November 22, 2013

The Honorable Regina A. McCarthy, Administrator
Office of the Administrator
U.S. Environmental Protection Agency
Room 3000
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20004


Dear Administrator McCarthy:

Western Energy Alliance (the “Alliance”) submits the following Petition for Administrative Reconsideration (“Petition”) of the Oil and Natural Gas Sector: Reconsideration of the Final Rule for Oil and Natural Gas Sector: Reconsideration of Certain Provisions of New Source Performance Standards; Final Rule, 78 Fed. Reg. 58,416 (Sept. 23, 2013). (“Final Rule”) under the Clean Air Act (“CAA”) § 307(d)(7)(B) and the federal Administrative Procedure Act 5 U.S.C. § 500 et. seq (“APA”). The Alliance appreciates many of the changes the Environmental Protection Agency (“EPA” or “the Agency”) made during the first phase of reconsideration. These changes, which focused largely on provisions affecting storage tanks, provided some necessary relief from impractical compliance deadlines in the original final rule and made other helpful clarifications. But, as described in more detail below, the Alliance requests further reconsideration of the Final Rule in the following respects: (1) make permanent the streamlined compliance monitoring; (2) remove any control requirements for Group 1 tanks; (3) remove application of the “once in always in” policy; (4) clarify the emissions calculations methodology; and (5) clarify the residency requirements for portable flowback tanks.

Western Energy Alliance represents over 430 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas across the West. The majority of members are independent producers—small businesses with an average of twelve employees.

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I. STANDARD OF REVIEW—PETITION FOR ADMINISTRATIVE RECONSIDERATION

A. CAA § 307(d)(7)(B)

The applicable standard for granting a petition for administrative reconsideration is, in relevant part:

If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit. Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.


A final agency rule also must be the logical outgrowth of the proposal. Envtl. Integrity Project v. EPA, 425 F.3d 992, 997 (D.C. Cir. 2005); see also Shell Oil Co. v. EPA, 950 F.2d 741, 750-51 (D.C. Cir. 1991); Northeast Maryland Waste Disposal Auth. v. EPA, 358 F.3d 936, 952 (D.C. Cir. 2004) (stating that a final rule is a “logical outgrowth” of a proposed rule only if interested parties “should have anticipated” that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period”) (quoting City of Waukesha v. EPA, 320 F.3d 228, 245 (D.C. Cir. 2003)).

The Final Rule introduces new concepts and requirements not present in, or not a logical outgrowth of, the proposed rule, and either fails to correct or exacerbates some of the errors that existed in the final rule of August 2012. And, at least with respect to the new control requirements applicable to Group 1 tanks and extension of the “once in always in” policy, these requirements could not reasonably have been anticipated. Accordingly, reconsideration is warranted under both § 307(d)(7)(B) and under the APA and the logical outgrowth doctrine.
II. SPECIFIC GROUNDS FOR RECONSIDERATION

The Alliance’s multiple grounds for reconsideration, consistent with the standards summarized above, are set forth below. The Alliance also generally supports the other industry or industry trade group petitions for reconsideration, and the points documented therein.

A. EPA should make permanent the streamlined monitoring requirements

As currently drafted, EPA finalized the streamlined compliance monitoring requirements, but only temporarily. The preamble indicates that EPA “will continue to fully evaluate the compliance demonstration and monitoring issues” and will “complete our reconsideration of these requirements along with other issues for which we intend to grant reconsideration, by the end of 2014.” 78 Fed. Reg. 58,431. The Alliance requests that EPA reconsider making these streamlined monitoring requirements permanent (as has already been suggested by prior commenters). In temporarily finalizing a set of streamlined compliance monitoring requirements, the Agency concluded “[w]e believe that [the streamlined compliance monitoring requirements] are adequate to assure compliance.” The Alliance understands that the Agency is addressing further implementation issues through additional reconsideration, but fails to understand how or why the rationale for the streamlined compliance monitoring requirements could or would change as a result of future reconsideration. If streamlined monitoring is adequate to assure compliance now—as EPA has concluded—it should be adequate to ensure compliance going forward.

Making streamlined monitoring permanent will provide needed certainty to the affected regulated community. In the Alliance’s experience, the frequency of monitoring, recordkeeping, and reporting under NSPS rules like Quad O for the oil and gas industry is the most significant factor in the cost of the rule. This is so because many of these facilities are un-manned, widely dispersed, and in rural areas—particularly in the Rocky Mountain West where the Alliance’s members predominantly operate. A future change in monitoring obligations, in addition to providing little (if any) air quality benefit, likely would exponentially increase the cost of the rule; and preserving this option adds uncertainty. Absent a demonstrated need, which in the Alliance’s opinion does not exist on this record, full-blown compliance monitoring is more prevalent in, and should be reserved for, National Emission Standards for Hazardous Air Pollutants (“NESHAPs”) and the control of air toxics under section 112. Streamlined monitoring is consistent with other NSPS rules and will reduce regulatory uncertainty without sacrificing emissions reductions or environmental benefit. Accordingly, the Alliance requests that EPA reconsider making the streamlined compliance monitoring requirements permanent.
B. Extending the “once in always in” policy to all storage vessels in the Final Rule is arbitrary and capricious agency action that imposes significant burdens, little (if any) benefit, and is unnecessary given other provisions of this NSPS

