



**COLORADO PETROLEUM
ASSOCIATION**

1700 Lincoln Street, Suite 2545

Denver, Colorado 80203

Tel: 303/860-0099

E-Mail: stan@coloradopetroleumassociation.org

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

August 20, 2014

Attn: Docket ID No. EPA-HQ-OAR-2011-0151
Ms. Gina McCarthy, Administrator
U.S. Environmental Protection Agency
Mailcode: 6102T
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Re: Comments of the Colorado Petroleum Association on the US Environmental Protection Agency's Advanced Notice of Proposed Rulemaking Regarding *Managing Emissions from Oil and Natural Gas Production in Indian Country*, Docket ID No. EPA-HQ-OAR-2011-0151.

Dear Administrator McCarthy:

The Colorado Petroleum Association ("CPA") welcomes this opportunity to comment on the Environmental Protection Agency's ("EPA") Advanced Notice of Proposed Rulemaking *Managing Emissions from Oil and Natural Gas Production in Indian Country*, Docket ID No. EPA-HQ-OAR-2011-0151.

The CPA is a non-profit trade association organized to operate in Colorado. The CPA members are involved in all aspects of oil and gas exploration, production, refining, marketing, and transportation. In Colorado, the CPA represents its members before local, state, and federal government entities on policy, factual, and legal issues. Oil and natural gas development in Colorado drives Colorado's economy, with 111,000 Colorado jobs supported by energy and mineral development, generating \$29.5 billion in economic activity. See *Oil and Natural Gas by the Numbers, Colorado's Oil and Natural Gas Producers*, <http://www.oilandnaturalgasincolorado.com/ColoradoOilAndGas.html>.

The EPA requests input on several aspects of a program for proposed new and modified sources in the oil and natural gas production industry in Indian Country. We provide comments below to EPA's

requests. In addition, we suggest EPA address other issues that, if appropriately resolved, would lead to an efficient and effective program for our industry.

I. General

The purpose of the Advanced Notice of Proposed Rulemaking is to solicit broad feedback on the most effective and efficient means of streamlining EPA's Indian Country Minor New Source Review program for sources in the oil and natural gas production segment of the oil and natural gas sector. EPA also seeks feedback, however, regarding specific emission control measures for existing sources in this sector. The Clean Air Act ("CAA") limits EPA's authority with respect to minor new source review ("MNSR Program") in Indian Country. The MNSR Program applicable to Indian Country (issued in 2011), grants EPA authority to ensure that emissions do not adversely impact air quality. As crafted, the Indian Country MNSR Program threatens to impede economic growth in Indian Country due to the time and resources needed to process individual permits. EPA's priority for new rules implementing MNSR for oil and gas sources should be to ensure that new and modified minor sources are authorized efficiently without undue delay. EPA should not attempt to address issues not within the scope of the MNSR Program, such as emissions controls on existing sources and nonattainment issues that are location-specific. When acting in the place of a tribe, EPA recognizes that tribes are to be treated the same as States. To that end, States have not designed MNSR Programs to address every pound of emissions with emissions control measures nor do they impose permit obligations on every ton of emission increase or every new piece of equipment. EPA's actions under this Advanced Notice of Proposed Rulemaking should not be inconsistent with this regulatory regime.

II. New Sources

EPA should prioritize its rulemaking efforts on streamlining the MNSR Program for new and modified sources in Indian Country. In addressing state MNSR programs, EPA and courts have recognized the limited authority under the CAA for minor sources and the flexibility for states handling minor sources:

[T]he CAA prescribes only the barest of requirements for "minor" NSR, which governs the construction or modification of stationary sources that do not meet the emissions thresholds for major NSR. For minor NSR, the [CAA] requires simply that each SIP "include . . . regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that [NAAQS] are achieved." 42 U.S.C. § 7410(a)(2)(C). The implementing regulations for minor NSR are likewise sparse, spanning less than two pages in the Code of Federal Regulations. See 40 C.F.R. §§ 51.160–51.164. The EPA has recognized that because "the Act includes no specifics regarding the structure or functioning of minor NSR programs" and because the implementing regulations are "very general[,] . . . SIP-approved minor NSR programs can vary quite widely from State to State." 74 Fed. Reg. 51,418, 51,421 (Oct. 6, 2009).

