



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

November 5, 2019

THE ADMINISTRATOR

The Honorable Gurbir S. Grewal
Attorney General of New Jersey
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 080
Trenton, New Jersey 08625

Dear Mr. Attorney General:

The purpose of this letter is to inform you that the U.S. Environmental Protection Agency (the EPA or agency) is no longer reconsidering the 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) (the "2007 Reasonable Possibility Rule" or the "2007 rule"). The state of New Jersey (New Jersey or the state) had sought reconsideration of the 2007 Reasonable Possibility Rule in a petition submitted on February 15, 2008. Consistent with the determination that was made by then-EPA Administrator Stephen L. Johnson on January 14, 2009, the EPA has concluded that it is not required to convene a proceeding to reconsider this rule under the *Clean Air Act* (CAA or Act) nor is additional public comment necessary or warranted.

As you are no doubt aware, on April 24, 2009, the EPA announced that, notwithstanding the prior determination made by Administrator Johnson on January 14, 2009, it had made a discretionary decision to grant New Jersey's petition and begin a proceeding to reconsider the 2007 rule. Because the EPA is now reaffirming that the Act does not mandate reconsideration of the 2007 rule, and because the EPA has further concluded that additional public comment is neither necessary nor warranted, I am notifying you that: (1) the discretionary reconsideration proceeding announced in April 2009 has ended; and (2) the EPA is not considering making any changes to the 2007 rule, nor is the agency soliciting additional public comment on the content of that rule. The EPA intends to concurrently notify the public that the agency will not be taking any further action to reconsider the 2007 rule.

I. Procedural History

The EPA substantially revised the New Source Review rules in 2002.¹ Among other things, those revisions impose recordkeeping requirements when there is a “reasonable possibility” that a project determined not to be a major modification may nevertheless result in a significant emissions increase. The purpose of this provision is to hold sources accountable for the projected emissions calculations they make when undertaking projects that they determine, based on those calculations, are not subject to major NSR permitting. In 2005, the U.S. Court of Appeals for the District of Columbia Circuit remanded this “reasonable possibility” provision to the EPA, holding that the “EPA failed to explain how it can ensure NSR compliance without the relevant data” and directing the EPA “either to provide an acceptable explanation for its ‘reasonable possibility’ standard or to devise an appropriately supportive alternative.” *New York v. EPA*, 413 F.3d 3, 35 (D.C. Cir. 2005).

In response, the EPA proposed a rule to define “reasonable possibility.”² The EPA proposed both pre- and post-change recordkeeping requirements when a source’s projected actual emissions increase from a project is greater than or equal to 50 percent of the NSR significance level (the proposed “percentage increase trigger”). The EPA proposed no recordkeeping requirements when a source’s projected actual emissions increase is less than this percentage increase trigger. In the final rule,³ in response to comments, the EPA imposed *additional* pre-change-only recordkeeping requirements in certain circumstances. Specifically, the final rule also subjects sources to pre-change recordkeeping requirements when a source’s projected actual emissions increase, when added to the amount of emissions excluded as provided by the regulations,⁴ is equal to or greater than 50 percent of the NSR significance level.

On February 15, 2008, New Jersey submitted to the EPA a Petition for Reconsideration under section 307(d)(7)(B) of the Act, alleging that the 2007 Reasonable Possibility Rule was procedurally defective because some content in the final rule was not a “logical outgrowth” of the proposed rule. The state alleged the EPA “suddenly did away with post-change record [keeping] requirements in circumstances where sources attribute projected emissions to demand growth,” and that this “was a bolt out of the blue” change from what had been originally proposed. The state further argued that, by imposing additional pre-change recordkeeping requirements, EPA created a distinction between pre-change and post-change recordkeeping requirements that did not exist in the proposed rulemaking, and that, therefore, New Jersey had not had the opportunity to meaningfully comment on the issue.

¹ 67 FR 80,186 (December 31, 2002).

² 72 FR 10,445 (March 8, 2007).

³ 72 FR 72,607 (December 21, 2007).

