittent-bleed) be replaced with low- or zero-bleed devices. While exemptions should be attainable in certain circumstances where highbleed devices are technically necessary, experience in Colorado suggests this will be rare.

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): Because of the ubiquitous nature of leaks, operators should conduct regular Leak Detection and Repair (LDAR) surveys at all facilities, including well pads, other production facilities, gathering compressor stations, and gas processing plants that are not covered under 40 CFR Part 60, subparts KKK and

[182] See 5 C.C.R. § 1001-9 XVIII (2009), available at https://www.sos.state.co.us/CCR/GenerateRulePdf.do?ruleVersionId=2772&fileName= 5%20CCR%201001-9).
[183] Cost-Benefit Analysis. Submitted per § 24-4-103(2.5), C.R.S. for proposed revisions to Colorado Air Quality Control Commission Regulation Number 3 (5 CCR 1001-5) and Regulation Number 7 (5 CCR 1001-9), p. 32, available at ftp://ft.dphe.state.co.us/apc/aqcc/COST%20BENEFIT%20ANALYSIS%20&%20EXHIBITS/CDPHE%20Cost-Benefit%20Analysis_Final.pdf.
[184] Email from Daniel Bon, CDPHE, to David McCabe, Clean Air Task Force, 1 November 2013.

OOOO. In the "Regulatory Analysis for Proposed Revisions to Colorado Air Quality Control Commission Regulation Numbers 3, 6 and 7," Colorado used a rule of thumb to estimate that operators could achieve VOC emissions reductions of 40 percent with annual inspections, 60 percent with quarterly inspections, and 80 percent with monthly inspections.[185]

Recent studies have shown that instrument-based LDAR programs are a very cost-effective way to reduce wasteful leaks. A recent study of LDAR surveys by Carbon Limits,[186] for example, showed that the cost of surveys is quite reasonable (for example, surveys of well sites cost about $400, with the cost rising somewhat for larger facilities), and once leaks are identified, it is in the operator's economic interest to repair them in almost every instance.[187] The report focuses on LDAR surveys of compressor stations, gas plants, and well sites/well batteries. Carbon Limits analyzed data from over 4,000 LDAR surveys of oil and natural gas facilities in Canada and the U.S. which identified nearly 40,000 leaks. The surveys in this study were performed with infrared (IR) cameras, which can rapidly scan components to locate hydrocarbon gas emissions.

Once identified, the leaks were measured with a high-volume sampler or were estimated. Carbon Limits then assessed the net present value (NPV) of repairing the identified leaks based on the estimated costs of repair and the value of the gas that was conserved by the repair. [Id. at 16.] The conclusions are striking: even using a very low value of conserved gas of $3/Mcf, over 97 percent of the identified emissions were from leaks that had a positive repair NPV (i.e., repairing the leak cost less than the value of the gas conserved). Even after taking into account the cost of performing a survey, the aggregate NPV of performing the surveys in the database and repairing the identified leaks was generally positive. [Id. at 18.] While many LDAR surveys had a small net cost (the survey and repair costs were slightly larger than the value of the conserved gas), this was outweighed by the net benefit of performing the survey and repairing the leaks at the leakier facilities.

Recognizing the low cost and high value of LDAR surveys, several states have taken steps to reduce waste from leaks by requiring regular surveys. In February 2014, Colorado revised its oil and gas regulations to require instrument-based LDAR surveys for well production facilities as well as at natural gas gathering compressor stations. [See 5 C.C.R. § 1001-9 § XVII.F (2014).] Facilities must perform LDAR surveys at compressor stations and well production facilities at a frequency that is dependent on the VOC emissions from that facility. [Id. at Tables 3, 4.] The frequencies required span from one time, for well production facilities with the smallest annual uncontrolled emissions, to annual, quarterly, and monthly, for facilities with successively larger annual uncontrolled emissions. Similarly, the required frequency for gathering compressor stations may be annual, quarterly, or monthly, depending on uncontrolled annual emissions. [Id. at Table 3.] The Colorado rules also require the repair to be made promptly, unless a shutdown is

[185] Regulatory Analysis for Proposed Revisions to Colorado Air Quality Control Commission Regulation 3, 6, and 7. Pg. 49, available at ftp://ft.dphe.state.co.us/apc/aqcc/REGULATORY%20ANALYSIS%20&%20EXHIBITS/CDPHE%20RA_FINAL.2014.pdf.

[186] Carbon Limits is an independent consultancy experienced in climate change policies and emission reduction project identification and development, particularly in the oil and gas sector.

[187] Carbon Limits, Quantifying Cost-Effectiveness of Systematic Leak Detection and Repair Programs Using Infrared Cameras, at 5, available at http://www.catf.us/resources/publications/ view/198).

required (in which case it must be made during the next scheduled shutdown). [See id. § XVII.F.7.a][188] Colorado also requires the repaired leak to be re-monitored within 15 days of the repair, in order to confirm that the leak was indeed fixed. [Id. § XVII.F.7.b.]

Several oil and gas producers in the state supported Colorado's rule.[189] Those firms submitted data, based on their own experience performing LDAR surveys, during the Colorado rulemaking process. These data show that firms can perform LDAR surveys at even lower cost than the figures used in the Carbon Limits study described above.[190]

Several other states require some or all oil and gas facilities to conduct instrument-based LDAR surveys regularly in order to obtain a permit or general permit. These include Pennsylvania,[191] Wyoming,[192] and Ohio.[193] We do not support these "step-down" provisions in LDAR rules as they incentivize operators to not find leaks, increase the complexity of the rule and compliance efforts, and the record shows that facilities can have leak frequencies below 2% and still waste copious amounts of natural gas.[194] The base frequency of the LDAR requirement for affected facilities in Wyoming and Ohio is quarterly. These rules demonstrate the feasibility of reasonable LDAR rules, but the EPA and the vast majority of states producing significant amounts of natural gas do not require LDAR for oil and gas production facilities or gas gathering and transmission compressor stations. Environmental Commenters therefore recommend that instrument-based LDAR surveys be carried out at least quarterly on all sources in the production segment. In addition, auditory, visual, and olfactory (AVO) inspections should be performed approximately monthly.

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[188] The first attempt to repair that leak must be made within 5 days; if the necessary parts must be ordered, or other good cause delays the attempt, a repair must be made within 15 days of either receipt of the parts of the cause of delay ceases to exist).

[189] Finley, Bruce. "Colorado pitches new rules to cut oil and gas industry air pollution," The Denver Post, 11/18/2013, available at http://www.denverpost.com/environment/ci_24548337/proposed-colorado-air-pollutionregsclamp-down-oil.

[190] Anadarko Petroleum Corporation. Regulations 3, 6 & 7 Colorado Air Quality Control Commission Hearing. February 19-21, 2014, available at ftp://ft.dphe.state.co.us/apc/aqcc/PRESENTATIONS/Noble%20Energy%20Inc%20&%20Anadarko%20Petroleum%20Corporation/Anadarko.pdf; Noble Energy. Colorado Air Quality Control Commission Hearing Proposed Revisions to Regulation 7 Testimony. February 19-21, 2014, available at ftp://ft.dphe.state.co.us/apc/aqcc/PRESENTATIONS/Noble%20Energy%20Inc%20&%20Anadarko%20Petroleum%20Corporation/Noble.pdf.

[191] Department of Environmental Protection, Air Quality Permit Exemptions, Category No. 38, available at http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-96215/275-2101-003.pdf.

[192] Quarterly instrument-based LDAR is required in the Upper Green River Basin for new and modified facilities. See Wyoming Department of Environmental Quality (2013), Oil and Gas Production Facilities Chapter 6, Section 2 Permitting Guidance at 22 and 27, available at http://deq.state.wy.us/aqd/ Oil%20and%20Gas/September%202013%20FINAL_Oil%20and%20Gas%20Revision_UGRB.pdf.

[193] Ohio General Permit 12 for oil and gas production sites requires quarterly instrument-based LDAR, although it contains provisions for less frequent LDAR for facilities with manageable leak frequencies (if less than 2% of components are leaking, the next survey can be skipped). See Ohio General Permit 12.1(C)(5)(c)(2) (available at http://epa.ohio.gov/dapc/genpermit/oilandgaswellsiteproduction.aspx).

[194] See Sierra Club, et al., Rebuttal Prehearing Statement for Colorado Oil and Gas 2014Rulemaking at 8-11, available at ftp://ft.dphe.state.co.us/apc/aqcc/REBUTTAL%20STATEMENTS,%20EXHIBITS%20&%20ALT%20PROPOSAL%20REVISIONS/Conservation%20Group/Conservation%20Groups%20-%20REB.PDF.

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): While we anticipate providing further comments on the control requirements available for these sources, we note here that there are available options at very reasonable cost to address the NOx emissions from both new and existing compressor engines according to one state with extensive experience with oil and gas development. As EPA notes, there are two main distinct types of "compressor engines": combustion turbines, which power centrifugal compressors, and reciprocating internal combustion engines that power the reciprocating compressors. [79 FR 32507.] Both types emit high levels of NOx, as well as PM, sulfur dioxide, carbon monoxide and some VOCs. In preparation of its Regional Haze State Implementation Plan (Haze SIP), Wyoming estimated that at least three controls would achieve between 80 and 99 percent control efficiency of NOx for reciprocating compressor engines: low-emission combustion retrofit (80 to 90 percent efficiency at $320-$2,500 per ton NOx removed); selective catalytic reduction (SCR) (90 percent efficiency at $870-$31,000 per ton NOx removed); and selective non-catalytic reduction (SNCR) (90 to 99 percent efficiency at $16-$36 per ton NOx removed).[195] Emissions from such sources can reach 700 tons per year of NOx. [Id. at 125.] Environmental Commenters therefore recommend a FIP approach require all new sources to install at least one of these technologies and to require existing sources to retrofit with the appropriate control. Moreover, EPA should require the use of electric motors for new engines – which eliminate the NOx and PM emissions from these sources – unless the operator shows it is infeasible to do so.

Wyoming further notes control technologies for the turbines, including: water or steam injection (68 to 80 percent control efficiency at $560-$3,100 per ton NO_x removed); low NO_x burners (LNB) (68 to 84 percent control efficiency at $2,000-$10,000 per ton NO_x removed); SCR (90 percent efficiency at $1,000-$6,700 per ton NOx removed); and a combination of SCR and water or steam injection (93 to 96 percent efficiency at $1,000-$6,700). [Id. at 126, Table 7.3.5-1.] Similar to the reciprocating combustion engines, an individual combustion turbine can emit up to 877 tons of NOx in a single year. [Id. at 124.] Accordingly, we recommend a FIP approach that requires the combination of water or steam injection plus SCR for all new sources, and for existing sources to retrofit with one of the above listed technologies.

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): While we anticipate providing further comments on the control requirements available for these sources, we note here that there are available options at very reasonable cost to address the NO_x emissions from external combustion units, or "process heaters." Specifically, control requirements include the use of SNCR (roughly 60 percent control efficiency at $4,700-$5,200), SCR (70 to 90 percent control efficiency at $2,900-$6,700), and a combination of SCR plus LNB (70 to 90 percent control efficiency at $2,900-$6,300). [Id. at 126, Table 7.3.5-1.]

EDF ANPR Comments – referenced by Earthjustice et al. (0044): An effective FIP should include the major emission reduction measures highlighted in the ICF report. These include well completions of both oil and gas wells, casing head and associated gas emissions, pneumatic controllers and pumps, storage vessels, liquids unloading, comprehensive LDAR, and

[195] Wyoming Dept. of Environmental Quality, Air Quality Division, Wyoming State Implementation Plan: Regional Haze: Addressing Regional Haze Requirements for Wyoming Mandatory Federal Class I Areas Under 40 CFR 51.309(g) (Jan. 7, 2011), at 126, Table 7.3.5-1. Docket No. EPA-R08-OAR-2012-0026-0002.

compressors. We more fully explore these control technologies in the appendix to these comments. [See EPA-HQ-OAR-2011-0151-DRAFT for Appendix.]

EDF ANPR Comments – referenced by Earthjustice et al. (0044): Fortunately, proven, cost-effective technologies exist to mitigate harmful emissions from oil and gas operations. According to an EDF-commissioned report by the independent consulting firm ICF International, approximately 40 percent of methane emissions from the oil and gas sector could be eliminated by 2018 at a total cost of just one penny per thousand cubic feet of gas produced.[196] Moreover, many of the pollution reduction measures contained in the report actually save money by routing gas to sales that otherwise would have been leaked to the atmosphere. Taking into account savings across the economy, an emissions reduction of 40 percent will help conserve gas worth approximately $100 million annually. [Id. at 1-2.] Because these strategies capture or control emissions that also include air toxics and VOCs, the report projects that the same strategies will reduce both toxic pollution and VOCs by 44 percent (representing reductions of 25,000 tons of HAP and 686,000 tons of VOC).

Of the mitigation measures identified in the report, 93% of them fall into five key categories: (1) comprehensive and frequent leak detection and repair ("LDAR") at facilities in the production, gathering, processing, and transmission segments; (2) replacement of high-bleed pneumatic controllers, and high-emitting intermittent pneumatic controllers, with low-bleed models; (3) installation of vapor recovery systems on wet seal compressors, and regular replacement of reciprocating compressor rod packings; (4) control of emissions from oil wells, including mitigation of associated gas venting and oil well completion emissions; and (5) control of liquids unloading emissions. Appendix 1 provides additional details for each of these key areas.[197]

American Petroleum Institute (API) (0046): The EPA should include natural gas processing plants (gas plants) within the scope of the O&G FIP. Gas plants contain similar unit operations (e.g., compression, dehydration) found in production operations, so extending the O&G FIP to cover gas plants would not be conceptually or functionally different than a FIP that covers only production operations. Moreover, gas plants often must be reconfigured to accommodate changes in upstream production operations. In order to prevent permitting delays at gas plants which will result in corresponding delays in production activities, gas plants must have a streamlined mechanism to get initial permits and to permit minor modifications.

In any event, similar to the clarifications provided in 40 CFR 60.5430 of NSPS OOOO, the EPA should clarify that Joule-Thompson valve, dew point depression valve, or an isolated or standalone Joule-Thompson skid does not make production operations a natural gas processing plant.

