



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-HQ-OAR-2010-0943; FRL-9614-6]

RIN 2060-AQ55

**Amendments to Delegation of Authority Provisions in the
Prevention of Significant Deterioration Program**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed Rule.

SUMMARY: The EPA is taking action to propose amendments to the New Source Review (NSR) Prevention of Significant Deterioration (PSD) program that would correct certain outdated language that currently limits EPA's ability to delegate the federal PSD program to interested Indian tribes. This action proposes changes that would provide consistency with the current federal PSD regulatory requirements by allowing the EPA to delegate the PSD program to interested tribes for their attainment areas. The regulations already authorize administrative delegation, and EPA has in the past delegated administration of the PSD program to states and local governments for their attainment areas. The EPA is proposing to delete a restriction on tribes' ability to take delegation of the PSD program and to include tribes, along with state and locals, in another section to make it clear that tribes may voluntarily take direct delegation of the NSR program in areas that are currently attaining the national ambient air quality standards (NAAQS). The rule would not impose any new requirements. The EPA is also proposing to correct a minor typographical error.

DATES: Comments must be received on or before **[INSERT DATE 60 days after publication in the Federal Register]**.

ADDRESSES: Submit your comments, identified by Docket ID No. **EPA-HQ-OAR-2010-0943**, by

one of the following methods:

- www.regulations.gov. Follow the on-line instructions for submitting comments.
- Email: a-and-r-docket@epa.gov. Include Docket ID No. EPA-HQ-OAR-2010-0943 in the subject line of the message.
- Fax: Send comments to (202) 566-9744, attention Docket ID No. EPA-HQ-OAR-2010-0943.
- Mail: Amendments to Delegation of Authority Provisions in the PSD program Docket, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Ave., NW, Washington, DC 20460, Attention Docket ID No. EPA-HQ-OAR-2010-0943.
- Hand Delivery: The EPA Docket Center, Public Reading Room, EPA West, Room 3334, 1301 Constitution Ave., NW, Washington, DC 20460, Attention Docket ID No. EPA-HQ-OAR-2010-0943. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. **EPA-HQ-OAR-2010-0943**. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or email. The www.regulations.gov website is an "anonymous access" system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through www.regulations.gov, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information

in the body of your comment and with any disk or CD-ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Amendments to Delegation of Authority Provisions in the PSD Program Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 564-1742.

FOR FURTHER INFORMATION CONTACT: Regina Chappell, Outreach and Information Division, Office of Air Quality Planning and Standards, Mail Code C-304-03, Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541-3650; fax number: (919) 541-0942; email: chappell.regina@epa.gov.

SUPPLEMENTARY INFORMATION: The supplementary information in this preamble is organized as follows:

I. General Information

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- I. National Technology Transfer and Advancement Act
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I. General Information

- A. Does this action apply to me? Generally, this rule only applies to tribal governments. It removes a restriction relating to delegation of the federal NSR PSD program and allows, but does not require, interested tribes to request such delegation for sources in their attainment areas. It does not

make changes to the underlying federal PSD program requirements and thus should not have significant impact on new or modified sources.

B. What should I consider as I prepare my comments to the EPA?

1. Submitting CBI. Do not submit this information to the EPA through www.regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to the EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404-02), Office of Air Quality Planning and Standards, Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA-HQ-OAR-2010-0943.

2. Tips for Preparing Comments. When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, Federal Register date and page number).

- Follow directions - The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.

- Describe any assumptions and provide any technical information and/or data that you used.

- If you estimate potential costs or burdens, explain how you arrived at your estimate in

sufficient detail to allow for it to be reproduced.

- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

- Make sure to submit your comments by the comment period deadline identified.

C. Where can I get a copy of this document?

In addition to being available in the docket, an electronic copy of this action will also be available on the Worldwide Web (WWW). Following signature, a copy of this final action will be posted in the regulations and standards section of the NSR home page located at <http://www.epa.gov/nsr/>, on the Tribal air home page at <http://www.epa.gov/oar/tribal> and on the Technology Transfer Network (TTN) policy and guidance page for newly proposed or promulgated rules at the following address: <http://www.epa.gov/ttn/oarpg/>. The TTN provides information and technology exchange in various areas of air pollution control.