⁴ In order to determine the projected increase that results from a particular change, the regulatory definition of “projected actual emissions” provides that the source “[s]hall exclude in calculating any increase in emissions that results from the particular project, that portion of the unit’s emissions following the project . . . that are unrelated to the particular project, including any increased utilization due to demand growth.” 40 CFR 52.21(b)(41)(ii)(c).

By letter dated January 14, 2009, Administrator Johnson denied New Jersey's petition.⁵ The Administrator determined that the CAA did not mandate reconsideration because the proposed rulemaking had provided sufficient notice and opportunity to comment. The Administrator found that the EPA had specifically solicited comment on the proposed range of alternatives. Further, the Administrator noted that New Jersey and others had specifically commented on the matters at issue and the EPA had responded with revisions in the final rule based on those comments.

On March 11, 2009, New Jersey submitted to the EPA a letter in which the state reiterated the objections it had raised in its Petition for Reconsideration.⁶ Subsequently, the EPA announced on April 24, 2009, that it would reconsider the 2007 Reasonable Possibility Rule.⁷ At that time, the EPA informed New Jersey that "after further review of the issues raised" in the state's petition, the agency had come to "believe that additional public comment" was "warranted." April 2009 Letter at 1. The EPA acknowledged that it had previously denied New Jersey's petition, having determined that the "allegedly new issues" cited in the petition "were actually a logical outgrowth from the proposal," whereas the "remaining issues raised" by the state "had all been raised for comment during the course of the rulemaking." *Id.* But, the agency further observed, the EPA "retains discretion to conduct a reconsideration under other circumstances." *Id.*

"Accordingly," the EPA continued, "with this letter we are granting the petition" and "intend to publish a *Federal Register* notice describing in detail our request for public comment." April 2009 Letter at 1. The agency then stated that "[f]ollowing that, we will determine whether any changes to the existing regulatory provisions are appropriate." *Id.* at 2. The aforementioned *Federal Register* notice has never been published.

II. Legal Background

Under CAA section 307(d)(7)(B), the EPA *must* convene a proceeding to reconsider a rule "[i]f the person raising an objection can demonstrate to the Administrator that [1] it was impracticable to raise such objection within the [notice and comment period] . . . and [2] if such objection is of central relevance to the outcome of the rule." Regarding "impracticability," the touchstone is whether the proposed rulemaking provided "adequate notice" of the final rule, whether commenters had an "opportunity to raise their objections during the comment period," and, therefore, whether the final rule was a "logical outgrowth" of the proposed rule. *Clean Air Council v. Pruitt*, 862 F.3d 1, 10 (D.C. Cir. 2017) (finding reconsideration was not mandated because the proposed rulemaking specifically sought comment on the provisions at issue, entities commented on the provisions at issue, and the EPA responded directly to comments on the issue in the final rulemaking).

Regarding "logical outgrowth" specifically, the D.C. Circuit has described the concept as follows:

⁵ Letter from Stephen L. Johnson, Administrator, U.S. EPA, to Anne Milgram, Attorney General, State of New Jersey (January 14, 2009) (the "January 2009 Determination").

⁶ New Jersey's letter provided the same factual assertions and legal bases for its objections as its February 15, 2008, Petition for Reconsideration.

⁷ Letter from Elizabeth Craig, Acting Assistant Administrator, EPA Office of Air and Radiation, to Anne Milgram, Attorney General, State of New Jersey (April 24, 2009) ("April 2009 Letter").

A final rule is the “logical outgrowth” of a proposed rule if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period. A final rule fails the logical outgrowth test if interested parties would have had to divine the Agency’s unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.

Id. at 10 (citations and internal quotation marks omitted). As generally noted by the courts, “[t]he final rule need only be a logical outgrowth of the proposed rule, not an exact replica of it.” *Cooling Water Intake Structure Coal. v. United States EPA*, 905 F.3d 49, 78 (2d Cir. 2018) (citation omitted).

In addition, a final rule is a logical outgrowth where “the [proposed rulemaking] expressly asked for comments on a particular issue or otherwise made clear that the Agency was contemplating a particular change.” *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009). The courts have found particularly compelling circumstances where the Agency revised the final rule in response to comments. *See S. Terminal Corp. v. EPA*, 504 F.2d 646, 658 (1st Cir. 1974) (finding that “[a]lthough the changes were substantial, they were in character with the original scheme and were additionally foreshadowed in proposals and comments advanced during the rulemaking.”); *see also Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (finding logical outgrowth where “commenters clearly understood that a matter was under consideration, since the Agency received comments on the matter from several sources.”) (citations and internal quotation marks omitted).

