

October 28, 2009

Administrator Lisa Jackson
U.S. EPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 1101A
Washington, DC 20460

Assistant Administrator Gina McCarthy
U.S. EPA Headquarters
Ariol Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 6101A
Washington, DC 20460

To Administrator Jackson and Assistant Administrator McCarthy:

Re: Comments on Final EIS for the Mandan, Hidatsa and Arikara Nation Proposed Refinery Project

On behalf of the Natural Resources Defense Council and its over 500,000 members, I am writing to comment on the Final Environmental Impact Statement (“FEIS”) for the proposed new Mandan, Hidatsa and Arikara (“MHA”) Nation’s Refinery (the “Refinery”).

I strongly urge EPA headquarters officials in the Office of Air & Radiation, Office of Water, Office of Enforcement and Compliance Assurance, and Office of General Counsel to review and re-evaluate this FEIS and the proposed Refinery itself from top-to-bottom.

It is bewildering and alarming that the Obama administration is proposing to approve a new refinery to process Canadian tar sands crude, in Indian country no less, that would for the first time in the history of the Clean Air Act (to our knowledge) fail to require *any* federal preconstruction permit for a refinery.

And incredibly, EPA’s rationale for that failing is EPA’s *own* negligence over the course of two decades -- not getting around to adopting minor new source review (“NSR”) regulations covering Indian country. For an administration sincerely committed to environmental justice, clean energy, protective environmental safeguards and the Rule of Law, the proposed actions for this Refinery are jarringly at odds with this administration’s own principles and priorities. The public will not understand nor accept the decision to proceed with this project as suggested by EPA Region VIII and the Bureau of Indian Affairs (“BIA”).

According to the Response to Comments on the draft EIS (“DEIS”), the Bush administration “made a non-applicability determination for federal air permits for the proposed refinery” in an April 2005 letter to the MHA Nation. But that does not mean that the Obama administration should persist in continuing the erroneous legal, policy, public health and

environmental practices of the prior administration. The BIA and EPA Region VIII have dutifully followed the course set by the Bush administration, set forth in the DEIS and April 2005 letter of non-applicability.

That is why NRDC believes it is crucial for EPA headquarters career officials and political appointees to decide whether this administration wishes to follow the failed environmental and energy policies of the prior administration. And whether this administration is willing to do so by subjecting a vulnerable, minority population in Indian country to a poorly controlled, harmful tar sands oil refinery.

It is beyond dispute that if this Refinery were to be built in any State, or even in Indian country following promulgation of EPA's minor NSR rule, that the Refinery would require *at least* a minor NSR permit. An official with EPA's Region VIII office, Steve Wharton, admitted this to me on a phone call in September. But Wharton said in the same conversation, echoing the position taken in the FEIS, that EPA was not requiring a minor NSR permit for this Refinery because the agency has not yet issued minor NSR regulations for Indian country.

EPA's most recent semi-annual regulatory agenda indicates that the agency planned to finalize the rule entitled "Review of New Sources and Modifications in Indian Country" by November 2009. It is therefore even more mystifying why EPA and BIA are rushing to approve this Refinery without even requiring a minor NSR permit (recognizing that a PSD permit is in fact required). NRDC and the Environmental Integrity Project, in more detailed comments submitted separately, believe that this proposed refinery should require a Prevention of Significant Deterioration ("PSD") permit, not even a minor NSR permit. Instead, neither is required and the units are subjected to a series of mediocre, inadequate New Source Performance Standards ("NSPS") rather than the more rigorous Best Available Control Technology ("BACT") safeguards required elsewhere for major sources (or even minor NSR, technology-forcing performance standards required in many other states for true minor sources).

EPA has an "obligation under the CAA to ensure the protection of air quality throughout the nation, including throughout Indian country." 63 Fed. Reg. at 7265. The final Tribal Authority Rule requires EPA to promulgate "without unreasonable delay such [Federal Implementation Plan] provisions as are necessary or appropriate to protect air quality ... if a tribe does not submit a tribal implementation plan ... or does not receive EPA approval of a submitted tribal implementation plan." 40 C.F.R. § 49.11(a).

Because the MHA Nation has not submitted a tribal implementation plan to EPA for approval, there are currently gaps in regulation of air quality on the Fort Berthold Indian Reservation. Because there is no EPA-approved tribal implementation plan for sources on the Fort Berthold Indian Reservation, EPA's own regulations require EPA to adopt a FIP before the Refinery may operate. Certainly the imposition of certain inadequate NSPS on some units, with many units left unmonitored by EPA's own admission (see, *e.g.*, Response to Comments ("RTC"), at E-52), does not satisfy EPA's obligation to "ensure the protection of air quality" on the Fort Berthold Reservation.

EPA's Response to Comments on the DEIS contains the following remarkably non-responsive and unsatisfying statement, replying to concerns raised by tribal members and other members of the public about the lack of adequate air quality safeguards covering the proposed Refinery's air pollution:

EPA has authority under Clean Air Act sections 301(a) and 301(d)(4) to promulgate "Federal Implementation Plans" (FIPs) as necessary or appropriate to protect air quality (40 CFR 49.11). EPA *may* develop a FIP for the refinery which *could* include additional monitoring, testing, recordkeeping, and reporting for the refinery units as needed to ensure protection of air quality.

