

**BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

In the Matter of the Final Rule:)	
)	
Prevention of Significant Deterioration,)	OAR-2006-0089
Nonattainment New Source Review, and)	
Title V: Treatment of Certain Ethanol)	
Production Facilities Under the "Major)	
Emitting Facility Definition")	
)	

PETITION FOR RECONSIDERATION

Pursuant to Section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B), the Natural Resources Defense Council petitions the Administrator of the Environmental Protection Agency ("the Administrator" or "EPA") to reconsider the final rule captioned above and published at 72 Fed. Reg. 24060-24078 (May 1, 2007). The grounds for the objections raised in this petition arose after the period for public comment and are of central relevance to the outcome of the rule. The Administrator must therefore "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." 42 U.S.C. § 7607(d)(7)(B). Petitioner requests that the Administrator stay the rule during the reconsideration. *Id.*

INTRODUCTION

On March 9, 2006, EPA proposed two changes with respect to the regulatory treatment of wet and dry corn milling facilities that produce fuel grade ethanol; EPA proposed: (a) to exempt fuel grade ethanol plants from the “chemical process plant” category in the definition of major source in both the Prevention of Significant Deterioration (“PSD”) and Title V Operating Permit (“Title V”) regulations and (b) to exempt the fugitive emissions generated at fuel grade ethanol plants from inclusion in the determination of major source status under the PSD, nonattainment New Source Review (“NSR”) and Title V programs. *See* 71 Fed. Reg. 12240 *et seq.* (March 9, 2006) (the “Proposed Rule”). The Natural Resources Defense Council submitted comments on the Proposed Rule, dated May 8, 2006.¹ Our previous comments are repeated and incorporated herein by reference.

On May 1, 2007, EPA announced a final rule excluding wet and dry corn milling facilities—as well as other facilities that produce ethanol by natural fermentation—from the definition of “chemical process plants”. *See generally*, 72 Fed. Reg. 24060 *et seq.* (the “Final Rule”). The Final Rule and preamble thereto includes “additional changes” from the preamble to the Proposed Rule and the Proposed Rule, *see* 72 Fed. Reg. 24060/1, which were not contemplated in the publication of the Proposed Rule.

This petition raises objections to the Final Rule. Each objection is “of central relevance to the outcome of the rule,” 42 U.S.C. § 7607(d)(7)(B), in that it demonstrates that the rule is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 7607(d)(9)(A). With respect to each objection, moreover, the regulatory language and EPA interpretations that render the rule “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” appeared for the first time on May 1, 2007, in the Final Rule. The last period for public comment on the rule closed on May 8, 2006. 71 Fed. Reg. 12240/2. The grounds for the objections raised in this petition thus “arose after the period for public comment.” 42 U.S.C. § 7607(d)(7)(B). The Administrator is therefore required to “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.” *Id.* Petitioner requests that the Administrator stay the rule during the reconsideration. *Id.*

OBJECTIONS

I. EPA’s Findings on Environmental Consequences are Arbitrary, Capricious and Unlawful

The preamble to the Final Rule, for the first time, presents an Agency finding that that the rule “is not likely to result in significant net environmental harm.” 72 Fed. Reg.

¹ Comment submitted by Patrice Simms, Natural Resources Defense Council (and attachment). EPA-HQ-OAR-2006-0089-0082 and EPA-HQ-OAR-2006-0089-0082.1.

24062/3. The preamble to the Proposed Rule did not reach any such conclusion; it merely stated: “EPA is seeking comment on the potential environmental effects,” 71 Fed. Reg. 12246/2.

Remarkably, despite taking no position on the environmental effects of the rule at the proposal stage, the Agency makes an environmental finding in the preamble to the Final Rule and devotes several pages in the Federal Register publication to justify this finding. As both the finding and the specific reasons supporting it were wholly unknown to the public during the comment period, and as the environmental consequences of the Final Rule are obviously of central relevance to the outcome of the rule, the Administrator must “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.” 42 U.S.C. § 7607(d)(7)(B).

In addition to having been impermissibly articulated for the first time at the issuance of the Final Rule, the EPA’s environmental determination and reasoning are fatally flawed and therefore arbitrary and capricious.

