



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

OFFICE OF  
AIR AND RADIATION

OCT 14 1994

MEMORANDUM

SUBJECT: Part D New Source Review (part D NSR) Requirements for  
Areas Requesting Redesignation to Attainment

FROM: Mary D. Nichols  
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for Air and Radiation (6101)

TO: Director, Air, Pesticides and Toxics  
Management Division, Regions I and IV  
Director, Air and Waste Management Division,  
Region II  
Director, Air, Radiation and Toxics Division,  
Region III  
Director, Air and Radiation Division,  
Region V  
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Region VI  
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Regions VII, VIII, IX, and X

I. Introduction

With this memorandum, EPA is amending one aspect of guidance issued September 4, 1992<sup>1</sup> and September 17, 1993<sup>2</sup> regarding requirements for nonattainment areas requesting redesignation to attainment. In these previous memoranda, EPA indicated that States must submit and receive full approval of any part D NSR regulations that were required by the Act to be submitted to EPA prior to or at the time of the submission of a complete redesignation request. The EPA has reconsidered that policy, however, and is establishing a new policy under which

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<sup>1</sup>Memorandum entitled, "Procedures for Processing Requests to Redesignate Areas to Attainment," from John Calcagni, Director, Air Quality Management Division, to Regional Air Division Directors.

<sup>2</sup>Memorandum entitled, "SIP Requirements for Areas Submitting Requests for Redesignation to Attainment of the Ozone and CO NAAQS On or After November 15, 1992," from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation, to Regional Air Division Directors.

nonattainment areas may be redesignated to attainment notwithstanding the lack of a fully-approved part D NSR program, provided the program is not relied upon for maintenance. In addition, EPA is not requiring that existing part D NSR rules be placed in the contingency portion of the maintenance plan pursuant to section 175A of the Act. As discussed below, however, EPA believes its new policy will assure that the statutory goals of part D NSR and section 175A to protect and maintain the NAAQS are achieved.

The EPA believes that this new policy is justifiable under the Agency's general authority to establish de minimis exceptions to statutory requirements where the application of the statutory requirements would be of trivial or no value environmentally. (See Alabama Power Co.. v. Costle, 636 F.2d 323, 360-61 (D.C. Cir. 1979).]

## II. Background/Clean Air Act Requirements

Section 107(d) (3) (E) of the Act requires that a State have in place a fully-approved SIP meeting all the requirements applicable to a nonattainment area under section 110 and part D of title I of the Act in order for the area to be redesignated to attainment.

In addition, section 175A requires that the area must have a fully-approved maintenance plan containing contingency provisions, as necessary, to promptly correct any violation of the applicable NAAQS that occurs after redesignation of the area. At a minimum, the contingency plan must "include a requirement that the State will implement all measures with respect to the control of the air pollutant concerned which were contained in the State implementation plan for the area before redesignation of the area as an attainment area."

The NSR requirements are contained in section 110(a) (2) (C) and in parts C and D of title I of the Act. Broadly speaking, section 110(a) (2) (C) of the Act mandates the development of a preconstruction review program to assure that the construction or modification of any stationary source is consistent with attainment of the NAAQS. The nonattainment NSR program in part D NSR and the attainment area prevention of significant deterioration (PSD) program in part C apply to major new sources and modifications of existing major sources. (Implementing regulations that set forth minimum requirements for State or local programs and Federal permitting programs have been promulgated at 40 CFR part 51 subpart I and appendix S, and 40 CFR section 52.21, respectively.)

To assure that major new or modified sources do not interfere with reasonable further progress towards attainment, nonattainment area part D NSR requires installation of control

technology representing the lowest achievable emissions rate (LAER) and emission offsets. To prevent "clean air" areas from significant degradation, the PSD program requires installation of best available control technology (BACT) and modeling to show that the new or modified source will not cause or contribute to violation of a NAAQS or a PSD air quality growth increment.

Previously, EPA interpreted these provisions together to require that any area seeking redesignation to attainment must have fully-approved part D NSR rules as part of the required fully-approved SIP. In addition, upon redesignation, the part D NSR rules were to be placed in the maintenance plan contingency provisions in accordance with section 175A of the Act unless the area needed to continue implementing part D NSR as one, element of the maintenance strategy.

### III. NSR Policy and Legal Rationale

The EPA now believes that a de minimis exception to the requirement of section 107(d)(3)(E) for part D NSR is justifiable because requiring the adoption and full approval of a part D NSR program as a prerequisite to redesignation would not be of significant environmental value in certain circumstances. The EPA has reconsidered its earlier position because, once an area is redesignated to attainment, the part D NSR program may be replaced by the corollary PSD program, if it is shown through the maintenance demonstration that the area will maintain without part D NSR and because part D NSR need not become part of the contingency plan.

#### A. Preconstruction Review Programs in Attainment Areas

There are several provisions in the Act and in EPA's regulations that require preconstruction review of new or modified major sources in attainment areas to assess the impact of the proposed emissions increases on the applicable NAAQS. These include the PSD program which covers 100 ton per year (tpy) or 250 tpy or greater sources (depending on the source category), the preconstruction review requirements of 40 CFR 51.165(b) that cover 100 tpy or greater sources, and the Interpretive Offset Rule. As to ozone, there are some particular requirements that apply. The EPA believes these programs will ensure that major new sources and modifications are given adequate preconstruction review.

After redesignation to attainment, State PSD rules, or Federal PSD rules in a delegated program, must ensure, as required by sections 165(a)(3)(B) and 110(a)(2)(C) of the Act, that preconstruction review of new and modified major sources will prevent increases in emissions that would cause or contribute to violations of the NAAQS. [See 40 CFR 51.166(k), 40 CFR 52.21(k).]

