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

THE ADMINISTRATOR

JAN 14 2009

Ms. Anne Milgram
Attorney General
State of New Jersey
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 093
Trenton, New Jersey 08625-0093

Dear Ms. Milgram:

This letter is in response to your February 15, 2008, Petition for Reconsideration and request for a stay on behalf of the State of New Jersey ("New Jersey") related to the U.S. Environmental Protection Agency's (EPA) final rule titled "Prevention of Significant Deterioration and Nonattainment New Source Review: Reasonable Possibility in Recordkeeping," which was published in the *Federal Register* on December 21, 2007 (72 FR 72607).

Under Clean Air Act (CAA) §307(d)(7)(B), EPA must convene a proceeding for reconsideration if an objection is of central relevance to the outcome of the rule and the grounds for the objection arose after the period of public comment or the objection was impracticable to raise during the period of public comment. In this petition, New Jersey 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. New Jersey alleges that EPA failed to solicit comment on the component of the final rule that required pre-change but not post-change requirements. New Jersey also alleges that the failure to require post-change recordkeeping renders this component unenforceable. New Jersey also alleges that the final rule as a whole is unenforceable and fails to respond to the Court's remand. After careful review and consideration of the objections raised in New Jersey's petition for reconsideration, EPA has decided to deny the petition. New Jersey has failed to establish that any of its objections meet the criteria for reconsideration under CAA §307(d)(7)(B). Below are the objections that New Jersey raised in the petition and our reasons for denying the petition.

Final Rule is a "Logical Outgrowth"

In the petition, New Jersey's first objection is that a component of the final rule is not a "logical outgrowth" of the proposed rule, and EPA, therefore, failed to give the notice required under both the Administrative Procedure Act (APA) and the CAA. New Jersey alleges that EPA

suddenly did away with the post-change recordkeeping and reporting requirements in circumstances where sources attribute projected emissions to demand a growth, which New Jersey describes as a "bolt out of the blue" change from the proposal. New Jersey further states that the public was not given an opportunity to comment on the importance of post-change records for NSR compliance and EPA is, therefore, required under the CAA and the APA to solicit additional public comments in a reconsideration proceeding.

New Jersey's claim that the additional requirement of pre-change recordkeeping for certain sources was not adequately noticed is unfounded. In the proposed rule preamble, EPA solicited comment on how the "reasonable possibility" standard is generally applied and what is to be recorded and reported in the case of a change or project for which there is a reasonable possibility that the change will result in a significant emissions increase. (See 72 FR 10449.) Specifically, the proposed approach required sources to compare baseline actual emissions to projected actual emissions to determine whether this value equals or exceeds 50 percent of the applicable New Source Review (NSR) significant level.

New Jersey and other state commenters opposed the proposed rule, in part because it did not directly address demand growth. Even so, they suggested a compromise:

> "EPA could at least require recordkeeping, monitoring, and reporting in instances in which predicted emission increases from the project, coupled with predicted emission increases that the facility believes will be caused by demand growth, exceed the significance threshold. This approach would keep the focus on significant emission increases, ensuring that for such changes, facilities correctly attribute emission increases to their projects."

Comments by New York, New Jersey, and other State Attorneys General, at 9

In the final rule, EPA retained the proposed approach, requiring sources to compare baseline actual emissions to projected actual emissions to determine whether this value equals or exceeds 50 percent of the applicable NSR significant level. As in the proposed rule, the final rule requires these sources to comply with both the pre-change and the post-change recordkeeping and reporting requirements. However, based on the comments received during the comment period, EPA required in the final rule that emissions attributable to independent factors (such as demand growth) be considered for purposes of the "percentage increase" test. Specifically, the final rule includes the additional requirement that sources whose projected actual emissions increase is less than 50 percent of the applicable NSR significant level must determine whether emissions attributable to demand growth that is unrelated to the change would cause the post-project emissions increase to exceed 50 percent of the applicable NSR significant level. If so, then under the final rule, these sources also have a reasonable possibility of causing a significant emission increase; but under these circumstances, the final rule requires such sources to comply with only the pre-change recordkeeping requirements and not the pre-change reporting requirements or post-change recordkeeping and reporting requirements. (See 72 FR 72610/1.)

