



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6

1445 ROSS AVENUE, SUITE 1200

DALLAS, TX 75202-2733

APR 29 2009

Secretary Hal Leggett, Ph.D  
Louisiana Department of Environmental Quality  
Galvez Building  
6502 North Fifth Street  
Baton Rouge, LA 70821-4301

Dear Secretary Leggett:

This letter shares with you EPA's legal position on the 1-hour ozone New Source Review (NSR) requirements in 8-hour ozone nonattainment areas such as Baton Rouge. As you know, these requirements were clarified by the U.S. Court of Appeals for the D.C. Circuit in *South Coast Air Quality Management Dist. v. EPA*,<sup>1</sup> and the Tulane Environmental Law Clinic has filed a Notice of Intent to sue both EPA and LDEQ on implementation of these requirements.

I hoped to discuss this issue with you and other interested parties at the proposed meeting this week, but I understand that meeting has been cancelled or delayed. Accordingly, I thought it might move the discussion forward by setting out EPA's position. I will also be sharing our views with other States who have responsibilities affected by the *South Coast* decision.

On April 30, 2004, EPA published a "Phase 1" rule that removed the need for States to include 1-hour ozone NSR elements as part of their federally approved SIP after EPA revoked the 1-hour national ambient air quality standard for ozone. The court vacated that provision and found that NSR was a "control" and that "withdrawing [it] from a SIP would constitute impermissible backsliding."<sup>2</sup> On October 3, 2007, EPA's Office of Air & Radiation informed Regional Administrators that the decision effectively restored NSR applicability thresholds and emission offsets in ozone nonattainment areas pursuant to classifications previously in effect for the 1-hour standard. The memorandum strongly encouraged States to comply with the court decision in a timely manner. We shared this memo with your staff after its issuance, and I am attaching another copy today.

In accordance with that memorandum, EPA expects States to implement 1-hour nonattainment NSR requirements using thresholds and emission offsets based on the classifications for areas designated nonattainment for the 1-hour ozone standard. In

---

<sup>1</sup> 472 F.3d 882 (D.C. Cir. 2006), cert. denied 128 S.Ct. 1065 (2008).

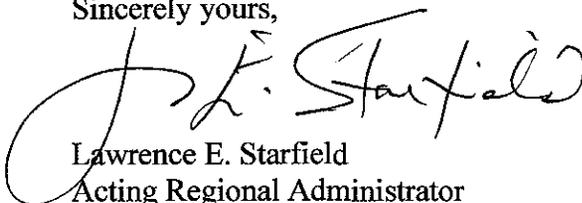
<sup>2</sup> Id. at 900.

addition, we interpret the CAA at Sections 172(c)(5) and 173 and regulations at 40 CFR 51.165(a)(2)(i) to require nonattainment NSR permits to be based on the requirements that apply at the time of permit issuance, not those that applied at the time of permit application.

We reviewed several recent public notices for NSR permit modifications that triggered nonattainment NSR requirements issued by LDEQ<sup>3</sup>, and we are pleased to see that your staff is applying the lower threshold limit and higher offset ratio discussed above, consistent with the *South Coast* decision. However, we encourage LDEQ to institute that practice throughout your permitting process and to undertake all appropriate rulemaking to ensure that LDEQ's permits can be issued consistent with the *South Coast* decision. LDEQ should also conduct an examination of facilities above the severe threshold of 25 TPY yet below the serious threshold of 50 TPY to ensure that the severe area major source threshold is applied to new sources and that those existing sources above the severe threshold have obtained the appropriate NSR/PSD and/or Title V operating permits. We will continue to review NSR permits, and will comment on any that do not implement the threshold and offset requirements set out in the *South Coast* decision.

If you would like to discuss these issues further, please let me know, or have your staff contact Mr. Jeffrey Robinson at 214-665-6435. We would also be pleased to participate in a meeting with you and other interested parties, if that can be arranged.

Sincerely yours,



Lawrence E. Starfield  
Acting Regional Administrator

Enclosure

cc: Ms. Cheryl Nolan  
Assistant Secretary  
Office of Environmental Services

---

<sup>3</sup> For example... Proposed Part 70 Air Operating Renewal/Major Modification Nonattainment New Source Review and Prevention of Significant Deterioration Permits and Emission Reduction Credits; Westlake Vinyls Company, LP – Geismar Site – VCM-E Plant; Permit Nos. 1248-V3 and PSD-LA-734; Agency Interest No. 1138 (July 18, 2008).



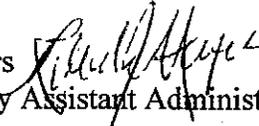
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

OCT - 3 2007

OFFICE OF  
AIR AND RADIATION

**MEMORANDUM**

**SUBJECT:** New Source Review (NSR) Aspects of the Decision of the U.S. Court of Appeals for the District of Columbia Circuit on the Phase 1 Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standards (NAAQS)

**FROM:** Robert J. Meyers   
Principal Deputy Assistant Administrator

**TO:** Regional Administrators  
Regions I-X

On June 8, 2007, the U.S. Court of Appeals for the District of Columbia Circuit responded to our petition for a rehearing of the court's December 22, 2006, decision on the Phase 1 Rule to implement the 8-hour ozone National Ambient Air Quality Standards (NAAQS). The purpose of this memorandum is to provide a brief summary of the implications of the court's opinion for the NSR program in ozone non-attainment areas.

The court reaffirmed its decision stating that the Environmental Protection Agency (EPA) improperly determined that areas designated as non-attainment under the 1-hour ozone NAAQS would no longer be subject to 1-hour New Source Review requirements. A number of areas that were designated as non-attainment for the 1-hour standard have lower classifications (and thus less-stringent NSR provisions) under the 8-hour standard. In the Phase 1 rule published in the Federal Register on April 30, 2004 (69 FR 23951), EPA made NSR applicability thresholds and emission offsets dependent upon the 8-hour attainment status of an air quality region. The effect of the court's ruling is to restore NSR applicability thresholds and emission offsets pursuant to classifications previously in effect for areas designated non-attainment for the 1-hour ozone standards.

We intend to undertake rulemaking to conform our NSR regulations to the court's decision. Planned NSR-related actions will occur in two distinct phases. First, we will issue an immediately-effective final rule under authority of the Good Cause Provision of the Administrative Procedures Act to restore the NSR applicability thresholds and emission offsets associated with designated 1-hour ozone nonattainment areas. Second,

we plan to undertake a separate notice and comment rulemaking to address longer-term applicability of 1-hour NSR requirements. In particular, we will determine the conditions and mechanisms under which the requirements for the 1-hour standard might cease to apply for NSR purposes. While we proceed with rulemaking to address the NSR-related components of the court decision, we strongly encourage you to have States comply with the court decision as quickly as possible.

If you or your staff have any questions on specific program elements, please refer to the attached list of EPA staff to contact.

Attachment

cc: Air Division Directors, Regions I-X

## **List of OAR Contacts**

<b>New Source Review</b>	--	David Painter (919) 541-5515
	--	Lynn Hutchinson (919) 541-5795
<b>Ozone Implementation</b>	--	John Silvasi (919) 541-5666
	--	Denise Gerth (919) 541-5550