The Agency’s application to this rule of the “once in always in” policy, exclusively reserved for rules under section 112 to date, is arbitrary and capricious, without support on the record, and inconsistent with the fundamental self-executing reality of this NSPS rule. On this point, the Final Rule engages in a bit of regulatory sleight of hand. The preamble states “[i]n the context of once in always in, the EPA has not extended this policy by providing that storage vessel affected facilities that subsequently reduce PTE to below 6 tpy remain affected facilities.” 78 Fed. Reg. at 58,430 (emphasis added). Yet, that is precisely what EPA has done. See 40 C.F.R. § 60.5365 (“A storage vessel affected facility that subsequently has its potential for VOC emissions decrease to less than 6 tpy shall remain an affected facility under this subpart.”) (emphasis added); see also 78 Fed. Reg. at 58,430 (indicating that vessels taken out of service continue to be affected facilities). Notwithstanding this fundamentally inaccurate and misleading preamble statement, the Final Rule inappropriately extends the once in always in policy to all facilities affected by this Rule—a decision unnecessary and inconsistent with the NSPS program generally and this rule specifically.

As EPA is well-aware, the once in always in (“OIAI”) policy was developed in the context of the section 112 Maximum Achievable Control Technology (“MACT”) program for the control of hazardous air pollutants. See EPA Memorandum, Potential to Emit for MACT Standards – Guidance on Timing Issues at 9 (May 16, 1995). As the Agency stated in this 1995 memorandum, “[a] once in, always in policy ensures that MACT emissions reductions are permanent, and that the health and environmental protection provided by MACT standards is not undermined.” Id. The central logic for this policy in the context of section 112 MACT standards is to prevent a regulatory loophole made possible by section 112 itself. As EPA frames it, the policy prevents the possibility that facilities could “backslide from MACT control levels by obtaining potential-to-emit limits, escaping applicability of the MACT standard, and [subsequently] increasing emissions to the major-source threshold.” Id. This potential for backsliding does not exist under a self-executing NSPS like Quad O where the PTE threshold governs applicability—either initially or via a subsequent emissions increase. And Quad O automatically applies based on the VOC threshold irrespective of the “major” or “minor” source status of the facility. Simply put, the logic for the OIAI policy under section 112 does not exist here.

It appears EPA’s main rationale for the OIAI approach is that “[h]aving storage vessels remain affected facilities when emissions decline allows regulatory agencies to track emissions

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2 The Alliance also notes that extension of the once in always in policy was not mentioned in the proposed reconsideration and, therefore, like the new control requirements for Group 1 tanks discussed below fails the logical outgrowth test.
of these storage vessels and to monitor compliance if they increase.” 78 Fed. Reg. at 58,430. Yet, this professed need for such information gathering is unsupported on the record, and we believe is an insufficient rationale for this unprecedented expansion of the OIAI policy. Using a command and control rule to mine industry data is inappropriate, impractical, and potentially unlawful. The Alliance also questions whether the rule remains cost-effective in light of the OIAI policy given the significant burdens placed on tanks falling below the applicability threshold compared with the minimal VOC reduction being achieved—a point EPA acknowledges. See 78 Fed. Reg. at 58,430 (“[W]e realize that there may be undue burden associated with control and monitoring, recordkeeping and reporting requirements for storage vessels that are not in service.”) As already noted, information gathering comes with a cost—monitoring, recordkeeping, and reporting requirements are the most significant cost drivers for this rule. Simply put, this is not a proper use of regulatory authority and Congress provided EPA other information gather powers under CAA § 114.

The Agency also states that extending the once in always in policy to this rule “is consistent in subpart OOOO.” 78 Fed. Reg. at 58,430. The Alliance disagrees and views such policy as entirely inconsistent with the rest of Quad O. Specifically, § 60.5395 already requires non-applicable facilities that experience an emissions increase (through fracturing or re-fracturing or for some other reason) to comply. These § 60.5395 triggers completely obviate any need to consider affected vessels “once in” to be “always in.” In short, this record does not support extension of the OIAI policy to this rule.

