

Judicial Review

Under section 307(b) of the CAA, judicial review of the final rule is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit May 9, 2003. Under section 307(d)(7)(B) of the CAA, only an objection to the rule that was raised with reasonable specificity during the period for public comment can be raised during judicial review. Moreover, under section 307(b)(2) of the CAA, the requirements established by today's final action may not be challenged separately in any civil or criminal proceeding we bring to enforce these requirements.

Outline

The information presented in this preamble is organized as follows:

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- II. Statutory and Executive Order Reviews
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I. Today's Final Action

A. Background

The 1970 Clean Air Act at section 110 required States to submit plans to provide for the implementation and maintenance of the national ambient air quality standards (NAAQS). While the 1970 CAA established requirements for protecting the NAAQS through SIP's, it did not address prevention of significant deterioration of air quality. On May 31, 1972 (37 FR 10842), the Administrator published initial approvals and disapprovals of SIP's submitted pursuant to section 110 of the CAA. On November 9, 1972 (37 FR 23836), all SIP's were disapproved insofar as they failed to provide for significant deterioration of air quality. This action was taken in response to a preliminary

injunction issued by the District Court for the District of Columbia, which also required the Administrator to promulgate regulations as to any State plan that either permits the significant deterioration of air quality in any portion of any State, or fails to take the measures necessary to prevent significant deterioration.

On July 16, 1973 (38 FR 18986), we¹ proposed several alternative plans for prevention of significant deterioration. On December 5, 1974 (39 FR 42510), we promulgated the Federal PSD program, 40 CFR 52.21. These regulations established a Federal program under section 101(b)(1) of the 1970 Clean Air Act (CAA) to conduct preconstruction review of specified source categories where State agencies fail to provide for prevention of significant deterioration of air quality. This final action also disapproved all State plans as lacking procedures or regulations for preventing significant deterioration of air quality and incorporated the Federal PSD regulations by reference into all State plans. Specifically, it incorporated the provisions of § 52.21 by reference into the SIP's in subparts B through DDD of part 52. (See 39 FR 42514 concerning § 52.21(a), plan disapproval.)

On June 19, 1978 (43 FR 26388), we amended our PSD regulations to implement the new requirements of the Clean Air Act Amendments of 1977 (Pub. L. 95–95). These regulations built on the previous ones, but provided a more comprehensive program pursuant to part C (sections 160–165) of title I, which was added in the 1977 CAA Amendments. The 1977 CAA Amendments also added the statutory requirement that the PSD program be implemented through SIP's submitted pursuant to CAA section 110. Our final rules in 1978 also amended § 52.21 to incorporate all of the new requirements of CAA sections 160–165 into the Federal PSD program. This final rule contained the same language concerning plan disapprovals that is contained in § 52.21(a)(1) as promulgated on December 31, 2002.

Section 52.21(a) *Plan disapproval*. The provisions of this section are applicable to any State implementation plan which has been disapproved with respect to prevention of significant deterioration of air quality in any portion of any State where the existing air quality is better than the national ambient air quality standards. Specific disapprovals are listed where applicable in subparts B

through DDD of this part. The provisions of this section have been incorporated by reference into the applicable implementation plans for various States, as provided in subparts B through DDD of this part. Where this section is so incorporated, the provisions shall also be applicable to all lands owned by the Federal government and Indian reservations located in such State. No disapproval with respect to a State's failure to prevent significant deterioration of air quality shall invalidate or otherwise affect the obligation of States, emission sources, or other persons with respect to all portions of these plans approved or promulgated under this part (46 FR 26403).

The 1978 final rule also incorporated section 52.21 by reference into the SIP's for 54 programs (50 States, Puerto Rico, Virgin Islands, American Samoa, and Guam) as follows:

(a) The requirements of sections 160 through 165 of the Clean Air Act are not met, since the plan does not include approvable procedures for preventing the significant deterioration of air quality.

(b) The provisions of section 52.21 (b) through (v) are hereby incorporated and made part of the applicable State plan for the State of _____ (see 43 FR 26410).

On August 7, 1980 (43 FR 52676), we amended our PSD regulations in response to the decision by the U.S. Court of Appeals for the D.C. Circuit in *Alabama Power Company v. Costle*, 636 F.2d 323 (D.C.Cir. 1979). In addition to revising the PSD rules to respond to the court, this final rule disapproved a number of SIP's for PSD purposes and incorporated § 52.21 by reference into the implementation plans for those States. It also contained the same language concerning plan disapprovals that is contained in the newly promulgated provisions at § 52.21(a)(1), as well as the same language concerning incorporation by reference in the relevant State-specific subparts of part 52 (see 45 FR 52741).

B. Revisions to Part 52

We proposed revisions to the nonattainment new source review (NSR) and PSD rules in a notice published in the **Federal Register** on July 23, 1996 (61 FR 38250). That **Federal Register** notice proposed a number of changes to our existing major NSR and PSD requirements. (Please refer to the outline of that proposed rulemaking for a list of changes that were proposed to our existing regulations.) Following the 1996 proposal, we held two public hearings and more than 50 stakeholder meetings. Environmental groups, industry, and State, local, and Federal agency representatives participated in these many discussions on all aspects of the proposed rules. On July 24, 1998, we published a notice of availability (NOA)

¹ In this preamble the term "we" refers to EPA and the term "you" refers to major stationary sources of air pollution and their owners and operators. All other entities are referred to by their respective names (for example, reviewing authorities).