

appendix S permitting requirements.) However, per section VI of appendix S, we have always recognized the need for flexibility under certain circumstances, which we address in detail below.

Also, note that EPA does not have a Federal permit program in place for nonattainment NSR. This creates particular difficulties for the Tribes, because their programs are not as mature as the State programs. Therefore, in most locations, EPA, not the Tribes, will need to address the implementation of appendix S in these areas, until a Tribe develops a nonattainment NSR program on its own.

b. What is the legal basis for requiring States to issue nonattainment NSR permits during the interim period?

Section 110(a)(2)(c) of the CAA establishes a general duty on States to include a program in their SIP that regulates the modification and construction of any stationary source as necessary to assure that NAAQS are achieved. This general duty, often referred to as "minor NSR," exists during all periods, including before a State has an approved part D NSR permit program.

Although section 110(a)(2)(c) does not define specific requirements States must follow for issuing major source permits during the interim period between nonattainment designation and EPA approval of a part D nonattainment NSR SIP ("interim period"), EPA's regulations codified at 52.24(k) require States to follow EPA's Emission Offset Interpretative rule codified at 40 CFR part 51, appendix S (hereinafter referred to as appendix S) during this time.⁶⁸

c. Codification of NO_x as an ozone precursor. Currently, only VOCs are expressly regulated as ozone precursors under the PSD regulations. Although appendix S specifically states that a source is major for ozone if it is major for VOCs, we do not believe this language is exclusive. The more general portion of the "major stationary source" definition states, "* * * any stationary

source that emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act," is considered a major source.

There is similar general language within the definition of "major modification." The nonattainment provisions of the Act, as amended in 1990, recognize NO_x as an ozone precursor; section 182(f) of the CAA established nonattainment requirements for NO_x. In addition, the definition of air pollutant under section 302(g) of the CAA includes, "* * * any precursors to the formation of any air pollutant * * *." Thus, where NO_x is considered a precursor to the formation of ozone, the State would use appendix S to issue a preconstruction permit to a new major source of NO_x emissions during the interim period.⁶⁹

Notwithstanding the above, in order to be completely clear, we are proposing to amend both our NSR and PSD regulations to expressly include NO_x as an ozone precursor in major PSD and major nonattainment NSR programs. Where relevant for both PSD areas and transitional NSR areas, States would be required to modify their existing programs to include NO_x as an ozone precursor.

Elsewhere in today's action, we are proposing to include NO_x as an ozone precursor for RACT requirements under subpart 1. Under section 182(f) (in subpart 2), a waiver from NO_x RACT and nonattainment NSR is possible under certain circumstances. We are proposing that the section 182(f) waiver provisions would also apply to areas designated nonattainment under either subpart 1 or subpart 2. However, the waiver provisions do not apply in areas where PSD is applicable.

3. Under What Circumstances Is a Transitional Program Needed During the Interim Period?

We request comment on providing States flexibility regarding major source nonattainment NSR program requirements in areas that meet specific conditions. We believe that a more flexible NSR option is appropriate in areas that are expected to reach 8-hour ozone attainment early—within 3 years after designation—through, for example, national or regional programs such as the NO_x SIP Call and the Tier 2 motor vehicle emissions standards. In these areas, we believe that States should

have the flexibility to apply a nonattainment NSR program that provides some relief from certain requirements.

Several factors warrant a flexible approach for implementing NSR in areas which qualify for the transitional program. We expect many areas to attain the new 8-hour standard within 3 years solely through regional NO_x reductions under the NO_x SIP Call rule and other currently applicable Federal programs. We intend this option to be available to any 8-hour ozone nonattainment areas located outside the NO_x SIP Call area, so long as those nonattainment areas can meet the 8-hour ozone NAAQS within 3 years after designation. Some of these areas may be in nonattainment due largely to transport from upwind sources; but no allowance is made under major NSR for sources in areas overwhelmed by transport. As we have construed it, this option would also encourage the early adoption of attainment plans, which we believe will lead to emissions reductions and resultant health benefits earlier than would otherwise occur. We request comment on the transitional program described in this proposed rulemaking, and in particular welcome information from States regarding how many new major sources or major modifications they anticipate would construct in transitional areas during the period between EPA's approval of a transitional part D nonattainment NSR plan and the State reaching attainment of the 8-hour NAAQS.

4. Elements of the Appendix S Transitional Program

a. Which nonattainment areas would be eligible for the transitional program? The appendix S transitional program would only be available to 8-hour ozone nonattainment areas that are subject to NSR under subpart 1, not subpart 2 (see discussion of classifications elsewhere in this proposal). In addition, in order to be eligible for the transitional option, by the date EPA publishes the nonattainment designations for the 8-hour standard (currently expected in 2004) a subpart 1 nonattainment area must: (1) Be attaining the 1-hour ozone standard; (2) be subject to subpart 1, not subpart 2, of part D;⁷⁰ (3) have submitted an attainment plan that demonstrates attainment within 3 years after designation; the attainment plan would have to include control measures under the NO_x SIP Call rule where

⁶⁸ The actual language at 40 CFR 52.24(k) allows States to issue permits under appendix S for a maximum period of 18 months after designation. After this time, if the nonattainment area does not have an approved Part D NSR permit program, a construction ban would apply. However, in 1990, Congress altered the provisions of the construction ban such that it would not apply when a State lacked an approved part D NSR permit program in the future. We believe that Congress' removal of the construction ban from the CAA supersedes the regulatory language at 52.24(k) and EPA has reinterpreted this language to allow States to issue permits under appendix S from designation until the SIP is approved even if this exceeds 18 months. See 1991 guidance memo, "New Source Review (NSR) Program Transitional Guidance", John S. Seitz, March 11, 1991. We will be revising the language at section 52.24(k) to properly reflect this interpretation.

⁶⁹ Note that new sources or modifications which are major as a result of NO_x emissions, and are thus subject to nonattainment NSR for NO_x, would also be considered major sources of nitrogen dioxide (NO₂), which is also a criteria pollutant. Since all areas are currently in attainment under the NO₂ NAAQS, these new NO_x sources will also need to go through PSD review of NO₂.

⁷⁰ Certain nonattainment NSR requirements in subpart 2 of part D are specifically spelled out in the CAA, and thus cannot be altered under a transitional program.