III. Discussion

After further reviewing the matter, I am confirming (and, to the extent necessary, reinstating) Administrator Johnson’s January 14, 2009, denial of New Jersey’s petition. The EPA will not proceed further with reconsideration of the 2007 Reasonable Possibility Rule. For the reasons specified in the January 2009 Determination and for the reasons set forth below, the EPA maintains that the 2007 final rule is a “logical outgrowth” of the proposed rule and that, therefore, the Act does not mandate that the EPA convene a proceeding for reconsideration of the 2007 Reasonable Possibility Rule. In addition, I find that, contrary to the statements made in the April 2009 Letter, additional public comment on the 2007 rule is neither necessary nor warranted and that there was no evident reason for the discretionary action that the EPA took in granting New Jersey’s petition.

A. The 2007 Rule Is Not Procedurally Defective

The EPA does not agree with New Jersey’s assertion that the final rule is procedurally defective, and, therefore, the EPA is not required to convene a proceeding for reconsideration under the Act. As is explained further below, the final rule was a “logical outgrowth” of the proposed rule. In the proposed rulemaking, the EPA announced the purpose for the rulemaking and the range of alternative actions that it was proposing and specifically solicited comment on, among other things, what recordkeeping requirements it should establish. New Jersey and others specifically commented on this topic and recommended that the EPA require additional

recordkeeping in situations where excluded emissions are nevertheless included in projected emissions increases. The EPA responded with revisions in the final rule requiring additional recordkeeping for such projected emissions calculations.

EPA Solicited Comment on the Issues

The notice of proposed rulemaking clearly announced its scope as including the “reasonable possibility” standard itself and the necessary recordkeeping and reporting requirements. The EPA announced that the “purpose of this rulemaking is to address the [D.C. Circuit’s remand in *New York v. EPA*, 413 F.3d 3, 35 (D.C. Cir. 2005)] by clarifying the reasonable possibility standard and thus clarifying the circumstances under which records must be kept for projects that do not trigger major NSR.” 72 FR at 10447.

In describing the range of issues that the EPA sought to address, the proposed rulemaking specifically quotes the Court’s concerns regarding balancing recordkeeping burdens against a source’s emissions projections for projects that do not trigger NSR.⁸ 72 FR at 10448, 10449. In keeping with that purpose, the proposed rulemaking specifically solicited comments “on how the reasonable possibility standard is generally applied and *what is to be recorded and reported.*” 72 FR at 10449 (emphasis added). The EPA, therefore, solicited comments on the trigger for the recordkeeping requirement (percentage increase of emissions) and the records that the EPA should require sources to keep for projects that do not require an NSR permit.

New Jersey Specifically Commented on the Issues

During the comment period, New Jersey registered its particular concern regarding accountability where, under the existing regulations, some emissions are excluded from a source’s projected emissions calculations (e.g. emissions that are excluded from projected emissions because they are unrelated to the project, such as demand growth). New Jersey commented that the “percentage increase trigger approach would not address the problem of lack of permitting agency oversight over determinations by facilities of whether emission increases that occur after a project should be attributed to the project or some independent factor (such as demand growth).” Comments by New York, New Jersey, and other State Attorneys General, at 9.

To alleviate its concern, New Jersey suggested that the EPA impose additional recordkeeping requirements in such situations where a source’s projected actual emissions increase

⁸ “The problem is that EPA has failed to explain how, absent recordkeeping, it will be able to determine whether sources have accurately concluded that they have no ‘reasonable possibility’ of significantly increased emissions. 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.” 413 F.3d at 34. “[T]he intricacies of the actual-to-projected-actual methodology will aggravate the enforcement difficulties stemming from the absence of data. The methodology mandates that projections include fugitive emissions, malfunctions, and startup[s and shutdowns], and exclude demand growth unrelated to the change. . . Each such determination requires sources to predict uncertain future events. By understating projections for emissions associated with malfunctions, for example, or overstating the demand growth exclusion, sources could conclude that a significant emissions increase was not reasonably possible. Without paper trails, however, enforcement authorities have no means of discovering whether the exercise of such judgment was indeed ‘reasonable.’” 413 F.3d at 35.