<u>Recommendation 3 – Natural Gas Processing Plants</u>

Modify the language in §49.101(b)(1)(i) to read:

[196] ICF INT'L, Economic Analysis of Methane Emission Reduction Opportunities In The U.S. Onshore Oil and Natural Gas Industries (Mar. 2014) [hereinafter ICF Report].
[197] Envtl. Def. Fund, Comments on BLM Forum on Venting and Flaring from Oil and Gas Operations on Public and Indian Trust Lands (May 30, 2014). See EPA-HQ-OAR-2011-0151-DRAFT for Appendix 1.

(i) The facility is an oil and natural gas production facility ***or natural gas processing plant*** *as defined in §49.102;*

Add the following definition to §49.102 for natural gas processing plant from NSPS OOOO:

Natural gas processing plant (gas plant) means any processing site engaged in the forced extraction of natural gas liquids from field gas, fractionation of mixed natural gas liquids to natural gas products, or both. A Joule-Thompson valve, a dew point depression valve, or an isolated or standalone Joule-Thompson skid is not a natural gas processing plant.

American Petroleum Institute (API) (0046): The proposed FIP for oil and gas sources in Indian Country is limited to facilities that meet the definition of an "oil and natural gas production facility" as defined in §49.102 [§49.101(b)(1)(i)]. The proposed definition for "oil and natural gas production facility" is too broad because it encompasses certain mobile sources and certain construction-related operations that traditionally are not considered stationary sources for the purposes of Clear Air Act (CAA) permitting programs. For example, the definition includes references to mobile and temporary sources, such as well drilling, completion, workover activities, and portable non-self propelled apparatuses associated with those operations that are not part of permanent oil and gas production operations. The CAA expressly precludes application of NSR and Title V to mobile sources, such as portable, engine-powered well-drilling equipment and portable RICE engines. [See CAA §302(z) and §110(a)(2)(C).] Therefore, these sources should not be covered by the O&G FIP.

American Petroleum Institute (API) (0046): With regard to temporary sources, states with established oil and gas permitting programs do not require inclusion of drilling, completion, initial well test, and workover activities in air permit applications. The states have confirmed these emissions are single events that do not trigger ongoing compliance obligations and, therefore, permitting such activities would create uncertainty and confusion for operators, inspectors, and the public. These activities are not part of permanent production operations and it should be clear that they are not subject to air permitting requirements.

There is a solid basis under the law for this approach. Well drilling, completion and workover activities are construction activities; they are not a component of "production." EPA recognized the distinction between production and construction in the Fort Berthold Indian Reservation (FBIR) FIP.

The reason we selected the initiation of completions operations as the date for defining a new facility is that owners and operators use drill rigs prior to initial completion operations and this equipment is generally not in one location long enough to be considered a stationary source. In addition, it is not certain during the drilling operations whether a well will be a producing well. Hence, it is not known whether an oil and natural gas production facility will be constructed to support that well. The outcome of a completion operation provides the well owners and operators information necessary to determine whether an oil and natural gas production facility will be constructed [FBIR FIP Final Rule dated 3/11/13 Page 17851].

In addition, emissions from these activities qualify as "secondary emissions" that are not included in potential to emit calculations for purposes of permitting.

> *Potential to emit means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source [40 CFR 52,21(b)(4)]. Secondary emissions means emissions which would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself … [40 CFR 52.21(b)(18)].*

Since secondary emissions such as those from drilling, completion and workover activities are excluded from PTE calculations, the O&G FIP should not apply to those activities.

We note that emissions from completion activities are already addressed in federal New Source Performance Standards for Crude Oil and Natural Gas Production, Transmission, and Distribution under 40 CFR Part 60 Subpart OOOO (NSPS OOOO). The O&G FIP will not replace or otherwise affect how the NSPS applies. Emissions from the engines associated with drilling rigs, completions equipment, and other portable engines are regulated under the non-road engine rules (40 CFR 1039, 1065, 1068, and 89 for diesel engines and 40 CFR 1048, 1060, 1065, and 1068 for propane, gasoline, and natural gas).

Additionally, the proposed oil and natural gas production facility definition does not include common unit operations such as water treatment, sweetening units (acid gas removal units), truck loading, and dewpoint suppression skids. Finally, "low to medium pressure, small diameter" are arbitrary descriptions for gathering pipelines. They are best described by purpose (i.e., to gather field gas).

API recommends the following change to the oil and natural gas production facility definition.

> *Oil and natural gas production facility means a stationary source engaged in the extraction and production of oil and natural gas, as well as the processing, transmission and distribution of natural gas, including the wells and all related processes used in the extraction, production, recovery, lifting, stabilization, and separation or treatment of oil, water, and/or natural gas (including condensate). Oil and natural gas production components may include, but are not limited to: wells and related casing head; tubing head and "Christmas tree'' piping; pumps; compressors; heater treaters; separators; storage vessels; pneumatic devices; stationary engines; natural gas sweetening; truck loading; dewpoint suppression skids, natural gas dehydrators; ~~well drilling, completion and workover processes and portable non-self-propelled apparatuses associated with those operations;~~ emission control equipment; and ~~low to medium pressure, smaller diameter,~~ gathering pipelines and related components that collect and transport the oil, natural gas and other materials and wastes from the wells or well pads [§49.102].*

American Petroleum Institute (API) (0046): The current list of referenced federal NSPS and NESHAP regulation does not include 40 CFR Part 63 Subpart ZZZZ – National Emission Standards for Hazardous Air Pollutants for Stationary Reciprocating Internal Combustion Engines. EPA should make it clear in the preamble and ensure that no regulatory language of the FIP excludes oil and gas sources from relying on Subpart ZZZZ to limit the potential to emit of engines to be able to qualify for the FIP.

This rule should be included in the list of referenced rules to make it clear that the O&G FIP applies to stationary engines at O&G sources.

Recommendation - NESHAP ZZZZ

> *(g) For sources that are subject to subpart ZZZZ, National Emission Standards for Hazardous Air Pollutants for Stationary Reciprocating Internal Combustion Engines, for purpose of this FIP, sources must comply with all of the applicable provisions of the standard as written as of [INSERT DATE OF FINAL PROMULGATION OF O&G FIP]:*

The EPA's summary of the above comments and the EPA's responses to these comments on the proposed amendments to the Federal Indian Country Minor NSR rule are as follows:

Comment #30: One commenter (0031) expressed concern that, in the absence of a FIP condition expressly requiring installation of equipment subject to the six other EPA rules included in the proposed FIP, a source could utilize second-hand equipment with no applicable NSPS or NESHAP requirement and, thus, operate with no control technology requirements or emission limitations as required by §49.154(c). The commenter recommended adding language to §§49.101 and 49.105 expressly requiring installation of equipment subject to the six other rules included in the proposed FIP.

Response #30: The EPA believes that the commenter's proposal is not workable as it would limit operators to only installing equipment that is regulated by an EPA standard. Mandating the use of equipment that meets an EPA standard runs contrary to the FIP's intent of applying a consistent set of national requirements across Indian country. In some instances sources may need to use a piece of equipment that is not subject to an EPA standard. Instead, our approach under the FIP is to require that equipment subject to one or more of the eight EPA standards comply with those standards for purposes of the FIP. As long as the equipment in question can meet the limits to which they are subject, regardless of the mechanism used to do so, the owner/operator should be able to use that equipment. We believe that this approach is sufficient to protect air quality in attainment, attainment/unclassifiable and unclassifiable areas. No change will be made as a result of this comment.

Comment #31: Three commenters (0040, 0044, 0046) asked the EPA to expand the scope of the proposed rule to include minor oil and natural gas sources outside the production segment. All three commenters requested that natural gas processing plants be added; two commenters requested that natural gas transmission and storage facilities be added, and one commenter requested that natural gas distribution facilities be added. One commenter asked the EPA to

indicate whether it intends to regulate any or all of these segments in the future, and if so, what is the EPA's projected timetable. One commenter recommended that the language in §49.101(b)(1)(i) be modified to read:

"The facility is an oil and natural gas production facility or natural gas processing plant as defined in §49.102;"

Response #31: In response to these comments, the EPA has determined to expand the regulatory language in the FIP to cover true minor natural gas processing plants. The EPA has added the requirements of 40 CFR part 60, subpart KKKK, to the list of standards to cover turbines at compressor stations. The EPA notes that it is not necessary to add 40 CFR 60, subpart KKK - Standards of Performance for Equipment Leaks of VOC From Onshore Natural Gas Processing Plants for Which Construction, Reconstruction, or Modification Commenced After January 20, 1984, and on or Before August 23, 2011, or 40 CFR part 60, subpart LL - Standards of Performance for SO_2 Emission from Onshore Gas Processing for which Construction Commenced after January 20, 1984, and on or Before August 23, 2011. These rules are already included in the current FIP requirements because they are already included in th eoil and natural gas NSPS rule at 40 CFR part 60, subpart OOOOa. The EPA is also adding the requirements of 40 CFR 63, subpart ZZZZ - National Emissions Standards for Hazardous Air Pollutants for Stationary Reciprocating Internal Combustion Engines to the FIP in the final rule. We are comfortable with including these additional facilities under the FIP to cover true minor natural gas processing facilities because the rules will require adequate control and we do not feel that source-specific review is necessary just as we do not regard it as necessary (unless we make an exception for air quality concerns) for true minor sources in the oil and natural gas production segment of the oil and natural gas sector.

With respect to the timetable for any future regulation of the oil and natural gas sector, all segments in the sector are already subject to regulation by the EPA under the Federal Indian Country Minor NSR rule. However, only certain segments are included in this FIP because we believe that the vast majority of true minor sources in the oil and natural gas sector are in the oil and natural gas production and natural gas processing segments of the sector.

Comment #32: One commenter (0046) stated that the proposed definition for "oil and natural gas production facility" should be revised to exclude references to mobile and temporary sources, such as well drilling, completion, workover activities, and portable non-self-propelled equipment because the CAA expressly precludes application of NSR and title V to mobile sources, such as portable, engine-powered well-drilling equipment and portable reciprocating internal combustion engines. The commenter recommended that the EPA should make it clear that these sources are not subject to air permitting requirements under the oil and natural gas FIP. This same commenter stated that the proposed oil and natural gas production facility definition does not include common unit operations such as water treatment, sweetening units (acid gas removal units), truck loading, and dew point suppression skids. The commenter noted that language such as "low to medium pressure, small diameter" are arbitrary descriptions for gathering pipelines, and that these equipment are better described by purpose (*i.e.*, to gather field gas). The commenter recommended the following change to the oil and natural gas production facility definition:

"Oil and natural gas production facility means a stationary source engaged in the extraction and production of oil and natural gas, as well as the processing, transmission and distribution of natural gas, including the wells and all related processes used in the extraction, production, recovery, lifting, stabilization, and separation or treatment of oil, water, and/or natural gas (including condensate). Oil and natural gas production components may include, but are not limited to: wells and related casinghead; tubing head and "Christmas tree" piping; pumps; compressors; heater treaters; separators; storage vessels; pneumatic devices; stationary engines; natural gas sweetening; truck loading; dew point suppression skids, natural gas dehydrators; ~~well drilling, completion and workover processes and portable non-self-propelled apparatuses associated with those operations;~~ emission control equipment; and l~~ow to medium pressure, smaller diameter,~~ gathering pipelines and related components that collect and transport the oil, natural gas and other materials and wastes from the wells or well pads [§49.102]."

Response #32: The EPA has replaced the definition of "oil and natural gas production facility" in §49.102 as proposed with "oil and natural gas source." The new definition incorporates some of the suggestions recommended by the commenter. We did not include the segments of transmission or distribution of natural gas in the definition because they do not fall within the scope of coverage of this FIP.[198] However, we believe that completion and workover processes should not be removed from the definition because they are stationary sources regulated under 40 CFR part 60, subpart OOOOa. This makes the treatment of these sources under the FIP definition (§49.102) consistent with definitions related to the oil and natural gas sector in 40 CFR part 60, subpart OOOOa; 40 CFR part 63, subpart HH; and the FBIR FIP.

Comment #33: One commenter (0044) recommended that specific oil and natural gas exploration and production equipment be regulated under the proposed FIP. Specific equipment recommended for inclusion in the FIP includes: drill rigs, liquids unloading, dehydrators, truck loadout, and phase separation. The commenter recommended that plunger lifts be required for all liquids unloading. The commenter recommended that dehydrators be required to control VOC by 95 percent by using a condenser.

Response #33: The EPA feels that the original suite of six federal rules proposed to be included in the FIP, in conjunction with the two additional federal rules added under this final action, combine to adequately control emissions from oil and natural gas facilities for purposes of the FIP. It should be noted that drilling rig engines are not considered stationary sources for purposes of permitting under the Federal Indian Country Minor NSR rule, and dehydrators are addressed under 40 CFR part 63, subpart HH (National Emission Standards for Hazardous Air Pollutants from Oil and Natural Gas Production Facilities), which is one of the eight federal rules included in the FIP. No change has been made as a result of this comment.

Comment #34: One commenter (0044) recommended that the proposed FIP include regulation of emissions from well completions for both oil and natural gas wells, as well as casinghead gas

[198] This FIP only covers the oil and natural gas production and natural gas processing segments of the oil and natural gas sector because we believe that the vast majority of true minor sources in the oil and natural gas sector are in those two segments.

and associated gas emissions. The commenter referenced recommendations in an ICF International report.[199]

Response #34: The FIP includes the recently revised Standards of Performance for New and Modified Sources in the Oil and Natural Gas Sector (40 CFR part 60, subpart OOOOa), which requires control of oil and natural gas well completions for hydraulically fractured wells. Casinghead gas and associated gas emissions from venting or flaring during ongoing production are not currently addressed under the eight federal rules included in the final FIP; however, if those emissions sources are regulated under a future revision of subpart OOOOa, then they would automatically fall under the requirements of this FIP at true minor sources. No change has been made as a result of this comment.

Comment #35: Two commenters (0040, 0046) recommended that the EPA clarify the definition of natural gas processing plant by revising it to be consistent with the definition in other air rules. Both commenters stated that the EPA should clarify that a Joule-Thompson valve, dew point depression valve, or an isolated or standalone Joule-Thompson skid does not make a site a natural gas processing plant. Both commenters recommended that the EPA reference or include in §49.102 the definition of a natural gas processing plant contained in 40 CFR part 60, subpart OOOO (§60.5430).