New Jersey objects that the failure to require post-change recordkeeping and reporting was not a logical outgrowth of the proposal, but we disagree. The addition, in the final rule, of a tighter requirement to address demand growth was recommended by New Jersey and other commenters. As for the split between pre- and post-change recordkeeping and reporting, the proposal "solicit[ed] comment on how the 'reasonable possibility' standard is generally applied and what is to be recorded and reported in the case of a change or project for which there is a reasonable possibility that the change will result in a significant emissions increase." (72 FR at 10449/1.) The proposal also quoted the Court's statement: "We recognize that less burdensome requirements may well be appropriate for sources with little likelihood of triggering NSR, but EPA needs to explain how its recordkeeping and reporting requirements allow it to identify such sources." 72 FR at 10449/3, quoting *New York v. EPA,* 413 F.3d 3, 35 (D.C. Cir. 2005). These statements made clear that the type of recordkeeping and reporting requirements and the circumstances under which recordkeeping and reporting would be required were at issue. Splitting those requirements – so that, in some circumstances, pre-change recordkeeping is required, but not post-change recordkeeping and reporting – is a logical outgrowth of the overall issue.

Final Rule is Enforceable and Lawful

New Jersey's second objection is that the Final Rule does not address the aspects of the NSR I Rule remanded by the D.C. Circuit to EPA as, in New Jersey's view, it remains unenforceable and, therefore, is unlawful. New Jersey alleges that the "reasonable possibility" standard provides sources with complete discretion regarding the duty to keep records, that is, only those sources that believe that there is a "reasonable possibility" that a change may trigger NSR must keep records. New Jersey objects that the source is under no obligation to record or maintain the basis for its decision that no reasonable possibility exists.

Similar comments were raised during the public comment period for the Proposed Rule and were addressed in the Final Rule. The Court's remand was addressed in the Final Rule by including regulatory changes to clarify the reasonable possibility standard and specifying the criteria under which records must be kept for a physical change or change in the method of operation that does not trigger major NSR permitting requirements. EPA fully explained why it believes that the rule is enforceable. EPA stated that in imposing a recordkeeping requirement on projects that attribute any emissions to demand growth, we believe our 'percentage increase test' further addresses the Court's concerns. This approach balances ease of enforcement with avoidance of requirements that would be unnecessary or unduly burdensome on reviewing authorities or the regulated community. (See 72 FR 72611/1-2.) Because New Jersey's concerns were raised during the rulemaking, the requirements of CAA section §307(d)(7)(B) have not been met and New Jersey's petition for reconsideration must be denied.

New Jersey further states that even in circumstances where a source decides that it actually needs to keep records, but for which a source attributes the bulk of its emissions to demand growth (whether accurately or inaccurately), there would be no post-change records to monitor and record the emission increases. New Jersey alleges that the D.C. Circuit's concerns – that in the NSR I Rule EPA did not explain how NSR compliance could be assured in the absence of records – have not been addressed.

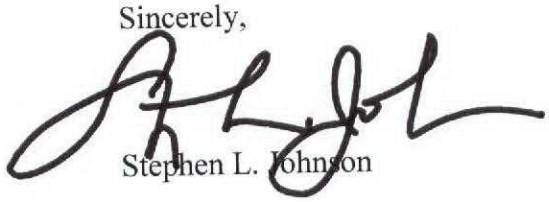
EPA explained in the preamble how the final rule addresses this concern. For sources that determine demand growth unrelated to the change to cause post-project emissions to exceed 50 percent of the applicable NSR level, pre-change recordkeeping is required. The pre-change records provide permitting authorities and enforcement officials sufficient information to determine whether the type of project undertaken could have a causal link to increases in emissions due to demand growth. With these records, enforcement authorities will have an adequate starting point to make further inquiries and to access other types of records, to verify post-project demand growth and enforce NSR requirements (See 72 FR 10450/1; 72 FR 72611/1.).

Request for Stay of Effectiveness

New Jersey also requested that EPA stay effectiveness 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