At the heart of EPA’s environmental finding is the Agency’s “predict[ion] that the revision of the major source threshold applicable to the ethanol fuel industry will allow for the construction of larger, more economically efficient plants which, in turn, will emit less emissions per gallon of ethanol produced.” *See, e.g.*, 72 Fed. Reg. at 24070/2. EPA offers no basis for this prediction other than the bald assurances of a handful of industry commenters and EPA offers no explanation for its theoretical musing that a larger “more *economically* efficient” plant would be more *environmentally* efficient. Economic efficiency and environmental efficiency are independent. Moreover, even if it is true that future, larger plants “will emit less emissions per gallon of ethanol produced,” EPA cannot ignore the likely impact from the expansion of current, inefficient facilities or that the Rule, overall, will undoubtedly lead to a significant net increase in emissions.

EPA further attempts to justify its environmental finding by noting how various constraints (*e.g.*, NSPS, NESHAP, state regulations, nonattainment area designations, etc.) may serve to prevent increases in emissions from *existing* ethanol fuel facilities as a consequence of this rule. *See* 72 Fed. Reg. 24070-24072. The impact of these constraints is merely speculative, however, and they generally do not apply to new facilities (a boom of new facilities is expected in coming decades) or facilities located in attainment areas (EPA acknowledges that most facilities—88 percent of all ethanol fuel facilities—are located in attainment areas).

Another shortcoming of EPA’s assessment of the environmental consequences of the rule is that the Agency focuses on an unreasonably short period of time. The preamble to the Final Rule seems to suggest that only environmental consequences over the next five years have been considered. *See, e.g.*, 72 Fed. Reg. 24071/3. This is extraordinarily short-sighted and ignores predictions that domestic ethanol fuel production is expected to increase many-fold in the coming decades.

In contrast to the speculative, baseless reasons offered in the preamble to the Final Rule to support the EPA's finding on environmental consequences, the Agency, in the preamble to the Proposed Rule, acknowledged in plain and logical terms a rationale for concluding that the rule will result in a significant net increase in emissions. According to EPA:

The obvious implication of changing the classification of facilities which produce ethanol fuel as a result of the wet or dry milling process to a classification other than chemical process plants is that this will allow these sources to expand production without triggering PSD permitting requirements, as a result of raising the applicable major source threshold from 100 tons per year to 250 tons per year. Many existing sources have taken PTE limits just below the 100 tons per year threshold to avoid PSD. Such sources would be able to raise these limits to just below 250 tons per year if the proposed rule is finalized as proposed.

71 Fed. Reg. 12246/1 (emphasis added). This conclusion was backed by at least one commenter—cited in the preamble to the Final Rule but apparently ignored in the Agency's deliberations—who calculated that whereas “a controlled 110 [million gallon per year (“mgy”)] ethanol production facility could be assumed to emit 100 [tons per year (tpy)],” “a controlled 250 mgy ethanol production facility could be assumed to emit 250 tpy.” 72 Fed. Reg. 24070/3 (citing Air Dispersion Modeling Study prepared by ICM, Inc.).

This expected increase in emissions will be further exacerbated by the provision in the rule that allows facilities to exclude fugitive emissions from emissions calculations. As the Proposed Rule explained: “[E]ven without raising the current 100 tons per year threshold, sources could expand production to some extent without triggering PSD, nonattainment NSR, or title V permitting requirements, because the calculation of actual and potential emissions would no longer need to include fugitive emissions at the facilities.” *Id.* at 12246/1&2

In the section of the preamble to the Final Rule devoted to addressing public comments submitted on the Proposed Rule, EPA concedes that “Several commenters provided specific examples of situations where implementation of [the rule] could cause or contribute to the negative impact on an area.” 72 Fed. Reg. 24073/2. EPA did not dispute this conclusion; rather, it meekly suggested that “we do not think there would be many instances where this is the case” and offered that “State or local government regulations/minor NSR program can be implemented to mitigate ... impacts.” *Id.* at 24073/3. EPA, therefore, acknowledges adverse local impacts to air quality and suggests, in essence, that members of impacted communities should cross their fingers and hope that State and/or local regulators intervene to limit the damage that will result from the rule. This is obviously arbitrary and capricious.

Faced with the inescapable conclusion that the rule will significantly increase air pollution, EPA attempts to sidestep the conclusion by tangentially offering the following hollow assurance:

Nonetheless, even if our consideration of potential environmental consequences understates potential negative environmental consequences, we believe that the potential for other environmental benefits and the desire to support our nation's energy policy objectives outweigh any potential negative environmental consequences that could potentially result from this rule.