See Luminant v. EPA, 675 F.3d 917 (5th Cir., March 26, 2012)

EPA rules provide that state MNSR programs must only ensure that construction or modifications shall not interfere with the attainment or maintenance of a national standard. 40 C.F.R. § 51.160. The state MNSR program must require the submission of specific information from facilities to allow the State to make the determination of noninterference. However, the state is not required to review all construction and modifications. In turn, EPA must provide as much flexibility for minor sources on tribal lands as is available under state minor NSR programs. Furthermore, EPA should not take the most stringent state approach. States choosing a stringent approach to mMNSR or the oil and gas sector have made a political and economic choice that EPA should not make for tribal lands.

Any control requirements under minor NSR must be “necessary or appropriate” for the attainment of NAAQS.” 42 U.S.C. § 7410(a)(2). In attainment or unclassifiable areas, no control requirements are necessary, except to limit the consumption of increment or to limit contribution to a neighboring nonattainment area. Before imposing control measures, EPA must determine that such measures are necessary for attainment of the air standards. Based on the information EPA indicates is available at this time, EPA has not yet made a determination that any level of emission control measures is necessary.

EPA must treat synthetic minors the same as natural minor sources. General Permits, permits-by-rule (“PBRs”), and rules by a Federal Implementation Plan (“FIP”) are enforceable rules that can ensure emissions from sources stay below major source thresholds, thus supporting synthetic minor source status. EPA should not prohibit synthetic minor sources from relying on such rules as the mechanism for their minor source status. Prior to the Indian Country MNSR Program, there was no EPA rule, guidance, or policy precluding synthetic minor sources from utilizing general permits, PBRs, or FIPs. In fact, EPA guidance in 1993 and 1995 advocated use of general permits and PBRs as approaches to limit potential to emit in order to reduce the number of sources subject to Title V and the Maximum Achievable Control Technology (MACT) program for both criteria pollutants and hazardous air pollutants. See Guidance from John Seitz on November 3, 1993 titled “Approaches to Creating Federally Enforceable Emission Limits”, and another from John Seitz and Bob VanHeuvelen on January 25, 1995, a joint guidance from the Office of Air Quality Planning and Standards and the Office of Enforcement and Compliance Assurance, titled “Options for Limiting the Potential to Emit of a Stationary Source Under Section 112 and Title V of the Clean Air Act”. On the same day, Kathy Stein, Director of the Air Enforcement Division issued guidance entitled “Guidance on Enforceability Requirements for Limiting Potential to Emit for SIPs and §112 Rules and General Permits.” The above-referenced guidance documents state that “sources may be issued general permits strictly for the purpose of avoiding classification as a major source” and “[g]eneral [p]ermits may be used to limit the potential to emit for numerous similar sources.” Furthermore, in EPA guidance issued in 1998 and in state implementation plan (“SIP”) approvals following the issuance of these guidance documents, EPA recognized general permits and permits-by-rule as tools for creating synthetic minors. Many states’ relied on these guidance documents to instruct their MNSR programs, respectively, and EPA should not change the policy for sources in Indian Country.