The Alliance believes that EPA is misplaced in its application of the OIAI policy to Quad O. The decision is inconsistent with the NSPS program in general, and the self-executing provisions applicable to all tanks regardless of thresholds under this rule, more specifically. By extending the policy to this rule, EPA has imposed significant compliance burdens on vessels that otherwise would not be subject to the rule, while gaining virtually no air quality benefit. Further, it is doubtful that the rule remains cost-effective for facilities whose emissions are below applicability thresholds given the OIAI. For these reasons, the decision is arbitrary and capricious, unsupported on the record, and the Alliance urges EPA to reconsider removing the provisions of the rule that treat vessels “once in” to be “always in.” Instead, EPA should rely on the inherent self-executing provisions of the NSPS rule to achieve the air quality benefits being forecast.

C. The control requirements on the Group 1 tanks appeared for the first time in the Final Rule, could not have been reasonably anticipated, and constitute arbitrary and capricious agency action on this record

For the first time, the Final Rule subjects Group 1 tanks to control requirements representing a diametrically different approach from what was proposed. The Alliance urges the Agency to reconsider such control requirements, if for no other reason than such requirement is not a logical outgrowth of the proposed rule.
As noted above, any final rule must be a logical outgrowth of the proposal. This ensures that the notice and due process considerations embedded within the governing statute (here, the CAA) and the APA are met. As the court stated in *Envtl. Integrity Project*:

[The APA’s notice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.]

425 F.3d at 996 (citing *International Union, United Mine Workers of America v. Mine Safety & Health Administration*, 407 F.3d 1250, 1259 (D.C. Cir. 2005)). Agency’s cannot “use the rulemaking process to pull a surprise switcheroo on regulated entities.” *Envtl. Integrity Project*, 425 F.3d at 997 (citing *International Union* as an example where the proposal provided a minimum air velocity of 300 feet per minute to ventilate underground coal mines and the final rule provided a maximum air velocity of 500 feet per minute).

Here, similar to the flip flop by the agency in *International Union*, EPA pivoted from not requiring controls on Group 1 tanks at any point in time to requiring controls in addition to other, costly rulemaking obligations—within the span of four months. The proposed rule would have required a notification to EPA of the presence of Group 1 facilities, but no control (or other) requirements unless a facility experienced an emissions increase. See 78 Fed. Reg. at 58,420. This proposed scheme was consistent with other parts of the rule that correctly placed the focus on emissions (e.g., the alternative 4 tpy control removal option and the provisions requiring compliance following an event resulting in an emissions increase). The Agency’s central rationale for the proposed approach was that:

[A]ll oil and natural gas wells decline in production over time, with corresponding declines in reservoir pressure and liquids production. Often these declines are relatively rapid and can occur over a year or two. Accordingly, emissions from storage vessels in Group 1 may have declined significantly (potentially below the 6 tpy threshold for some) by the time controls are available to all affected sources.

78 Fed. Reg. 22,126, 22,131 (Apr. 12, 2013) (emphasis added). The Final Rule ignores this fundamental rationale and upends this scheme entirely. See e.g., 78 Fed. Reg. at 58,417 (“A key feature of this action is that the final amendments require control of all storage vessel affected facilities constructed since the August 23, 2011, proposed date of the 2012 NSPS.”) It is this about face that violates the notice requirements of § 307(d)(7)(B), the APA, and the logical outgrowth test. This fundamental change could not have been reasonably anticipated—particularly on the record before the Agency and the public at the time of the proposed rule. On
this basis alone, EPA should remove the control requirements for Group 1 tanks (or, although
less preferable for the reasons discussed next, open the record for additional comment).

Even putting aside the lack of logical outgrowth, the rationale for EPA’s change in
position for Group 1 tanks does not hold up. The Final Rule does not require Group 1 tanks to
have controls until April 15, 2015. EPA acknowledges that production often declines within a
year or two. Such a production decline horizon is consistent with the Alliance’s experience and
nothing in the record suggests this is no longer true. Yet, the Final Rule subjects Group 1 tanks to
control requirements even though, at a minimum, these tanks will be two years old and some
nearly four years old on April 2015. If the Agency had stopped there (i.e., only requiring an
emissions determination and potential controls on April 15, 2015 for Group 1 tanks), it may not
have been so problematic. But EPA went further by subjecting Group 1 tanks to emissions
calculation obligations (October 15, 2013) and notification requirements (January 15, 2014) in
the interim. These intervening regulatory requirements are unlawful because they impose
compliance obligations—at significant cost—on older tanks that, as acknowledged by EPA, are
likely to not have enough emissions to require controls at all. The Alliance views EPA’s
approach in this respect as nothing more than a fishing expedition designed not to control
emissions or result in air quality benefits, but to provide the Agency with information about all
Group 1 tanks. This is not an appropriate or lawful use of the Agency’s NSPS authority. And
because Group 1 tanks are now subject to control requirements, the Agency’s extension of the
“once in always in” policy to tanks poses serious long-term implications for operators—with
very little or no associated air quality benefit.