In addition, EPA's regulations at 40 CFR 51.165(b) require that SIP's contain preconstruction review requirements that apply to new or modified 100 tpy or greater sources of a pollutant in areas designated attainment or unclassifiable for the pollutant in cases where the new or modified source would contribute to a violation of a NAAQS. This requirement provides for preconstruction review-for sources that are exempt from PSD due to PSD's higher (250 tpy) major source threshold for certain source categories.

In the absence of SIP provisions that comply with 40 CFR 51.165(b) or a part D NSR program, States would have to use the Interpretive offset Rule at 40 CFR 51 appendix S as a surrogate rule for permitting new and modified major sources in these attainment areas. (See 45 FR 31310, May 13, 1980.)

For SO<sub>2</sub>, PM-10, NO<sub>2</sub> and CO, EPA has established levels of ambient impacts to determine whether the major new or modified source would cause or contribute to a violation. Where the source is found to cause or contribute to a violation, the source would be subject to more stringent technology and emissions mitigation requirements of appendix S or a 40 CFR 51.165(b) program.

With particular respect to ozone, because of the difficulty in modeling the impact of emissions from specific sources on ozone formation, EPA regulations [40 CFR 51.165(b) (3) and appendix S] do not fully address how emissions of ozone precursors should be treated to assure that major new or modified sources do not cause or contribute to a NAAQS violation. Nevertheless, if preconstruction monitoring or other information indicates the area is not continuing to meet the standard after redesignation to attainment, appendix S or a 40 CFR 51.165(b) program would also apply. The EPA believes that in any area that is designated or redesignated as attainment under section 107, but experiences violations of the NAAQS, these provisions (and any implementing SIP provisions) should be interpreted as requiring major new or modified sources to obtain VOC emission offsets of at least a 1:1 ratio, and as presuming [consistent with section 182(f)] that 1:1 NO<sub>x</sub> offsets are necessary.<sup>3</sup>

In addition, attainment (PSD) plans require that major new and modified sources apply BACT. Generally, BACT differs from LAER by enabling permitting authorities to justify, based on

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<sup>3</sup>The EPA is in the process of revising EPA's rules for NSR and PSD, some of which will replace appendix S. However, the proposed revisions will not change the substantive permitting requirements where an attainment area is violating the ozone NAAQS.

economic, energy, and environmental impacts, the use of control technologies less effective than the most stringent available. In an area that is not meeting the NAAQS, EPA believes that due to consideration of the NAAQS violations, the state may impose a more stringent level of control than might be otherwise selected as BACT. [See Draft New Source Review Manual, page 8.54 (October 1990).]

Taken together, these preconstruction review programs can assure that major new or modified sources achieve the statutory goals of part D NSR and the maintenance provisions of section 175A.

#### B. Part D NSR and Contingency Provisions

Requiring the full approval of a part D NSR program would ensure that the program would become a contingency provision in the maintenance plan. As stated above, pursuant to section 175A(d) and section 107(d)(3)(E), the contingency plan must contain, at a minimum, all measures contained in the nonattainment SIP. However, EPA is interpreting the term "measure" as used in section 175A(d) so as not to include part D NSR.

The term "measure" is not defined in section 175A(d) and Congress utilized that term differently in different provisions of the Act with respect to the PSD and part D NSR permitting programs. For example, in section 110(a)(2)(A), Congress required that SIP's include "enforceable emission limitations and other control measures, means, or techniques . . . as may be necessary or appropriate to meet the applicable requirements of the Act." In section 110(a)(2)(C), Congress required that SIP's include "a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D (i.e., PSD and part D NSR)." [Emphasis added.]

If the term "measures," as used in sections 110(a)(2)(A) and 110(a)(2)(C), had been intended to include PSD and part D NSR, there would have been no point to requiring that SIP's include both measures and preconstruction review under parts C and D (PSD or part D NSR). Thus, in sections 110(a)(2)(A) and (C), it is apparent that Congress distinguished the requirement for "measures" from the requirement for preconstruction review programs. On the other hand, in other provisions of the Act, such as section 161, Congress appears to have included PSD within the scope of the term "measures."

The fact that Congress used the undefined term "measure" differently in different provisions of the Act indicates that the term is susceptible to more than one interpretation and that EPA has the discretion to interpret it in a reasonable manner in the context of section 175A. Inasmuch as Congress itself has used the term in a manner that excluded PSD and part D NSR from its scope, EPA believes it is -reasonable to interpret "measure," as used in section 175A(d), not to include part D NSR. The reasonableness of this interpretation is further supported by the fact that PSD, a program that is the corollary of part D NSR for attainment areas, goes into effect in lieu of part D NSR,<sup>4</sup> and that, as discussed above, EPA intends to implement the PSD and other NSR programs in a way that will achieve the basic statutory goals of part D NSR. Therefore, EPA does not believe that part D NSR need be part of an area's contingency plan.

#### IV. Other Required Programs

The EPA is not changing its previously stated policy with respect to the need for States to adopt and receive full approval of other programs required by the Act prior to or at the time of the submission of a redesignation request. The existence of a corollary program for attainment areas distinguishes part D NSR from other required programs under the Act, such as enhanced inspection and maintenance and reasonably available control technology (RACT) programs, which have no corollary program. Moreover, EPA believes that those other required programs are clearly within the scope of the term "measure" as used in section 175A.

For further information regarding part D NSR requirements for areas redesignating to attainment, please contact Carla Oldham at (919) 541-3347; for general information about PSD requirements for attainment areas, contact Dennis Crumpler at (919) 541-0871.

cc: Air Branch Chief,- Regions I-X

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<sup>4</sup>EPA is not suggesting that NSR and PSD are equivalent, but merely that they are the same type of program.