The MNSR Program method that would be available for synthetic minors as well as true minors should also be effective to limit Hazardous Air Pollutants (HAPs). The regulatory gap on Indian Country that EPA proposes to fill by establishing a MNSR program also exists for sources that could avoid major source

status for HAPs. EPA's authority for MNSR on Tribal lands thus means that EPA has authority to create a minor HAP source program to allow sources to avoid major status for HAPs. As a result, any mechanism used to streamline the MNSR Program for oil and gas sources should also be available to limit HAP emissions below major source thresholds. In order to avoid application of the MACT/National Emissions Standards for Hazardous Air Pollutants (NESHAP) program, the limits must be effective from the date of construction. A FIP or PBR can be effective from the date of construction because a source can elect coverage immediately even if the rule does not require notification until some time after the effective coverage of the rule. EPA should design the MNSR mechanism to apply on the date that construction begins but allow notice of coverage after commencement of construction. Such a design could help ensure more consistent compliance with applicable limits.

a. General Air Quality Permit for New or Modified True Minor Source Spark Ignition and Compression Ignition Engines

On July 17, 2014, EPA proposed General Air Quality Permit for New or Modified True Minor Source Spark Ignition and Compression Ignition Engines, which was published shortly after publication of this Advanced Notice of Proposed Rulemaking. The CPA members are confused with respect to EPA's intended applicability of the proposed engine general permits to the oil and gas industry. Both the preamble and background documents for the proposed rule for spark ignition and compression engines include discussions that acknowledge the extensive use of these types of engines in the oil and gas industry; however, the industry is not listed as an example of regulated entities in Table 1 of the proposed rule. Furthermore, EPA does not indicate how a general permit for engines might integrate with a sector based oil and gas FIP or PBR being considered in this Advanced Notice of Proposed Rulemaking. Establishment of multiple permit regimes for the same sources would defeat the purpose of streamlining the MNSR for oil and gas sources in the natural gas production segment. One streamlining benefit of a PBR or FIP is that it requires no pre-construction approval. In comparison, it could take 90-days or longer to get approval to use a general permit or full MNSR General Permit for engines. Since engines co-exist at many sites with other production equipment, construction, and commencement of operations at sites with engines would be delayed regardless if other equipment is authorized by a FIP or PBR since all equipment on-site is integral to the site's operation.

If EPA intends to propose engine requirements equivalent to those proposed in the July 17, 2014, General Permits directly into an oil and gas sector based FIP or PBR, that would also limit the usefulness of an oil and gas sector based FIP or PBR. In any case, EPA should develop one MNSR rule for oil and gas sources and should not divide the source category under different rules as doing so would create confusion, reduce clarity, and would be contrary to the purpose of the ANPR which is to streamline, simplify, and reduce the burden on administrative resources.

III. Existing Sources

EPA has limited authority to impose new requirements on existing sources. EPA should exercise authority over existing sources only as the CAA allows and after a determination that such regulation is necessary to address nonattainment of the air standards.

EPA cites the Fort Berthold Indian Reservation FIP as an example of appropriate regulation of existing sources. However, EPA did not explain that the major and minor NSR programs under the CAA authorized the Fort Berthold FIP. The regulation of existing sources in the Fort Berthold FIP was not a broad extension of EPA's air quality authority but within EPA's limited authority to regulate new sources. The sources covered by the Fort Berthold FIP were subject as *new* sources, not as existing sources—except to the extent that the sources needed to secure minor existing source status to enable any construction to also be considered minor. As further background, the North Dakota Department of Health had a long-standing set of control requirements. Those control requirements were set forth to reduce emissions to a level that would allow an operator to claim that a site was a minor source. This mechanism established enforceable limits and allowed such sources to avoid major source air programs. This also allowed companies to avoid having to contend with permitting a source under Prevention of Significant Deterioration (“PSD”) requirements. PSD requires ambient monitoring data, air dispersion modeling, and other burdensome requirements. As on all tribal lands, operators on tribal lands in North Dakota were not afforded the same rights as sources on state lands to establish a site as a minor source. Thus, the FBIR FIP filled the regulatory gap that had disadvantaged operators on tribal lands. The FIP was not implemented to address National Ambient Air Quality Standards (“NAAQS”) issues in a post-designation regime. EPA's justification for the Ft. Berthold FIP primarily relied on the assertion that a FIP was justified because otherwise a “regulatory gap” would exist as compared to the North Dakota program that applied to the state lands surrounding the Ft. Berthold Indian Reservation. EPA did not attempt to justify the rule on the basis of emissions data, air quality information, or other evidence suggesting a need to regulate existing sources in order to attain or maintain compliance with NAAQs or to meet some other CAA-based air quality criteria.

