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

MAR 27 2008

THE ADMINISTRATOR

Mr. John D. Walke
Natural Resources Defense Council
1200 New York Avenue, N.W., Suite 400
Washington, D.C. 20005

Dear Mr. Walke:

This letter is in response to your July 2, 2007, Petition for Reconsideration and request for a stay on behalf of the Natural Resources Defense Council (NRDC) related to the U.S. Environmental Protection Agency's final rule entitled "Prevention of Significant Deterioration, Nonattainment New Source Review and Title V: Treatment of Certain Ethanol Production Facilities Under the 'Major Emitting Facility' Definition," also known as the "Ethanol Rule," which was published in the *Federal Register* on May 1, 2007 (72 FR 24060).

In its petition, NRDC alleges that the objections raised in the petition arose after the period for public comment and are of central relevance to the outcome of the rule in that each objection demonstrates that the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." NRDC also alleges that each of their objections is related to the regulatory language and EPA interpretations that appeared for the first time on May 1, 2007, in the Final Rule and that, therefore, the grounds for their objections arose after the period for public comment. NRDC concludes that Section 307(d)(7)(B) of the Clean Air Act (CAA) requires EPA to convene a proceeding for reconsideration of the rule and to provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed.

Section 307(d)(7)(B) of the CAA requires EPA to convene a proceeding for reconsideration based on objections that were not raised during the public comment period only if "it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment...and if such objection is of central relevance to the outcome of the rule..."[1]

---

[1] Section 307(d)(7)(B) of the CAA, 42 U.S.C. 7606(d)(7)(B), provides:

Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the

After careful review and consideration of the objections raised in NRDC's petition for reconsideration, EPA has decided to deny the petition. NRDC has failed to establish that any of its objections meet the criteria for reconsideration under Section 307(d)(7)(B) of the CAA. Below are the objections NRDC raised in the petition and our reasons for denying the petition.

EPA's Findings on Environmental Consequences

In its petition, NRDC's first objection relates to EPA's findings on the potential environmental consequences of the rule; these findings appeared in the preamble to the final ethanol rule. (*See* 72 FR 24060, 24070-73.) NRDC alleges that EPA took no position on the environmental effects of the rule at the proposal stage and that EPA's finding that the rule "is not likely to result in significant net environmental harm" and EPA's specific reasons supporting that finding were wholly unknown during the comment period. NRDC further states that the environmental consequences of the final rule are of central relevance to the outcome of the rule and thus, the Administrator must convene a proceeding for reconsideration pursuant to CAA Section 307(d)(7)(B).

NRDC's claim that EPA took no position on the environmental effects of the rule at the proposal stage is unfounded. In fact, in both the proposed and final rule preambles EPA discussed that the rule may result in emissions increases. In the preamble to the proposed rule, EPA stated that the rule would allow sources ("synthetic" minors) to expand capacity without triggering PSD permitting requirements, i.e., sources increasing thresholds up to 250 tons per year (tpy). EPA also provided that sources could increase emissions by more than 149 tpy and still remain minor sources. EPA also acknowledged that other emissions increases could occur because some sources would no longer be required to count fugitive emissions. 46 FR 12240, 12246 (March 9, 2006).

EPA requested comments on the potential environmental effects of the proposed rule and then responded to those comments. In the time between the proposal and the final rules, EPA drew conclusions from a more in-depth evaluation of environmental effects. The conclusions contained in the preamble to the final rule were consistent with and a logical outgrowth of the discussion of potential emission increases in the preamble to the proposed rule. The additional information and evaluation in the preamble to the final rule merely supplemented the evaluation of environmental effects that was available at proposal and was based in part on information submitted during the comment period. Having requested comment on the environmental effects of the proposal, EPA put the public, including petitioners, on notice that EPA intended to discuss the comments received related to environmental effects and to provide responses.

---

rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b)). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

The petitioners suggest that EPA's statement in the preamble to the final rule that the rule is "not likely to result in significant net environmental harm" was new. However, it is perfectly appropriate for EPA to further evaluate and characterize the degree of the environmental effects of the rule between promulgation of the proposed rule and the final rule without initiating a new round of public comment. Petitioners have not established that this evaluation and characterization of the environmental effects was of central relevance to the outcome of the rule or that any objection to the rule based on its environmental impacts could not have been raised during the comment period.

The petition on pages 3 through 5 also takes issue with certain other statements EPA made in conjunction with its discussion of potential environmental effects of the rule such as EPA's statement that building fewer larger ethanol plants to meet ethanol demand may be more desirable from an environmental standpoint than building a greater number of smaller plants. However, these statements are not of central relevance to the outcome of the rule and thus NRDC's objections to these statements do not warrant initiation of reconsideration proceedings. In the preamble to the final rule, EPA acknowledged that the environmental evaluation may have understated potential environmental consequences and determined, after appropriately considering environmental protection and economic growth, that the rule was justified. Section 307(d)(7)(B) of the CAA is not triggered merely because NRDC does not agree with the manner in which EPA weighed and balanced these considerations.

I note that Section 202(a)(1) of the Energy Independence and Security Act of 2007 (Pub. L. 110-140), which amends §211(o) of the CAA, provides that EPA must revise regulations within one year of enactment to ensure that renewable fuels (such as ethanol) produced from any new facility that commences construction after the date of enactment (December 19, 2007) "achieves at least a 20 percent reduction in lifecycle greenhouse gas emissions compared to baseline lifecycle greenhouse gas emissions." The practical effect of this new requirement is that new ethanol facilities will be discouraged from using coal as an energy source. Thus, concerns raised by certain commenters that new facilities will use coal to fuel the ethanol production process discussed and responded to at 72 FR 24073 do not appear to be well-founded.