Response #35: The FIP proposal did not include a definition of natural gas processing plant. In this final action we are modifying §49.102 to revise the definition of an "oil and natural gas production facility" (now "oil and natural gas source") to make the treatment of these sources under the FIP definition (§49.102) consistent with definitions related to the oil and natural gas sector in 40 CFR part 60, subpart OOOOa; 40 CFR part 63, subpart HH; and the FBIR FIP. We have also included natural gas processing plant as part of the definition of "oil and natural gas source" under §49.102.

One of the two commenters recommending including the definition of gas processing plant from 40 CFR part 60, subpart OOOO provided incorrect language for the definition. Nonetheless, we have concluded that adding a definition for natural gas processing plant to the FIP is unnecessary; including natural gas processing plant in the definition of source is sufficient to extend the coverage of this FIP to non-major natural gas processing plants. At the beginning of §49.102 we make it clear that all terms not defined in the section shall have the meaning given them in 40 CFR part 60, subpart OOOOa, among other sources, which would include how natural gas processing plant is defined in the subpart.

Comment #36: One commenter (0046) noted that the current list of referenced federal NSPS and NESHAP regulations does not include 40 CFR part 63, subpart ZZZZ – National Emission Standards for Hazardous Air Pollutants for Stationary Reciprocating Internal Combustion Engines. The commenter stated that the EPA should make it clear in the preamble and ensure that no regulatory language of the FIP excludes oil and natural gas sources from relying on subpart ZZZZ to limit the PTE of engines to be able to qualify for the FIP. The commenter

[199] ICF International, Economic Analysis of Methane Emission Reduction Opportunities in the U.S. Onshore Oil and Natural Gas Industries (March 2014), at 3-3, available at: http://www.edf.org/sites/default/files/methane_cost_curve_report.pdf.

recommended that subpart ZZZZ be included in the list of referenced rules (at §49.105(g)) as follows:

> "For sources that are subject to subpart ZZZZ, National Emission Standards for Hazardous Air Pollutants for Stationary Reciprocating Internal Combustion Engines, for purpose of this FIP, sources must comply with all of the applicable provisions of the standard as written as of [INSERT DATE OF FINAL PROMULGATION OF O&G FIP]:"

Response #36: The EPA has included the requirements of 40 CFR part 63, subpart ZZZZ into the final FIP as requested by the commenter. As with all of the appplicable requirements from all eight of the regulations referenced in this FIP, a source can rely on the reductions required by 40 CFR part 63, subpart ZZZZ to reduce its PTE.

Comment #37: One commenter (0044) recommended that the FIP require all new compressor engines to install steam injection and control technologies such as low-emission combustion retrofit, selective catalytic reduction (SCR), or selective non-catalytic reduction (SNCR) and to require existing sources to retrofit with the appropriate control. The commenter further recommended that the EPA should require the use of electric motors for new engines unless the operator shows it is infeasible to do so. One commenter recommended that the FIP require all external combustion units to control NO_x emissions with SNCR, SCR, or a combination of SCR plus low NO_x burners.

Response #37: The proposed FIP incorporates control requirements for internal and external combustion units in accordance with 40 CFR part 63, subpart DDDDD (National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters); 40 CFR part 63, subpart ZZZZ (National Emissions Standards for Hazardous Air Pollutants for Stationary Reciprocating Internal Combustion Engines); 40 CFR part 60, subpart IIII (Standards of Performance for Stationary Compression Ignition Internal Combustion Engines); 40 CFR part 60, subpart JJJJ (Standards of Performance for Stationary Spark Ignition Internal Combustion Engines); and 40 CFR part 60, subpart KKKK (Standards of Performance for New Stationary Combustion Turbines). In the development of the FIP, we have relied on the analysis conducted in the development of these existing rules to determine adequate control technology requirements for these types of sources. The FIP only applies to new true minor sources and modifications at existing true minor sources thus does not address the control of emissions from existing sources.

6.0 Comments Related to Pollutants Included in the Proposed FIP

Earthjustice et al. (0044): The Proposed FIP states that the pollutants it regulates are VOCs, NOx, SO2, PM, PM10, PM2.5, H2S, CO, and various sulfur compounds. [80 FR 56563.] Notably absent is methane. Methane is an extremely potent greenhouse gas with 87 times the warming potential of carbon dioxide over a 20-year timeframe. [Coalition ANPR Comments at 4; EDF ANPR Comments at 2.] The oil and gas industry is the largest source of anthropogenic methane pollution in the United States. [Coalition ANPR Comments at 3.] As EPA recognizes in the Proposed Amended NSPS Rule, "reducing methane from [the oil and natural gas] source category . . . is something that should be directly addressed through standards for methane . . .

and, as such, would be an important step towards mitigating the impact of GHG emissions on climate change." [80 FR 56599.] Further, EPA explains that "there are cost-effective controls that can simultaneously reduce both methane and VOC emissions from . . . equipment across the industry, which in some instances would not occur were we to focus solely on VOC reductions." [Id.] Accordingly, EPA proposes to directly regulate methane emissions in the Proposed Amended NSPS Rule. [Id. at 56600.] In the Proposed FIP, EPA states that it will incorporate the Proposed Amended NSPS Rule into the FIP. [80 FR 56563.] The final rule should thus also cover methane emissions to provide operators and tribes with certainty that the parts of the NSPS rule governing methane emissions also apply in Indian Country. This would also further EPA's stated interest in regulating greenhouse gases through minor source NSR review.[200] And it would further the Obama Administration's goal of reducing greenhouse gas emissions to 17% below 2005 levels by 2020.[201]

It is also important for EPA to regulate methane directly in the final rule because regulations that do not address methane emissions result in significantly less pollution abatement. According to CATF, direct methane standards would reduce about half of the sector's methane emissions, while VOC standards would reduce methane emissions by only about 5%. [CATF at 42.]

EDF ANPR Comments – referenced by Earthjustice et al. (0044): Upstream oil and gas facilities also emit other harmful co-pollutants including smog-forming VOCs and carcinogenic air toxics. EPA has estimated that an average of approximately 15% of produced natural gas consists of VOCs, and 1% consists of air toxics.[202] According to a recent report by ICF, the oil and gas sector emits nearly 1.6 million tons of VOC and 57,000 tons of HAP each year. [ICF at 4-12, 4-13.] VOCs contribute to ground-level ozone formation and cause a range of human health issues, including heightened risks of cancer, respiratory disease, and developmental disorders in children. Air toxics from oil and gas operations include known carcinogens such as benzene, as well as variety of other organic compounds recognized as hazardous to public health.

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): Oil and gas activities also emit coarse and fine particulate matter (PM10 and PM2.5) and fine particulate precursors like sulfur dioxide (SO2), VOC, and NOx. Particulate matter has been linked to serious respiratory and cardiovascular problems, including aggravated asthma attacks, chronic bronchitis, decreased lung function, heart attacks, and premature death. Sensitive populations, such as the elderly, children, and people with existing heart of lung problems, are most at risk from PM pollution. PM also contributes to haze, reducing visibility in scenic areas.[203] Dust can damage significant cultural resources by, for example, obscuring rock art.[204] Black carbon, a component of PM emitted by combustion sources such as flares and older diesel engines also contributes to climate change. [UNEP Report at 6.]

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[200] See 76 FR 38759 n.19 (discussing potential for future permitting of greenhouse gas emissions through the PSD program).
[201] White House at 1.
[202] EPA, Oil and Natural Gas Sector: Standards of Performance for Crude Oil and Natural Gas Production, Transmission and Distribution: Background Technical Support Document for Proposed Standards at 4-6 (2011).
[203] See EPA, Visibility—Basic Information, available at http://www.epa.gov/visibility/what.html
[204] BLM, West Tavaputs Plateau Final Environmental Impact Statement ("West Tavaputs FEIS"), at 3-19, 4-239, available at http://www.blm.gov/ut/st/en/fo/price/energy/Oil_Gas/wtp_final_eis.html.

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): Oil and gas wells and their associated equipment also release hazardous air pollutants (HAPs), including n-hexane, benzene, toluene, ethyl benzene, xylenes, formaldehyde, naphthalene, acetaldehyde, methanol, carbonyl sulfide, ethylene glycol, 2,2,4-trimethylentane, methylene chloride, and others. Documented health effects of the many types of HAPs emitted by the oil and gas industry include increased risks of cancer, respiratory diseases, and birth defects, among others. Children, pregnant women, the elderly, and individuals with underlying health problems (such as respiratory and cardiovascular disease) are particularly vulnerable to these risks.

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): Emissions of NOx and other reactive nitrogen compounds harms sensitive ecosystems by acidifying soils and waters as well as causing over-fertilization. The effects of nitrogen deposition and acidification have been realized at iconic, treasured public lands including Rocky Mountain and Great Smoky national parks. At Rocky Mountain National Park for example, the effects of nitrogen deposition have crossed a damaging threshold. "Observed ecosystem changes include changes in the chemistry of old-growth, Engelmann spruce forests and other alpine vegetation, shifts in population of lake diatoms, excess [nitrogen] leakage into lakes and streams, and alterations in biogeochemical cycling associated with increased microbial activity in high elevation soils and talus."[205]

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): The oil and gas industry is also the largest source of anthropogenic methane pollution in the U.S. according to the EPA's Greenhouse Gas Inventory, and recent analyses indicate that the inventory may underestimate the total methane emissions from this industry.[206] Methane is an extremely potent greenhouse gas that has 36 times the warming potential of carbon dioxide over a 100-year timeframe and 87 times the warming potential of carbon dioxide over a 20-year timeframe.[207] To reach the Obama Administration's climate goals of reducing greenhouse gas emissions 17% by 2020, the administration must achieve additional reductions of methane from the oil and gas sector.[208] Methane also increases smog-forming ozone, which impacts public health and the environment, as discussed above. Moreover, as EPA's Office of Air and Radiation has recognized in its Climate Change Adaptation Implementation Plan, a warming climate will only make it harder for the agency to ensure compliance with ozone standards.[209] Higher temperatures and weaker air circulation as a result of climate change is likely to lead to more ozone formation from the same level of emissions of ozone precursors. Climate change may also lengthen the ozone season, exposing individuals to health threats for longer periods of the year. There are a growing number of regions within the U.S. with air quality issues related to oil and gas development, including areas within and affected by development within Indian country.

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[205] National Park Service et al., Rocky Mountain Atmospheric Nitrogen and Sulfur Study Report (2009) at S-2, available at http://www.nature.nps.gov/air/Pubs/pdf/RoMANS_V1_20100218.pdf.
[206] See, e.g., Brandt, A.R., et al., Methane Leaks from North American Natural Gas Systems, Science, Vol. 343, no. 6172 at pp. 733-735 (Feb. 14, 2014), available at http://www.novim.org/images/pdf/ScienceMethane.02.14.14.pdf.
[207] IPCC, Climate Change 2013: The Physical Science Basis (Sept. 2013), Chapter 8, page 714, Table 8.7, available at https://www.ipcc.ch/report/ar5/wg1/.
[208] See White House, Climate Action Plan: A Strategy to Reduce Methane Emissions (March 28, 2014). Available at http://www.whitehouse.gov/sites/default/files/strategy_to_reduce_methane_emissions_2014-03-28_final.pdf.
[209] EPA, Office of Air and Radiation Climate Change Adaptation Implementation Plan, Draft (Oct. 21, 2013), available at http://www.eenews.net/assets/2013/11/01/document_pm_03.pdf.

EDF ANPR Comments – referenced by Earthjustice et al. (0044): Venting and equipment leaks from the oil and natural gas sector release large quantities of methane, volatile organic compounds ("VOCs"), and hazardous air pollutants. Methane, the main component of natural gas, is now believed to be an even more influential contributor to climate change than previously thought. More than one-third of today's human-caused global warming comes from short-lived climate pollutants that include methane, according to the Intergovernmental Panel on Climate Change ("IPCC").[210] The most recent IPCC report also found that a ton of methane is 84 to 86 times more potent than the same amount of carbon dioxide within the first two decades after it is emitted, and 28 to 34 times more potent within the first 100 years after it is emitted. Further, the National Climate Assessment, released in May 2014, found that climate change is already causing a host of adverse effects around the United States, including longer and more frequent droughts and heat waves, more frequent and intense extreme weather events, increased flooding, larger wildfires, and longer fire seasons.[211] Many of these impacts will be acutely felt on tribal lands.[212]

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): We agree with EPA that in order to properly function as a replacement of the minor NSR permitting program, our preferred FIP approach "would need to regulate emissions of all 'regulated NSR pollutants' from minor sources that construct, or major or minor sources that undertake a minor modification." [Id. at 32518.] Such pollutants include the emissions of nitrogen oxides (NOx) and volatile organic compounds (VOC), both precursors to ground-level ozone formation (hereinafter "ozone" or "smog"), as well as hydrogen sulfide (H2S).

As stated above, addressing emissions of NOx and VOC from new and existing sources is particularly important. As precursors to ozone, reducing NOx and VOC emissions is vital to ensure the health and welfare of communities that are experiencing increased, or even any, oil and gas development as well as to improve visibility in Class I areas. As EPA recognizes, air quality information suggests that an area's ability to comply with the 2008 ozone national ambient air quality standard (NAAQS) is tied to the level of oil and gas production. [Id.] Moreover, elevated ozone concentrations contribute to adverse health impacts to the public – and especially children – including decreased lung function, increased hospital admissions, inflammation and possible long-term lung damage, and even premature mortality.[213]

The damage is not limited to our health. Impairment to ecosystems is dissed with respect to NOx and ozone above. Each of these pollutants also contributes to visibility impairment. Moreover,

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[210] Climate Change 2013: The Physical Science Basis, Contribution of Working Group I To The Fifth Assessment Report of The Intergovernmental Panel On Climate Change (Thomas F. Stocker et al., Eds. 2013).
[211] U.S. Global Change Research Program, 2014 National Climate Assessment (May 2014).
[212] See id. at 298 ("Climate change impacts on many of the 566 federally recognized tribes and other tribal and indigenous groups in the U.S. are projected to be especially severe, since these impacts are compounded by a number of persistent social and economic problems."); see also id. at 302–04 (discussing adverse impacts of ecosystem and water quality changes on tribal communities).
[213] EPA, 2006 Air Quality Criteria for Ozone and Related Photochemical Oxidants, (Feb. 2006); EPA, Fact Sheet: Health and Environmental Effects of Ground-Level Ozone, (July 17, 1997); see also National Ambient Air Quality Standards for Ozone, 75 FR 2938, 2,948 (Jan. 19, 2010).

increased ozone concentrations can decrease crop yields by up to 15 percent.[214] Reducing VOC emissions will also provide the co-benefit of reducing of methane emissions, as EPA notes [79 FR 32504], as well as of organic hazardous air pollutants such as "BTEX" compounds (benzene, toluene, ethyl benzene and xylenes) and n-hexane. Additionally, reducing H2S will reduce a pollutant with toxic properties that has been linked to: respiratory infections; eye, nose, and throat irritation; breathlessness, nausea, dizziness, confusion, and headaches.[215]

The EPA's summary of the above comments and the EPA's responses to these comments on the proposed amendments to the Federal Indian Country Minor NSR rule are as follows:

Comment #38: One commenter (0044) recommended that the EPA expand the pollutants regulated in the proposed FIP to include methane. The commenter noted that, in the proposed FIP, the EPA states that it will include the requirements of the proposed, amended 40 CFR part 60, subpart OOOOa in the FIP. The commenter stated that adding methane to the list of pollutants covered by the rule would provide operators and tribes with certainty that the parts of the NSPS rule governing methane emissions also apply in Indian country.