With very few exceptions, the CAA limits EPA authority to impose new emission control standards on existing sources to major sources in nonattainment areas and smaller sources only as determined to be necessary to attain or maintain the air standards. With respect to the few exceptions where the CAA authorizes regulation of existing sources, the CAA also imposes threshold criteria that EPA must meet to regulate existing sources. For example, the NESHAPs require a MACT floor and such standards usually apply to major sources. EPA must meet other criteria to regulate non-major sources. Regulation in nonattainment areas must be “necessary for attainment” and requires analysis of the emission inventory, modeling, and other data as well as a determination of what controls or measures are reasonable. Even authority to set performance standards under CAA section 111(d) is limited to pollutants that do not have an NAAQS and are not emitted from a source category subject to a NESHAP under section 112. For such limited pollutants and source categories, 111(d) would only apply to existing sources that, if they were new, would have been subject to a NSPS under 111(b). Under such a program, EPA would issue emission guidelines first and then allow states to develop programs designed around the specific sources in the state. Only when states fail would EPA be able to directly regulate existing sources in the state. Assuming EPA would act for a tribe under 111(d), EPA would be authorized to design the 111(d) program only after EPA issued emissions guidelines nationally for the sector (not just tribal lands). Then the CAA would require EPA to design a program around the specific sources and conditions in the jurisdiction (e.g., the tribal land), including consideration of the remaining useful life of the sources in the category.

Even if EPA stands in the place of a state to develop a plan to attain and maintain the standards, EPA's tribal authority does not give it broad powers over minor or existing sources. Like a state, EPA must make a determination that such regulation is necessary to attain or maintain the NAAQS.

In the 2006 rulemaking for the Indian Country New Source Review Rule proposal, EPA requested comment on whether to regulate existing minor sources. EPA proposed four options. In the final rule published in 2011, EPA decided to require existing minor sources only to register with EPA (Option 3). While EPA originally preferred Option 1 (exempting existing minor sources from the MNSR Program, unless the source makes a modification), EPA did not select this Option 1 because "even though we agree that this option is consistent with state minor NSR programs and it is the least burdensome option for existing minor sources, we believe that collecting source inventory data for minor sources in Indian Country is necessary to successfully implement the minor NSR program." See 79 Fed. Reg. at 38,772. EPA also stated that "these source inventory data are needed to assess the feasibility of an actual emissions-based applicability test and to determine if we need to modify the minor NSR thresholds at a later time." EPA decided not to regulate existing minor sources because EPA believed that doing so "would overwhelm limited EPA resources even if we were to use a 'sunset clause.'" 76 Fed. Reg. at 38,772. Furthermore, EPA expressly stated that it "believe[s] that subjecting all minor sources to this program is not necessary to achieve the NAAQS, as demonstrated by state minor NSR programs." See 71 Fed. Reg. at 48,714. Based on this rulemaking decision alone, EPA should not revisit the issue of regulating existing sources until it has completed an inventory analysis and has determined that regulating such sources would not overwhelm limited EPA resources as EPA believed it would in 2011. EPA has already concluded based on a rulemaking record that to regulate existing minor sources would be inconsistent with state MNSR programs.

EPA must treat tribal lands as states per (Section 301(d) of the CAA). Under CAA section 110, 301 or 302, EPA cannot regulate minor sources or existing sources except "as necessary to achieve the NAAQS."