is less than the NSR significance level but would be greater than the significance level when considering both the projected increase and the amount of emissions excluded. Comments submitted by New Jersey said the following:

EPA could at least require recordkeeping, monitoring, and reporting in instances in which predicted emissions from the project, coupled with predicted emissions 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 emissions increases to their projects.

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

Notably, New Jersey did not suggest subjecting such projected emissions to the lower threshold of the EPA's proposed percentage increase of 50 percent of significance level, but rather to the greater threshold of 100 percent of the significance level. In other words, in the final rule, the EPA established pre-change recordkeeping requirements that are more stringent than those suggested by New Jersey.

EPA Did Not "Suddenly [Do] Away with Post-Change Record Requirements," But Instead Added Additional Recordkeeping Requirements

In its 2008 petition, New Jersey alleges that: "[i]n the Final Rule . . . EPA suddenly did away with post-change record requirements in circumstances where sources attribute projected emissions to demand growth." Petition at 11. This is not true. In the proposed rule, the EPA *did not* propose *any* specific recordkeeping requirements when the projected actual emissions increase is less than the percentage increase trigger, including situations where a source's projected emissions calculations exclude emissions attributed to demand growth. However, in the final rule, directly in response to comments on the proposed rule, the EPA *did* impose pre-change recordkeeping requirement in such situations.

New Jersey claims that, by imposing additional pre-change recordkeeping requirements, the EPA created a distinction between pre-change and post-change recordkeeping requirements that did not exist in the proposed rulemaking and, therefore, that New Jersey did not have the opportunity to meaningfully comment on the issue. New Jersey's petition argues as follows:

In contrast to the Proposed Rule, however, the Final Rule allows a source that determines a "RP" exists solely by virtue of emissions associated with demand growth, to escape pre-change reporting and post-change RR requirements. EPA failed to solicit comment on the reasonableness of making a distinction between pre-change and post-change requirements or allowing sources under certain circumstances to escape RR as the Agency did not suggest that it might make such distinctions in the Proposed Rule.

Petition at 8.

The EPA disagrees that New Jersey did not have the opportunity to comment on the type of records that should be kept in order to hold sources accountable for projected emissions

calculations in situations where demand growth is a factor. The announced purpose of the proposed rulemaking was to address the Court’s concerns regarding the balancing of recordkeeping burdens against the possibility that a source may erroneously calculate projected emissions.

In keeping with that purpose, the proposed rulemaking specifically solicited comments “on how the reasonable possibility standard is generally applied and *what is to be recorded and reported.*” 72 FR at 10449 (emphasis added). In addition, the EPA specifically “solicit[ed] comment on the types of records sources keep for business purposes.” 72 FR at 40450. The public was on notice that the types of records under consideration included both post-change and pre-change records. Thus, New Jersey had the opportunity to address whether both types of records should be kept in all circumstances or whether it would be problematic to require one without the other, either as a general matter or in the context of the additional reporting requirements in certain circumstances when excluded emissions are considered as New Jersey requested.

As noted above, in its comments, New Jersey specifically registered its concern regarding the recordkeeping necessary to hold sources accountable for projected emissions calculations when an independent factor such as demand growth is involved. New Jersey and other parties had the opportunity at that time to inform the EPA of any view that such a requirement should include both pre-change and post-change records. Instead, with regard to those cases in which demand growth is a factor in projected emissions calculations, New Jersey focused on setting the percentage increase trigger threshold at 100 percent of the NSR significance level to trigger recordkeeping requirements.

Rather than adopt the higher percentage increase threshold that would trigger recordkeeping requirements as suggested by New Jersey, the final rulemaking “refine[s] the ‘percentage increase’ test by providing for [pre-change] recordkeeping to document projections of an emissions increase that would exceed the 50-percent threshold if emissions attributable to independent factors (such as demand growth) are counted.” 72 FR at 72610.

