March 7, 1999

MEMORANDUM

SUBJECT: Potential to Emit (PTE) Transition Policy for Part 71 Implementation in Indian Country

FROM: John S. Seitz, Director /s/
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TO: See Addressees

What is the purpose of this memorandum?

This memorandum discusses EPA's transition policy concerning potential to emit (PTE) limits for stationary air pollution sources located in Indian country.[1] Under this policy, EPA would treat a source as nonmajor for the purposes of the Federal Operating Permits Program (part 71) if its actual emissions are and remain below 50 percent of the PTE thresholds for major source status, for every consecutive 12-month period (beginning with the 12 months immediately preceding the date of this memorandum) and it maintains adequate records to demonstrate that its actual emissions are kept below these levels.

What is meant by "Indian country"?

Indian country, as defined in 40 CFR 71.2, means: (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

[1]For purposes of administering the part 71 program, EPA treats areas for which EPA believes the Indian country status is in question as Indian country [40 CFR 71.4(b)].

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. This definition parallels the definition of Indian country contained in 18 U.S.C. section 1151 and has been applied extensively by the federal courts.

Why is EPA issuing this policy?

On July 1, 1996, EPA published final regulations, codified in 40 CFR part 71, for the Federal title V operating permits program (61 FR 34202). Subsequently, on February 19, 1999, EPA promulgated regulations setting forth EPA's approach for issuing Federal operating permits to stationary sources in Indian country (64 FR 8247). These regulations will trigger the requirement for sources in Indian country that are subject to part 71 to submit permit applications within one year, or sooner in some cases.

Sources located in areas covered by EPA-approved part 70 programs can often avoid major source permitting under title V of the Clean Air Act (CAA) by obtaining enforceable "synthetic minor" limitations on their operations.[2] However, unlike mechanisms available for many such sources, a Federal mechanism is not currently in place to create practicably enforceable synthetic minor limits for sources in Indian country. As stated in the recent final part 71 rule, EPA's view is that State or local permits that may have been issued to sources in Indian country (and limitations in such permits) are not effective in limiting the PTE of sources for purposes of avoiding the part 71 program, or for any purpose under the CAA, unless EPA has explicitly approved the State or local permitting program as applying in Indian country. As a result, some sources located in Indian country are not yet able to obtain enforceable limits to avoid being major sources under the part 71 program, even though their actual emissions may be well below the relevant major source thresholds. The EPA believes that the lack of a mechanism

[2]The term "synthetic minor" refers to air pollution sources whose maximum capacity to emit air pollution under their physical and operational design is large enough to exceed the major source threshold but are limited by an enforceable emissions restriction that prevents this physical potential from being realized. Through such synthetic minor permits, sources avoid triggering major source requirements.

to create enforceable synthetic minor limits is a disadvantage for Indian country sources who might want to obtain limits on their operations to avoid major source status under title V.

The EPA expects the minor preconstruction permit program for Indian country now being developed and other activities currently underway to provide mechanisms to limit emissions of Indian country sources in the future. However, there will be a gap between the part 71 program permit application requirement and the development of those broadly available Federal mechanisms. Because of this gap, EPA intends to implement today's policy to facilitate smooth implementation of the program, and to ensure that early implementation of the program can focus attention on creating high-quality permits for higher-emitting part 71 sources.

Who may take advantage of this policy?

Air pollution sources may take advantage of this policy if they are located in Indian country, would be covered by the part 71 program, and their potential emissions equal or exceed a major source threshold, but their actual emissions are at or below 50 percent of the threshold. The decision to utilize this policy is purely voluntary and at the discretion of the source. All sources are free to apply for a part 71 permit.

Why would sources want to take advantage of this policy?

Title V requires operating permits for major sources as well as other types of sources, as described in part 71 (see section 71.3). If a source takes advantage of this policy for all regulated air pollutants for which the source would be a major source, EPA would treat it as a nonmajor source for purposes of title V. If the source is not otherwise subject to title V, EPA would not require it to apply for a permit or to pay part 71 permit fees.

