



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 49

[EPA-R01-OAR-2020-0374; FRL- 10014-00-Region 1]

Approval and Promulgation of Air Quality Implementation Plan; Mashantucket Pequot Tribal Nation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) proposes to approve the Mashantucket Pequot Tribal Nation's (MPTN or the Tribe) Tribal Implementation Plan (TIP) under the Clean Air Act (CAA) to regulate air pollution within the exterior boundaries of the Tribe's reservation. The proposed TIP is one of two CAA regulatory programs that comprise the Tribe's Clean Air Program (CAP). EPA approved the Tribe for treatment in the same manner as a State (Treatment as State or TAS) for purposes of administering New Source Review (NSR) and Title V operating permits under the CAA on July 10, 2008. In this action we propose to act only on those portions of MPTN's CAP that constitute a TIP containing severable elements of an implementation plan under CAA section 110(a). The proposed TIP includes permitting requirements for major and minor sources of air pollution. The purpose of the proposed TIP is to enable the Tribe to attain and maintain the National Ambient Air Quality Standards (NAAQS) within the exterior boundaries of its reservation by establishing a federally enforceable preconstruction permitting program.

DATES: Written comments must be received on or before **[Insert date 30 days after date of publication in the Federal Register]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R01-OAR-2020-0374 at <https://www.regulations.gov>, or via email to Bird.Patrick@epa.gov. For comments submitted at [Regulations.gov](https://www.regulations.gov), follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [Regulations.gov](https://www.regulations.gov). For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **“FOR FURTHER INFORMATION CONTACT”** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>. Publicly available docket materials are available at <https://www.regulations.gov> or at the U.S. Environmental Protection Agency, EPA Region 1 Regional Office, Air and Radiation Division, 5 Post Office Square – Suite 100, Boston, MA. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office’s official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding legal holidays and facility closures due to COVID-19.

FOR FURTHER INFORMATION CONTACT: Patrick Bird, Air Permits, Toxics and Indoor Programs Branch, U.S. Environmental Protection Agency, Region 1, 5 Post Office Square, Mail Code: 05-2, Boston, MA, 02109-0287. Telephone: 617-918-1287. Fax: 617-918-0287. Email: Bird.Patrick@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document whenever “we,” “us,” or “our” is used, we mean EPA.

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I. Background

EPA is proposing to approve a TIP submitted by the MPTN for approval under section 110 of the CAA. The proposed TIP addresses attainment and maintenance of the National Ambient Air Quality Standards (NAAQS) by establishing a federally enforceable preconstruction permitting program within the exterior boundaries of the Tribe’s reservation. It also allows for sources that otherwise would have the potential to emit hazardous air pollutants or regulated NSR pollutants in amounts at or above those for major sources to request federally enforceable permit limitations that restrict emissions to below those of a major source.

The MPTN is an Indian Tribe federally recognized in 1983 by Congressional legislation (Pub. L. 98-134, § 9, Oct. 1St, 1983 97 Stat 855, Title 25 U.S.C.A. § 1751-1760). The Secretary of the Interior recognizes the “Mashantucket Pequot Tribe of Connecticut” (73 FR 18553, 18554, April 4, 2008). MPTN’s CAP was established by Tribal Council Resolution in 2005 (TCR102600-01 of 02). Beginning in 2005, the MPTN, with assistance from EPA, began developing a draft permitting program with the goal of submitting it to EPA for approval under the CAA. On May 4, 2005, the MPTN submitted a request that we find the Tribe eligible for TAS pursuant to § 301(d) of the CAA and Title 40, part 49 of the Code of Federal Regulations (CFR), for the purpose of implementing its CAA permitting program.

Specifically, the MPTN requested a TAS eligibility determination for purposes of implementing two CAA programs that together comprise the CAP: (1) A Tribal Implementation Plan (TIP) that includes source-specific rules¹ and major and minor source permit programs under CAA section 110; and (2) an operating permit program under title V of the Act. In addition, the Tribe requested TAS for receiving notifications under title V of the CAA and submitting recommendations to EPA on air quality designations under CAA section 107(d). On July 10, 2008, EPA determined that the Tribe is eligible for TAS for these purposes.

The MPTN formally submitted the applicable elements of its TIP to EPA Region 1 on December 7, 2018. Having found that the MPTN is eligible for TAS to implement these regulatory programs, EPA is now proposing to approve the Tribe's TIP. We intend to act on the Tribe's title V operating permit program in separate notice and comment processes, as appropriate.

¹ The Tribe’s actual TIP submittal did not include source-specific rules, so that is not part of our action.