II. Background Information for Proposed Amendments

A. What is the New Source Review Program?

The major NSR program contained in parts C and D of title I of the Clean Air Act is a preconstruction review and permitting program applicable to new major sources and major modifications at such sources. In areas meeting the NAAQS (“attainment” areas) or for which there is insufficient information to determine whether they meet the NAAQS (“unclassifiable” areas), the NSR requirements under part C of title I of the Act apply. We call this portion of the major NSR program the “Prevention of Significant Deterioration” or PSD program. In areas not meeting the NAAQS and in ozone transport regions (OTR), the major NSR program is implemented under the requirements of part D of title I of the Act. We call this program the “nonattainment” major NSR program. We have promulgated rules in 40 CFR 52.21 to implement PSD in portions of the country that do not have

approved state or tribal PSD programs. This proposed action makes corrections to the PSD program in 40 CFR 52.21.

B. What is the statutory authority and regulatory approach for this proposed action?

The authority for this proposed action is Clean Air Act Section 301(a). EPA notes that Clean Air Act Section 301(d) (which postdates the original regulation that established 52.21(u)) and its implementing regulations under the Tribal Authority Rule (TAR) at 40 CFR 49.6 and 49.7 allow tribes to seek approval for such programs covering their reservations or other areas within their jurisdiction. These provisions also establish the criteria tribes must meet and the types of information that must be included in tribal applications to obtain eligibility to administer tribal programs, including Tribal Implementation Plans and tribal NSR programs. The TAR allows tribes to seek approval for such programs covering their reservations or other areas within their jurisdiction.

However, although section 301(d) of the Act and the TAR authorize the EPA to review and approve tribal programs, neither the Act nor the regulations require EPA approval of tribal programs as the sole mechanism available for tribal agencies to take on permitting responsibilities. Some tribes may choose not to develop tribal NSR programs for submission to the EPA for approval under the TAR, but may still wish to assist the EPA in implementing all or some portion of the federal PSD program for their area of Indian country. Accordingly, we are exercising our discretion to propose corrections for 40 CFR 52.21, which will remove a restriction that had prevented EPA from delegating administration of the federal PSD program to interested tribal agencies for their attainment areas. By administering the federal program through a delegation, tribal agencies may remain appropriately involved in implementation of an important air quality program and may develop their own capacity to manage such programs in the future should they choose to do so. Removing this restriction is consistent with EPA's existing and well-established procedures for delegating administration of federal CAA programs, including existing provisions at 40 CFR 52.21 (u) – which already provides for administrative delegation to state and local agencies, but which currently prevents delegation to interested tribes – 40

CFR 71.4(j) and 71.10 (federal operating permits), 40 CFR 49.122 (federal air rules for Indian reservations in the Pacific Northwest), and 40 CFR 49.161 and 49.173 (NSR rules for Indian country).

C. Why is this action needed?

This action will enable EPA to delegate the federal PSD program (40 CFR 52.21(u)) to interested Indian tribes. This action is consistent with existing PSD regulatory requirements, which already provide for delegation of administration of the program, and makes that opportunity available to tribes by allowing EPA to delegate administration of the PSD program to interested tribes.

III. Summary of Proposed Amendments

We are proposing to amend the NSR PSD program provisions at 40 CFR 52.21, paragraph (u) Delegation of Authority. In paragraph (u)(1), we are correcting an erroneous cross reference and deleting a cross reference that is no longer needed. In paragraph (u)(2)(i), the current provisions state that the delegate agency shall consult with the appropriate state and local air pollution control agency. We are proposing to include tribes along with state and local air pollution control agencies in this provision to provide equivalent involvement for tribal air pollution control agencies. The paragraph (u)(3) provision for reviewing a source or modification located on an Indian Reservation states that the review authority shall not be redelegated other than to an EPA Regional Office except where the state has assumed jurisdiction over such land would no longer be in effect upon EPA amending subsection (u). We are proposing to delete paragraph (u)(3) to remove this restriction which had prevented EPA from delegating the PSD program to interested tribes, and to redesignate current paragraph (u)(4) as new paragraph (u)(3). These amendments will provide appropriate opportunities for interested tribes to seek delegation of the federal PSD program over relevant sources and modifications in their areas.