EPA must justify regulating existing sources on criteria different than the criteria to justify regulating new minor sources. While EPA might determine that new minor source emissions must be mitigated to minimize contributions to nearby nonattainment areas or to prevent consumption of increment in an area where EPA has made a determination that emissions will continue to increase, to regulate existing sources, EPA must develop an attainment plan for the nonattainment area in which those sources are located and address emissions from all sources that contribute to the nonattainment of the standard. In development of an attainment plan for a nonattainment area, EPA would address major sources first, both new and existing, and then minor new sources and lastly, minor existing sources. EPA would also be able to address emissions from mobile sources, both new and existing, when developing a plan for attainment in a nonattainment area.

EPA can only develop attainment plans for areas designated nonattainment, and the plan must be designed for the specific location taking into account the unique mixture of emissions sources, the meteorology of the area, and expected levels of growth as well as expected emission reductions from new rules coming into effect.

Each unique NAAQS violation should have its own set of CAA applicable area-specific existing source solutions. Violations of NAAQS are not all created by the same meteorological and man-made combinations. Such solutions should be part of the attainment FIP in accordance with the post-designation schedule set forth in the CAA.

Examples of meteorological and man-made combination variability include the following:

- Texas and California summer ozone issues are associated with hot weather, NO_x, and HRVOCs
- Wyoming winter ozone issues are associated with snow cover
- Florida lead issues are associated with lead smelting
- Arizona PM 2.5 issues are associated with cold weather wood burning

[consider concluding sentence/brief paragraph for this section.]

IV. Existing Sources And Consideration of Existing State Programs

Citing existing state air quality requirements, and specifically Colorado's February 2014 rulemaking, EPA asserts that "cost-effective emission reduction measures" are available and 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. *See* 79 Fed. Reg. 32,502, 32,516 (June 5, 2016). Based on this pre-determined conclusion that cost-effective measures are available, EPA requests comments on "whether to require emission controls for existing oil and natural gas production sources in Indian Country to create a growth margin that will allow further development in the oil and natural gas production segment in a manner that is protective of the environment." *See* 79 Fed. Reg. at 32,516. If EPA ends the rulemaking analysis at this point and concludes that existing source controls are cost-effective, EPA is skipping a crucial step in its proposed rulemaking analysis— an assessment of costs based on the most up-to-date information regarding potential impacts and costs from regulation of existing sources, particularly in attainment areas. EPA must analyze these considerations in detail and seek information from the regulated industry specifically on whether available cost effective emission reduction measures exist for implementation in Indian Country. Prior to proceeding with any proposals related to regulation of existing sources, additional time should be provided for gathering of this complex and complicated pollutant and geographic specific information in order to appropriately and accurately inform any analysis by EPA. Importantly, as discussed in greater detail below, any analyses regarding cost effectiveness must take into account the nature of ambient air quality in the area (nonattainment/attainment), the nature of production (and the corresponding emissions), and other relevant factors that impact the relationship between the benefits and costs for specific tribal areas. To disregard this critical inquiry would be a fatal flaw in EPA's analysis. At this time, EPA presents only general statements with regard to the "availability" of "cost-effective emissions reduction measures," none of which clearly and articulately supports expansive emission control regulations for new and existing sources in Indian Country. Importantly, EPA must consider these factors and the cost-effectiveness for each tribal area—not in a generic manner. Developing all of this relevant information

requires significant time. EPA should refrain from proceeding to regulate existing sources during this period of information gathering.

First, EPA expresses a general concern about the “rapid growth of the oil and natural gas production segment in combination with existing exploration and production activities,” potentially resulting in adverse air quality impacts. *See* 79 Fed. Reg. at 32,516. However, oil and gas production and corresponding air emissions are expected to decrease, not increase, in many hydrocarbon producing regions in Indian Country and such declines should be considered in any analysis on an area-specific basis.