Approval and implementation of the MPTN TIP will be an important step in ensuring that basic air quality protection is in place to protect public health and welfare in the MPTN reservation, consistent with the CAA's overarching goals of protecting air resources throughout the nation, including air resources in Indian Country.

II. CAA Requirements and the Role of Indian Tribes

A. How did the 1990 CAA Amendments include Indian Tribes?

Under the 1990 amendments to the CAA, the EPA may approve eligible Tribes to administer certain provisions of the CAA. Pursuant to Section 301(d)(2) of the CAA, EPA promulgated the Tribal Authority Rule (TAR) on February 12, 1998 (63 FR 7254). The TAR specifies the CAA provisions for which it is appropriate to treat Tribes in the same manner as states, the eligibility criteria the Tribes must meet if they choose to seek such treatment, and the procedure by which EPA reviews a Tribe's request for an eligibility determination.

As a general matter, EPA determined in the TAR that it is not appropriate to treat Tribes in the same manner as states for purposes of specific plan submittal and implementation deadlines for NAAQS-related requirements. *See* 40 CFR 49.4. Thus, Tribes are generally not subject to CAA provisions which specify a deadline by which something must be accomplished. So, for example, provisions mandating the submission of state implementation plans do not apply to the Tribes. Furthermore, under the TAR (40 CFR 49.7(c)), a Tribe may choose to implement reasonably severable portions of the various CAA programs, as long as it can demonstrate that its proposed air program is not integrally related to program elements that are not included in the plan submittal and is consistent with applicable statutory and regulatory requirements. This modular approach is intended to give Tribes the flexibility to address their most pressing air resource issues and acknowledges that Tribes often have limited resources with which to address their environmental concerns. Consistent with the exceptions listed in 40 CFR 49.4, once

submitted, a Tribe's proposed air program will be evaluated in accordance with applicable statutory and regulatory criteria in a manner similar to the way EPA would review a state submittal. *See* 40 CFR 49.9(h). EPA expects Tribes to fully implement and enforce their approved programs and, as with states, EPA retains its discretionary authority to impose sanctions for failure to implement an air program.

Where the provisions of the act or implementing regulations governing the program for which the Tribe seeks approval require criminal enforcement authority, the Tribe may enter into a memorandum of agreement with the appropriate EPA Region to provide for criminal enforcement by EPA. *See* 40 CFR 49.7(a)(6) and 49.8.

B. What criteria must a Tribe demonstrate to be treated in the same manner as a state under the CAA?

Under Section 301(d) of the Clean Air Act, 42 U.S.C. 7601, and the TAR (at 40 CFR 49.6), EPA may treat a Tribe in the same manner as a state for purposes of administering certain CAA programs or grants if the Tribe demonstrates that (1) it is federally recognized; (2) it has a governing body carrying out substantial governmental duties and powers; (3) the functions to be exercised by the Tribe pertain to the management and protection of air resources within the Tribe's reservation or within non-reservation areas under the Tribe's jurisdiction; and (4) it can reasonably be expected to be capable of carrying out the functions for which it seeks approval.

C. What is an implementation plan for criteria air pollutants, and what must it contain?

Implementation plans are a set of programs and regulations submitted by states and, if they so choose, by Tribes, that outline a definite plan by which the state or Tribe intends to help attain or maintain NAAQS. NAAQS have been established for the following six pollutants: ozone;

carbon monoxide; particulate matter; sulfur dioxide; lead; and nitrogen dioxide. The EPA calls these pollutants “criteria pollutants” because the original standards were based on information in air quality criteria documents developed for pollutants that “endanger the public health or welfare.” Once approved by EPA, implementation plans become enforceable as a matter of federal law.

Implementation plans are governed by Section 110 of the CAA, 42 U.S.C. 7410. Under Sections 110(o) and 301(d) of the CAA and the TAR (40 CFR 49.9(h)), any TIP submitted to EPA shall be reviewed in accordance with the provisions for review of state implementation plans (SIPs) set forth in CAA Section 110. Thus, the TIP must include not only the substantive rules by which the Tribe proposes to help achieve NAAQS, but must also provide assurances that the Tribe will have adequate personnel, funding, and authority to administer the plan, as required by CAA Section 110(a)(2)(E), and requirements governing conflicts of interest, as required by CAA Section 128. Under Section 128, implementation plans must contain requirements that (1) any “board or body” that approves permits or enforcement orders have at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to the permits or orders and (2) conflicts of interest are disclosed. EPA does not intend to read Section 128 to limit a Tribe's flexibility in creating a regulatory infrastructure that ensures an adequate separation between the regulator and the regulated entity (59 FR 43956, 43964 (Aug. 25, 1994)).