RTC at E-51 (emphasis added). The fact that "EPA has authority" to promulgate a FIP to protect air quality, but is refusing to exercise that authority – or even to require federally enforceable preconstruction permits – provides no solace to the members of the MHA Nation and downwind communities that will be harmed by air pollution from the Refinery. We urge EPA headquarters officials to take a less blithe and passive approach to the administration's responsibility to protect vulnerable populations in Indian country against harmful air pollution.

Failure to Require Federally Enforceable Permit Conditions, or Provide Meaningful Emissions Data

In all my years reviewing state and federal preconstruction and operating permits as an air pollution attorney, I have never seen a new facility approval exercise more lacking in enforceable conditions; reliable and accurate data; or potential emissions calculated in accordance with EPA policies.

The core problem lies with Region VIII's refusal to require any preconstruction permit for the proposed Refinery, as described above. Quite apart from this indefensible outcome, the decision to proceed with the air pollution conditions in a bizarrely disjointed FEIS means that EPA and BIA end up trying to fit a square peg into a round hole. The FEIS lacks basic permit conditions to enforce emissions and emissions rates that end up just being unsubstantiated estimations anyway. Chapter 4 in the 2007 Air Quality Report ("AQR") is illustrative.

The AQR projects various emissions rates for criteria pollutants from proposed equipment, without explaining or justifying the basis for those projections. There is simply a table with rows and columns of numbers. Then the AQR explains that EPA has generated "conservative emission estimates for NO_x" emissions from the Flare by multiplying the "designed loading rate" of 15 lbs/hr by 33.33. AQR at 4-1. Why 33.33? Why not 20? Or 50? Or 100? The document does not say. The AQR then refers the reader to a "Flare Example NO_x Calculation" in an Appendix C – that is nowhere to be found. Appendix C does not even contain a "Flare Example NO_x Calculation." AQR at App. C-1. Nor do any other documents in the docket that we were able to locate.

Instead, all that Appendix C contains is a "Fugitive Emissions – Example Calculation for Valves." *Id.* If this "example" is any indication of what the "Flare Example NO_x Calculation" might have been, however, the availability of this example would have supplied little more

example than its total absence. The fugitive emissions example “assumes” 3% of valves will leak, while 97% will be “non-leakers,” with no basis or justifications provided for this assumption. And nowhere does the document explain what an “example calculation” is supposed to represent anyway – certainly not actual emissions data about the facility or enforceable permit conditions.

But at least there is an “example calculation” for fugitive emissions from valves. The AQR contains *no* other air emissions calculations for other equipment at the facility.

The FEIS and accompanying materials rely essentially on a handful of mediocre NSPS to substitute for BACT or minor source BACT that would be in line with best practices at other refineries around the country. See AQR, Appendix A. EPA knows very well that these NSPS do not match the rigor of BACT. EPA freely admits that “not all emissions will be monitored under these [NSPS] regulations.” RTC at E-51.

It remains unanswered throughout all of the FEIS materials why EPA believes this is the *responsible* manner to safeguard and monitor air quality on the Fort Berthold Reservation, and why EPA is comfortable treating the only oil refinery ever permitted by EPA (to our knowledge) in this lax fashion.

EPA headquarters should be concerned not just about the shoddy work associated with this FEIS and the adverse air quality impacts it would allow on the Fort Berthold Reservation. EPA also should be concerned about this level of thoroughly deficient approval for any new facility, much less a tar sands refinery, serving as an acceptable agency practice and an example for state, local and tribal permitting authorities of what EPA headquarters finds worthy of EPA’s imprimatur. Indeed, we urge the Office of Air & Radiation, Office of Enforcement and Compliance Assurance and Office of General Counsel to scrutinize this FEIS especially with a future eye toward whether EPA would consider it (along with the Air Quality Report) to be an enforceable and acceptable approach to permit drafting by EPA’s state, local and tribal partners. In particular, we urge OECA – including the office’s Office of Environmental Justice -- to evaluate this proposed refinery and its pollution control practices to determine whether they are consistent with the best practices that OECA and states have required in recent consent decrees arising out of EPA’s refinery enforcement initiative.

We are confident these inquiries can only lead to the conclusion that the Region VIII documents do not reflect adequate or enforceable permit drafting -- and certainly should not be tolerated based on the wrongheaded paradox that Region VIII here is claiming that no preconstruction permit is needed anyway.

EPA has affirmed the authority and obligation under the Clean Air Act and EPA’s Tribal Authority Rule for the Administrator to ensure the protection of air quality throughout Indian country:

EPA is not relieved 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. See, e.g., CAA section 301(a). Moreover, section 301(d)(4) provides EPA with discretionary authority, in cases where it has determined that treatment of tribes as identical to states is "inappropriate or administratively infeasible," to provide for direct administration through other regulatory means. EPA is exercising this discretionary authority and has created a new section (§49.11) to this final rule which provides that the Agency will promulgate a FIP to protect tribal air quality within a reasonable time if tribal efforts do not result in adoption and approval of tribal plans or programs. Thus, EPA will continue to be subject to the basic requirement to issue a FIP for affected tribal areas within some reasonable time.