EPA cannot assume that all tribal areas are identical, particularly for purposes of regulation of existing sources. The age of operations and production in different tribal areas; the type of production (oil and gas); the ambient air quality of the tribal area; and numerous other factors differ across Indian Country. Even for those areas where oil and gas activity may be increasing, EPA indiscriminately lumps all hydrocarbon producing regions in Indian Country into one indistinguishable category—an approach that sets dangerous precedent for establishment of effective and purposeful regulation. In fact, EPA presents no information demonstrating that emissions from oil and gas sources in hydrocarbon producing basins within Indian Country are increasing, or will increase in the foreseeable future; or the rate at which those sources and the relevant emissions from those sources are expected to increase. Furthermore, EPA makes no assessment or comparison of the extent to which growth is similar to or different from growth in those states (such as Colorado) on which EPA relies for its contentions regarding cost-effectiveness.

Second, EPA misplaces its confidence in Colorado’s “cost-effective” measures as a model for regulation of the oil and natural gas sector in Indian Country. As an initial matter, EPA inappropriately assumes, without any analysis, that the benefits and costs analyzed by the State of Colorado are transferrable to all of Indian Country. This assumption is incorrect. Cost-benefit analyses are based on considerations specific to locations including (1) area specific emission factors which depend upon the type and content of production; (2) incremental costs from the baseline requirements; and (3) other relevant factors, including but not limited to, location and accessibility, among other considerations. Importantly, Colorado’s recent regulations expanded existing regulatory requirements both for new and existing minor sources and in attainment and nonattainment areas. Here, oil and gas minor sources in Indian Country are not typically subject to existing regulatory requirements. As a result, imposing requirements similar to those recently adopted in Colorado would dramatically and drastically increase the overall costs to operators.

Third, EPA should not consider only the impacts from each individual requirement as Colorado did with respect to its recent rulemaking. Rather, EPA should consider the impacts collectively from any requirements. These collective impacts are particularly relevant to evaluation of the impacts on marginal wells, particularly in areas of declining production. Colorado’s cost-benefit analysis failed to adequately analyze impacts to marginal wells. EPA cannot similarly ignore the impacts to marginal wells, particularly given the limited emissions associated with those marginal wells. In certain tribal areas, marginal wells represent a significant number of wells. Collectively, these marginal wells result in

significant benefits and revenues for the tribes. Imposing requirements on these existing sources could require operators to shut-in and abandon the wells—resulting in a significant loss of revenue for tribes and a significant chain of effects throughout the tribal areas.

Fourth, Colorado’s emissions inventory and its assumptions and analyses regarding emissions reductions expected from the February 2014 rules are not the most accurate information and are misleading with respect to impacts to sources, particularly existing sources in attainment areas. The Colorado Air Pollution Control Division (the “Division”) itself acknowledged that its cost-benefit analysis was based on reasonably available data and that where data was not available, the Division relied upon assumptions in its cost-benefit analysis. See Colorado Department of Public Health and Environment, Colorado Air Quality Control Division, Regulation No. 7, Statement of Basis and Purpose, at 128 (“The Commission recognizes that additional information would benefit the Commission, Division, industry, and other stakeholders and therefore encourages the Division to work with energy companies, to evaluate the comparative effectiveness of various kinds of instrument based monitoring methods and program designs at a range of types, sizes, and frequencies at well production facilities and natural gas compressor stations.”). The Division concluded that the rules are cost-effective based on a variety of assumptions and analyses, including Colorado’s oil and gas emissions inventory, engineering judgments about capture and destruction efficiencies, and corresponding forecasts of emissions reductions and air quality benefits as a result of the rules’ controls. Due to multiple significant flaws in these assumptions and analyses, the ultimate benefits in Colorado’s rule, as assumed and endorsed by EPA, are overstated and the costs understated. These flaws include an inflation of the oil and gas VOC inventory through use of a novel capture efficiency factor that is lacking support in empirical data and is inconsistent with the preparation of inventories pursuant to EPA guidance. Additional error skewed the projections and conclusions developed through Colorado’s analyses due to the use of inaccurate emission factors as well as the failure to account for production decline from emissions based on APEN (“Air Pollutant Emissions Notice”) registrations, in particular. See, e.g., Ryder Scott Company, L.P., “Estimated Future Oil Production, Gas Production and Well Count In the State of Colorado,” at 4, Davis, Graham & Stubbs, LLP, Exhibit E to Prehearing Statement (Jan. 1 2014); see also 2014 Colorado Oil and Gas Hearing, Davis Graham & Stubbs LLP, Exhibit OO to Prehearing Statement, “Effects of Compounding Errors” (Jan. 6, 2014).