EPA will evaluate the elements submitted in each TIP on a case-by-case basis to ensure the selected program is reasonably severable under the CAA, and that the TIP has control measures that adequately address the specific types of pollution of concern on the reservation. Once EPA approves the TIP, its provisions are enforceable by the Tribe, by EPA, and by citizens. As with

SIPs, EPA maintains an ongoing oversight role to ensure the approved TIP is adequately implemented and enforced and to provide technical and policy assistance. An important aspect of EPA's oversight role is that EPA retains legal authority to bring an enforcement action against a source violating the approved TIP.

III. Evaluation of the MPTN's Implementation Authorities

A. How did the MPTN demonstrate eligibility to be treated in the same manner as a State under the CAA?

By letter dated May 4, 2005 and submitted to EPA, the MPTN requested an EPA determination that the Tribe is eligible for TAS for the purposes of implementing two CAA programs: (1) A TIP that includes source-specific² rules and major and minor source permit programs under CAA section 110; and (2) an operating permit program under title V of the Act. In addition, the Tribe requested TAS for receiving notifications under title V of the CAA and for submitting recommendations to EPA on air quality designations under CAA section 107(d). EPA notified appropriate governmental entities and the public of the Tribe's application and addressed all comments received as part of that process.

On July 10, 2008, based on the information submitted by the Tribe, and after consideration of all comments received in response to notice of the Tribe's request, EPA determined that the MPTN met the eligibility requirements of CAA section 301(d) and 40 CFR 49.6 for these purposes under the CAA. This determination nullified TCR011195-01 of 03 authorizing interim measures until the Tribe could establish TAS. TCR102500-01 of 02 enacted the MPTN's Clean Air Act creating a Tribal Air Quality Program to administer the CAA, and TCR 102600-02 of 02 approved a TIP that addressed a single pollutant of concern, nitrogen oxides (NO_x).

² As noted earlier, the Tribe's actual TIP submittal did not include source-specific rules.

TCR091605-01 repealed TCR102600-02 of 02 and approved a TIP to address all criteria pollutants through a minor source preconstruction permitting program. TCR060806-06 of 14 adopted a “Global Policy for Air Permitting” that specified the use of best available control technology (BACT) for sources of air pollution. TCR100809-02 of 02 approved EPA grant funding for the purpose of further developing the TIP to include both minor and major sources of air pollution.

The EPA drafted a decision document entitled “Mashantucket Pequot Tribal Nation of Connecticut: Eligibility Determination under 40 CFR part 49 for Clean Air Act Minor and Major New Source Review and Title V Operating Permit Programs” (TAS Decision Document, included in the docket of this rulemaking), which was dated June 30, 2008, and signed by Robert W. Varney, Regional Administrator, EPA Region 1 on July 10, 2008. The EPA determined that the MPTN had demonstrated: (1) that it is an Indian Tribe recognized in 1983 by Congressional legislation (Pub. L. 98-134, § 9, Oct. 1st, 1983 97 Stat 855, Title 25 U.S.C.A. § 1751-1760) and by the Secretary of the Interior (73 FR 18553, 18554 (Apr. 4, 2008)); (2) that it has a governing body carrying out substantial governmental duties and functions; (3) that the functions to be exercised by the Tribe pertain to the management and protection of air resources within the exterior boundaries of the Tribe's reservation; and (4) that the Tribe is reasonably expected to be capable of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the CAA and all applicable regulations.

B. How would the MPTN administer and enforce the TIP?

The proposed TIP would be implemented primarily by the MPTN Air Quality Program (AQP) staff and the Tribe's legal counsel. According to the MPTN TIP submittal, AQP staff has received extensive training in TIP development, permit writing and regulatory enforcement and

has also demonstrated considerable capabilities in the programmatic, administrative, and legal functions of implementing an air quality program. The MPTN is currently one of only two Tribal Governments that EPA Region 1 has recognized as capable of issuing permits with enforceable limitations on a source's potential to emit.

As discussed above in section III.A, EPA evaluated the Tribe's implementation and enforcement capabilities as part of our determination that the MPTN is eligible for TAS to implement this TIP and other CAA programs. As part of that determination, EPA found that the MPTN is reasonably expected to be capable of implementing and enforcing the TIP and other CAA programs in a manner consistent with the terms and purposes of the CAA and all applicable regulations.