Response #38: The Federal Indian Country Minor NSR rule does not regulate GHGs, which include methane. The FIP is implementing the Federal Indian Country Minor NSR rule for the oil and natural gas sector, and, therefore, does not regulate GHGs. However, it is worth noting that, while the rule does not directly regulate methane, any controls that effectively control VOC emissions will also control methane emissions. In addition, in the event that subpart OOOOa as adopted requires control of methane, methane emissions will be reduced. No change has been made as a result of this comment.

7.0 Comments Related to Exclusion of Existing Sources from the Proposed Oil and Natural Gas FIP

Marrs (0027): While the EPA does not generally regulate existing permits in the case of minor sources, here there should be an exception. The minor sources at issue here do contribute to negative health and safety effects on humans, thus the various sources in the natural gas and oil industry—with typically volatile organic compounds (VOCs), and hazardous air pollutants (HAPs)—the goal could be lost should there not be some sort of alteration to support existing sources of emissions.

[214] Fitzgerald L. Booker, Joseph E. Miller, & Edwin L. Fiscus, The Ozone Component of Global Change: Potential Effects on Agricultural and Horticultural Plant Yield, Product Quality and Interactions with Invasive Species, 51 J. Integrative Plant Biology, 337, 342-43 (2009).
[215] EPA, Office of Air Quality Planning and Standards, Report to Congress on Hydrogen Sulfide Air Emissions Associated with the Extraction of Oil and Natural Gas (EPA-453/R-93-045), (Oct. 1993) ("EPA Hydrogen Sulfide Report"), available at http://nepis.epa.gov.

The amount of untapped mineral land in Indian country is vast,[216] and with more limits generally on these industries coming in the near future, there is the potential for oil and natural gas companies to expand their production into mineral and gas reserves in Indian country, thus contributing to more minor source emissions overall, despite the ppm regulations required already on newly created sources, even having gone through the regulation processes of the Bureau of Land Management, and the EPA to obtain site-specific permits, or following the FIP. While a minor concern currently, given the nature of the industry's rapid resurgence, and calls for its expansion into Indian country,[217] there is potential for harmful emissions to have a negative effect on local tribes' air quality, which the EPA appears to recognize.[218]

National Tribal Air Association (0032): The NTAA understands that the Proposed Rule will apply to true minor and minor modifications at existing true minor sources engaged in oil and natural gas production, and will not cover existing sources, one primary reason being that the focus of the Federal Indian Country Minor NSR Rule is on new and modified oil and natural gas sources. Further, EPA indicates that, unlike NSR general permits and permits by rule, a federal implementation plan (FIP) could be extended to existing sources, and that EPA is prepared to address such sources, to the extent necessary, through area- or reservation-specific FIPs. Unfortunately, EPA does not appear to want to go any further in regulating existing sources, under this FIP nor any other FIP or regulatory action. The NTAA disagrees wholly with EPA on this decision.

EPA acknowledges that a commenter on the Advance Notice of Proposed Rulemaking "Managing Emissions from Oil and Natural Gas Production in Indian Country" indicated that existing true minor source oil and natural gas facilities are having harmful impacts to the health and welfare of Tribal members. Another commenter indicated that, in response to the Federal Indian Country Minor NSR Rule, EPA Region 8 received approximately 6,300 registrations from existing minor sources in the natural gas sector, demonstrating such sources are responsible for considerable air pollution emissions within Indian Country, such as methane and VOCs, pollutants that NTAA has already identified as having health and environmental impacts to Indian Tribes. The NTAA finds it egregious that EPA would not want to regulate existing sources beyond those for which it makes a determination that an area- or reservation-specific FIP is necessary, considering that in the aggregate, such sources will surely have negative impacts on Indian Country.

The NTAA recommends that EPA develop an approach for regulating existing true minor source oil and gas facilities in Indian Country apart from the Proposed Rule that, not only takes into account those parts of Indian Country where EPA finds an area- or reservation FIP is necessary for existing sources, but addresses existing sources throughout all of Indian Country. Such an approach could include the use of FIPs, general permits, or permits by rule.

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[216] Revenue, royalties paid to tribes, and output all expected to increase greatly in the future. Source: U.S. Bureau of Indian Affairs, Oil and Gas Outlook in Indian Country, (visited November 1, 2015) Available at: http://www.bia.gov/cs/groups/xieed/documents/document/idc1-024535.pdf.

[217] Rob Bishop, Freeing Indians from Obama's Grip, Wall Street Journal (Oct. 27, 2015).

[218] Id. Roughly 56 million acres belonging to American Indians are "in trust" under the Bureau of Land Management.

QEP Resources, Inc. (0038): Finally, QEP supports EPA's decision to focus on new sources, rather than existing sources, under the FIP. We agree that existing sources are best addressed in the context of area-specific rulemakings, at a time when the individual need arises. Only with a reservation-specific FIP can EPA take into account the complete inventory of emissions in an area and the relevant modeled air quality impacts to determine which existing sources and how such sources should be further regulated, while still allowing for reasonable further development.

The regulation of existing sources requires a deliberate, data-based and transparent process. Take, for example, the Uinta Basin in Utah. Based on 2012-2014 EPA data, monitored ozone levels in and Duchene Counties are above the new 2015 ozone National Ambient Air Quality Standard ("NAAQS") of 70 ppb.[219] An official nonattainment designation for the Basin may be forthcoming at the end of 2017. After an official 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 may then consider regulation of existing sources. Under the Clean Air Act ("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. As the Agency has proposed, EPA should begin by implementing appropriate permitting mechanisms that allow for efficient processing of new sources in Indian country. Then, EPA may conduct an appropriate analysis of specific areas that are officially designated in violation of a NAAQS, as prescribed in the CAA, to regulate existing sources.

Ute Indian Tribe (0039): The Ute Indian Tribe is also concerned about the cumulative air quality impact from existing minor source emissions. Hundreds of unregulated existing minor sources on the and Ouray Reservation harm the health and welfare of tribal members. Neither a general permit nor a permit-by-rule would allow EPA to regulate these emissions. A FIP could regulate existing sources. However, not all existing minor sources should be regulated in the same manner and EPA should target those sources most directly contributing to air quality degradation. If EPA chooses to regulate existing sources in a FIP developed specifically for the Uintah and Ouray Reservation, it should apply control requirements to existing source emissions in a flexible manner, gradually increasing enforcement as appropriate.

The Tribe would like to see the rule apply to the oldest and most inefficient minor sources. Prioritizing existing minor sources could provide a solution that is not overly burdensome to oil and gas operators on the Reservation. Without first meeting with the Tribe's Air Quality Division to determine which sources should be included, a FIP that includes all existing sources would compromise continued development on the Reservation, limiting both tribal revenue and opportunities for tribal members. Oil and gas operations have created enormous opportunities for the Tribe and its members. It is crucial that a reservation-specific FIP not unfairly hamper these opportunities.

[219] See http://www3.epa.gov/ozonepollution/pdfs/20151001datatable20122014.pdf.

Gas Processors Association (GPA) (0040): In addition, GPA urges EPA to create a process for existing sources to participate in the FIP on a voluntary basis. GPA agrees with EPA that the FIP should not be extended to include all existing sources as a matter of law. [See 80 FR 56569-71.] At the same time, however, there may be a number of reasons why a specific existing source may wish to participate in the FIP on a voluntary basis. In light of the EPA's conclusion that compliance with the FIP will be protective of the environment and achieve air quality goals for Indian Country, allowing existing sources to register and be regulated under the FIP should, on balance, have a positive effect on air quality.

On a case-by-case basis, certain operators may have an interest in reconsidering their existing operations at a site and electing to comply with the NSPS and NESHAPs included in the proposed FIP. Furthermore, operators that also have new or modified sources that are subject to the FIP may prefer to operate under a uniform regulatory program for all of their sources, regardless of whether they are new, modified, or existing. Operating under a uniform regulatory structure can reduce compliance costs and improve efficiency by reducing the number of unique permitting requirements with which an operator's employees must be trained to implement.

Further in some cases, voluntary participation by existing sources may provide a means to improve air quality. For example, in near-nonattainment areas with significant existing oil and natural gas production, a FIP that applies only to new sources may not have a significant impact on air quality, given the large number of existing sources. However, existing sources could potentially reduce their emissions and improve air quality by voluntarily complying with the FIP. As explained above, individual sources may prefer a single regulatory program for new and existing sources from an efficiency standpoint, even if the emissions limitations included in the FIP are slightly more stringent for existing sources. Thus, GPA urges EPA to include an open ended process for existing sources to voluntarily register to become subject to the FIP and rescind existing minor permits, if necessary, at any time after the FIP is finalized.

In addition, GPA urges EPA to allow the FIP to be used to authorize minor modifications at major sources. Minor modifications at major sources can involve the same equipment and emissions profile as modifications at minor sources. Further, major sources that have already undergone very-involved NSR permitting review at the time of construction should not be at a disadvantage when undertaking minor modifications. Many state-level permitting programs allow this type of approach. For example, the TCEQ allows major sources to utilize permits by rule to authorize minor modifications.

Earthjustice et al. (0044): Environmental and Tribal Commenters support the adoption of a FIP to regulate minor oil and gas sources in Indian Country based on the key advantage of a FIP: the authority to regulate existing sources.[220] Although EPA recognized this as the primary advantage of a FIP in the ANPR, the Proposed FIP does not include any additional regulation of existing sources. Given existing air quality problems caused by oil and gas development in Indian Country—including many areas that already violate federal standards—prompt regulation of existing sources is necessary. Moreover, regulation of existing sources will help to reduce methane emissions and further the Obama Administration's goal of reducing greenhouse gas emissions to 17% below 2005 levels by 2020. As EPA recognizes and Colorado and Wyoming

[220] See Coalition ANPR Comments at 13; EDF ANPR Comments at 12.

have proven, there are available controls for controlling emissions from existing sources at reasonable costs to the industry. Without requiring these measures nationwide, including in Indian Country, EPA has not met its obligation to protect public health and welfare, and has not fulfilled its trust responsibilities to Indian tribes. EPA should at least regulate existing sources within Indian Country located within the boundary of a state that already regulates existing sources, in order to create a level playing field and ensure that environmental harms are not concentrated within Indian Country or in areas impacted by emission sources within Indian country.

Although EPA proposes to address existing sources in reservation- or area-specific FIPs, this approach will create further delay in addressing pressing air quality problems and will result in an uneven playing field within Indian Country. Additionally, there is little guidance for when the agency will prepare such FIPs. At a minimum, EPA should add specific criteria and triggers for reservation-specific FIPs and increase opportunities for tribes, tribal members, and members of the public to request preparation of a reservation- or area-specific FIP.

Earthjustice et al. (0044): EPA should regulate existing oil and gas sector sources nationwide in order to prevent adverse impacts on public health and the environment. In the ANPR, EPA solicited comments on the advantages and disadvantages of available approaches to manage oil and gas sector emissions. [79 FR 32503.] The options the agency considered included a FIP, a general permit, and a permit by rule. [Id.] EPA explained that the primary advantage of a FIP is that it could cover existing sources. [Id. at 32514.] Both the Coalition and EDF ANPR comments supported a FIP approach for this reason. [EDF Comments at 12; Coalition ANPR Comments at 13.] But in the Proposed FIP, EPA decided not to regulate existing sources (beyond those already covered by the NESHAPs, which includes only some glycol dehydrators and process heaters. [80 FR 56557–58; 42 U.S.C. § 7412(d)(3)).]

By 2018, 90% of oil and gas sector emissions will be attributable to facilities that already existed in 2011.[221] Because many oil and gas emissions sources have long lifetimes and slow turnover, EPA will not be able to sufficiently protect public health and welfare, ensure compliance with the NAAQS, PSD, the Class I visibility protection mandate, and reduce greenhouse gas emissions unless it requires existing sources to adopt some of the affordable emissions controls which some states already require. [See Coalition ANPR Comments at 14–16.]