72 Fed. Reg. 24062/2. EPA never explains the "potential for other environmental benefits" offered by the rule. Similarly, EPA fails to explain "our nation's energy policy objectives" or how attainment of those objectives is advanced by the Rule. In any event, it is unlawful, arbitrary, and capricious for the Agency to interpret (or misinterpret) the clear terms of the Clean Air Act based upon a "desire" to support some undefined sense of "our nation's energy policy objectives." The Agency is bound instead to obey the clear text of the Clean Air Act and to promote the objective of the statute, as expressed unambiguously by Congress therein, namely: "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401 (b)(1).²

II. EPA Unlawfully Failed to Conduct a 302(j) Rulemaking

In the preamble to its Proposed Rule, EPA asserted that "Since we are not changing the list of source categories that we listed under Section 302(j), but merely redefining one of those listed categories, we do not believe that it is now necessary to conduct a rulemaking which meets the requirements of 302(j) of the Act in order to redefine when we count fugitive emissions relative to chemical process plants." 71 Fed. Reg. 12245/1. EPA did, however, "solicit comment ... on whether it is appropriate to define chemical process plants to exclude wet and dry corn milling facilities for the purpose of determining when fugitives are to be counted in major source determinations under PSD, nonattainment NSR, and title V without specifically addressing the requirements associated with a 302(j) rulemaking." *Id.*

² In the preamble to the Final Rule EPA suggests that the rule is appropriate because "the basic goal of PSD are [sic] to ensure that economic growth will occur in harmony with the preservation of existing clean air resources." 72 Fed. Reg. 24065/3. EPA's interpretation of the purpose of the PSD seems to ignore the purpose as set forth by Congress in CAA section 160, which states that Congress intended the PSD program "to protect health and welfare" and "to ensure that economic growth will occur in a manner consistent with the preservation of existing clean air resources." 42 U.S.C. § 7470. Since the rule sacrifices air quality in favor of nearly unfettered economic interests, the Final Rule cannot be said to serve the goals of the PSD program.

In the preamble to the Final Rule EPA repeats its position that “we do not think that interpreting the category to exclude a narrow set of facilities triggers the section 302(j) rulemaking requirement,” but announces, for the first time, its wholly new position that “Nonetheless, even if this action triggers the section 302(j) rulemaking requirement, we believe this rulemaking constitutes a sufficient section 302(j) rule that is consistent with the way we interpreted that requirement in 1980 and re-affirmed in 1984.” 72 Fed. Reg. 24068 (citing 45 Fed. Reg. 52676, 52690 (Aug. 7, 1980) and 49 Fed. Reg. 43202 (Oct. 28, 1984)). The Final Rule then proceeds to provide nearly a page of text explaining EPA’s prior and current interpretations of Section 302(j) and how these requirements have been satisfied. Both EPA’s conclusion that its rule constitutes a Section 302(j) rulemaking—and the reasons offered in support of this conclusion—were wholly unknown to the public during the comment period, and therefore the Administrator must “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.” 42 U.S.C. § 7607(d)(7)(B).

In any event, it is worth noting that the Final Rule does not lawfully satisfy the requirements of Section 302(j). Section 302(j) of the Act states:

Except as otherwise expressly provided, the terms “major stationary source” and “major emitting facility” mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).

In 1980, EPA adopted regulations which, pursuant to Section 302(j), memorialized the list of source categories relative to the definition of “major emitting facility” (e.g., including chemical process plants) and adopted the same list to identify source categories for which fugitive emissions were to be counted in determining whether a source was a major source. *See generally* 45 Fed. Reg. 52676 *et seq.* The 1980 rule for fugitive emissions, which tracks the categories set forth in Section 169(1), was adopted as a result of the decision in *Alabama Power v. Costle*, 626 F. 2d. 323 (D.C. Cir. 1979), in which the court held that “fugitive emissions are to be included in determining whether a source or modification is major only if and when EPA issues an appropriate legislative rule.” At the time that EPA adopted its fugitive emissions regulations it adopted two explicit criteria for such 302(j) determinations, namely: (1) whether sources in a category could degrade air quality; and (2) whether the cost of controlling fugitive emissions is unreasonable compared to the expected benefits.