The MPTN staff is responsible for inspecting facilities within the exterior boundary of the reservation and responding to any complaints received. AQP staff, and if needed, the MPTN tribal law enforcement authorities, will assume enforcement activities for the purposes of compliance with air regulations. Other MPTN agencies will also provide compliance and enforcement assistance, as appropriate, in accordance with applicable Tribal and Federal law. The MPTN's AQP oversees the enforcement of the TIP and establishes requirements and procedures for civil and criminal enforcement. The MPTN AQP has the authority to issue administrative compliance orders, assess civil penalties, and take other enforcement actions against persons who violate requirements of the TIP or other requirements of the CAA within the exterior boundaries of the reservation. A violation by the owner or operator of any emission limitation, emission standard or any other condition contained in a permit shall subject the owner or operator to any or all enforcement penalties, including permit revocation, available under the

CAA. No subsequent permit will be issued until violations have been resolved to the satisfaction of the AQP.

Furthermore, EPA Region 1 and the MPTN have a memorandum of agreement between the two agencies outlining general terms for the cooperation of criminal enforcement matters as provided by section 113(c) of the CAA, 42 U.S. C. 7413(c). The agreement, entitled “Memorandum of Agreement Between the Mashantucket Pequot Tribe of Connecticut and the U.S. Environmental Protection Agency Region I (a copy of which is provided in the docket of this action) provides procedures of communication as they relate to investigative leads of potential criminal enforcement matters concerning non-Native Americans and Native Americans.

IV. Evaluation of the MPTN's Tribal Implementation Plan

The MPTN TIP establishes a preconstruction permitting program for new and modified stationary sources within the Tribe’s jurisdiction by: 1) providing a mechanism to issue preconstruction air permits to major and minor sources of criteria air pollutants; 2) providing a mechanism for an otherwise major source to voluntarily accept emission limitations to restrict its potential to emit (PTE) and become a synthetic minor source; 3) providing the option for major stationary sources, seeking to minimize permitting complexities associated with major new source review, to establish a plantwide applicability limitation (PAL) within an actual emissions PAL permit; and 4) setting forth the criteria and procedures that the AQP will use to administer the program. Requirements of this TIP are applicable to any person who owns, operates, seeks to construct or plans to modify a stationary source of air pollutants located within the exterior boundaries of MPTN.

A. Does the MPTN TIP meet all CAA requirements?

The MPTN's CAP is comprised of two regulatory programs: (1) A Tribal implementation plan (TIP) for the implementation, maintenance, and enforcement of the NAAQS under CAA 110; and (2) a Tribal operating permits program under title V of the Act. As stated earlier, in this action we propose to act only on the TIP.

Pursuant to section 110 of the Clean Air Act (42 U.S.C. Section 7410), the TIP portion of the program addresses attainment and maintenance of the NAAQS by establishing a federally enforceable preconstruction permitting program for major and minor source of air pollution. Consistent with authorities approved by EPA in the MPTN TAS for CAA section 110 permitting programs and EPA's Federal Minor New Source Review Program in Indian Country (*See* 40 CFR 49.151), it also allows for sources that otherwise would have the potential to emit hazardous air pollutants in amounts at or above those for major sources (40 CFR 63.2) to request federal enforceable permit limitations that restrict emissions to below those of a major source. Subtitle 12.2 of the Tribe's regulations contains those elements specific to the TIP. This Subtitle, with definitions contained in Subtitle 12.1, Section 4, meets the minimum program requirements for implementation plans for review of new sources and modifications specified at 40 CFR 51.160 through 51.166.

1. EPA's Evaluation of the MPTN Minor NSR Program

The purpose of the MPTN's minor new source review permitting requirements is to establish a preconstruction permitting program, for new minor sources and minor modifications at stationary sources. The requirements that minor source programs must meet to be approved are outlined in 40 CFR 51.160 through 51.164. These regulations require states to develop "legally enforceable procedures" to enable a state "to determine whether the construction or modification of a [source] will result in (1) a violation of applicable portions of the control strategy; or (2) interference with attainment or maintenance of a national

standard.” *See* 40 CFR 51.160(a). The program must identify the types and sizes of sources subject to review, and the state's plan must discuss the basis for determining which facilities will be subject to review. *See* 40 CFR 51.160(e).

Although the Act does not require Tribes to develop and seek EPA approval of NSR permit programs, where a Tribe decides to do so, EPA evaluates the program in accordance with applicable statutory and regulatory criteria in a manner similar to the way in which EPA would review a similar state submittal. *See* 40 CFR 49.9(h); 59 FR 43956 at 43965 (Aug. 25, 1994) (proposed TAR preamble); 63 FR 7254 (Feb. 12, 1998) (final TAR preamble).