Earthjustice et al. (0044): There are many ways of regulating existing sources at reasonable costs, some of which have already been adopted by states.[222] Many states already regulate a variety of existing sources. In February 2014, Colorado revised its oil and gas sector emissions regulations, becoming the first state in the country to directly regulate methane emissions.[223]

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[221] EDF ANPR Comments at 8 (discussing ICF INT'L, Economic Analysis of Methane Emissions Reduction Opportunities In The U.S. Onshore Oil And Natural Gas Industries At 1-1 (2014) (appx. at 1388)).
[222] See, e.g., Comments of EDF et al. on Proposed Control Techniques Guidelines for the Oil and Natural Gas Industry, Dkt. ID No. EPA-HQ-OAR-2015-0216 (Dec. 4, 2015) ("Proposed CTGs Comments"); EDF ANPR Comments at 7; Coalition ANPR Comments at 19–28.
[223] See Bruce Finley, Colorado Adopts Tougher Air Rules for Oil, Gas Industry, DENVER POST (Feb. 23, 2014), http://www.denverpost.com/environment/ci_25213661/colorado-adopts-tougher-air-rules-oil-gas-industry; Stephanie Paige Ogburn, Colorado First State to Limit Methane Pollution from Oil and Gas Wells, SCIENTIFIC

Among other things, Colorado adopted regulations governing several existing sources at reasonable costs, including combustion devices, storage tanks, compressors, and well production facilities.[224] Additionally, Wyoming regulates existing sources in nonattainment areas. Wyoming regulates all existing oil and gas well production facilities and compressor stations in the Upper Green River Basin ozone nonattainment area. [Wyo. Admin. Code Env. AQ Ch. 8 § 6.] California's Bay Area Air Quality Management District regulates existing pneumatic controllers.[225]

Analysis conducted by these state governments indicates just how reasonable the costs of these requirements are. For example, Colorado calculated that replacing existing high-bleed pneumatic devices with low-bleed pneumatic devices statewide would result in annualized cost-savings of $1,084 over a fifteen-year period (assuming a 5% rate of return and natural gas value of $3.5/mcf).[226] As a result of complying with Colorado's regulations, operators will collectively save $10,172,256 a year. [Id. at 23.] Collectively, over a fifteen-year period, this accounts to total cost-savings of $152,583,840. [See id.] Although capturing gas and using it for a beneficial purpose is always preferable to flaring and should be required whenever and wherever possible, there may be instances in which a source's only option to avoid venting gas is to route it to a completion control device. This can be done at a reasonable cost level, although this method will not necessarily result in net cost savings for operators because it does not allow for the capture and use of additional natural gas. Colorado calculated that the total annualized cost of installing an auto-igniter control device at existing sources statewide was $475, for a cost effectiveness of $272/ton of VOC emissions reduced. [Id. at 21.] Colorado calculated the annualized cost of controlling VOC emissions from existing glycol dehydrators at a 6-tpy emissions threshold at $6,286.80 per device, for a cost-effectiveness of $632/ton. [Id. at 24; see also Proposed Amended NSPS Comments.] Again, we emphasize that capture and use of gas should always be the first line of defense against venting; flaring should only be seen as an option of last resort against venting.

EPA's proposed CTGs also identify many emissions control strategies that can readily be implemented for existing sources at reasonable costs, and that some states have already implemented.[227] EPA should consider adopting some of the affordable emissions control strategies identified in the Draft CTG in the final rule.

Independent consultant ICF International has determined that 40% of methane emissions from the oil and gas sector could be eliminated by 2018 at a total cost of one cent per mcf of gas

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AMERICAN (Feb. 25, 2014), http://www.scientificamerican.com/article/colorado-first-state-to-limit-methane-pollution-from-oil-and-gas-wells/.

[224] See Colo. Dep't Pub. Health & Env't, Revisions to Colorado Air Quality Control Commission's Regulation Numbers 3, 6, and 7: Fact Sheet at 1–4 (2014), https://www.colorado.gov/pacific/sites/default/files/AP_Regulation-3-6-7-FactSheet.pdf (Appx. at 1503).

[225] See Jimmy Cheng, Permit Handbook, Chapter 3.5: Natural Gas Facilities and Crude Oil 18 Facilities 5 (2013), http://hank.baaqmd.gov/pmt/handbook/rev02/PH_00_05_03_05.pdf (Appx. at 1507).

[226] Colo. Air Pollution Control Div., Initiation Economic Impact Analysis: Regulation Number 7 at 22 (Nov. 13, 2013), https://www.colorado.gov/pacific/sites/default/files/062_R7-Initial-EIA-request-11-21-13-26-pgs-062_1.pdf (APCD EIA) (Appx. at 1514).

[227] See, e.g., Proposed CTGs at 6-19 (discussing Colorado's requirement that operators install no- or low bleed pneumatic controllers at all new and existing operations statewide); see also Proposed CTGs Comments.

produced. [ICF INT'L at 1-1.] According to ICF, that 40% reduction would save the United States as a whole $100 million annually. [Id. at 1-1 to 1-2.] ICF's report breaks down costs and cost savings of reducing emissions from existing sources by equipment and segment of the oil and gas production process. [See id. at 4-10.] This demonstrates that reducing emissions from some specific existing sources, such as capturing gas from existing centrifugal compressors, can save operators as much as $5/mcf.

CATF has also conducted extensive analysis of strategies to reduce emissions from existing sources.[228] Its analysis shows that EPA can make significant gains in reducing methane emissions by regulating existing sources, and that proven technologies and practices can reduce methane pollution from existing sources by up to 1,350,000 metric tons per year. [Id. at 3.] Existing pneumatics and compressors account for 30% of the oil and gas sector's methane emissions. [Id. at 18.] CATF identified technologies to reduce methane pollution from existing pneumatics and compressors by 45% and 85%, respectively. [Id. at 40.] Overall, CATF found its recommendations to be extremely cost-effective. The average abatement cost of the measures recommended in CATF's report was only $8 to $18 per metric ton of carbon dioxide equivalent, which is just $0.04 to $0.09 per mcf of natural gas sold. [Id. at 44.] And some specific emissions reductions at existing sources are even more cost effective—CATF estimates that operators will save $200 per metric ton of avoided methane pollution from reduced emissions from compressors in the processing segment. [Id. at 30.]

Earthjustice et al. (0044): Under the CAA, EPA is "authorized to treat Indian tribes as States," and must promulgate regulations "specifying those provisions of [the CAA] for which it is appropriate to treat Indian tribes as States." [42 U.S.C. § 7601(d)(1)(A), (2).] Pursuant to this requirement, EPA issued the Tribal Air Rule (TAR). [63 FR 7254 (Feb. 12, 1998).] In this rule, EPA concluded that it was not appropriate to treat tribes as states under CAA §§ 110(a)(1) and 111(c)(1), which govern SIP submission and approval. [40 CFR § 49.4(a), (d).] EPA determined that it was not appropriate to subject tribes to the strict deadlines for implementation plan development set by §110(c)(1).

But this does not mean that there are no implementation plans for tribal lands—EPA still retains the responsibility to protect air quality in Indian Country, just as it does nationwide. [See 76 FR 38752–53.] As EPA itself explained, including § 110(c)(1) on the list does "not relieve [EPA] of its general obligation under the CAA to ensure the protection of air quality throughout the nation, including throughout Indian Country. In the absence of an express statutory requirement, EPA may act to protect air quality pursuant to its gap-filling authority under the Act as a whole." [Id.][229]

When EPA determines that treating tribes as states is inappropriate, the CAA gives EPA discretion to create regulations or otherwise directly administer those provisions of the CAA to

[228] David McCabe et al., Waste Not: Common Sense Ways To Reduce Methane Pollution From The Oil And Natural Gas Industry (2015), http://www.catf.us/resources/publications/files/WasteNot.pdf (Appx. at 2142).
[229] In addition to EPA's general obligation to ensure air quality protection nationwide, EPA also has a specific obligation to Indian Country under its trust responsibilities. See Nance v. EPA, 645 F.2d 701, 711 (9th Cir. 1981) ("[A]ny Federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes.").

"achieve the appropriate purpose." [42 U.S.C. § 7601(d)(4).] Under this § 7601(d)(4) authority, the agency "shall promulgate without unreasonable delay such Federal implementation plan provisions as are necessary or appropriate to protect air quality.[230, 231] Thus, EPA has ample authority to regulate existing source in Indian Country to fulfill the purposes of the Act.

Moreover, when EPA issues a FIP in Indian Country, it is standing in the shoes of a tribe.[232] As discussed above, states can (and do) regulate existing sources. Tribes have similar authority to regulate existing sources within their boundaries if doing so will protect the health, safety, and welfare of their people, so long as such regulations do not conflict with any act of Congress.[233] Thus, when standing in the shoes of a tribe, EPA also has authority to regulate existing sources.

EPA has already issued one reservation-specific FIP that covers new, modified, and existing oil and gas production operations at FBIR. [78 FR 17836 (Mar. 22, 2013).] As EPA explained, regulating existing sources through the FBIR FIP furthered the agency's purposes under the CAA: "Our primary goal, as always is with regard to regulations developed under the CAA, was to ensure increased protection to the public health and the environment. This FIP provides these benefits through promulgation of enforceable requirements to limit VOC emissions from [existing] facilities."[234, 235]

Earthjustice et al. (0044): Several industry commenters on the ANPR questioned EPA's legal authority to regulate existing sources in Indian Country. None of their comments have merit. For example, some industry commenters argue that EPA cannot issue a FIP covering existing sources because the agency has not identified a gap that needs filling.[236] But as explained above, there is no existing regulatory mechanism governing NSR at sources in Indian Country, and SIPs governing regulations for both attainment and nonattainment areas do not apply in Indian

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[230] ." 40 CFR § 49.11(a) (emphasis added); see also 42 U.S.C. § 7602(y) (defining a FIP as "a plan (or portion thereof) promulgated by [EPA] to fill all or portion of a gap or otherwise correct all or a portion of an inadequacy in a SIP").

[231] EPA need not issue a FIP if it instead approves a Tribal Implementation Plan (TIP). 40 CFR § 49.11(a). But "there are . . . no currently approved TIPs specifically applying to the issuance of general permits with respect to the reduction of emissions related to oil and natural gas production facilities." 80 FR 56562. Accordingly, EPA has discretion to issue a FIP governing NSR permitting for minor oil and gas production facilities nationwide. See Michigan v. EPA, 268 F.3d 1075, 1079 (D.C. Cir. 2001) ("In the absence of a tribal implementation plan, EPA may provide a federal operating plan for lands under the tribe's jurisdiction.").

[232] ODEQ, 740 F.3d at 193 (explaining that EPA's jurisdiction to regulate air quality is concurrent with the jurisdiction of the tribe in whose shoes EPA is standing).

[233] See Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2030 (2014) (explaining that tribes retain their rights as sovereigns "unless and until Congress acts" to diminish their authority); see also Sandra D. Benischek, Clean Air in Indian Country: Regulation and Environmental Justice, 12 VILL. ENVTL. L.J. 211, 214 (2001) (Appx. at 1540) (discussing the ability of tribes to regulate existing sources).

[234] 78 FR 17838; see also Ariz. Pub. Serv. Co., 562 F.33d at 1125–26 (upholding FIP that applies to an existing source located within an area of Indian Country that is designated as attainment).

[235] EPA has also already issued the tribal NSR rule, which is a nationally applicable FIP governing NSR for non-oil and gas sources in Indian country. 76 FR 38748 (July 1, 2011) (codified at 40 CFR §§ 49.151–72). A reviewing court declined to address whether EPA exceeded its authority by issuing this nationally applicable FIP. See ODEQ, 740 F.3d at 189.

[236] See, e.g., Comments of QEP Energy Company on Managing Emissions from Oil and Natural Gas Production in Indian Country; Docket ID Number EPA-HQ-OAR-2011-0151 at 2–3 (Aug. 18, 2014) ("QEP Comments").

Country. The industry commenter claims support from Louisiana Public Service Commission v. FCC, 476 U.S. 355, 374 (1986). [QEP Comments at 3.] But this case involves an FCC regulation governing the depreciation of telephone plants and equipment. [La. Pub. Serv. Comm'n, 476 U.S. at 358.] It has nothing to do with EPA's authority to directly implement the CAA in Indian Country. The cited page includes a general truism that "[a]n agency may not confer power upon itself." [Id. at 374.] Yet, EPA would not be conferring power upon itself if it chose to regulate existing sources through a FIP. EPA would be exercising the power that Congress has conferred upon it to "directly administer such provisions [which EPA has determined it is inappropriate for tribes to be treated as states] so as to achieve the appropriate purpose." [42 U.S.C. § 7601(d)(4).] Nothing in the language of the statute limits EPA's authority to regulate new and modified sources.

Earthjustice et al. (0044): Industry commenters also argue that EPA lacks authority to regulate existing sources because doing so is beyond the scope of the 1998 TAR and the tribal NSR rule, which explicitly only applied to new and modified sources.[237] But nothing prevents EPA from accomplishing two regulatory purposes in a single FIP. Although EPA has elected in the Proposed FIP to conclude that compliance with the proposed FIP will also constitute compliance with minor source NSR permitting, [see 80 FR 56558], nothing prevents EPA from addressing other related issues.

Relatedly, industry commenters argue that EPA can only take action to carry out the statutory directives contained in 42 U.S.C. §§ 7410(a)(2)(C) and 7601(d). [See, e.g., QEP Comments at 3.] They rely on a D.C. Circuit case which states that "EPA cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of EPA in a particular area."[238] But § 7601(d) gives EPA extremely broad authority to "directly administer" any provision of the CAA that EPA determines it is not appropriate for tribes to carry out themselves.

An industry commenter also claimed that "The D.C. Circuit has twice rejected EPA's attempt to use 301(a) and 304(d) to directly regulate sources in Indian Country outside of its limited authority under the CAA."[239] This is not true. Both ODEQ and Michigan concerned EPA's authority to implement federal rules in areas for which Indian Country status was in question. [ODEQ, 740 F.3d at 189; Michigan, 268 F.3d at 1078.] Neither case casts any doubt on EPA's authority to issue FIPs in order to implement the CAA in areas clearly under tribal jurisdiction. Similarly, industry commenters highlighted language from a D.C. Circuit opinion concluding that the word "necessary" in another CAA section CAA limited EPA's discretion.[240] The issue in Virginia was whether the 1990 CAA Amendments granted EPA independent authority to condition approval of ozone SIPs on adoption of specific control technologies. [Id. at 1410.] The court held that while § 7410 did not provide this authority, § 7511c did. [Id.] Nothing about the case impacts the scope of EPA's authority to determine that it is "necessary" to issue a FIP for tribal lands under the terms of EPA's own regulation, 40 CFR § 49.11(a).

[237] See, e.g., QEP Comments at 3 (discussing 63 FR 7263 and 76 FR 38749).
[238] Am. Petrol. Inst. v. Browner, 52 F.3d 1113, 1119 (D.C. Cir. 1995).
[239] QEP Comments at 3–4 (citing ODEQ, 740 F.3d at 193; Michigan, 268 F.3d at 1082).
[240] See QEP Comments at 4 (discussing Virginia v. EPA, 108 F.3d 1397, 1409 (D.C. Cir. 1997)).

