



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
RESEARCH TRIANGLE PARK, NC 27711

APR - 1 2010

OFFICE OF  
AIR QUALITY PLANNING  
AND STANDARDS

**MEMORANDUM**

**SUBJECT:** Applicability of the Federal Prevention of Significant Deterioration Permit Requirements to New and Revised National Ambient Air Quality Standards

**FROM:** Stephen D. Page, Director *Stephen Page*  
Office of Air Quality Planning & Standards (E404-04)

**TO:** Air Division Directors and Deputies  
Regions I - X

This memorandum responds to inquiries that we are receiving from parties who are currently developing or reviewing applications for Prevention of Significant Deterioration (PSD) permits under the Clean Air Act (CAA) requesting that the Office of Air and Radiation (OAR) provide guidance on the applicability of PSD permitting requirements to a newly promulgated or revised National Ambient Air Quality Standard (NAAQS or standards). Accordingly, I am writing to reiterate the Environmental Protection Agency's (EPA's) existing interpretation of the relevant provisions of the CAA and EPA regulations, and EPA's position on how these requirements apply under the federal PSD program.

**General Applicability of PSD Permit Requirements to New or Revised NAAQS**

The CAA requires that proposed new and modified major stationary sources must, as part of the issuance of a permit to construct, demonstrate that emissions from the new or modified major source –

- will not cause, or contribute to, air pollution in excess of any
- (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies...;
  - (B) national ambient air quality standard in any air quality control region; or
  - (C) any other applicable emission standard or standard of performance under this chapter;

CAA §165(a)(3). Similarly, EPA's federal PSD program regulations at 40 CFR 52.21(k)(1) require proposed sources and modifications to demonstrate that their allowable emissions will not cause or contribute to a violation of "any national ambient air quality standard in any air quality control region."

EPA generally interprets the CAA and EPA's PSD permitting program regulations to require that each final PSD permit decision reflect consideration of any NAAQS that is in effect at the time the permitting authority issues a final permit. As a general matter, permitting and licensing decisions of regulatory agencies must reflect the law in effect at the time the agency makes a final determination on a pending application. See *Ziffrin v. United States*, 318 U.S. 73, 78 (1943); *State of Alabama v. EPA*, 557 F.2d 1101, 1110 (5<sup>th</sup> Cir. 1977); *In re: Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 614-616 (EAB 2006); *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 478 n. 10 (EAB 2002).

Consistent with such interpretations, EPA has previously concluded that the relevant provisions cover any NAAQS that is in effect at the time of issuance of any permit. For example, in the context of applying the PSD provisions to the NAAQS for particulate matter less than 2.5 micrometers (PM<sub>2.5</sub>), EPA has stated that "section 165 of the CAA suggests that PSD requirements become effective for a new NAAQS upon the effective date of the NAAQS." 73 FR 28321, 28340, (May 16, 2008); 70 FR 65984, 66043, (Nov. 1, 2005). That observation was based, in part, on EPA guidance for implementing the PM<sub>2.5</sub> NAAQS that the Agency issued shortly after those standards first became effective in 1997. John Seitz, EPA Office of Air Quality Planning and Standards, "Interim Implementation for the New Source Review Requirements for PM<sub>2.5</sub>" (Oct. 23, 1997). Both the 1997 guidance and EPA's final rule addressing the application of the PSD program to PM<sub>2.5</sub> explained that section 165(a)(1) of the CAA provides that no new or modified major source may be constructed without a permit that meets all the requirements in section 165(a). In addition, those documents observe that one such requirement is the provision in section 165(a)(3) which says that emissions from such source may not cause or contribute to a violation of any NAAQS. The October 23, 1997 guidance provided an interim policy for assuring compliance with the requirements for PM<sub>2.5</sub>, after observing that the "new NAAQS for PM<sub>2.5</sub>, became effective on September 16, 1997." In addition, the guidance expressed EPA's intent to provide a separate memorandum that would address "EPA's views on implementing the ozone and PM<sub>10</sub> NAAQS during the interim period following *the effective date* of the new 8-hour ozone and revised PM<sub>10</sub> NAAQS." [Emphasis added.] Those statements made shortly after the promulgation of new NAAQS in 1997 are consistent with the view expressed in the final rule for PM<sub>2.5</sub> in 2008 that "PSD requirements become effective for a new NAAQS upon the effective date of the NAAQS."