For the reasons discussed below, we propose to approve the MPTN minor NSR program in accordance with the TAR and the criteria for approval of minor NSR programs at 40 CFR 51.160 through 51.164. It is important to note, however, that we are proposing to approve this program as a base program suitable to the MPTN’s reservation.

Section 110(a)(2)(C) of the Act (42 U.S.C. Section 7410(a)(2)(C)) requires that each implementation plan include a program to regulate the construction and modification of stationary sources, including a permit program as required by parts C and D of title I of the Act, as necessary to assure that the NAAQS are achieved. In this application, MPTN is establishing a preconstruction permitting program for new minor sources and minor modifications at stationary sources. In addition, MPTN is establishing a mechanism for an otherwise major source to voluntarily accept restrictions on its potential to emit to become a synthetic minor source. This mechanism may also be used by an otherwise major hazardous air pollutant (HAP) source to voluntarily accept restrictions on its potential to emit to become a synthetic minor HAP source. Parts C and D, which pertain to prevention of significant

deterioration (PSD) and nonattainment, respectively, address the major NSR programs for major stationary sources, and the permitting program for “nonmajor” (or “minor”) stationary sources is addressed by section 110(a)(2)(C) of the Act. We commonly refer to the latter program as the “minor NSR” program. A minor stationary source is a source whose “potential to emit” is lower than the major source applicability threshold for a particular pollutant as defined in the applicable major NSR program.

- a) **Applicability:** Owners and operators of stationary sources must apply for and be granted a permit prior to the beginning of actual construction. This applies to new minor NSR sources, existing sources seeking to undertake a minor modification, and any existing source proposing a physical or operational change at a permitted source that would increase allowable emissions of a regulated NSR pollutant above its existing annual allowable emissions limit.
- b) **Minor NSR Source Permits:** No person shall begin actual construction of any new minor NSR source without first obtaining a permit to construct. Applications for permits must include facility information, a listing of each emissions unit, detailed unit specific information for all affected emissions units, a description and characterization of the total facility emissions, and if required by the AQP an air quality impact analysis in accordance with 40 CFR part 51, Appendix W.
- c) **General Permits:** A general permit must include the following elements: 1) Identification of the specific category of emissions units or sources to which the general permit applies, 2) information required by applicants requesting coverage under a general permit, 3) the effective date(s) of the general permit and rules concerning renewing coverage under the general permit, 4) monitoring, reporting and recordkeeping as applicable, 5) additional permit provisions as applicable, and 6) the fee required for processing the request for general permit coverage.

d) Synthetic Minor Source Permits: This provision is applicable to any owner or operator of a stationary source requesting a synthetic minor source permit to establish emissions limitations that limit the source's potential to emit to below major source thresholds. A source that is issued a permit and becomes a synthetic minor source under this section but remains a major source for title V purposes continues to be subject to the applicable title V program provisions. In addition, a synthetic minor source is subject to all applicable tribal rules, regulations, emissions standards and other requirements.

As noted earlier, although the Act does not require Tribes to develop and seek EPA approval of NSR permit programs, where a Tribe decides to do so, EPA evaluates the program in accordance with applicable statutory and regulatory criteria in a manner similar to the way EPA would review a similar state submittal. 40 CFR 49.9(h); 59 FR 43956 at 43965 (Aug. 25, 1994) (proposed TAR preamble); 63 FR 7254 (Feb. 12, 1998) (final TAR preamble). For the reasons discussed below, we propose to approve the MPTN's minor NSR program in accordance with the TAR and the criteria for approval of minor NSR programs at 40 CFR 51.160 through 51.164. It is important to note, however, that we are proposing to approve this as a base program suitable to the MPTN's reservation. Other Tribal NSR programs may differ significantly and should each be evaluated on a case-by-case basis in light of air quality needs in the relevant area.

The MPTN's minor new source review permitting requirements apply to stationary sources that are not major NSR sources and have the potential to emit the following Regulated NSR pollutants at or above the following annual ton per year thresholds:

(a) Nitrogen oxides (NO_x), 10

- (b) Volatile Organic Compounds, 5
- (c) Carbon monoxide (CO), 10
- (d) Sulfur dioxide (SO₂), 10
- (e) Particulate Matter, 10
- (f) PM₁₀, 5
- (g) PM_{2.5}, 3
- (h) Lead, 0.1
- (i) Fluorides, 1
- (j) Sulfuric acid mist, 2
- (k) Hydrogen sulfide (H₂S), 2
- (l) Reduced sulfur compounds (incl. H₂S), 2
- (m) Municipal waste combustor emissions, 2
- (n) Municipal solid waste landfill emissions, 10 (as nonmethane organic compounds)
- (o) Any other limit that may become applicable in the event that an attainment designation for Mashantucket is changed by the Administrator.