Finally, some industry commenters raised dicta from a footnote in Luminant Generation Company v. EPA, 675 F.3d 917, 932 n.12 (5th Cir. 2012), which states that "[t]he provisions of the CAA that apply to minor NSR require state regulation only insofar as is necessary to assure achievement of the NAAQS." [See, e.g., QEP Comments at 4.] This dicta is part of a footnote in which the court muses about whether EPA might be able to disapprove of a SIP provision on grounds that were not at issue in the case.[241] It has no bearing on EPA's broad regulatory authority to issue a FIP when standing in the shoes of a tribe, a completely separate inquiry from what a state is required to do under one section of the CAA. Moreover, the statement does not limit EPA's ability to regulate existing sources through minor NSR if doing so is necessary to achieve the NAAQS. Given that many areas of Indian Country are already in nonattainment despite the six regulations already being in place, it may well be necessary for EPA to regulate existing sources in other areas in order to prevent them from dipping into nonattainment.

Earthjustice et al. (0044): EPA acknowledges in the Proposed FIP that "managing emissions from existing oil and natural gas sources in some areas of Indian Country also may be important" in order to protect public health and the environment. [80 FR 56570.] EPA also expressed "concern that the rapid growth of the oil and natural gas production segment . . . could result, or in some cases already has resulted, in adverse air quality impacts." [Id.] As EPA acknowledged in the ANPR, "[a]vailable evidence indicates that cumulative emissions from existing sources in the oil and natural gas production industry are causing elevated ambient ozone levels in areas outside of Indian Country . . . [and] air quality in Indian Country may be similarly at risk of reaching unhealthy levels." [79 FR 32513.] Although there is some uncertainty due to the lack of monitoring and other data, EPA acknowledges that "air quality levels may violate the 8-hour NAAQS in some areas and also may cause increases in ozone concentrations in area already violating the 8-hour ozone NAAQS." [Id.]

In fact, many areas of Indian Country already have design values which put them in nonattainment with the ozone NAAQS, and others are approaching the NAAQS.[242] Regulation of existing sources is necessary to remedy these air quality concerns. EPA regulations provide that the agency "shall promulgate without unreasonable delay such Federal implementation plan provisions as are necessary or appropriate to protect air quality" in Indian Country.[243] Ensuring compliance with the NAAQS—which EPA sets to protect public health and the environment—is necessary and appropriate.

Furthermore, the existence of a large number of unregulated existing sources that have not undergone NSR review makes it necessary for EPA to regulate them in order to ensure that they do not pose a threat to human health or the environment. In the FBIR FIP, EPA "determined that existing facilities should also be subject to the FIP . . . given the number of existing facilities that were operating as unregulated sources." [78 FR 17841.] EPA found that regulating these sources was necessary to achieve its goal of "protect[ing] the public health and the environment by

[241] See United States v. Barela, 797 F.3d 1186, 1190 (10th Cir. 2015) ("[S]tatements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand." (quotations omitted)).
[242] See supra pp. 5–8; accord 79 FR 32508–13; 80 FR 56570; EDF ANPR Comments at 2–8; Coalition ANPR Comments at 2–12.
[243] 40 CFR § 49.11(a); see also 42 U.S.C. § 7602(y) (requiring EPA to "provide for attainment").

providing those living on the Reservation the same level of air quality and health protection as people living outside the Reservation." [Id. at 17,839.] The same is true throughout Indian Country. Moreover, emissions control technologies that are applicable to existing sources have reasonable costs, are readily available, and are already required in some states such as Colorado. [79 FR 32513; 80 FR 56569.] Therefore, it makes sense for EPA to regulate existing sources throughout Indian Country.

Earthjustice et al. (0044): Regulation of existing sources is also warranted given the uncertainties associated with air quality in Indian Country.[244] Given the existing data showing serious air quality problems associated with oil and gas development is some areas of Indian Country and the lack of monitoring data in other areas, EPA should regulate existing sources now, rather than exposing tribal members, other residents, and natural and cultural resources to harmful air pollution for additional years while the agency installs new monitors and gathers data.

Regulation of existing sources will also further the White House's goal of reducing methane emissions from the oil and gas sector. In March 2014, the White House identified reducing oil and gas sector methane emissions as a key part of the Administration's strategy to reduce greenhouse gas emissions 17% by 2020. [See White House at 1.] In the ANPR, EPA acknowledged that reducing methane from the oil and gas sector is a key part of the Obama Administration's President's Climate Action Plan. [79 FR 32504–05.] Given that by 2018, 90% of methane emissions from the oil and gas sector will be from existing sources, [see supra p. 18], the earlier that EPA acts to reduce methane emissions from those sources, the more feasible it will be for the Administration to achieve its climate goals.

Even if EPA chooses not to regulate existing sources throughout Indian Country, it should at least regulate existing sources located in states that already do so. EPA notes in the Proposed FIP that "[a]ddressing existing sources through a FIP could be especially useful in areas of Indian Country for which surrounding state requirements apply to existing oil and natural gas sources located on lands that are within a state's jurisdiction." [80 FR 56570.] Putting state and tribal lands on a level playing field will protect the health of tribal members by avoiding a race to the bottom that concentrates pollution on tribal lands. EPA acknowledged in the FBIR FIP that it was especially important to regulate existing sources because North Dakota already did so on the surrounding state lands. [See 78 FR 17837, 17,840.] EPA intended to "level the health protections between the residents living on the FBIR and the residents living in the State of North Dakota." [78 FR 17841.] EPA should do the same here.

In certifying compliance with Executive Order 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, EPA claims that the Proposed FIP will not have such a disproportionate impact. [80 FR 56572.] But this is not the case. On tribal lands that are located within the boundaries of states that already regulate existing sources, like Colorado, tribal members will face additional burdens from pollution that their

[244] See supra pp. 8–9; see also Phillip M. Kannan, The Precautionary Principle: More Than A Cameo Appearance in United States Environmental Law?, 31 WM. & MARY ENVTL. L. &POL'Y REV. 409, 441–47 (2007) (Appx. at 1557) (discussing how the precautionary principle is embedded within the Clean Air Act).

neighbors who live on state lands do not face. Accordingly, EPA should at least regulate existing sources on tribal lands in located within states that already regulate existing sources.

Earthjustice et al. (0044): EPA should define "necessary or appropriate" by identifying more specific criteria for when reservation-specific FIPs will be issued. One such criterion would be that the ozone concentrations in an area of Indian Country (or the surrounding area under state jurisdiction) are close to the NAAQS. Given the extensive and robust body of scientific evidence establishing that ozone causes a wide range of adverse impacts to human health at levels of 60 ppb, design values above 60 ppb should be the minimum criterion.[245]

EPA should also base its decision on the availability of two years of valid monitoring data to prevent substantial delay. And EPA should consider data from all available, reliable monitors, such as those operated by tribes or the industry, regardless of whether EPA has certified them as regulatory monitors. Other factors that can guide EPA's decision to implement reservation-specific FIPs include public health studies showing health impacts, such as increased asthma rates, hospitalizations, and premature deaths. EPA should also consider the current and projected levels of oil and gas production on or near tribal lands.

Earthjustice et al. (0044): When EPA develops a reservation-specific FIP, it should conduct modeling so that tribes and operators can understand how particular sources will contribute to degradation of air quality. Tribal governments can use this modeling data to develop their own tribal air quality plans, or to apply for treatment as a state status.[246] Such modeling data will also be crucial to other land and minerals management agencies, including BLM, the Forest Service, and the Bureau of Indian Affairs ("BIA"), which are tasked with assessing the environmental impacts of proposed oil and gas development projects. EPA should also request available monitoring data from past National Environmental Policy Act ("NEPA") analyses conducted by these surface management agencies during the process of developing reservation-specific FIPs.

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): Because a FIP is the only method by which EPA may regulate existing sources, Environmental Commenters support the development of a FIP. As discussed in the ANPR, EPA has authority to develop a FIP for existing sources within Indian country to protect air quality. [79 FR 32513-14; 42 U.S.C. § 7601(a), (d)(4).] Furthermore, as discussed in more detail below, there are cost-effective pollution control measures that will benefit public health and the environment that should be applied to new and existing sources within Indian country. This approach is particularly warranted given the scarcity of monitoring within Indian country. We further recommend that EPA establish a requirement to periodically review (not less than every five years) the FIP emission limits and controls described below to ensure continued reflection of the best available cost-effective control.

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): Regulation of existing sources is necessary to fulfill the goal President Obama stated in his 2012 State of the Union Address to develop shale gas resources "without putting the health and safety of our citizens at risk." It would also help to fill gaps left by EPA's regulatory efforts to date. In his Blueprint for a

[245] See Ozone NAAQS Revisions Comments at 20–24 (documenting scientific evidence).
[246] See Kronk Warner, supra n. 14 (discussing barriers to tribes applying for treatment as a state status).

Secure Energy Future, President Obama charged the Secretary of Energy's Advisory Board with recommending advice to agencies on practices for shale development to ensure protection of public health and the environment.[247] In 2011, the Advisory Board's Natural Gas Subcommittee, made up of a balanced group of industry and environmental experts, recommended that "measures should be taken to reduce emissions of air pollutants, ozone precursors, and methane as quickly as practicable. The Subcommittee support[ed] adoption of rigorous standards for new and existing sources of methane, air toxics, ozone precursors and other air pollutants from shale gas operations."[248]

Although EPA adopted controls for new and modified sources as part of New Source Performance Standards (NSPS) and National Emissions Standards for Hazardous Air Pollutants (NESHAPS) for the oil and natural gas sector, it did not heed the Advisory's Board's recommendations about regulating methane or existing sources.[249] Likewise, the Indian Country Minor NSR applies only to new and modified sources. Therefore, almost all of the current sources located within Indian country remain unregulated.

At the same time, there is substantial evidence demonstrating that existing oil and gas sources are responsible for considerable air pollution emissions within Indian country. For example, according to the Department of the Interior's Office of Indian Energy and Economic Development (IEED), since 2002, annual income from energy mineral production on Indian lands has increased by more than 113%. [79 FR 32509.] EPA acknowledges there is substantial existing oil and gas development in the Uinta, San Juan, Wind River, and Williston Basins. [Id. at 32508-09.] In response to the requirement in the Indian Country Minor NSR rule for existing minor sources to register with the appropriate EPA office, Region 8 received more than 6,400 registrations from true minor sources in the oil and natural gas sector. [79 FR 32510.]

This existing equipment and infrastructure is responsible for significant national, regional, and localized pollution. [See supra Section II.] A recent report by ICF International estimates that sources existing as of 2011 will contribute 2.7 million metric tons of VOC in 2018.[250] Regions

[247] White House, Blueprint for a Secure Energy Future (March 30, 2011), available at http://www.whitehouse.gov/sites/default/files/blueprint_secure_energy_future.pdf.

[248] U.S. DOE, Secretary of Energy Advisory Board, Shale Gas Production Subcommittee 90-Day Report at 2, 15 (Aug. 18, 2011), available at http://www.shalegas.energy.gov/resources/081811_90_day_report_final.pdf (emphasis added); U.S. DOE, Secretary of Energy Advisory Board, Shale Gas Production Subcommittee Second 90-Day Report at (Nov. 18, 2011), available at http://www.shalegas.energy.gov/resources/111811_final_report.pdf.

[249] See Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants, 77 FR 49490 (Aug. 16, 2012); U.S. DOE, Secretary of Energy Advisory Board, Shale Gas Production Subcommittee Second 90-Day Report at 4, 5 (Nov. 18, 2011), available at http://www.shalegas.energy.gov/resources/111811_final_report.pdf (recognizing that EPA's proposed rules "fall short" because they failed to propose regulating methane or existing sources). The final rule did not fix these deficiencies.

[250] ICF International, Economic Analysis of Methane Emission Reduction Opportunities in the U.S. Onshore Oil and Natural Gas Industries (March 2014), at 3-3, available at http://www.edf.org/sites/default/files/methane_cost_curve_report.pdf). Calculated by adding methane emissions from the Gas Production, Gathering and Boosting, Gas Processing, Gas Transmission, Gas Storage, and Oil Production segments, and converting them to VOC equivalent using the VOC/methane ratios derived the Oil and Gas Regulatory Impact Analysis, Regulatory Impact Analysis: Proposed New Source Performance Standards and

like the Uinta Basin are already exceeding the ozone NAAQS, and the lack of extensive air quality monitoring means there may be other NAAQS violations that have yet to be identified. Even in regions where there are not yet NAAQS violations, emissions from oil and gas sources contribute to elevated ozone levels and HAPs emissions that harm public health. Therefore, EPA's approach must reduce emissions from existing sources in order for EPA to meet its duty to protect public health and welfare.

Controlling existing sources would also help to improve visibility impairment and nitrogen deposition in treasured landscapes, like national parks and wilderness areas.[251] Existing source controls will also have a co-benefit of methane reduction, reducing the climate impacts of oil and gas development and reducing waste of valuable natural gas. Furthermore, regulation of existing sources will level the playing field across all areas of Indian country and may provide for a "margin of growth" that will not otherwise be possible.

There are very cost-effective measures for controlling emissions from existing sources. [See infra Section III-F.] For example, in February 2014, Colorado adopted additional controls for existing sources, including pneumatic controllers and storage tanks. Colorado also adopted greatly expanded leak detection and repair requirements. The state's analysis found that these control measures were very cost effective and, in some cases, provide the industry with cost savings based on sale of the recovered natural gas. Therefore, at a minimum, EPA's approach should include the regulation of existing sources through a FIP.

Coalition ANPR Comments – referenced by Earthjustice et al. (0044): In light of the cumulative impacts from the emission sources associated with oil and gas development, including sources that are currently operating, we recommend that EPA regulate all existing sources and equipment discussed below without promulgating an applicability threshold. Many of the emissions from "minor" sources associated with oil and gas development occur from smaller emissions sources. Individually, a particular emission source may not emit large amounts of a pollutant. But given the massive quantities of the individual sources, and the difficulty obtaining consistent emissions information from so many sources located in remote areas, it does not make sense – and indeed would be very detrimental to public health and welfare – to ignore or exempt any existing sources. As such, Environmental Commenters recommend that the pollution controls described below in Section III.F apply to all new and existing sources regardless of whether any applicability threshold is met. Simply being a covered source emitting a regulated NSR pollutant warrants installation of the respective pollution controls or practices.