Furthermore, Colorado failed to consider that the costs of pollution control requirements would be disproportionately higher for facilities with lower levels of uncontrolled emissions than those with higher levels of uncontrolled emissions.

Fifth, new information may soon be available regarding real world costs associated with the Colorado regulations. Colorado operators are now implementing the comprehensive and extremely stringent regulatory regime imposed by Colorado. Over the course of the next year or so, operators in Colorado will have significantly more accurate information—based on practical experience—of the true costs (and benefits) associated with the types of regulatory controls imposed by Colorado. EPA should not take steps to implement similar requirements on existing sources until more accurate information becomes available. In fact, initial estimates and information related to implementation of Colorado’s new regulations indicate that in fact the costs will be higher than anticipated for many operators both for

individual requirements and collectively. Citing Colorado’s Cost-Benefit Analysis, EPA states that “Colorado’s proposed revisions indicate that operators could install flares and controls on existing, uncontrolled storage tank batteries with VOC emissions of 6 tons per year (tpy) or higher at an average cost effectiveness value of \$716 per ton of VOC reduced, and could install flares on existing produced water storage tanks with VOC emissions of 6 tpy or higher at an average cost effectiveness value of \$715 per ton of VOC reduced.” See 79 Fed. Reg. at 32,516, FN45. By way of another example, EPA states—without critical review of the same—that Colorado “determined leak detection and repair monitoring to be cost effective at oil and natural gas production facilities.” See 79 Fed. Reg. at 32,516. However, Colorado operators seeking to hire outside contractors to perform monitoring under Colorado’s extensive leak detection and repair program or install flares and other controls on existing, uncontrolled tank batteries, are finding that the Division’s cost estimates are grossly underestimated. In short, it is premature and inappropriate to rely on Colorado’s nascent program.

Finally, as noted above, even if Colorado’s rulemaking accurately assessed the cost-effectiveness of its regulations, it would be inappropriate for EPA to apply such state-specific emissions control measures—control measures that are based on state-specific inventories and data, state-specific regulatory and cost-benefit analyses, as well as state-specific basins and operations—to all of Indian Country without specific inventories and data to analyze the regulatory, operational, and technical nuances in Indian Country and in fact in each tribal area. EPA cannot over-simplify this proposed rulemaking by avoiding a comprehensive cost-benefit analysis of its own to understand and balance the costs and benefits of potential emissions regulations in Indian Country. EPA’s general concerns about growth without supporting data and its idle reliance on Colorado’s unproven program is far from acceptable. Prior to any further consideration of regulation of existing sources, EPA should gather significant additional information before proposing any requirements for existing sources. Given the March 2016 deadline for obtaining permits for oil and gas minor sources in Indian Country, EPA should not delay development of a streamlined mechanism for permitting new minor oil and gas sources. Instead, EPA should delay consideration of requirements related to existing sources to allow implementation of the tribal minor NSR program, other federal regulatory requirements, and the gathering of other relevant information.

V. Development of a Proximity-Based Standard Is Not Appropriate at This Time

In the Advanced Notice of Proposed Rulemaking, EPA considers implementing a proximity-based standard (i.e., a setback) in a general permit, PBR, or FIP. See 70 Fed. Reg. at 32,516. A setback requirement in Indian Country is not appropriate at this time.