We note that the MPTN's minor NSR thresholds for NO_x and VOC are slightly higher than the thresholds in Part 49, i.e. 10 tpy as opposed to 5 tpy for NO_x and 5 tpy as opposed to 2 tpy for VOC. EPA is proposing to approve these differences as they are consistent with EPA's intent to allow Tribes to fashion programs based on their particular circumstances. In EPA's preamble to 40 CFR Part 49, EPA stated the following about Tribes' minor NSR programs and the requirements of 40 CFR Part 49.

[W]e seek to establish a flexible preconstruction permitting program for minor sources in Indian country that is comparable to similar programs in neighboring states in order to

create a more level regulatory playing field for owners and operators within and outside of Indian country. *See* 76 FR 38748 at 38754 (July 1, 2011). This final rulemaking is not intended to establish a new set of minimum criteria that a Tribe or a state would need to follow in developing its own minor source permitting program. Rather, these rules simply represent how we will implement the program in Indian country in the absence of an EPA-approved Tribal implementation plan. However, if a Tribe is developing its own program, this can serve as one example of a program that meets the objectives and requirements of the Act. 76 FR 38748 at 38754 (July 1, 2011).

This final minor source permitting program addresses, on a national level, many environmental and regulatory issues that are specific to Indian country. We understand that different Tribes may face different issues and may therefore, like states developing SIPs, choose to develop TIPs tailored to their individual Tribal circumstances and needs. This rule will allow Tribes to develop their own TIPs, consistent with the overarching requirement that the Tribe ensure that the TIP will not interfere with any applicable requirement of the CAA. 76 FR 38748 at 38754 (July 1, 2011).

Finally, we note that the State of Connecticut's SIP-approved minor new source review threshold is 15 tons per year for covered pollutants.

The MPTN's minor NSR permit program requires each applicant for a minor new source review permit to submit, among other things, a certified application containing information about the facility, the industrial process, the nature and amount of emissions, and any information needed to determine applicable technology-based emission limitations.

The permit program establishes administrative procedures for action on permit applications, including public notice and a comment period of at least 30 days. The program also provides for an opportunity for public hearings on such permit applications. The issuance or denial of a permit may be appealed administratively and, thereafter, judicially to the Tribal Court.

We propose to approve these procedures as legally enforceable procedures that establish a base program suitable to the MPTN's reservation and that satisfy the minimum requirements of CAA section 110(a)(2)(C) and 40 CFR 51.160 through 51.164. Note that we are not approving into the TIP the administrative appeal and judicial review procedures in Tribal Court, although they nonetheless remain a valid and important part of the MPTN's permitting program.

2. EPA's Evaluation of the MPTN Major NSR Programs

- a. Nonattainment New Source Review: MPTN proposes to implement the nonattainment major new source review program as set forth in sections 171 through 193 of the CAA (42 U.S.C. Sections 7501-7515). It requires that major NSR sources subject to this program comply with the provisions and requirement of 40 CR Part 51 (Appendix S) and the requirements of Section 173(c)(1) of the CAA (42 U.S.C. Section 7503(c)(1)), which requires the application of lowest achievable emissions reductions and emissions offsets for new major sources and major modifications for pollutants (and precursors of those pollutants) designated as nonattainment in the geographic area the facility is located in. At present, MPTN is designated as serious nonattainment for the 2008 ozone NAAQS and marginal nonattainment for the 2015 ozone NAAQS.

The AQP will use the criteria and procedures stipulated within Appendix S to issue, administer and enforce permits subject to the TIP. It should be noted that some important provisions of Appendix S are paraphrased in various paragraphs of the application; however, the full provisions of Appendix S, as may be amended from time to time, are incorporated by reference into the Tribe's regulations. For the purposes of the Tribe's application, the term State Implementation Plan (SIP) as used in Appendix S means Tribal Implementation Plan (TIP) and the term "State" shall mean the Tribe (MPTN), Tribal or, as applicable, Mashantucket. In addition, the requirements of Sec. 173(c)(1) of the CAA are also incorporated by reference into the Tribe's regulations. The provisions (Chapter 3, Sec. 2. Applicability) apply to major NSR sources and major modifications if, for the applicable regulated NSR pollutant evaluated, Mashantucket is currently designated as a nonattainment area under 40 CFR Sec.81.307. Under NSR, the MPTN AQP will issue, administer and enforce permits subject to the TIP by following the provisions stipulated within 40 CFR Part 51, Appendix S. In accordance with section 173(a)(4) of the Act (42 U.S.C. Section 7503(a)(4), the AQP shall not issue a permit or permits to a stationary source to which the requirements of the part apply if the reviewing authority has determined that the applicable implementation plan is not being adequately implemented for the nonattainment area in which the proposed source is to be constructed or modified. In accordance with section 173(a)(3) of the CAA and 40 CFR 51 Appendix S, the TIP requires that a permit applicant certify that all existing major sources owned or operated by the applicant (or any entity controlling, controlled by, or under common control with the applicant) in Mashantucket are in compliance with all applicable emission limitations and