Moreover, Environmental Commenters recommend that EPA does not exempt sources that already comply with a new source performance standard (NSPS) or national emission standards for hazardous air pollutants (NESHAP). If those standards were adequate, the current problem with emissions from existing sources would not exist. The controls that EPA should promulgate

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Amendments to the National Emissions Standards for Hazardous Air Pollutants for the Oil and Natural Gas Industry, (July 2011), at 3-16, Table 3-3 (hereafter "2011 RIA").

[251] Environmental Commenters note that, while regulating existing sources here would help visibility impairment in some areas, it does no relieve EPA or the states from following the statutory requirements to develop a long-term strategy to provide controls on human-induced haze pollution in order to restore natural visibility conditions at a reasonable rate of progress. See 42 U.S.C. § 7491(b)(2)(B); 40 CFR § 51.308(d)(3).

via a FIP should go beyond what the existing NSPS or NESHAP currently require and sources covered under those standards should not be exempted.

EDF ANPR Comments – referenced by Earthjustice et al. (0044): It is essential that EPA address emissions from existing oil and gas sources in this rulemaking. According to the ICF Report, oil and gas facilities existing in 2011 will contribute 90 percent of projected methane emissions by 2018. Of the three options EPA presented in the ANPR, a FIP is the only tool capable of controlling the significant emissions from existing sources. Further, as EPA recognized in the ANPR, "a number of cost-effective emission reduction measures could be applied to existing emissions units to balance new growth by mitigating the potential for adverse air quality impacts from overall increases in emissions." [ANPR, 79 FR 32516.]

EDF ANPR Comments – referenced by Earthjustice et al. (0044): Another important conclusion of the ICF study is that it is essential to deploy these cost-effective solutions at existing sources of pollution in order to significantly reduce emissions. According to ICF, approximately 90% of emissions from the oil and gas sector in 2018 will be attributable to facilities that were already in existence as of 2011. Given the long lifetime and slow turnover of many facilities and equipment types in this sector, any rule EPA adopts pursuant to this ANPR will not be sufficiently protective of public health without addressing existing sources.

EDF ANPR Comments – referenced by Earthjustice et al. (0044): EPA has flexibility to design a FIP that fully remedies the gap in regulation of oil and gas sources by including common-sense, comprehensive standards for both new and existing sources – which is imperative for reducing emissions from the oil and gas sector, as noted in section II of these comments. When issuing a FIP, EPA "stands in the shoes" of a state and assumes the same rights and duties that would ordinarily fall to the state. This includes the authority and responsibility provided in section 110(a)(2) of the Act to adopt and enforce such pollution control measures as may be needed to fulfill the purposes of the Act, including measures that apply to existing facilities. Consistent with this broad mandate, EPA has issued several recent FIPs for Indian country, including the FIP applicable to oil and gas facilities in the Ft. Berthold Indian Reservation, that include emission control requirements for existing sources.[252]

Western Energy Alliance (0045): Second, we support EPA's decision to focus on new sources, rather than existing sources, under the FIP. We agree that existing sources are best addressed in the context of area-specific rule-makings, at a time when the individual need arises.

American Petroleum Institute (API) (0046): API supports EPA's decision not to propose standards for existing O&G sources located in or near nonattainment areas. We agree with the Agency that such standards can and should be developed on a regional basis in a way that reflects local air quality characteristics and needs.

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[252] See, e.g., Approval and Promulgation of Federal Implementation Plan for Oil and Natural Gas Production Facilities Fort Berthold Indian Reservation, 78 FR 17836, at 17,841 (March 22, 2013), codified at 40 CFR §§ 49.4161–49.4168 (covering existing minor oil and gas sources) [hereinafter Fort Berthold FIP]; Source-Specific Federal Implementation Plan for Four Corners Power Plant, Navajo Nation, 72 FR 25698 (May 7, 2007) (FIP for existing source); Source Specific Federal Implementation Plan for Navajo Generating Station, Navajo Nation, 75 FR 10174 (Mar. 5, 2010) (FIP for existing source).

State of Utah, Office of Energy Development (0047): Market conditions and falling commodity prices have created significant headwind for the oil and gas industry and recent declined activity is expected to continue. During this sensitive period, unnecessary regulatory costs would be particularly damaging to the viability of the oil and gas industry, which is the key economic driver in the Uinta Basin. To ensure that the ICMNSR and FIP and its implementation do not unnecessarily burden industry, we ask the EPA to address existing sources only after an effective program for new sources is established, and through a more deliberate and inclusive process that includes current air quality data and emissions inventories.

State of Utah, Office of Energy Development (0047): The unique meteorology and conditions present in the Uinta Basin have created significant challenges to identifying the most effective approaches to reducing ozone concentrations. The State of Utah has invested significant time and resources to better understand and address the complex and unique issues of wintertime ozone formation and mitigation in the Uinta Basin. While much progress has been made to identify the most effective approaches to mitigating wintertime ozone, many questions remain. Recent dramatic shifts in market-place conditions and commodity prices will likely create significant changes to the Basin's emissions profile.

Along with updated science and a dramatically different marketplace, oil and gas production and controls have changed substantially since the last inventory was conducted a decade ago. To reflect these changes, an updated inventory of emission sources would ensure that effective and least-cost approaches are properly assessed. The EPA should complete an updated emission inventory before imposing significant new retrofit costs on industry.

The EPA's summary of the above comments and the EPA's responses to these comments on the proposed amendments to the Federal Indian Country Minor NSR rule are as follows:

Comment #39: Several commenters (0027, 0032, 0038, 0039, 0040, 0044, 0045, 0046, 0047) submitted comments on the subject of regulating existing sources in the proposed FIP. Three commenters recommended that the EPA regulate existing sources; one commenter recommended that the EPA create a voluntary process for existing sources to register and to be regulated under the FIP; three commenters agreed with the EPA's position not to regulate existing sources; and one commenter recommended that the EPA regulate existing sources only in the context of area-specific rules. One of the commenters favoring the regulation of existing sources noted that there is substantial evidence demonstrating that existing oil and natural gas sources are responsible for considerable air pollution emissions within Indian country, and that a FIP is the only method by which the EPA may regulate existing sources. This commenter further noted that many areas of Indian country are already in nonattainment despite the six regulations already in place, and that it might be necessary for the EPA to regulate existing sources in other areas in order to prevent them from slipping into nonattainment. One of the commenters recommended that the EPA develop an approach for regulating existing true minor source oil and natural gas facilities in Indian country apart from the Proposed Rule that not only takes into account those parts of Indian country where the EPA finds an area- or reservation FIP is necessary for existing sources,

but addresses existing sources throughout all of Indian country. Such an approach could include the use of FIPs, general permits, or permits by rule.

The three commenters requesting that the EPA not regulate existing sources recommended that regulation of existing sources should be addressed in the context of area-specific rulemakings, developed on a regional basis in a way that reflects local air quality characteristics, current air quality data, and emissions inventories. One of the commenters requesting that the EPA address existing sources in the context of area-specific rulemakings suggested that not all existing minor sources should be regulated in the same manner; the EPA should target those sources most directly contributing to air quality degradation. This commenter further recommended that, should the EPA choose to regulate existing sources, the EPA should apply control requirements to existing source emissions in a flexible manner, gradually increasing enforcement as appropriate.

Response #39: The purpose of the proposed FIP was to address pre-construction permitting for new and modified true minor sources locating or located in reservation areas of Indian country and other areas of Indian country over which a tribe has jurisdiction in order to satisfy the requirements of the Federal Indian Country Minor NSR rule. We chose this approach both because of our concern that the number of applications for source-specific permits from true minor sources in the oil and natural gas sector would overwhelm the available resources of the Reviewing Authority and to provide consistency in the regulation of such sources throughout the areas where the Federal Indian Country Minor NSR rule is in effect. The proposed FIP does not address existing sources, unless they undergo modification. We see no reason to change that in the final FIP. Rather, as discussed above, we believe the best way to address emissions from existing sources is through a reservation- or area-specific FIP if and when we determine that one is necessary or appropriate to protect air quality. In addition to satisfying the requirements of the Federal Indian Country Minor NSR rule, we believe that the final FIP addressing only new and modified true minor sources in the oil and natural gas production and natural gas processing segments of the oil and natural gas sector is sufficient to protect air quality in all of the areas to which it applies regardless of the current level of oil and natural gas production and natural gas processing activities in any particular area. The exception to this statement is the Uintah and Ouray Reservation in Utah. For the Uintah and Ouray Reservation, we have sufficient concerns with the impact of emissions from existing sources that we plan to propose a separate reservation-specific FIP addressing such sources. Similarly, we will consider promulgating such reservation- or area-specific FIPs in the future as we believe necessary or appropriate to protect air quality.

Comment #40: One commenter (0044) recommended that specific existing oil and natural gas production equipment be regulated under the proposed FIP, including: reciprocating compressors, centrifugal compressors, liquids unloading at existing wells, glycol dehydrators, liquid storage vessels, and pneumatic controllers.

The commenter recommended that the EPA require: (1) the replacement of the rod packing of existing reciprocating compressors every 36 months or 26,000 hours of operation; (2) replacement of wet seal configurations on centrifugal compressors with one that utilizes dry seals or that captures the emissions from the oil degassing unit; (3) that plunger lifts be required for all

liquids unloading; (4) that dehydrators control VOC by 95 percent with a condenser; (5) that storage vessels capture VOC emissions via a closed vent system and route those emissions to a beneficial use; and (6) that high bleed pneumatic controllers be replaced with low-bleed controllers except when technically necessary.

Response #40: As stated above, the purpose of the FIP, as proposed and as finalized herein, is to satisfy the requirements of the Federal Indian Country Minor NSR rule, and not to regulate existing sources.

Comment #41: One commenter (0044) recommended that the proposed FIP be revised to require regular Leak Detection and Repair (LDAR) surveys at all new and existing facilities, including well pads, other production facilities, gathering compressor stations, and natural gas processing plants that are not covered under 40 CFR part 60, subparts KKK and OOOO. This commenter recommended that instrument-based LDAR surveys be carried out quarterly on all sources in the production segment and that auditory, visual, and olfactory inspections should be performed monthly.

Response #41: The EPA proposed to add LDAR requirements for well sites and compressor stations, including gathering and boosting stations, to 40 CFR part 60, subpart OOOOa rule in September 2015.[253] As those requirements have been incorporated into the final subpart OOOOa regulation[254] – and, thus, the FIP – any LDAR requirements finalized under 40 CFR part 60, subpart OOOOa are part of the FIP. Thus, new and modified true minor sources subject to the FIP will be required to comply with certain LDAR requirements. As noted in response to Comments #39 and #40, and for the reasons stated therein, we did not propose to regulate existing sources under the FIP, and the final FIP does not regulate existing sources.

8.0 General Comments (e.g., Administrative, Incorporate by Reference)

Earthjustice et al. (0044): The same day that EPA issued the Proposed FIP, it also proposed three other rules for the oil and gas sector: amended New Source Performance Standards ("NSPS") (Proposed Amended NSPS Rule),[255] a Source Determination Rule,[256] and Control Techniques Guidelines ("Proposed CTGs").[257] The Proposed FIP requires oil and gas sources in Indian Country to comply with the Proposed Amended NSPS Rule. Therefore, Environmental and Tribal Commenters incorporate the comments of several environmental and public health organizations on the Proposed Amended NSPS Rule by reference into this letter.[258]

American Petroleum Institute (API) (0046):

[253] "Oil and Natural Gas Sector: Emission Standards for New and Modified Sources in the Oil and Natural Gas Sector," U.S., Environmental Protection Agency, 80 FR 56593, September 18, 2015, https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-21023.pdf.
[254] "Oil and Natural Gas Sector: Emission Standards for New, Modified and Reconstructed Sources," May 12, 2016, http://www.epa.gov/airquality/oilandgas/actions.html.
[255] 80 FR 56593 (Sept. 18, 2015) (Docket No. EPA-HQ-OAR-2010-0505).
[256] Footnote 4: 80 FR 56579 (Sept. 18, 2015) (Docket No. EPA-HQ-OAR-2013-0685).
[257] Footnote 5: 80 FR 56577 (Sept. 18, 2015) (Docket No. EPA-HQ-OAR-2015-0216).
[258] Comments of CATF et al. on Proposed Oil and Natural Gas Sector: Emission Standards for New and Modified Sources, Dkt. ID No. EPA-HQ-OAR-2010-0505 (Dec. 4, 2015).

Proposed Language

40 CFR 49.105 requires that oil and natural gas sources using the FIP registration process comply with six specific federal new source performance standards (NSPS) and national emission standards for hazardous air pollutant (NESHAP) regulations.

Issue 1 - Incorporation by Reference

The proposed rule appears to make an "evergreen" incorporation by reference – i.e., whenever the O&G FIP is invoked, the rule appears to require application of the then-current version of each incorporated regulation. API does not object to this approach as a practical matter because the then-current version of each rule will apply on its own terms to affected sources. However, it is beyond EPA's authority to make an "evergreen" incorporation by reference because any amendment of the incorporated rules would result in an amendment to the O&G FIP, which effectively would be accomplished without notice and comment rulemaking as to the FIP. We recommend that EPA incorporate into the O&G FIP the rules as they stand at the time the FIP is promulgated. The FIP can easily be amended later if significant changes are made to the underlying rules.

Recommendation 1 - Incorporation by Reference

(a) For true minor sources that are subject to 40 CFR part 63, subpart DDDDD (National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters), for purposes of this FIP, sources must comply with all of the applicable provisions of the standard as written as of [INSERT DATE OF FINAL PROMULGATION OF O&G FIP].