The CAA demands that tribes and EPA ensure that any regulations adopted are based on the best available data concerning air quality and potential health impacts. Thus, as with all of EPA’s actions under the CAA, EPA’s proposal for a proximity-based requirement must be supported by the requisite data, including any demonstration of health impacts warranting specific action. EPA has failed to make this demonstration to date and has cited no scientific, peer-reviewed articles that indicate the necessity for a proximity-based standard. If EPA implements a setback requirement through a PBR, GP, or FIP, EPA would be setting precedent that would yield significant and negative unintended consequences likely resulting in a host of unsupported and unfounded regulation both in the oil and gas industry and beyond. In fact, disregarding the basic thresholds for developing regulation under the CAA would

expose other emissions sources to the threat of potential setbacks regulations. EPA must be mindful of these consequences and should respect and abide by the regulatory and statutory standards prior to initiating a rulemaking. In short, to develop a setback without the supporting data would be inconsistent with the CAA as well as good policy.

Finally, setback regulations have historically been considered “land use” regulation relegated to state and local jurisdictions. Establishing a setback requirement applicable to all of Indian Country would undoubtedly create jurisdictional conflicts. As stated in the Advanced Notice of Proposed Rulemaking, EPA proposes to be “committed to supporting tribes’ right to self-governance and protecting their inherent sovereignty.” See 79 Fed. Reg. at 32,508. Thus, EPA should respect tribal authority to regulate its land uses and refrain from establishing setbacks in Indian Country.

VI. The Endangered Species Act (“ESA”), National Historic Preservation Act (“NHPA”), and General Conformity

Oil and gas projects on tribal lands typically require approvals from the Bureau of Land Management (“BLM”) and thus are subject to National Environmental Policy Act (“NEPA”) analysis, ESA consultation, and compliance with NHPA. In areas of nonattainment, oil and gas projects require BLM to conduct a General Conformity analysis under the Clean Air Act. In light of the extensive NEPA, ESA, and NHPA analyses typically conducted for these oil and gas projects, EPA should not require any additional analyses under ESA or NHPA and should rely instead on the existing analyses and determinations conducted by other agencies. In addition, EPA should provide clear guidelines for conducting any General Conformity evaluation under CAA section 176 as described more fully below.

a. EPA Should Provide Clear Guidelines for General Conformity That Can Be Implemented Pending EPA Attainment Plan Development

Although we urge EPA to develop an attainment plan for areas in Indian Country that are designated nonattainment before EPA imposes emission reduction measures on new minor sources or minor existing sources, we urge EPA to provide clear guidelines on the General Conformity requirement for newly designated nonattainment areas.

Newly designated nonattainment areas that are designated as marginal nonattainment are not required to develop attainment SIPs. Attainment plans for new nonattainment areas should consider emission reductions from all sources of emissions in the nonattainment area and developing such plans can take a few years. However, the General Conformity requirements apply one year after the nonattainment designation and limit new economic activity that depends on federal action. To allow economic growth to continue in these areas, EPA should develop guidelines, through rulemaking, that would protect air quality while allowing economic growth to continue pending the development of an attainment plan that would appropriately address all sources contributing to the air quality violation.

VII. Conclusion

The CPA urges EPA prioritize rulemaking efforts on streamlining and implementing the MNSR Program for the oil and gas sector to ensure that new and modified minor sources are authorized efficiently

without undue delay. EPA should not attempt to address issues not within the scope of the MNSRP program, such as emissions controls on existing sources and location-specific nonattainment issues.

The CPA reserves the right to raise more particular issues during the rulemaking proceedings, to amend or supplement the policy, legal and factual issues presented above and to respond to the issues and proposals submitted by other parties to this action.

The CPA thanks EPA for the opportunity to comment on the Advanced Notice of Proposed Rulemaking. We would like to meet and work with EPA as it continues to analyze the MNSR Program in Indian Country. If you have questions, please contact me at stan@coloradopetroleumassociation.org.

Sincerely,

Stan Dempsey, Jr.

Stan Dempsey, Jr.
President, Colorado Petroleum Association