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

APR 24 2008

OFFICE OF
AIR AND RADIATION

The Honorable Henry A. Waxman
Chairman
Committee on Oversight and Government Reform
United States House of Representatives
Washington, D.C. 20515-6143

Dear. Mr. Chairman:

Thank you for your letter of April 4, 2008, to the U.S. Environmental Protection Agency (EPA) Administrator Stephen Johnson, in which you request that the EPA provide responses to a number of questions regarding the proposed rulemaking entitled "Prevention of Significant Deterioration (PSD) New Source Review: Refinements of Increment Modeling Procedures." The Administrator has asked me to respond to your letter and these questions. I want to assure you that no final decisions have been made on this rule, and that, as part of the final rule development process, we will consider all comments received on the proposal in deciding whether and how to move forward on the final rule.

1. How was the need for this proposal identified and who within the Agency suggested the promulgation of this rule?

Jeffrey R. Holmstead, past Assistant Administrator for EPA's Office of Air and Radiation initiated the promulgation of this rule for several reasons.

First, we have not previously adopted detailed regulations establishing a specific methodology that sources and reviewing authorities must use to calculate increment consumption. States and EPA Regional offices have conducted PSD increment analyses based primarily on EPA guidelines and guidance documents. For that reason, differing interpretations of analytical requirements and approaches have existed since the inception of the program, including controversies over how binding the guidelines and guidance are on reviewing authorities and whether EPA or the reviewing authority has the ultimate discretion to determine which approaches are acceptable for a specific increment analysis. For example, during a periodic review of compliance with the PSD increments in the State of North Dakota that started in 1999, a number of questions arose regarding the appropriate methodology that should be used to measure consumption of the increment.

Second, our different stakeholders, including states, EPA Regional Offices and air associations such as the Western States Air Resources Council (WESTAR) and the Northeast States for Coordinated Air Use Management (NESCAUM), have asked us for greater clarity on how to conduct increment analyses. For example, beginning in 2002, WESTAR convened several meetings with state and EPA staff to discuss these issues and in 2005 WESTAR submitted to EPA recommendations on how to improve the PSD program.

2. When was this rule put on the Agency's regulatory agenda? Please describe the process used to add rulemakings to EPA's agenda that are not ordered by a court or required by statute.

This rule was put on the Agency's April 30, 2007 regulatory agenda (72 FR at 23195). The EPA's regulatory agenda is published twice a year and includes regulations and certain major policy documents. However, there is no legal significance to the omission of an item from the agenda, and we generally do not include minor amendments or the following categories of actions:

- Administrative actions such as delegations of authority, changes of address, or phone numbers.
- Under the Clean Air Act: Revisions to State Implementation Plans; Equivalent Methods for Ambient Air Quality Monitoring; Deletions from the New Source Performance Standards source categories list; Delegations of Authority to States and Area Designations for Air Quality Planning Purposes.

3. On what date was the technical staff outside the Office of Air Quality Planning and Standards, including the regional modeling staff, notified that this rule was being drafted?

The technical staff outside the Office of Air Quality Planning and Standards (OAQPS) was informed about this rule being drafted on November 2, 2006. Regional modeling staff was subsequently informed on November 6, 2006.

4. On what date did technical staff outside the Office of Air Quality Planning and Standards, including the regional modeling staff, receive the text of the draft proposal?

The technical staff outside OAQPS, including the regional modeling staff, received the text of the draft proposal on November 13, 2006.

5. On what date were their comments due?

The regional modeling staff comments were due on November 20, 2006. However, additional comments from the regional modeling staff as well as other EPA offices were received during November and December of 2006 and were also reviewed by OAQPS.

6. Documents reviewed by the Committee suggest that some EPA staff believed their comments would not be considered. Staff stated that they did not "want to spend any time on Don Quixote impersonations" because they did "not expect the proposed rule to change direction based on the comments we submit." What steps were taken to fully consider staff comments and assure staff that their comments would in fact be considered? Were staff comments critical of the proposal presented to the Administrator?

Similar to EPA's other rulemakings, comments received from the technical staff outside OAQPS on drafts of proposals were reviewed and considered. More importantly, it should be noted that in evaluating and resolving the North Dakota issues, WESTAR recommendations and similar issues in the years leading up to the proposal, OAQPS staff had several extensive discussions with regional and other technical staff on many of the same types of issues that we ultimately decided would benefit from a regulatory clarification. Additionally, we scheduled a conference call on December 14, 2006, between the Air Quality Policy Division Director of OAQPS and the EPA regions to discuss concerns expressed by the regional modeling staff.

7. In what ways was the proposal modified in response to comments from EPA's technical staff?

We made a few changes (primarily technical corrections and editorial changes) based on the comments from EPA staff, but did not make any significant changes to the proposals in the initial draft because the comments did not raise any significant new issues compared to previous discussions (such as those related to the North Dakota issues and WESTAR recommendations) leading up to the proposal.

8. Staff at the National Park Service have suggested this proposal would "make it much easier to build power plants" near national parks. Does the Agency deny this?

We developed this proposal based on the need to clarify how increment consumption must be addressed and not whether or not it would be easier to build power plants. In the absence of any data or evidence provided by the National Park Service, we are unable to conclusively confirm or deny their suggestion.

9. EPA staff criticized the rule's proposal to allow the use of an annual average emission rate for evaluating 24-hour and 3-hour pollution levels because such a method would "almost always mask a short-term concentration peak." Another EPA employee compared this proposal to determining compliance with highway speed limits based on an individual's annual average speed. Does the Agency dispute these characterizations? If yes, please explain why the Agency disputes them. If no, please explain whether the rule addresses this concern in any way.