Additional precedent for this interpretation can be found in the 1987 final rule titled "Regulations for Implementing Revised Particulate Matter Standards" (52 FR 24672, July 1, 1987) issued at the time EPA established new PM<sub>10</sub> standards. In that rule, EPA stated that "once the PM<sub>10</sub> NAAQS becomes effective, EPA will be responsible for the protection of the PM<sub>10</sub> NAAQS as well as the review of PM<sub>10</sub> as a regulated pollutant." 52 FR at 24682. In support of that conclusion, EPA observed that the federal

PSD regulations at 40 CFR 52.21(k)(1) contain “a general provision requiring prospective PSD sources to demonstrate that their potential emissions will not cause or contribute to air pollution in violation of ‘any’ NAAQS.” *Id.* at 24682 n. 9. Based on that analysis, EPA concluded that “[w]hen the revised NAAQS for particulate matter becomes effective, each PSD application subject to EPA’s Part 52 PSD regulations, and not eligible to be grandfathered under today’s action, must contain a PM<sub>10</sub> NAAQS analysis.” 52 FR at 24684.

As illustrated above, under certain circumstances EPA has previously allowed proposed new major sources and major modifications that have submitted a complete PSD permit application before the effective date of new requirements under the PSD regulations, but have not yet received a final and effective PSD permit, to continue relying on information already in the application rather than immediately having to amend applications to demonstrate compliance with the new PSD requirements. In the transition from the total suspended particulate NAAQS to the PM<sub>10</sub> NAAQS, EPA explicitly established rule provisions that allowed proposed new major sources and major modifications that had submitted a complete PSD permit application before the effective date of new PM<sub>10</sub> NAAQS, but that had not yet received a final and effective federally-issued PSD permit, to continue relying on information already in the submitted application rather than immediately having to amend applications to demonstrate compliance with the new PSD requirements. *See, e.g.*, 40 CFR 52.21(i)(1)(x). EPA has adopted similar provisions pertaining to new or revised PSD increments. 40 CFR 52.21(i)(9)-(10). Those proposed sources and modifications meeting these transition requirements were “grandfathered” or exempted from the new PSD requirements that would otherwise have applied to them. Thus, while we have included the necessary provisions to grandfather sources from new requirements under certain circumstances, we have not always chosen to do so for NAAQS revisions in general.

### **Applicability of the New 1-Hour NO<sub>2</sub> NAAQS to Existing Permit Applications**

On January 22, 2010, the EPA Administrator signed a final rule containing a new NAAQS for nitrogen dioxide (NO<sub>2</sub>) based on a 1-hour averaging time. That final rule was published in the Federal Register on February 9, and will become effective on April 12, 2010. EPA did not promulgate a grandfathering provision related to the 1-hour NO<sub>2</sub> NAAQS for permits in process but not yet issued as of April 12, 2010. Accordingly, permits issued under 40 CFR 52.21 on or after April 12, 2010, must contain a demonstration that the source’s allowable emissions will not cause or contribute to a violation of the new 1-hour NO<sub>2</sub> NAAQS. In the case of the new NO<sub>2</sub> 1-hour NAAQS, while the short-term standard is new, the pollutant is not, having been considered a regulated pollutant for many years pursuant to the NO<sub>2</sub> annual NAAQS. There are no exceptions under 40 CFR 52.21 in this case because as noted above, EPA has not adopted a grandfathering provision applicable to the 1-hour NO<sub>2</sub> NAAQS that would enable the required permit to be issued to prospective sources in the absence of such ambient air quality demonstration.

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