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The Honorable Gina McCarthy, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

**Re: Petition to Revise the Federal Implementation Plan for True Minor Oil and Gas Sources
on Tribal Lands**

Dear Administrator McCarthy:

The American Petroleum Institute (“API”) hereby petitions the U.S. Environmental Protection Agency (“EPA” or “Agency”) to revise 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 (“FIP”) published at 81 Fed. Reg. 35944 (June 3, 2016).

API represents over 650 oil and natural gas companies, leaders of a technology-driven industry that supplies most of America’s energy, supports more than 9.8 million jobs and 8 percent of the U.S. economy, and, since 2000, has invested nearly \$2 trillion in U.S. capital projects to advance all forms of energy, including alternatives. Many of our members conduct oil and gas development and production operations on tribal lands and, thus, will be directly impacted by this final rule.

API worked closely with EPA during the development of the Tribal Minor New Source Review (“NSR”) rule and the FIP for the oil and gas sector. Our goals throughout this process have been to establish rules that satisfy Clean Air Act (“CAA”) permitting requirements, provide adequate protection to health and environment, and allow for permitting to be accomplished in a simple and streamlined way.

A streamlined permitting process would be sensitive to both regulatory agency resources and important given the oil and gas production sector’s need for operational flexibility associated with new oil and gas development. EPA has worked hard to accommodate this need and we greatly appreciate the Agency’s efforts. The FIP is an innovative approach to minor source permitting on tribal lands that entails only minimal possible administrative delays – with only three important exceptions.

First, the FIP requires case-by-case review under the Endangered Species Act (“ESA”) and National Historic Preservation Act (“NHPA”) and, in most cases, does not allow a project to go forward until EPA gives approval of the ESA and NHPA screening. This is required, notwithstanding the fact that EPA concluded in the final rule that application of the FIP to individual sources is not a federal action that triggers ESA or NHPA review. The need for EPA approval before a project can be implemented promises to inject delay into FIP implementation that will defeat the streamlining that API and EPA collectively worked to accomplish.

Second, the FIP does not allow for the creation of synthetic minor sources. EPA concluded in the final rule that sources needing synthetic minor limits must use the traditional (and time consuming) case-by-case permitting process. Yet, EPA allowed for the creation of synthetic minor sources in the general permits for other source types under the Tribal Minor NSR program. The approach and principles that EPA developed in those permits are easily applicable to sources in the oil and gas sector.

Third, EPA provided that, if an area is designated nonattainment for a given pollutant, the FIP no longer applies and a new minor source permitting program must be developed as part of the subsequent nonattainment Tribal Implementation Plan (“TIP”). The effect of this decision is that no minor source permitting mechanism will be available until a TIP is approved – which would effectively cause a permitting moratorium. This can and should be avoided by allowing the FIP to remain in place as a “bridge” after a nonattainment designation is made until the time that a TIP is approved.

These three issues are described in more detail below. API petitions EPA to revise the FIP to resolve these three important issues.

1. Endangered Species Act and National Historic Preservation Act Screening

Section 49.104 of the FIP requires companies that want to apply the FIP to a given project to assess the potential impacts of the project on endangered species and historic properties. Two options are provided.

Under the first, for projects for which ESA and NHPA review have already been conducted (e.g, in the context of a BLM approval), the company must submit documentation to EPA demonstrating that the prior review occurred. The documentation must be attached to the Part 1 application for the project.

Under the second, the company must conduct a screening review of potential ESA and NHPA impacts related to the project. In conjunction with the final rule, EPA issued forms and guidance for completing the screening review. The screening review must be submitted to EPA prior to submitting the Part 1 application. EPA must approve the screening review before the Part 1 application may be submitted. The rule sets deadlines by which EPA is required to act on a screening review. The need for EPA approval may significantly delay projects, which would defeat the streamlining that otherwise is accomplished by the FIP.

API submitted comments on the proposed FIP, arguing that implementation of the FIP by individual sources is not a federal action that triggers ESA and NHPA review. EPA agreed with this comment in the final rule preamble, but asserted that such review is needed and authorized “in connection with the EPA’s issuance of the FIP” and that “the only way to address potential impacts on these resources in conjunction with the FIP ... is to require the owners/operators to do it.” 81 Fed. Reg. at 35960-1.

