



Pennsylvania Department of Environmental Protection

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Secretary

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EPA Docket Center (Air Docket)
U.S. Environmental Protection Agency
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Washington, D.C. 20460

RE: Docket ID No. OAR-2003-0079
NSR Implementation Under the Eight-Hour Standard

To Whom It May Concern:

The Commonwealth of Pennsylvania ("Pennsylvania") appreciates the opportunity to submit these comments on the U.S. Environmental Protection Agency's ("EPA") Nonattainment Major New Source Review Implementation Under Eight-Hour Ozone National Ambient Air Quality Standard: Reconsideration, published in the *Federal Register* on April 4, 2005 (70 *Fed. Reg.* 17018). In this notice, EPA requests comment on whether it should interpret the Clean Air Act ("CAA") to "require areas to retain major NSR [new source review] requirements that apply to certain one-hour ozone nonattainment areas in implementing the eight-hour standard, and whether EPA properly concludes that a State's request to remove one-hour major NSR programs from its State Implementation Plan ("SIP") will not interfere with any applicable requirement within the meaning of Section 110(l) [42 U.S.C. §7410(l)] of the Act" (*Id.*). This comment period is in response to issues raised in a petition for reconsideration of EPA's final rule to implement the eight-hour ozone National Ambient Air Quality Standard ("NAAQS") published on April 30, 2004 (69 *Fed. Reg.* 23951).

Pennsylvania strongly disagrees with the approach EPA is taking on the New Source Review ("NSR") program under its eight-hour implementation rule. The language of the CAA clearly demonstrates that the NSR provisions are aimed at reducing emissions. EPA's interpretation that NSR is a measure to control growth in emissions is fairly new and is contrary to its previous interpretations of NSR as a control measure or requirement. The removal of NSR requirements in one-hour nonattainment areas will result in a backsliding of control measures or requirements by raising the tonnage thresholds for triggering NSR and by reducing the ratio of emission offsets required. It will result in some degree in growth of emissions, and thus will interfere in some degree with reasonable further progress as well as attainment. Furthermore, EPA's position that not allowing backsliding for a relaxation of the NAAQS, but allowing such backsliding for a tightening of the NAAQS is wholly inconsistent with one of CAA's primary goals, attaining and maintaining air quality standards to protect public health and the environment.



I. Background

The goals of the CAA include attaining and maintaining air quality to satisfy all NAAQS requirements. A primary means of achieving this is through placing preconstruction review and permitting requirements on certain new and modified sources of air pollution to require control technology and to protect against degradation of air quality. These requirements are implemented through the NSR program. The nature of the NSR pre-construction requirements depends upon where the source is to be located.

Sources, located in an area that meets the relevant ambient air quality standard (attainment), are subject to the prevention of significant deterioration pre-construction permitting requirements and must employ the "best available control technology" ("BACT") for each pollutant that it will emit in significant amounts. With the exception of southeastern Pennsylvania, major sources, in Pennsylvania, that have the potential to emit 100 tons per year ("TPY") for more of carbon monoxide, nitrogen oxides ("NO_x"), sulfur oxides, and particulate matter, 50 TPY of volatile organic compounds ("VOCs"), are currently subject to these PSD requirements.

Sources located in an area that fails to meet the relevant ambient air quality standard (nonattainment) are subject to the nonattainment new source review pre-construction permitting requirements and must commit to achieve the "lowest achievable emission rate" ("LAER") for each pollutant that it would emit in significant amounts. In addition, the proposed emission increases must be offset at ratios based on the nonattainment classification of the area in which the new or modified major source is located. In southeastern Pennsylvania, major sources that have the potential to emit 25 TPY of NO_x and VOCs are currently subject to these nonattainment requirements. In addition, these sources are subject to a 1 to 1:3 offset ratio.

II. Antibacksliding Issues

Section 172(e), 42 U.S.C. § 7502(e), of the CAA provides that if EPA relaxes a NAAQS, it must within 12 months "promulgate requirements . . . [that] provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation." The final rule is contrary to the provisions of the CAA, 42 U.S.C. §§ 7401 *et seq.*, because it will allow major sources in one-hour nonattainment areas to backslide from NSR requirements. Specifically, areas that are designated to a less stringent classification for the eight-hour standard than for the one-hour (e.g., a one-hour serious area that is moderate or marginal under the eight-hour standard, or that is assigned to Subpart 1) may weaken their NSR provisions down to the level applicable to the eight-hour classification. This entails at least two relaxations. First, it will raise the tonnage thresholds defining major new and modified sources subject to NSR. As a result, these sources can greatly increase the amount of pollution emitted and still avoid BACT and LAER controls. Second, for those sources that trigger NSR, it will reduce the ratio of emission offsets required.