standards under the Act (or are in compliance with an expeditious schedule which is Federally enforceable or contained in a court decree).

- b. Prevention of Significant Deterioration: MPTN proposes in the TIP to implement the prevention of significant deterioration (PSD) program as set forth in Sections 160 through 169B of the Act (42 U.S.C. Sections 7470-7492). This requires that major NSR sources subject to this program comply with the provisions and requirement of 40 CFR 52.21. While some of the important provisions of 40 CFR 52.21 are paraphrased in various paragraphs in the Tribe's application, the provisions of 40 CFR 52.21 are incorporated into the Tribe's regulations by reference, as the federal regulations may be amended from time to time. The following paragraphs of 40 CFR 52.21 do not apply for the purposes of the Tribe's program: Paragraph (a)(1); Paragraph (g); Paragraph (s), Paragraph (t); and Paragraph (u). In addition, the AQP will use the criteria and procedures stipulated within 40 CFR 52.21 to issue, administer and enforce permits subject to the TIP. Pursuant to 40 CFR 52.21(g)(1), MPTN shall be considered a Class II area. An application for PSD permits shall contain all the following information: 1) control technology evaluation in accordance with 40 CFR 52.21(j), 2) a source impact analysis in accordance with 40 CFR 52.21(k)(1), 3) an air quality analysis in accordance with 40 CFR 52.21(m), 4) source information required in accordance with 40 CFR 52.21 (n), 5) additional impact analyses required pursuant to 40 CFR 52.21 (o), and 6) a demonstration showing that all stationary sources with MPTN exterior boundaries are subject to emissions limitations and are in compliance, or on schedule for compliance which is federally enforceable or contained in a court decree, with all applicable emission limitations and standards under the CAA.

The major source permit program establishes administrative procedures for action on permit applications, including public notice and a comment period of at least 30 days. The program also provides for an opportunity for public hearings on such permit applications. The issuance or denial of a permit may be appealed administratively and, thereafter, judicially to the Tribal Court. Note that we are not approving into the TIP the administrative appeal and judicial review procedures in Tribal Court, although they nonetheless remain a valid and important part of the MPTN's permitting program.

3. EPA's Evaluation of the Tribe's Public Participation Requirements

The MPTN's TIP meets the CAA's requirements for public participation in the permitting process. The AQP regulations provide for an opportunity for public comment prior to permit issuance on all draft permits and the associated public record, except for sources seeking coverage under a general permit and for administrative permit revisions. However, the AQP in its discretion may determine that public participation is warranted for these actions also.

The MTPN's public participation requirements include at a minimum the following: availability, in the area affected by the air pollution source, of the draft permit and associated public record, for public inspection; public notice, describing the availability of the documents for review and the opportunity to comment; a comment period, no less than thirty (30) days commencing upon the date of notice publication; a thirty (30) day period for EPA to review commencing upon the date a copy of the required notice is provided to the Administrator through the appropriate Regional Office; and if requested by a member of the public or if the AQP determines that comments received were significant and warrant such, a

public hearing for tentative approval of the permit shall be held with appropriate notice provided.

The MTPN TIP allows for under limited circumstances administrative permit revisions for minor and major sources of air pollution. Administrative permit revisions are not subject to the permit application, issuance, public participation, or administrative and judicial review requirements. Circumstances that would allow for administrative permit revisions include: (1) the correction of typographical errors; (2) changes in the name, address or phone number of any person identified in the permit or similar minor administrative change at the source; (3) changes in ownership or operational control of a source; (4) requirements related to more frequent monitoring or reporting by the permittee; (5) increases in an emissions unit's annual allowable emissions limit for a regulated NSR pollutant, when the action that necessitates such increase is not otherwise subject to minor or major source permitting requirements; (6) the establishment of an emission limitation for a replacement unit when the construction of which does not trigger the need for a new permit; or (7) any other type of change that the AQP has determined to be similar to the circumstances references above. We note that similar provisions related to administrative permit revisions at minor and major sources of air pollution exist within the EPA's Federal Minor New Source Review Program in Indian Country. *See* 40 CFR 49.159(f) and 49.153(a)(2)