63 Fed. Reg. at 7265. We urge Administrator Jackson to exercise that authority to impose BACT-level conditions upon the emissions units at the proposed Refinery, whether through the vehicle of a Federal Implementation Plan or the PSD permit rightfully required for this project.

Potential Circumvention Concerns

Plans for this proposed refinery have been accompanied by disturbing and repeated indications that the project proponents intend to refine ordinary, higher sulfur crude oil at the Refinery in addition to the Canadian synthetic crude feedstock addressed in the FEIS and 2007 Air Quality Report. See, e.g., Comments on Proposed MHA Nations Refinery, by Jerry Nagel (September 9, 2009) (docketed); comments submitted by other tribal members by today's comment deadline.

Such a planned mode of operation would not only exceed the scope of the proposed project and FEIS, and plainly result in emissions greater than major source thresholds, but also constitute a violation of the Clean Air Act under EPA's PSD "circumvention" policies:

EPA stated in the June 28, 1989 Federal Register notice on the definition of federally enforceable (54 FR 27274) and in its June 13, 1989 guidance on "Limiting potential to Emit in New Source Permitting" that it is not only improper but also in violation of the Clean Air Act to construct a source or major modification with a minor source permit when there is intent to operate as a major source or major modification. Permits with conditions that do not reflect a source's planned mode of operation are sham permits, are void & initio, and cannot shield a source from the requirement to undergo preconstruction review. 40 CFR §52.21(r) (4) requires application of NSR requirements to a source that asks for a relaxation of permit limits which would make the source major. EPA stated that it will require application of §52.21(r) (4) even where a source legitimately changes a project after finding it cannot comply with the operating restrictions which were taken in good faith.

"Applicability of New Source Review Circumvention Guidance to 3M-Maplewood Minnesota," John Rasnic, OAQPS, to George Czerniak, Region 5 (June 17, 1993). And while the 3M-Maplewood memo concerned a situation involving multiple sham synthetic minor permits, its conclusions are equally applicable to a situation where, for the sake of argument, EPA should be issuing at least a minor NSR permit rather than an FEIS. In truth EPA should be requiring a PSD permit for the Refinery.

Based on information brought to our attention indicating intentions to refine ordinary crude oil from the Fort Berthold Reservation at the Refinery, information that we believe will be included in the docket for the FEIS, we urge EPA to investigate such information.

AP-42

The 2007 Air Quality Report indicates that Region VIII used “emission factors from AP-42 Table 1.4-3. . . to estimate HAP emissions from the boilers and heaters” for the proposed refinery. Air Quality Report at 4-2. But EPA’s own publications demonstrate that emissions factors are not remotely up to this task, and this practice contradicts EPA’s own admonitions in AP-42 itself:

Use of these factors as source-specific permit limits and/or as emission regulation compliance determinations is not recommended by EPA. Because emission factors essentially represent an average of a range of emission rates, approximately half of the subject sources will have emission rates greater than the emission factor and the other half will have emission rates less than the factor. As such, a permit limit using an AP-42 emission factor would result in half of the sources being in noncompliance.

AP-42, Introduction at 2. This recognition by EPA, echoed in numerous other Agency materials,¹ demonstrates that usage of emissions factors in the manner undertaken in the Air Quality Report and FEIS is improper.

Please do not hesitate to contact me should you have any questions about these comments.

Sincerely,

John Walke
Clean Air Director
Natural Resources Defense Council

Cc: Mike Black, BIA

¹ As EPA is aware, the Office of Inspector General has designated the Office of Air and Radiation’s emission factor development program “a significant weakness that impedes achievement of major air program goals and is, therefore, a material weakness under the *Federal Managers’ Financial Integrity Act (FMFIA)*.” *Emission Factor Development*, EPA OIG Report No. 6100318 (Sept. 30, 1996); *see also The Effectiveness and Efficiency of EPA’s Air Program*, EPA OIG Report No. E1KAE4-05-0246-8100057, at 6, 33-35 (Feb. 27, 1998). This latter report has noted that emissions factors are unavailable for many sources of air pollution, and those that are available are often unreliable. *Id.* at 34. The report notes further that without reliable emission factors, OAR and the states cannot be sure that proper emission limits are established and that air permitting programs are effective, in which case “the nation’s air quality could be adversely affected and people could be subjected to the health hazards associated with excessive exposure to air pollutants.” *Id.* at 35.

Cc: Rob Brenner, EPA, OPAR
Bill Harnett, EPA, OAQPS
Lisa Heinzerling, EPA, OPEI
Adam Kushner, EPA, OECA
Charles Lee, EPA, OEJ
Diane Mann-Klager, BIA
Steve Page, EPA, OAQPS
Bob Sussman, EPA, Office of the Administrator
Peter Tsirigotis, EPA, OAQPS
Steve Wharton, EPA, Region VIII