We believe these characterizations are not directly applicable to our use of an annual average emission rate. The suggested use of a maximum short-term emissions approach for modeling source impacts on short-term standards has at least two potential problems. First, it is not usually easy to determine a source's maximum actual emissions rate for a given year, especially when the affected time period is long ago, such as the early 1980s. Many sources are not required to

maintain continuous emissions monitors on their emissions units, or did not have such monitors in use for the earlier period when the data were needed. Second, while it may be assumed that every source operates at its maximum allowable level for at least a brief period of time during its annual operation, it is not usually the case that it operates at such level for sustained periods of time. Thus, the modeled change in concentration would tend to be overly conservative when increment consumption modeling is based on maximum emissions rates from all sources that consume increment. This issue is further discussed in the proposal preamble at 72 FR 31389.

10. Please quantify the public health impact of the short-term concentration peaks described in question 9.

Under the PSD program, major new stationary sources and major modifications are evaluated prior to construction to ensure compliance with the National Ambient Air Quality Standards (NAAQS) and the applicable PSD air quality increments. Each source applying for a PSD permit determines its public health impacts at that time as part of its demonstration of compliance with the NAAQS air quality analysis under the program. For this NAAQS analysis, short-term and long-term allowable emissions rates are used. Allowable emissions are the emissions rate of a stationary source calculated using the maximum rated capacity of the source, unless the source is subject to a federally enforceable limit. See 40 CFR § 51.166(b)(16) or 40 CFR § 51.21(b)(16) for a complete definition. Thus, the public health impacts of the short-term concentration peaks for each PSD source are quantified as part of its NAAQS analysis.

11. Analysis by EPA's Region 7 estimated that the annual averaging proposal could underestimate pollution levels by 1.5 to 13 times compared to actual short-term emissions. Does EPA contest this estimate? If so, please provide any supporting analysis. Was Region 7's analysis included in the record for the rule? If not, why not?

Region 7's analysis was an internal presentation done by its regional modeling staff for Region 7's management. It was not presented or submitted to OAQPS, and hence was not included in the record for this rule. However, if the Region asks us to consider this analysis in the ongoing final rule development process, we will take it into account as we decide whether and how to proceed with the rule.

12. With regard to the variance issue, EPA's March 5, 2008, letter states that a "permit must... model the Class II increment including the variance source." Does EPA believe that this requirement offers some protection of the air quality in Class I areas? If so, please explain how EPA believes that would occur.

EPA believes Congress made the determination in enacting the Clean Air Act that the Class II increments would provide some protection for Class I areas after the issuance of a variance by a Federal Land Manager. In section 165(d)(C)(iv) of the Clean Air Act, Congress specified alternative increment values (equivalent to the Class II increments for particulate matter and sulfur dioxides in all but one instance) that function as backstop to ensure protection of Class I areas after a variance has been issued. As explained in the proposed rule, EPA's interpretation is that Congress intended for these alternative increments to protect Class I areas after it has been established (through the variance process) that the Class I increment is not a reliable predictor of

adverse impact on Air Quality Related Values (AQRVs) in a particular area. 72 FR at 31382. Congress designed Class I area procedures to provide primary protection for AQRVs.

Protection of Class I increments is important, but as discussed in the proposal, AQRVs actually control whether a permit affecting a Class I area is issued or not. The Clean Air Act imposes an affirmative responsibility on Federal Land Managers in Class I areas to protect air quality related values. For more detail on the variance process and our interpretation of the role of the alternative increments (equivalent to the Class II increments) that apply after the issuance of a variance, please see the preamble of the proposed rule, 72 FR at 31381-84.

13. Agency staff responding to a draft, argued that the variance exception "gives a permanent 'pass' to [sources operating under a variance], regardless of subsequent events." Was the draft edited to address these concerns before publication of the proposal? If so, what changes were made?

We do not agree with the characterization that a variance exception provides a permanent pass to sources operating under a variance for the reasons outlined in response to question 12 above and hence, no changes were made to the proposal.

14. Which regions and staff supported the proposal to allow the use of proprietary models and methodologies for calculating actual emissions? In what other contexts does EPA believe the modeling data and program code should be kept out of the public eye?

We would like to clarify that we continue to require preferred models and codes to be non-proprietary. See paragraph 3.1.1(b)(vi) of 40 CFR part 51, Appendix W. However, application of the non-proprietary requirement to data developed for input into or use by a preferred model is not explicitly addressed in Appendix W and this is the area that the proposal clarifies. If proprietary data are needed as model inputs, we believe that it is currently within the discretion of the states to require some independent review of the proprietary data by an oversight agency, if such a review is deemed critical to the overall assessment of appropriateness of data for a particular modeling application.

Another option within the discretion of the state would be for the state itself to conduct the review, provided that proprietary information and trade secrets are protected under a system that is equivalent to EPA's rules for requesting non-disclosure of Confidential Business Information (CBI) submitted to the Agency. See 40 CFR part 2. In the case of software, we believe that a demonstration of the reproducibility of the data or model simulation, as well as documentation regarding the quality assurance procedures used in the development of the proprietary software, are the relevant information needed to support the integrity and accuracy of this software if the software is needed for a particular modeling application. The Agency believes this approach achieves an appropriate balance between the competing goals of public participation and the protection of intellectual property that is needed to promote private sector investment in the preservation of relevant model input data that would otherwise be lost.

Again, thank you for your letter. If you have any further questions, please contact me or your staff may call Josh Lewis, in EPA's Office of Congressional and Intergovernmental Relations, at 202-564-2095.

Sincerely,

Robert J. Meyers
Principal Deputy Assistant Administrator