EPA’s turnabout with respect to applicable controls on Group 1 tanks is irrational and
fails the logical outgrowth test. The regulated community has not been able to adequately
comment on the new requirements or the Agency’s asserted support for them. As a result, the
need for Group 1 controls has not been adequately developed on this record. The Alliance
requests that the Agency reconsider imposing control requirements on the Group 1 tanks in favor
of the proposed approach.

3 On this point, the Agency no longer believes combustor supply is a limiting factor. Yet, the Agency
notes “great variability” with the projections of potential combustor supply, that if changed “could
potentially affect sources’ ability to acquire and install control by the current compliance deadline.” 78
Fed. Reg. at 58,420 (noting that combustor supply projections are largely based on one supplier’s
projections which “greatly exceed” the others). While the Alliance appreciates that EPA considered a
phased-in compliance approach in light of this variability, we see the fact the Agency placed control
requirements on Group 1 tanks for the first time in the Final Rule based on such scant and “variable” data
to be a fundamental flaw on this record. If it turns out that the potential combustor supply problems
materialize, the phased-in compliance approach will do little to address the problem, in our estimation.
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D. The Final Rule creates confusion about how to calculate emissions for tanks

The rule is unclear as to how storage vessel emissions must be calculated to determine applicability for storage vessels subject to the regulation. In 60.5365(e), the final rule states,

The potential for VOC emissions must be calculated using a generally accepted model or calculation methodology, based on the maximum average daily throughput determined for a 30-day period of production prior to the applicable emission determination deadline specified in this section.

This statement is not clear regarding the proper statistical value EPA intends industry to use, “maximum” or “average,” during the 30-day period. During normal operations, most storage vessel emissions fluctuate based on production and ambient atmospheric conditions. A calculation based on maximum daily emissions will not account for such fluctuation, including periods of low emissions. For this reason, the use of maximum values will not accurately reflect emissions from storage vessels over a 30-day period. We suggest EPA use the average, rather than the maximum, daily throughput over a 30-day period of production calculated using generally accepted models or methodologies. And to avoid any confusion, the Alliance requests that EPA make this change to the regulatory language in 60.5365(e) rather than through a guidance letter or other preamble language.

E. Clarification requested regarding temporary flowback tanks

The Alliance has a general concern about how the Agency will address requirements for flowback tanks going forward. We recognize that EPA did not address this issue during the first phase of reconsideration. But to preserve the Alliance’s record on the issue given the somewhat peculiar multiple-phase reconsideration of Quad O, and to hopefully help the Agency as it moves forward with subsequent reconsiderations, we felt it necessary and appropriate to raise the issue in this petition. See generally McGee v. United States, 402 U.S. 479 (1971) (generally requiring exhaustion of administrative remedies before judicial review of agency action); but see Sims v. Apfel, 530 U.S. 103 (2000) (explaining that in a rulemaking context “[w]here [] an administrative proceeding is not adversarial, we think the reasons for a court to require issue exhaustion are much weaker”).

The August 16, 2012 final rule subjects storage vessels to Quad O requirements if they remain on a given site for more than 180 days. 77 Fed. Reg. 49,490, 525 (Aug. 16, 2012). The concern some Alliance members have voiced with this requirement relates specifically to temporary flowback tanks at multi-well sites where the tanks may be on site for more than 180 days and receive flowback from several different wells, not simultaneously, but in stages. The current 180-day requirement applied to a single pad creates a disincentive for further reducing the footprint of oil and gas operations by constructing large multi-well pads. We do not believe this was EPA’s intent. The Alliance is not in a position at this time to suggest a solution on this
issue other than perhaps applying the 180-day trigger for temporary flowback tanks on a per well basis (i.e., the 180 day applicability clock would re-start when flowback from a new well into a temporary tank replaces flowback from the prior well). We recognize there are myriad technical complexities to work through on this issue and request that the Agency address the issue in more detail. Accordingly, we encourage the Agency to take up this issue in any subsequent reconsideration phase(s). If EPA chooses not to address the issue, the Alliance reserves its right to raise the issue during any judicial appeal.

III. CONCLUSION

Western Energy Alliance appreciates the hard work by EPA to improve many aspects of the Quad O NSPS, including the most recent Phase 1 reconsideration. That said, the Final Rule still contains several significant flaws that warrant further reconsideration as described in this petition. These include: making the streamlined compliance monitoring permanent; removing application of the “once in always in” policy—raised for the first time in the Final Rule; removing control requirements for Group 1 tanks—raised for the first time in the Final Rule; clarifying the emissions calculation methodology; and addressing residency requirements for flowback tanks. The Alliance looks forward to working with the Agency to fix or clarify these issues, and also looks forward to further phases of reconsideration in general recognition that this significant rule must be as robust as possible.

Respectfully submitted,

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Enclosure

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