(b) For true minor sources that are subject to 40 CFR part 60, subpart IIII - Standards of Performance for Stationary Compression Ignition Internal Combustion Engines, for purposes of this FIP, sources must comply with all of the applicable provisions of the standard as written as of [INSERT DATE OF FINAL PROMULGATION OF O&G FIP]:

…

(c) For true minor sources that are subject to 40 CFR part 60, subpart JJJJ - Standards of Performance for Stationary Spark Ignition Internal Combustion Engines, for purposes of this FIP, sources must comply with all of the applicable provisions of the standard as written as of [INSERT DATE OF FINAL PROMULGATION OF O&G FIP]:

…

(d) For true minor sources that are subject to 40 CFR part 60, subpart Kb - Standards of Performance for Volatile Organic Liquid Storage Vessels, for purposes of this FIP, sources must comply with all of the applicable provisions of the standard as written as of [INSERT DATE OF FINAL PROMULGATION OF O&G FIP]:

…

(e) For true minor sources that are subject to subpart OOOOa, Emission Standards for New and Modified Sources in the Oil and Natural Gas Sector, for purposes of this FIP, sources must comply with all of the applicable provisions of the standard as written as of [INSERT DATE OF FINAL PROMULGATION OF O&G FIP]:

(f) For true minor sources that are subject to 40 CFR part 63, subpart HH – National Emission Standards for Hazardous Air Pollutants from Oil and Natural Gas Production Facilities, for purposes of this FIP, sources must comply with all of the applicable

provisions of the standard as written as of [INSERT DATE OF FINAL PROMULGATION OF O&G FIP]:

American Petroleum Institute (API) (0046):

Issue 3 - NSPS OOOOa Typographic Error
There is a typographic error in the reference to the proposed NSPS OOOOa standard. The word "applicable" should be included, as it is in the references to the other five regulations.

Recommendation 3 - NSPS OOOOa Typographic Error

(e) For sources that are subject to subpart OOOOa, Emission Standards for New and Modified Sources in the Oil and Natural Gas Sector, for purposes of this FIP, sources must comply with all of the applicable provisions of the standard as written as of [INSERT DATE OF FINAL PROMULGATION OF O&G FIP], except for the following:

The EPA's summary of the above comments and the EPA's responses to these comments on the proposed amendments to the Federal Indian Country Minor NSR rule are as follows:

Comment #42: One commenter (0046) noted that the proposed language for §49.105 requires that oil and natural gas sources using the FIP registration process comply with six specific federal NSPS and NESHAP regulations. The commenter stated that "The proposed rule appears to make an "evergreen" incorporation by reference – *i.e.*, whenever the oil and natural gas FIP is invoked, the rule appears to require application of the then-current version of each incorporated regulation." The commenter stated that it is beyond the EPA's authority to make an evergreen incorporation by reference because any amendment of the incorporated rules would result in an amendment to the oil and natural gas FIP, which effectively would be accomplished without notice and comment rulemaking for the FIP. The commenter recommended that the EPA incorporate into the oil and natural gas FIP the rules as they stand at the time the FIP is promulgated, noting that the FIP can easily be amended later if significant changes are made to the underlying rules. The commenter recommended that the text of §49.105 be revised to directly incorporate by reference each of the six rules.

Response #42: The EPA notes that, under 1 CFR part 51, it cannot incorporate other regulations by references. It believes the proposed approach to including the NSPS and NESHAP standards in the FIP is the most efficient method of maintaining consistency with the applicable standards. Having to amend the FIP every time a standard is changed would be burdensome and create ambiguity for sources. We disagree that we lack the authority to adopt this approach through notice and comment rulemaking. While some of the requirements with which sources must comply may change over time, this does not result in a de facto amendment of the FIP. Rather, the FIP at all times requires compliance with the eight other rules, to the extent that they apply. Even in the absence of the FIP, sources subject to any of the eight other rules would be required to comply with those standards as they exist at the time the source begins construction. The public will have ample opportunity to comment on any proposed changes to the standards themselves. No changes have been made as a result of this comment.

Comment #43: One commenter (0046) noted that there is a typographical error in the reference to the proposed 40 CFR part 60, subpart OOOOa standard; the word "applicable" should be included, as it is in the references to the other five regulations.

Response #43: The EPA has corrected the error in the final rule.

9.0 Other Comments (e.g., Forms, ANPR Comments, General Support)

Anonymous Public Comment (0009): I am in support of the proposals outlined in docket EPA-HQ-OAR-2014-0606. People in "Indian Country" deserve the same air quality standards as people elsewhere.

Ute Indian Tribe (0039): In addition to our comments on the proposed rule, the Tribe also incorporates and encloses its August 20, 2014 comments on EPA's advance notice of proposed rulemaking entitled Managing Emissions from Oil and Natural Gas Production in Indian Country, published in the Federal Register on June 5, 2014. [79 FR 32502.] Many of these comments are still applicable to the proposed rule." [These August 20, 2014 comments are included in the text of the submitted written comments on pages 8-17.]

Ute Indian Tribe (0039): Under the Clean Air Act, where a tribe has not developed an approved Tribal Implementation Plan ("TIP"), EPA has the authority to step into the shoes of the tribe pursuant to the FIP authority and implement a FIP in Indian Country. [76 FR 38748, 38752.] EPA promulgated the "tribal authority rule" in 1998 to provide more detailed criteria and procedures for tribes to be treated as states under the CAA if they seek CAA program approval. [63 FR 7254 (Feb. 12, 1998).] Tribes are authorized to develop a comprehensive TIP and seek full authority to monitor and enforce the National Ambient Air Quality Standards (NAAQS) within their reservation. The Ute Indian Tribe has an interest in at least exploring the possibility of working toward a TIP so that it may one day assume primacy over certain regulatory functions and expand its authority gradually.

Ute Indian Tribe (0039): The final rule should not implement a setback requirement. This rule should address air emissions, not the location of the sources creating those emissions in relation to structures in Indian country. Including a setback requirement undermines tribal sovereignty, contravenes explicit requirements embodied in existing Indian mineral leases, and is contrary to existing BIA regulations. Moreover, EPA cannot exceed the authority granted by Congress.[259] Congress has not granted authority to EPA to supplant tribal surface jurisdiction. Further, specific setback requirements are already embodied in Indian mineral leases and the regulations implementing and governing the same. Finally, many oil and gas producing tribes already have ordinances or regulations that establish setbacks. EPA does not have surface authority as a setback requirement has nothing to do with the air.

The federal government should protect trust resources by refusing to implement unnecessary regulatory barriers and complications that compromise the value of Indian minerals that fund essential government services. Including setback requirements in this rule would be such an example of unnecessary regulations. The federal government should not regulate where the tribes

[259] La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986).

already do. While some tribes have passed zoning laws for oil and gas facilities, others include setback provisions in Exploration and Development Agreements or oil and gas leases. Further, EPA should support tribes that exercise their sovereignty. Tribes can determine the appropriate setback distance. Applying state setback requirements to Indian land would undercut tribal negotiations, tribal ordinances, and tribal regulations. Such action 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. The Ute Indian Tribe opposes any attempt to apply state law to the Uintah and Ouray Reservation.

It is the duty of tribes to protect the property and wellbeing of lands subject to tribal jurisdiction by establishing setback requirements applicable to such lands. Individual tribal energy offices have the expertise to determine proper distances and when a variance should be granted. Establishing a distance from certain types of structures is a matter of tribal, not federal, concern. Additionally, EPA should not compromise the ability of tribes to include other provisions in setback requirements, limiting operations to more than just a house, structure, or reservoir of water without the surface owner's prior written consent. The federal government implicitly acknowledged this in the Fort Berthold FIP, which does not contain a setback requirement. The EPA must defer to tribes on setback requirements. Finally, federal regulations already include setback requirements. Indian mineral leases authorized by the IMLA and the 1909 Act contain a provision prohibiting the lessee from drilling within a certain distance of any house or barn on the premises without the lessor's written consent approved by the Secretary. [See 25 CFR §§ 211.47(±); 212.47(±).] This distance is typically two hundred feet. These agreements between Indian mineral owners and mineral lessees, which the Secretary approves, include a bargained for setback requirement.

Ute Indian Tribe (0039): EPA requests comments on whether state requirements should be the basis for requirements in surrounding areas under Federal jurisdiction should be used. The Tribe does not believe that it is appropriate to apply state regulations to Indian Country. Just as it would be inappropriate to apply Utah or California state law to the Uintah and Ouray Reservation, it would be inappropriate to apply one state's law to all of Indian Country. For example, applying robust yet costly and burdensome regulations to Indian Country, like those that exist in the State of California, would disadvantage Indian tribes in states more conducive to oil and gas development. By developing reservation or region-specific FIPs, EPA would promote development while also applying, if necessary, an added layer of environmental protection that specifically addresses the Tribe's concerns and the unique characteristics of the region or reservation.

The EPA's summary of the above comments and the EPA's responses to these comments on the proposed amendments to the Federal Indian Country Minor NSR rule are as follows:

Comment #44: One commenter (0039) stated that the final rule should not implement a setback requirement. The commenter stated that including a setback requirement undermines tribal sovereignty, contravenes explicit requirements embodied in existing Indian mineral leases, and is contrary to existing BIA regulations. The commenter also noted that the EPA cannot exceed the

authority granted by Congress. The commenter characterized setback requirements as unnecessary regulations, stating that the tribes can determine the appropriate setback distance.

Response #44: There was no setback requirement in the proposed FIP, and the EPA is not adding a setback requirement in the final rule. No changes have been made as a result of this comment.

Comment #45: One commenter (0039) submitted comments on whether state requirements should be the basis for the FIP requirements. One commenter recommended that, if the EPA chooses not to regulate existing sources throughout Indian country, then the EPA should at least regulate existing sources located in states that already do so. The commenter noted that putting state and tribal lands on a level playing field will protect the health of tribal members. The commenter also noted that, in order to comply with the requirements of Executive Order 12898, the EPA should regulate existing sources on tribal lands that are located within states that already regulate existing sources. The commenter stated that it is not appropriate to apply state regulations to Indian country. Reservation- or region-specific FIPs should be developed that address tribes' concerns and the unique characteristics of the regions or reservations at issue.

Response #45: As discussed above, and for the reasons stated, the FIP does not regulate existing sources. Further, a mere desire to "level the playing field" is not a sufficient, sole basis for imposing requlatory requirements on oil and natural gas source owners/operators. Rather, the EPA would need to determine that the state law requirements in question were necessary or appropriate. No changes have been made as a result of this comment.

Comment #46: One commenter (0009) expressed support for the proposed rules.

Response #46: The EPA appreciates the expression of support.

10.0 Comments on Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

Ute Indian Tribe (0039): EPA should engage the Tribe in additional government-to-government consultation once EPA has reviewed comments on the proposed rule and is prepared to discuss those comments and any changes to the proposed rule. EPA's May 4, 2011, "Policy on Consultation and Coordination with Indian Tribes" provides in Section V.B.I. that "regulations or rules" and "permits" are "normally appropriate for consultation" among a number of other EPA activities. In addition, EPA's commitment to consult on regulations and rules fulfills Executive Order No. 13175 on "Consultation and Coordination with Indian Tribal Governments" which requires that, "Each agency shall ... ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."

Of course, this is also consistent with President Obama's direction in his November 5, 2009, Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation. In that Memorandum the President stated that, "My Administration is committed to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications including, as an initial step, through complete and consistent implementation of Executive Order 13175." The President also stated that, "Consultation is a critical ingredient of a

sound and productive Federal-tribal relationship." We agree with the President. Federal rules are more effective when we work together.

Ute Indian Tribe (0039): Most important and before proceeding further, the Tribe asks that EPA, the Department of Justice and concerned tribes engage in consultation to address EPA 's misguided attempt to revise the definition of Indian Country. The issue EPA should be addressing is its regulatory process for affirming tribal authority to exercise jurisdiction under the Clean Air Act, not Congress' longstanding definition of Indian Country.

Comment #47: One commenter (0039) requested that the EPA consult with tribes on development of the FIP, and also requested that the EPA not revise the definition of Indian Country as part of this regulatory action.

Response #47: The EPA agrees with the commenter that consultation with affected tribes is important to development of a successful FIP. The EPA remains available to consult with tribes in regards to issues that affect them, including on the draft FIP, or proactively in connection with tribal efforts to develop a TIP. The EPA has reached out to tribes during the development of this FIP. The EPA notes that the Mandan, Hidatsa, and Arikara Nation expressed an interest in working with us to develop this FIP, although they did not submit specific comments on this topic. It is worth noting that we have made some changes to the FIP proposal as a result of tribal comments. Most notably, at the request of a tribal commenter, we have clarified that we are not changing the definition of Indian country. Instead, we are clarifying the geographic applicability of the FIP with respect to areas of Indian country. As the FIP is implemented we will continue to provide regular outreach to tribes to ensure we address issues concerning the FIP if and when they arise. The EPA is always available for consultation with any interested tribe. After the comment period for this rulemaking closed in December, the EPA followed up on the commenter’s request and it was determined that the requested consultation was no longer necessary.

11.0 Comments Requesting Extension of the Comment Period

Twelve commenters (0008, 0014, 0015, 0018, 0019, 0021, 0022, 0023, 0024, 0025, 0026, 0058) requested that the EPA extend the public comment period beyond the 60-day period provided for in the September 18, 2015 Federal Register notice of the proposed FIP, which indicated comments must be received by November 17, 2015. Commenters noted that the proposed rule was out for public review concurrently with several other proposed EPA and Bureau of Land Management (BLM) oil and gas rules. These requests asked for an extension of between 60 and 180 days.

Response: After considering the requests to extend the public comment period received from various trade and business organizations, states and tribes, the EPA decided to extend the public comment period until December 4, 2015. This extension ensured that the public had additional time to review the proposed rule.

12.0 Out of Scope Comments

Thirteen commenters (0010, 0011, 0012, 0013, 0020, 0027, 0037, 0043, 0047, 0050, 0052, 0058) provided comments that are considered out of scope relative to this regulatory action. These comments were related to the following:

- Concerns related to methane emissions;
- Deferment to state regulations to control oil and gas emissions;
- Ongoing studies in the Uinta Basin;
- The EPA's proposed New Source Performance Standard for new and modified oil and gas sources;[260]
- The EPA's proposed Control Technique Guidelines for oil and gas sources;[261]
- The EPA's source determination proposal for oil and gas sources;[262]
- Flash gas capture technologies; and
- An inquiry about getting a comment submitted in December 2015 published in the Response to Comments Document.

[260] "Oil and Natural Gas Sector: Emission Standards for New and Modified Sources in the Oil and Natural Gas Sector," U.S., Environmental Protection Agency, 80 FR 56593, September 18, 2015, https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-21023.pdf.
[261] "Release of Draft Control Techniques Guidelines for the Oil and Natural Gas Industry," U.S., Environmental Protection Agency, 80 FR 56577, September 18, 2015, https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-21027.pdf.
[262] "Source Determination for Certain Emission Units in the Oil and Natural Gas Sector," U.S., Environmental Protection Agency, 80 FR 56579, September 18, 2015, https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-21026.pdf.