I also note that petitioners asserted that EPA's reference to energy policy objectives in EPA's final rule was an abandonment of the objectives of the CAA. (*See* page 5 of NRDC's petition for reconsideration.) However, EPA's references to energy policy objectives were in the context of EPA's balancing of the dual goals of the PSD program: environmental protection and economic growth. *See* 72 FR 24062/2-3 ("We continue to believe that supporting our nation's efforts toward energy independence is an important national goal, and that this consideration is appropriate in deciding how to balance our nation's economic growth with environmental protection."). Energy policy can and is intended to affect economic growth and thus, the two are interrelated.

302(j) Rulemaking

NRDC's second objection relates to the ethanol rule's amendment of New Source Review (NSR) regulatory provisions that govern treatment of fugitive emissions. Section 302(j) of the CAA requires EPA to conduct a rulemaking before requiring fugitive emissions from a

source to be counted in determining whether the source is a major source. The final ethanol rule redefines the term "chemical process plant" that appears on the regulatory list of sources for which fugitive emissions are counted in determining major source status ("the 302(j) list") to exclude ethanol plants that produce ethanol by natural fermentation. In the preamble to the proposed ethanol rule, EPA stated that a Section 302(j) rulemaking was not required because EPA was redefining a category on the 302(j) list, but not changing the list. The final ethanol rule preamble reiterated EPA's position that a Section 302(j) rulemaking is not required, but also noted that if a Section 302(j) rulemaking is required, the proposed and final ethanol rule constituted an adequate Section 302(j) rulemaking determination.

NRDC's petition for reconsideration states that EPA's conclusion that the ethanol rulemaking constitutes a sufficient Section 302(j) rulemaking and the rationale for that conclusion wholly were unknown to the public during the comment period, and therefore, the Administrator must convene a proceeding for reconsideration of the rule pursuant to Section 307(d)(7)(B) of the CAA.

In its petition, NRDC objects to and alleges no opportunity to comment on EPA's position that even if a Section 302(j) rulemaking were required, the proposed and final ethanol rule constituted an adequate Section 302(j) rulemaking determination. NRDC's objection is not of central relevance to the outcome of the rule. As stated in the preamble to the proposed rule and further explained in the final rule preamble, EPA's position is that a Section 302(j) rulemaking is not required because EPA is redefining a category already on the Section 302(j) list, not adding a source category to the Section 302(j) list. EPA took comment on this issue, received comments and further explained the rationale for this position in response to comments received. (*See*, e.g., 72 FR 24068-69.)

NRDC's objection to EPA's position that the ethanol rulemaking constituted an adequate Section 302(j) rulemaking is not of central relevance to the outcome of the rule because EPA's primary position is that a Section 302(j) rulemaking is not required. Further, EPA's position that the ethanol rulemaking constitutes an adequate Section 302(j) rulemaking was set forth in response to comments we received on the requirements of Section 302(j). This position merely supplements and offers additional support for EPA's determination in the proposed rule that a separate Section 302(j) rulemaking is not required. EPA specifically solicited comments on the requirements of Section 302(j) and the public was on notice that EPA intended to respond to these comments. Thus, EPA is not required to convene reconsideration proceedings to allow for additional comment on EPA's determinations concerning the requirements of Section 302(j).

CAA's Anti-Backsliding Provisions

NRDC's third objection relates to EPA's discussion of the anti-backsliding provision of Section 193 of the CAA. NRDC claims that EPA's conclusions that the rule does not violate Section 193 and the reasons offered in support of that conclusion were wholly unknown to the public during the comment period and that EPA, therefore, must convene a proceeding for reconsideration.

EPA did not address Section 193 of the CAA in the proposed rule because we believe that this part of the law does not apply to the ethanol rulemaking. Section 193 applies to nonattainment areas only and provides that "[n]o control requirement in effect, or required to be adopted by an order, settlement agreement, or plan in effect before the date of the enactment of the Clean Air Act Amendments of 1990 in any area which is a nonattainment area for any air pollutant may be modified after such enactment in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant." The proposed and final rules do not change control requirements in nonattainment areas. In the final rule, EPA responded to a comment received that asserted that Section 193 of the CAA applies. The final rule noted that the rule did not, in and of itself, modify any requirements applicable in nonattainment areas and that the appropriate time to address Section 193 of the CAA is when a control requirement in a nonattainment area is changed.

EPA has no obligation to discuss all inapplicable provisions of law in a rulemaking proposal. Further, EPA has no obligation to convene a reconsideration proceeding when, in response to a comment asserting that a particular provision of law is relevant to the rulemaking, EPA explains that the provision is not relevant. As evidenced by the comments that EPA did receive concerning the applicability of Section 193, NRDC has not established that it was impractical to raise such issues during the comment period or that the grounds for such objections arose after the comment period. NRDC's objections to EPA's response to comment do not trigger the Section 307(d)(7)(B) requirement for reconsideration proceedings.

Request for Stay of Implementation

NRDC also requested that EPA stay implementation of the final rule pending reconsideration of the rule. Because EPA is denying the petition for reconsideration in its entirety, a stay pending reconsideration is unnecessary.

We appreciate your comments and interest in this important matter.

Sincerely,

Stephen L. Johnson

cc: Mr. Colin C. O'Brien
Staff Attorney
Clean Air Program, NRDC