For example, in southeastern Pennsylvania a number of stationary sources agreed to voluntary emission reductions under 25 TPY for NO_x and VOCs, by taking certain limitations and/or restrictions, to avoid treatment as a major source. As “synthetic minors” these sources avoided such requirements as LAER and reasonably available control technology or “RACT.” Under EPA’s final rule, these sources will now be able to increase emissions to 50 TPY of VOCs and 100 TPY of NO_x before triggering any major source threshold requirements. As a result, by relaxing these CAA requirements, EPA will encourage emission increases and allow sources that would otherwise be major to escape NSR and the LAER control requirements.

In addition, nonattainment NSR requires control through the offset requirement. Specifically, Section 173(a)(1)(A) provides that the permitting agency cannot issue an NSR permit unless it determines that “by the time the source is to commence operation, sufficient offsetting emissions reductions have been obtained, such that total allowable emissions from existing sources in the region, from new or modified sources which are not major emitting facilities, and from the proposed source will be sufficiently less than total emissions from existing sources (as determined in accordance with the regulations under this paragraph) prior to the application for such permit to construct or modify so as to represent (when considered together with the plan provisions required under Section 7502 of this title) reasonable further progress (as defined in Section 7501 of this title).” 42 U.S.C. §7503(a)(1)(A). In Pennsylvania, this means that sources in the five-county Philadelphia area will no longer need to comply with a 1 to 1:3 offset ratio, but will only need to offset emissions through a 1 to 1:15 ratio. By relaxing NSR requirements applicable to ozone nonattainment areas, EPA both excuses sources from having to obtain offsets at all (by virtue of falling below the major source thresholds) and, for those sources that exceed even the weakened thresholds, lowers the tonnages of offsets required.

III. NSR as a Control Measure

EPA asserts “the NSR program is a growth measure and is not specifically designed to produce emissions reductions” (69 *Fed. Reg.* 23986). But Section 172(e), 42 U.S.C. §7502(e), broadly applies to “controls,” and is not limited to that subset of controls designed to reduce emissions. EPA further argues “our revised approach is more consistent with our longstanding treatment of NSR as a growth measure. We have historically treated control measures differently from measures to control growth” (*Id.*). However, as recently as 2001, EPA treated NSR as a control measure to reduce emissions and improve air quality.

For example, on March 2, 1995, EPA issued a policy establishing an alternative attainment process whereby states could commit to a two-phase approach to meet CAA statutory requirements.¹ The Phase I requirements include adoption of specific control strategies necessary to meet the post 1996 rate-of-progress (“ROP”) plan through 1999. The Phase II requirements include participation in a two-year regional consultative process with other states in

¹ Memorandum from Mary D. Nichols, Assistant Administrator for Air and Radiation, EPA to Regional Administrators entitled “Ozone Attainment Demonstrations” dated March 2, 1995.

the eastern U.S. with EPA to identify and commit to additional emission reductions necessary to attain the health-based ozone standard by the CAA deadlines.

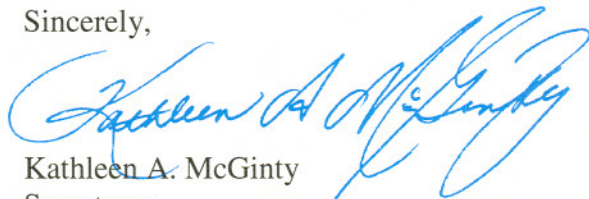
As a result, Pennsylvania was required to submit the Phase I portion of the SIP revision, including the 1999 24 percent reduction milestone. As part of that SIP revision, Pennsylvania identified source and process shutdown emission reduction credits ("ERCs") at a 1:1.3 offset ratio, under 25 *Pa. Code* Subchapter E (related to NSR), as a control measure used to attain the 1999 ROP requirements. This means that sources, which have "banked" ERCs may use no more than 77 percent of these emissions at a later date. In addition, as part of the Phase II SIP revision, Pennsylvania identified its NSR program as a control measure put in place to reduce emissions through this offset requirement and through the installation of LAER control equipment.

On October 26, 2001, EPA fully approved as meeting the requirements of Section 182(c)(2) and (d) of the CAA, 42 U.S.C. § 7511a(c)(2) and (d), the post ROP plans (Phase I) and the one-hour attainment demonstration SIP (Phase II), which included the NSR program elements as control measures necessary to achieve the one-hour health-based ozone standard in the Philadelphia area (66 *Fed. Reg.* 54143). Moreover, EPA specifically identified the offset ERCs as a control measure, which was credited in the attainment plan. As a result, EPA's position that the NSR provisions are merely "growth measures" and that therefore the anti-backsliding principles of Section 172(e), 42 U.S.C. § 7502(e), do not apply, is arbitrary and capricious.

IV. Conclusion

As set forth in the above comments, Pennsylvania believes that the April 30, 2004, final rule will allow sources in one-hour nonattainment areas the ability to backslide from NSR requirements. Moreover, the NSR program is a control measure contemplated by Congress necessary to assure that national ambient air quality standards are achieved. Therefore, Pennsylvania strongly urges EPA to reverse course and assure that one-hour ozone NSR requirements remain mandatory control measures in eight-hour nonattainment areas to protect air quality.

Sincerely,



Kathleen A. McGinty
Secretary