IV. Summary of Impacts of Proposed Amendments

This action will allow, but not require, interested tribes to take direct delegation of the federal PSD program. It does not make changes to the underlying federal requirement (meaning the requirement that the EPA must implement the program where delegation does not occur) and thus should not have a

significant impact on new or modifying sources.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a “significant regulatory action” under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Orders 12866 and 13563 (76 FR 3281, January 21, 2011).

B. Paperwork Reduction Act

This action does not impose any new information collection burden. This action only allows tribes to implement an existing program. This action does not change the underlying federal requirements; it will allow interested tribes to accept delegation. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations 40 CFR 52.21 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and has assigned OMB control number 2060-0003. The OMB control numbers for EPA’s regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule would not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

For the purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration’s regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) a small organization that is any

not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. Small entities will not incur any adverse impacts as a result of this rule because this action does not create any new requirements or burdens. No costs are associated with these amendments to part 52. This proposed rule will not impose any requirements on small entities. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This action contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538 for state, local, or tribal governments or the private sector. This action imposes no enforceable duty on any state, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 and 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action will allow tribes to voluntarily take delegation of the PSD requirements but does not require them to do so.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The EPA has implementing authority for 40 CFR part 52 for Indian country. This action allows interested tribes to take delegation of the federal program if they choose; it does not modify the responsibility of the EPA to implement the program where no delegation occurs. Thus, EO

13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between the EPA and state and local governments, the EPA specifically solicits comment on this proposed action from state and local officials.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

Subject to the Executive Order 13175 (65 FR 67249, November 9, 2000) EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or the EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement.

The EPA has concluded that this action will have tribal implications. However, it will neither impose substantial direct compliance costs on tribal governments, nor preempt Tribal law. This proposed rule does not impose any requirements on tribes so it does not impose substantial direct costs. However, it does support tribal self-governance by enabling tribes to implement the federal PSD program as the EPA's delegate, if they choose.

The EPA consulted with tribal officials early in the process of developing this regulation to permit them to have meaningful and timely input into its development. Tribal consultation was offered in a consultation letter to all federally recognized tribes on November 10, 2011. We will provide consultation to those tribes who request consultation. We have also participated in various tribal meetings attended by tribal environmental professional, i.e., National Tribal Air Association (NTAA), National Tribal Forum (NTF). We have received no adverse comments when this proposal was presented at those various meetings. The EPA specifically solicits additional comment on this proposed action from tribal officials.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

The EPA Interprets Executive Order 13045 (62 FR 19885, April 23, 1977) as applying to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law No. 104-113, 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specification, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs the EPA to provide congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, the EPA is not considering the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and

addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This proposed rule imposes no new requirements but does allow interested tribes to accept delegation of the existing federal program.

List of Subjects in 40 CFR Part 52

Air pollution control, Environmental protection, Indians, Indians-law, and Indians-tribal government.

Dated: December 22, 2011.

Lisa P. Jackson,
Administrator.

For the reasons stated in the preamble, the Environmental Protection Agency proposes to amend 40 CFR part 52 as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401, et seq.

2. Amend § 52.21 by revising paragraphs (u)(1) and (u)(2)(i) and by removing paragraph (u)(3) and redesignating paragraph (u)(4) as paragraph (u)(3) to read as follows:

§ 52.21 Prevention of significant deterioration of air quality.

* * * * *

(u) *Delegation of authority.* (1) The Administrator shall have the authority to delegate his responsibility for conducting source review pursuant to this section, in accordance with paragraph (u)(2) of this section.

(2) * * *

(i) Where the delegate agency is not an air pollution control agency, it shall consult with the appropriate state, tribe, and local air pollution control agency prior to making any determination under this section. Similarly, where the delegate agency does not have continuing responsibility for managing land use, it shall consult with the appropriate state, tribe, and local agency primarily responsible for managing land use prior to making any determination under this section.

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