We petition EPA to revise the FIP to eliminate the requirement for case-by-case consideration of the ESA and NHPA. The FIP is no different than myriad other EPA CAA regulations that allow for implementation by affected sources without the need for ESA or NHPA review. For example, when a new source is constructed that is covered by a “MACT” standard, there is no obligation for ESA or NHPA review. Similarly, when an affected facility is constructed or modified and triggers the applicability of a New Source Performance Standard, no ESA or NHPA review is required. Like the FIP, these are EPA-issued regulations that apply directly to affected sources or facilities. There is no rational basis to require ESA and NHPA review under the FIP, but to not require similar review under other directly-applicable federal standards.

2. Synthetic Minors

EPA did not address synthetic minor sources in the proposed FIP. This was a notable omission because EPA had provided a mechanism to establish synthetic minor sources in a previously-issued tribal minor NSR general permits rule for other source types¹ and knew from API’s comments on that rule,² and through numerous discussions with API during the development of the FIP, that API strongly supported establishing such a comparable mechanism in the FIP.

API submitted comments on the proposed FIP arguing that the FIP should include a mechanism for establishing synthetic minors. States such as Texas have general permit programs that allow for synthetic minors to be established. In practice, such programs have worked well. Also, EPA’s tribal minor NSR general permits for other source types shows that there is a viable way to establish synthetic minors without resorting to case-by-case permitting. Lastly, there is ample legal authority to use a FIP to establish effective limits on an affected source’s potential to emit.

EPA did not provide a mechanism for establishing synthetic minors in the final FIP. EPA argued that permitting authority “review is necessary to establish synthetic minor limits because without the

¹ See 80 Fed. Reg. 25068 (May 1, 2015).

² See, Letter from Matthew Todd to Air and Radiation Docket and Information Center, *Comments on Proposed Rule: General Permits for the Federal Minor New Source Review Program in Indian Country* (Sept. 17, 2014) at 2, 6. Similarly, API argued for a mechanism to establish synthetic minors in its comments on EPA’s ANPR on minor source permitting of O&G sources on tribal lands. Letter from Matthew Todd to U.S. Environmental Protection Agency, *Comments of the American Petroleum Institute on the U.S. Environmental Protection Agency’s Advance Notice of Proposed Rulemaking “Managing Emissions From Oil and Natural Gas Production in Indian Country”* (Aug. 20, 2014) at 2, 7.

verification that the required controls and associated compliance provisions will accomplish their objective, the source is a major source.” 81 Fed. Reg. at 35967. EPA also asserted that there is “no evidence of a high volume of requests for synthetic minor permits from oil and natural gas sources.” *Id.* Therefore, case-by-case permits should be a viable mechanism.

We petition EPA to revise the rule to allow for the creation of synthetic minor sources. We believe that the FIP does, in fact, provide adequate permitting authority review because permitting authorities may request case-by-case review if they determine that the FIP is not adequate for a given project where the source seeks to establish itself as a synthetic minor. In any event, EPA’s concerns about the need for greater permitting authority involvement can easily be resolved by issuing a parallel general permit for oil and gas sources (which would require minimal additional effort beyond what was required to issue the FIP because its requirements should largely mirror those already included in the FIP).

3. Nonattainment Areas

API argued in its comments on the proposed FIP that EPA should extend applicability of the FIP to newly designated nonattainment areas. We argued that, absent such a provision, there would be no way to permit minor sources on tribal lands until issuance of a nonattainment FIP/TIP, which likely would not occur until years after the nonattainment designation. We suggested that the FIP could serve as a temporary bridge until an area-specific program could be put into place.

In the final rule, EPA decided not to extend the FIP to nonattainment areas. EPA instead stated its “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.” 81 Fed. Reg. at 35968-9.

EPA provided further explanation in response to a comment suggesting that the FIP should require air quality modeling and monitoring:

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, (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. 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.

For areas designated nonattainment for NAAQS (2008 ozone NAAQS, 2006 and 2012 PM2.5 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.

81 Fed. Reg. at 35963.

Even if EPA is correct that current air quality data indicate that many tribal lands should not be expected in the near future to be designated nonattainment for relevant pollutants, the FIP will be in place for the foreseeable future. It is easily conceivable that, in the longer run, tribal lands may face air quality issues as a result of the establishment of more stringent air quality standards or because of local emissions or regional transport. Without a change to the FIP, there will be no viable minor source permit rule on tribal lands that become nonattainment areas.

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Thank you for your consideration of these important issues. We look forward to working with you and your staff to resolve them. Please feel free to contact me (202.682.8340) if you have questions or need more information.

Sincerely,

Howard J. Feldman

CC: Janet McCabe, EPA
Steve Page, EPA
Chebryll Edwards, EPA
Chris Stoneman, EPA