Are there any exceptions to this PTE policy?

Major sources for the purposes of title V include any stationary sources that are major sources as defined in section 112, section 302, or part D of title I of the CAA. Consistent with EPA's once-in-always-in policy for maximum achievable control technology (MACT) standards, this policy would not apply to any source that is already required to obtain a title V permit due to being subject to a MACT standard.

Likewise, this policy would not be relevant for Indian country sources with actual emissions above 50 percent of a major source threshold, but still below the major source threshold. For those sources, the only practicably enforceable mechanism currently available to limit PTE would be a limit developed by a Tribe or State with Clean Air Act programs that EPA had explicitly approved as applying in the sources' areas of Indian country.

Additionally, if a source is subject to title V for a reason other than its PTE (see 40 CFR part 71, section 71.3), then it remains subject to title V regardless of this policy. For example, if the source currently has a prevention of significant deterioration (PSD) permit under part C of title I of the CAA, then it is required to get a title V permit.

What do sources need to do to qualify under this policy?

Sources would need to do three things. First, they would need to send a letter to the appropriate EPA Regional Office indicating their intent to take advantage of this policy prior to the deadline for submittal of their part 71 permit application. The EPA believes it is appropriate to ask sources to take this step, even though EPA's transition policy for part 70 programs does not discuss it, because EPA is less familiar with source populations in specific areas than are state, local and tribal governments. This notification action will assist EPA in identifying sources and makes it clear to the Agency which sources are intending to take advantage of this policy. Second, sources would need to maintain their actual emissions, for every consecutive 12-month period (beginning with the 12 months immediately preceding the date of this memorandum), at levels that never exceed 50 percent of any of the major stationary source thresholds applicable to that source. Third, sources would need to keep records on site to demonstrate that emissions are below these thresholds for the entire transition period. A source having a PTE which is at or above the major source threshold, and which has actual emissions above the 50 percent threshold without complying with major source requirements of the CAA (or without otherwise limiting its potential to emit), could be subject to enforcement.

How long will this policy be in place?

The EPA would implement this policy from the date of this memorandum until either EPA adopts and implements a mechanism that a source can use to limit its PTE, or EPA explicitly approves a tribe's or state's program providing such a mechanism

for the relevant area of Indian country. Where the mechanism is the Federal preconstruction permit program referred to above, this policy would extend to a date to be specified in the rule that establishes the preconstruction program.

What is the connection between the Tribal Authority Rule (TAR) *and this policy?*

The Tribal Authority Rule (TAR), officially titled "Indian Tribes: Air Quality Planning and Management; Final Rule," was published on February 12, 1998 in the Federal Register. The TAR authorizes EPA to treat eligible tribes in the same manner as States for some purposes under the CAA and to approve tribal air quality programs meeting the applicable minimum requirements of the CAA. The EPA expects that many Tribes will develop and seek approval of CAA programs, including programs that may provide a practicably enforceable mechanism for limiting sources' PTE. Such a mechanism could be used to limit PTE for sources of any size. Note that if Tribes obtain EPA approval of their own part 70 programs, they will be free to require title V permits of all major sources (and minor sources, if they choose to do so) notwithstanding this policy.

Who should read this memorandum, and who are the contacts for more information?

We are asking Regional Offices to send this memorandum to States and Indian tribes within their Regions. Questions concerning specific issues and cases should be directed to the appropriate Regional Office. The Regional Office staff may contact Scott Voorhees of the Operating Permits Group (919-541-5348), Lynn Hutchinson of the Integrated Implementation Group(919-541-5795), John Walke (202-260-9856) or Mike Thrift (202-260-7709) of the Office of General Counsel, or Carol Holmes of the Office of Regulatory Enforcement (202-564-8907). The document is also available on the Internet, at http://www.epa.gov/ttn/oarpg under "Actions Sorted by CAA Title, Operating Permits & New Source Review (Title V), Memoranda, Policy & Guidance Memos."

The policies set forth in this memorandum are intended solely as guidance, do not represent final Agency action, and cannot be relied upon to create any rights enforceable by any party.

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