



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

JAN 19 2010

THE ADMINISTRATOR

Mr. Colin O'Brien
Natural Resources Defense Council
1200 New York Avenue, N.W., Suite 400
Washington, D.C. 20005

Dear Mr. O'Brien:

The purpose of this letter is to respond to the Petition for Reconsideration and request for a stay on behalf of the Natural Resources Defense Council and Sierra Club ("Petitioners") concerning the U.S. Environmental Protection Agency's final rule entitled "Approval and Promulgation of Air Quality Implementation Plans; Wisconsin; NSR Reform Regulations," published in the *Federal Register* on December 17, 2008.¹ EPA has carefully reviewed the points raised in the Petition and the request to stay the rule pending reconsideration and ultimately withdraw and abandon the final rule. For the reasons discussed below, the Petition for Reconsideration is respectfully denied.

Please note that although the Petition for Reconsideration cites CAA 307(d)(7)(B) as the basis for the Petition, the provisions of CAA 307(d) apply only to those actions enumerated in CAA 307(d)(1). The action at issue in the Petition is neither listed under CAA 307(d)(1) nor determined to be subject to CAA 307(d) by EPA under CAA 307(d)(1)(V). Accordingly, EPA does not believe the Petition is properly brought under CAA 307(d)(7)(B). Instead, we believe the appropriate basis for the Petition is the general Administrative Procedure Act provision that permits interested parties to "petition for the issuance, amendment or repeal of a rule." 5 USC 553(e). As a result, EPA is responding to the Petition as though it is based on this APA provision.

Unlike CAA 307(d)(7)(B), the APA does not provide a standard for when reconsideration is appropriate.² Previously, the Supreme Court explained that a question concerning

¹ Hereinafter referred to in this letter as "Petition for Reconsideration" or "Petition".

² Under CAA 307(d)(7)(B), EPA shall convene a proceeding for reconsideration if (1) the person seeking reconsideration can demonstrate that it was impracticable to raise the objection supporting the request for reconsideration during the comment period, or if the grounds for the objection arose after the comment period, and (2) the objection is of central relevance to the outcome of the rule.

administrative reconsideration involves two opposing policies: (1) “the desirability of finality,” and (2) the public interest in reaching the right result. *Civil Aeronautics Board v. Delta Air Lines, Inc.*, 367 U.S. 316, 321 (1961). It is with this case law in mind that EPA reviewed the Petition for Reconsideration.

Issues Raised by Petition

1. Procedural Issues

The Petition requests reconsideration of several aspects of the final rule because EPA did not discuss at proposal certain information presented in EPA’s response to comments at final promulgation. In particular, EPA’s proposal did not discuss: (1) the analysis addressing the effect of the decision in *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005), vacating two provisions of the final rule and remanding a third; and (2) the 2003 Power Point presentation given by Wisconsin Department of Natural Resources concluding that the regulations would increase emissions within the state (hereinafter “2003 Presentation”). The Petition maintains that failing to address this information at proposal, as opposed to at promulgation in the response to comments, violates section 307(d). The Petition also objects to EPA’s use of this information to conclude that the final rule does not violate the anti-backsliding provision contained in section 193. 73 Fed. Reg. 76,565/1-2.

EPA respectfully disagrees that its responses were improper or warrant reconsideration. Regarding WDNR’s 2003 Presentation, EPA’s response referenced a WDNR 2006 follow-up report to the Wisconsin legislature on *Incorporation of Federal Changes to the Air Permitting Program* (hereinafter “2006 Report to Legislature”), which negated the conclusion expressed in the 2003 Presentation. We believe it was reasonable to rely on the 2006 Report to Legislature in the response to comments to address the 2003 Presentation because the 2006 Report was publicly available.

Regarding the *New York* decision, EPA’s response relied on the supplemental environmental analysis supporting the 2002 reform rules, which contained information sufficient to address the removal of the vacated components of those rules. EPA reviewed this aspect in response to the Petitioners’ comments and found that the SEA’s overall findings and conclusions remained unchanged. Also, to further explore the assertions in the comments, we applied the SEA methodology to readily available information on the numbers and kinds of sources permitted in Wisconsin to quantify the effects of Wisconsin’s SIP changes. An assessment of the Wisconsin’s permitting data using the SEA methodology did not alter the findings and conclusions of the SEA. Finally, since the results of EPA’s SEA analysis were specifically intended to respond to comments and were made available at the time of the final rulemaking, EPA believes its analysis was both responsive and timely.