Based on the text of Section 302(j), the *Alabama Power* decision, and EPA’s existing fugitive emissions regulations, it is clearly unlawful and arbitrary and capricious for EPA to alter its fugitive emissions regulations without an express 302(j) rulemaking. As we read the foregoing authority, EPA must specifically evaluate whether eliminating

this requirement is appropriate based on criteria that relate to the intent of the PSD program and the air quality impact of such emissions. Here, EPA is proposing to adopt a significant rule change without examining, and without providing the public an opportunity to consider and comment on, the real-world implications of the agency's proposal. At the very least, EPA must evaluate fully the emissions and air quality implications of excluding these sources from fugitive emission controls, and the public must be given the opportunity to review and comment on EPA's analysis.

III. EPA Unlawfully Violates the Clean Air Act's Anti-Backsliding Provision.

Section 193 of the Clean Air Act, 42 U.S.C. §7515 is not discussed or cited anywhere in the preamble to the Proposed Rule. In the preamble to the Final Rule published in the Federal Register, however, EPA devotes nearly a page of discussion to explaining how the rule does not violate the CAA's Section 193 anti-backsliding provision. Both EPA's conclusion that its rule does not violate Section 193—and the reasons offered in support of this conclusion—were wholly unknown to the public during the comment period, and therefore the Administrator must “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.” 42 U.S.C. § 7607(d)(7)(B).

Section 193, applicable to nonattainment areas, states: “No control requirement in effect, or required to be adopted by an order, settlement agreement, or plan in effect before November 15, 1990, in any area which is a nonattainment area for any air pollutant may be modified after November 15, 1990, in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant.” 42 U.S.C. § 7515. Recently, the U.S. Court of Appeals for the D.C. Circuit ruled that “NSR is a control.” *South Coast Air Quality Mgmt. District v. EPA*, 472 F.3d 882, 901 (2006). The Final Rule enables ethanol fuel facilities—at least 12% of which are located in ozone nonattainment areas, *see* 72 Fed. Reg. 24072/2—to exclude fugitive emissions for purposes of quantifying total emissions under the nonattainment NSR program. Further, EPA has admitted that this exclusion of fugitive emissions from control calculations will increase emissions. The Final Rule, therefore, clearly violates Section 193's mandate that control requirements in nonattainment areas *not* be modified unless the modification insures equivalent or greater emission reductions of such air pollutant.

In the preamble to the Final Rule, EPA states that the Agency “respectfully disagree[s]” with the court's decision in *South Coast Air Quality Mgmt. District* and that the Agency has filed an appeal. 72 Fed. Reg. 24074/2. Until a decision to the contrary is released by the D.C. Circuit or the Supreme Court, EPA's decision to ignore this precedent is unlawful, arbitrary and capricious.

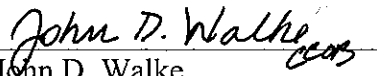
EPA also asserts in the Final Rule preamble that “Section 193 applies to nonattainment areas only” and that the Agency “believe[s] the appropriate time to determine the applicability of and compliance with section 193 is when a control requirement in a nonattainment area is changed.” With respect to the applicability of

Section 193, EPA's view is overly restrictive; Section 193 applies not only to "nonattainment areas" for a given pollutant, but to "*any area which is a nonattainment area for any air pollutant.*"³ Additionally, EPA's assertion that "the appropriate time to determine the applicability of and compliance with section 193 is when a control requirement in a nonattainment area is changed" contradicts the plain and unambiguous language of Section 193 and the D.C. Circuit opinion in *South Coast Air Quality Mgmt. District*. The Final Rule modifies a "control requirement in effect ... before November 15, 1990," in nonattainment areas in a manner that does not "insure[] equivalent or greater emission reductions of such air pollutant." 42 U.S.C. § 7515. The Final Rule is therefore unlawful.

CONCLUSION

For the reasons stated above, the Administrator must "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." 42 U.S.C. § 7607(d)(7)(B). Petitioner requests that the Administrator stay the rule during the reconsideration. *Id.*

Respectfully submitted,


John D. Walke

Natural Resources Defense Council
1200 New York Ave., N.W., Suite 400
Washington, D.C. 20005
(202) 289-6868

Attorney for NRDC

Dated: July 2, 2007

³ Hence, if an area was in nonattainment for Pollutant A (e.g., ozone), Section 193 would prevent "backsliding" with respect to any pollutant (Pollutants B, C, and D), not just ozone.