



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-HQ-OAR-2010-0943; FRL-9909-19-OAR]

RIN 2060-AQ55

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is promulgating amendments to the New Source Review (NSR) Prevention of Significant Deterioration (PSD) program that amend certain outdated language that limited the EPA's ability to delegate the federal PSD program to interested Indian tribes. This final action provides 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 EPA regulations already provide for the administrative delegation of the PSD program to state and local governments for their attainment areas and administrative delegation of the nonattainment NSR program to states, tribes and local governments. This final rule deletes a restriction on tribes' ability to take delegation of the PSD program and includes tribes, along with state and local governments, to make it clear that tribes, as well as states and local governments, may voluntarily request and assume direct delegation of the NSR program in areas that are currently attaining the national ambient air quality standards (NAAQS). This final rule does not create any new requirements.

DATES: This final rule is effective [Insert the date of publication in the **Federal Register**].

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-

HQ-OAR-2010-0943. All documents in the docket are listed on the www.regulations.gov website. 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, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the EPA's Docket Center, Public Reading Room, EPA West, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20004. 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 EPA Docket Center is (202) 566-1742.

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 address: chappell.regina@epa.gov.

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I. General Information

A. Does this action apply to me?

Generally, this final rule applies only to tribal governments. It removes a restriction relating to delegation of the federal NSR PSD program to tribes 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 any significant impact on new or modified sources.

B. 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 this Final Rule

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 (CAA or Act) is a preconstruction review and permitting program applicable to new major sources and major modifications at existing sources. In areas designated as meeting the NAAQS (“attainment” areas) or for which there is insufficient information to determine whether they meet the NAAQS (“unclassifiable” or “unclassifiable/attainment” 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 the PSD program in portions of the country that do not have approved state or tribal PSD programs. This final rule amends 40 CFR 52.21.

B. What is the statutory authority and regulatory approach for this final rule?

The authority for this proposed action is the CAA section 301(a). The EPA notes that CAA section 301(d) (which postdates the original regulation that established §52.21(u), a

provision that is being amended by this rule) 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.

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 the 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 their own 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 amending 40 CFR 52.21 to remove a restriction that has prevented the 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 the 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 air 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 final action needed?

This final action enables the 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 to states, and makes that opportunity available to interested tribes.

III. Summary of Final Rule

This rule amends 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 provisions stated that the delegate agency shall consult with the appropriate state and local air pollution control agency. We have included tribes along with state and local air pollution control agencies in this provision to provide equivalent involvement for tribal air pollution control agencies. Paragraph (u)(3) was deleted to remove the restriction that stated the Administrator shall not redelegate review authority to anyone other than an EPA Regional Office except where the state has assumed jurisdiction over such land. This restriction had prevented the EPA from delegating the PSD program to interested tribes and will no longer be in effect once paragraph (u) is amended. Paragraph (u)(4) was designated as the new paragraph (u)(3). These changes 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 the Amendments

This final 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 that the EPA must implement the program where delegation does not occur and thus should not have a significant impact on new or modified sources.

The EPA has administered the delegation process under §52.21(u) for the federal

PSD Program and the EPA intends to continue using the same approach when applying this provision to tribal governments. The provision now designated as §52.21(u) has been in place, in one form or another, since the federal Prevention of Significant Air Quality Deterioration rule was first promulgated in 1974. (See 39 FR 42510, 42517, December 5, 1974; 45 FR 33290, May 19, 1980). Over time, the EPA has used that provision to successfully delegate authority to implement the Federal PSD Program to numerous state and local air pollution control agencies. See e.g. 46 FR 9580, Jan. 29, 1981 (delegations to states in Region 5). Those delegations are authorized by the EPA's Regional Offices. The process for delegating programs varies somewhat from Region to Region. Regardless of the exact process used, however, the specifics of the delegation are embodied in a formal delegation agreement. The agreement becomes effective when signed by the Regional Administrator and the state or local agency. The EPA believes that the many prior successful delegations carried out under §52.21(u) provide an appropriate background of experience for the Agency as it moves forward with including interested tribes as potential delegate agencies for purposes of the PSD program. The EPA expects that the same procedures that have been used with state and local agencies will prove relevant and equally successful as tribes begin to seek administrative delegation of the Federal PSD Program. Precise details and functions at issue with any particular delegation will – as they have been with states and local agencies – be memorialized in an applicable written delegation agreement between the EPA and the delegated tribal governing body.

The EPA notes that it has since written additional regulations that include somewhat more detailed delegation provisions. With regard to delegations to tribes, these include, for instance, the Federal Air Rules for Indian Reservations in Idaho, Oregon and Washington and the rule titled Review of New Sources and Modifications in Indian Country. In those cases, the EPA was establishing new regulatory programs for areas of Indian country,

including newly-established administrative delegation opportunities and procedures. In each case, the EPA provided a discussion of the delegation process that was appropriate for the new programs. By contrast, as discussed above in the case of §52.21(u), the EPA already has a substantial body of experience and history applying the provision that one can look to for guidance. The EPA believes the various provisions the EPA has established for administrative delegations are appropriate for the particular programs in which they are included. As a result, some of the more recent delegation provisions differ from §52.21(u) in some respects.