B. What procedural requirements did the MPTN satisfy?

Section 110(a) of the CAA requires that implementation plans be adopted by a state after reasonable notice and public hearing. EPA has promulgated specific procedural requirements for SIP revisions in 40 CFR part 51, subpart F. These requirements include publication of notices, by

prominent advertisement in the relevant geographic area, of a public hearing on the proposed revisions, a public comment period of at least 30 days, and an opportunity for a public hearing. The MPTN developed its CAA programs in consultation with EPA Region 1 starting in 2005. Following an extensive public comment process, the MPTN Tribal Council codified the CAP under Tribal Law. The program includes both the TIP, which only applies to permitting programs under Section 110 of the CAA, 42 U.S.C Section 7410, and other “tribal only rules” that are not intended to be federally enforceable, and the program was made available for a 30-day public comment period that included the opportunity for the public to request a hearing. No public hearing was requested, and all comments received have been addressed, provided to EPA and posted as part of the public record. The program was then adopted to provide for sound regulation and control of sources of air pollution in Mashantucket to ensure the health, safety and general welfare of all Tribe’s members, residents, employees, and guests. The administration of the Tribe’s program furthers the Tribe’s sovereignty and self-government. We find that the MPTN's process for adopting and submitting the TIP satisfied the procedural requirements for adoption and submission of implementation plans under CAA section 110(a) and EPA's implementing regulations.

Specifically, MPTN’s TIP submittal has fulfilled the following requirements: 1) a formal letter of submittal from the Tribe’s Chairman requesting EPA approval of the plan in a letter dated Dec. 7, 2018 from Rodney A. Butler, MPTN, Council Chairman, to Alexandra D. Dunn, Region Administrator, EPA New England Region 1 (Cover Letter), 2) evidence that the Tribe has adopted the plan in the Tribal code or body of regulations to include the date of adoption or final issuance as well as the effective date of the plan (TCR101118-05 of 05) in Attachment 1, 3) evidence that the Tribe has the necessary legal authority under tribal law to adopt and implement the plan, 4) a copy of the actual regulation, or document submitted for approval and

incorporation by reference into the plan (Attachment 3), 5) evidence that the Tribe followed all the procedural requirements of the Tribe's laws and constitution in conducting and completing the adoption/issuance of the plan (Article II and IV MPTN constitution), 6) evidence that the public notice was given of the proposed change consistent with procedures approved by EPA, including the date of publication of such notice (Attachment 4, Exhibits A, B, C, D and E), 7) certification that public hearings were held in accordance with information provided in the public notice and the Tribe's laws and constitution (Attachment 4, Exhibit C), and 8) compilation of public comments and the Tribe's response thereto (Attachment 4, Exhibit H, Attachment 5).

V. Proposed Action

EPA is proposing to approve the Mashantucket Pequot Tribal Nation's Tribal Implementation Plan under the Clean Air Act to regulate air pollution within the exterior boundaries of the Tribe's reservation. In this action we propose to act only on those portions of MPTN's CAP that constitute a TIP containing severable elements of an implementation plan under CAA section 110(a). The proposed TIP includes permitting requirements for major and minor sources of air pollution. Specifically, we are proposing to approve the following sections of the MPTN's air quality regulations. Title 12, Subtitle 12.1, § 2 – Applicability (with effective date); Title 12, Subtitle 12.1, § 4 – Definitions; and Title 12, Subtitle 12.2 – New Source Review – MPTN TIP.

EPA is soliciting public comments on the issues discussed in this notice or on other relevant matters. These comments will be considered before taking final action. Interested parties may participate in the Federal rulemaking procedure by submitting written comments to this proposed rule by following the instructions listed in the **ADDRESSES** section of this **Federal Register**.

VI. Incorporation by Reference

In this rule, the EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference the MPTN rules discussed in section III. and IV. of this preamble. The EPA has made, and will continue to make, these documents generally available through <https://www.regulations.gov> and at the EPA Region 1 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

VII. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a TIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing TIP submissions, EPA's role is to approve tribal choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this proposed action merely approves tribal law as meeting Federal requirements and does not impose additional requirements beyond those imposed by tribal law. For that reason, this proposed action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not expected to be an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

List of Subjects in 40 CFR Part 49

Environmental protection, Administrative practice and procedure, Air pollution control, Incorporation by reference, Indians, Intergovernmental relations, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: August 18, 2020.

Deborah Szaro,
Acting Regional Administrator,
EPA Region 1.

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