It is my understanding that EPA is not required to reopen the public comment process for the purpose of allowing opportunity for rebuttal of its responses to public comments. This is especially so in this instance where no substantive changes were made to the rule in response to public comments. Finally, regarding section 193, we note that the final rule reflects what EPA

initially proposed. The information and arguments introduced into the record and the preamble to the final rule are based upon previously available information and arose in response to public comments. For these reasons, EPA believes that the description of the basis for the final rule provided at proposal was sufficient to allow consideration of the issues raised, and reconsideration is not warranted.

2. Substantive Issues

In addition to the procedural concerns noted above, the Petition maintains that the final rule causes Wisconsin's revised State Implementation Plan to "interfere with applicable requirement[s] concerning attainment and reasonable further progress" 42 U.S.C. § 7410(l), notwithstanding EPA's determination to the contrary. 73 Fed. Reg. 76,565/1. The Petition asserts that EPA's determination is flawed because it primarily rests on the Agency's finding that Wisconsin's provisions are consistent with the parallel ones found in the Agency's 2002 final rule. The Petition disputes this finding because the 2003 Presentation concluded that the changes would likely increase air pollution from new or modified air-pollution sources. Also, the Petition noted that EPA misconstrued the 2006 Report to Legislature that acknowledges that WDNR's 2003 Presentation "did not examine other changes that might occur at a facility that could reduce allowable emissions, such as a plant-wide applicability limit." For these reasons the Petition contends that EPA cannot make a finding that revising Wisconsin's permit provisions that track the non vacated provisions of the 2002 rule "would not interfere with attainment or other applicable requirements," 70 Fed. Reg. at 36,903/3. The Petition therefore concludes that Wisconsin's final rule violates section 110(l) of the Act and the section 193 ban on "backsliding" in nonattainment areas.

In assessing the changes to the Wisconsin SIP to implement the NSR Reform regulations, as noted previously, EPA applied the SEA methodology to the specifics of Wisconsin's permits program and concluded that reasonable further progress would not be hindered and the ban on "backsliding," if applicable³, would not be violated. EPA's analysis applying the SEA to the conditions in Wisconsin indicated a modest, but positive, impact resulting primarily from the addition of plant-wide applicability limits. EPA's experience has pointed to improvements in overall control when such limits are implemented. The information in the record indicates that categories of sources commonly permitted in Wisconsin can benefit from implementing plant-wide limits, which will provide improved air quality, albeit in a modest amount. The Petition notes that use of these limits is voluntary. However, EPA believes that sources have the incentive to use plant-wide limits and that the SEA approach derives from real-world experience with their application. EPA also noted that the 2006 Report to Legislature included information that adoption of changes to the Michigan SIP mirroring those approved for Wisconsin did not result in any of the negative outcomes raised in the Petition.

³ Our notice approving the SIP change also concluded that, because of the date referenced in the quoted section of the Act, section 193 is not applicable.

It should be noted, even if EPA's analyses showed the Wisconsin SIP changes to be neutral in their effect on RFP, such an outcome would have been sufficient under the Act for EPA's approval. Based on the studies and analyses undertaken thus far, we continue to expect modest benefits to result following Wisconsin's implementation of the federal New Source Review reform provisions. Thus, we believe our action is consistent with sections 110(l) and 193 of the Act.

Having considered the arguments with respect to each of the provisions for which the Petition requests reconsideration, EPA concludes that reconsideration is not appropriate because it is desirable to finalize the Wisconsin NSR Reform regulations as part of Wisconsin's State Implementation Plan. Moreover, EPA duly considered and determined that the three NSR Reform regulations at issue taken together will not interfere with applicable requirements concerning attainment and reasonable further progress in Wisconsin. For the reasons stated previously in support of the rule and, as explained further in this letter, EPA respectfully denies the Petition for Reconsideration and request for a stay.

I thank you for raising these issues and appreciate your comments and interest in this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lisa P. Jackson', with a long horizontal flourish extending to the right.

Lisa P. Jackson