V. Summary of Public Comments and the EPA Responses

The EPA received a total of five public comments during the 60-day open comment period of the proposed rule. Specifically, two were from tribes, one from an industry party and two were from private citizens. The tribes and private citizens that commented on the proposed rule were very supportive of this action. They stated that it was a practical rule that would not only allow interested tribes to seek delegation of the program but also provide additional opportunities for self governance for tribal communities. One industry party commented that they support the EPA's efforts to build tribal capacity for implementing and enforcing CAA programs and that it is important to provide opportunities to tribes to be involved with the implementation of CAA programs on tribal lands.

We agree that this rule is important to increase opportunities for involvement of interested tribes in air program implementation and to promote self governance for tribal communities. It is designed to eliminate a prior limitation on tribal involvement and expand the Agency's ability to work with interested tribes on implementation of the federal PSD program.

One tribe commented that there should be agency support and outreach to tribes that may not have been involved with this rulemaking process to assist them with the

implementation of the program. Following promulgation, we intend to hold additional conference calls and trainings to assist those interested tribes in the delegation process.

We also received comments from one industry party focusing on the overall delegation of administrative authority to include legal and tribal authority, delegation process and agreement, and TAS applicability. This company commented that the CAA does not give the EPA legal authority to delegate its federal authority to a state or tribe to administer the EPA's federal regulations. We disagree, and believe that section 301(a) of the CAA provides clear legal authority for administrative delegation as discussed in the Tribal Authority rule. They further stated that the Agency's administrative delegation provisions in the federal PSD rules must clearly explain that tribal law needs only to authorize the applicable tribal agency to administer the federal PSD rules and provisions for which it is delegated responsibility. The EPA notes that where the Agency delegates administration of the federal PSD program to a state, local agency or tribe, the program remains applicable to the regulated sources under federal legal authority established under the CAA and the EPA's regulations.

Industry commented that the rule must clearly describe the delegation process and what the delegation agreement does and does not do. The EPA anticipates being consistent with prior delegations to states and local agencies, to include processes, scope and limitations, and that these would be reflected in a formal delegation agreement. Industry also commented that TAS is not required for a delegation of administrative authority. The EPA agrees. This amendment will put tribes on an equal footing with state and local air pollution control agencies for purposes of taking delegation to assist the EPA with administration of the federal PSD program.

The full text of public comments and the EPA's responses to those comments can be found in the Amendments to Delegation of Authority Provisions in the PSD Program docket (EPA-HQ-OAR-2010-0943).

VI. 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 allows interested tribes to accept delegation. 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 the 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 will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today’s 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 final 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 this final rule amending part 52. This final rule will not impose any requirements on small entities.

D. Unfunded Mandates Reform Act

This action does not contain a federal mandate 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 allows 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 final 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.

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

Subject to the Executive Order 13175 (65 FR 67249, November 9, 2000) the 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 final rule does not impose any new 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 provided consultation to 17 tribes who requested it. We have also participated in various tribal meetings attended by tribal environmental professionals, i.e., National Tribal Air Association (NTAA), National Tribal Forum (NTF). We received no adverse comments when this action was presented at those various meetings. The EPA specifically solicited additional comment on this proposed action from tribal officials.

During development of the proposal, the EPA notified tribes in the summer of 2011

of our intent to propose amendments to the delegation of authority provisions in the PSD program during a regularly scheduled meeting with the NTAA. These NTAA meetings update members of upcoming EPA policies and regulations and to receive input from them on the effects of these efforts in Indian country.

The Agency held a consultation call on January 11, 2012, with one tribe. Another consultation call was held on January 30, 2012, with 16 tribes. Tribal comments received during consultations on the proposed rule were: tribes indicated they were in favor of the rule; described the proposal as a responsible use of an Agency rulemaking; and described the proposal as supporting tribal self-governance. The EPA considered the additional input from these consultation calls and coordination activities, in conjunction with public comments, in this final rule development.

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, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the EO has the potential to influence the regulation. This action is not subject to EO 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 EO 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 specifications, 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 action does not involve technical standards. Therefore, the EPA did not consider 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 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 final 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 final rule imposes no new requirements but does allow interested tribes to accept delegation of the existing federal program.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801, et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of

the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this final rule and other required information to the United States Senate, the United States House of Representatives and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2). This rule will be effective upon publication in the Federal Register.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Indians, Indians-law, and Indians-tribal government; Incorporation by reference.

Dated: April 11, 2014.

Gina McCarthy,
Administrator.

For the reasons stated in the preamble, 40 CFR part 52 is amended 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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