In the final rulemaking, the EPA explained that these pre-change recordkeeping requirements provide sufficient information to determine whether a source properly excluded demand growth from its projected emissions calculations and that this approach balances recordkeeping burden for some limited types of projects. In imposing pre-change recordkeeping requirements for such projects, the EPA explained that the final rule:

[F]urther addresses the Court’s concerns that a source might overstate the demand growth exclusion but not retain records to support its exclusion of emissions attributable to demand growth. The rule imposes pre-change recordkeeping requirements on projects that have a higher probability of variability and/or error in projected actual emissions. This approach balances ease of enforcement with avoidance of requirements that would be unnecessary or unduly burdensome on reviewing authorities or the regulated community.

72 FR at 72611.

B. There Is No Evident Reason for Discretionary Reconsideration

With respect to the April 24, 2009, announcement by the EPA that it intended to convene a reconsideration proceeding, I note that the Agency at that time failed to provide any explanation to rebut the earlier conclusions reached by the Administrator in January 2009. Thus, particularly when viewed in light of intervening court decisions addressing the nature of the EPA's authority under CAA section 307(d)(7)(B),⁹ the April 2009 announcement can at best be understood to communicate a statement of the EPA's intent to convene a discretionary action to reconsider the 2007 rule under inherent Agency authority. However, even acting in that capacity, the EPA did not provide any reason for convening such a proceeding, and the Agency did not proceed to publish a notice of proposed rulemaking to initiate a rulemaking process.¹⁰ Given the discretionary and preliminary nature of the April 2009 letter, the EPA necessarily retains the discretion to put an end to such a proceeding. The EPA is doing so now because it has determined that there is no need, more than 10 years after the rule has been in effect, to provide an additional opportunity for public comment on the issues New Jersey had sought to reopen.

Therefore, the Agency has determined that discretionary reconsideration of the 2007 rule and further notice and comment is neither necessary nor warranted.

* * * *

For the foregoing reasons, the EPA reaffirms its conclusion in the January 2009 Determination that the grounds for reconsideration under CAA section 307(d)(7)(B) are not met in this instance. The EPA solicited comments on the issues presented and the range of issues sought to be addressed by the proposed rulemaking. New Jersey had ample opportunity to, and did, meaningfully comment on the issue of the necessary recordkeeping requirements. The EPA responded to New Jersey's comments and suggestions by revising and ultimately imposing additional pre-project recordkeeping requirements when demand growth is a factor that are more stringent than those requirements suggested by New Jersey.

Finally, to the extent New Jersey continues to feel that additional records should be kept in order to enforce the NSR requirements, the state retains the discretion to adopt state regulations that would require sources in its jurisdiction to keep such records in circumstances not addressed in the 2007 EPA rule. The final rulemaking specified: "[w]e are establishing these requirements as minimum program elements of the PSD and nonattainment NSR programs. . . . State and local authorities may adopt or maintain NSR program elements that have the effect of making their regulations more stringent than these rules. Several state and local authorities have regulations already approved into their SIPs that are more stringent than these rules." 72 FR 72613.

⁹ See, *Clean Air Council v. Pruitt*, 862 F.3d 1, 8-9 (D.C. Cir. 2017) (recognizing a distinction between a mandatory reconsideration proceeding under section 307(d)(7)(B) of the CAA and an agency's broad discretion to reconsider a regulation at any time); *Air Alliance Houston, et al. v. EPA*, 906 F.3d 1049, 1061-63 (D.C. Cir. 2018) (contrasting general EPA rulemaking authority under the CAA with the specific provision on reconsideration of a rule in section 307(d)(7)(B)).

¹⁰ A grant of reconsideration does not constitute a final agency action, because it is not a final decision and does not determine rights or obligations. See *Clean Air Council*, 862 F.3d at 6 ("[By itself] an agency's decision to grant a petition to reconsider a regulation is not [a] reviewable final agency action.").

I appreciate the opportunity to be of service and trust the information provided is helpful.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew Wheeler", with a long horizontal flourish extending to the right.

Andrew R. Wheeler

cc: Lisa Morelli
New Jersey Assistant Attorney General