

SECTION 5

OUTSTANDING REQUIREMENTS

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5.1: Major Source Permits and Nonattainment New Source Review

On April 24, 2003, EPA published a final rule finding that the Baton Rouge nonattainment area did not attain the 1-hour standard by November 15, 1999, the attainment date set for "serious" nonattainment areas as set forth in the CAA. As a result, EPA reclassified the area to the next higher classification of "severe". This classification brought with it new control measure requirements, one of which set the permitting major source threshold at 25 tons per year (tpy) with an offset ratio of 1.3 to 1 with LAER or 1.5 to 1 without LAER.

LDEQ complied with these requirements by promulgating a revision to LAC 33:III.504.L and M. This rule revision was submitted to EPA along with the applicable VOC and NO_x RACT revisions in June 2005 as a revision to the SIP. The rule revisions for Chapter 5 became applicable to administratively complete permit applications on June 23, 2003, in accordance with LAC 33:III:519.A.

On April 30, 2004, the Baton Rouge area was initially classified as marginal under the 1997 8-hour NAAQS with a new attainment date of June 15, 2005. Following implementation of the 1997 8-hour NAAQS, LDEQ relaxed this requirement to the serious classification threshold of 50 tpy. According to the Phase I rule, nonattainment new source review (NNSR) thresholds should be based on the area's designation classification under the 8-hour NAAQS. This relaxation did not go as far as the Phase I rule allowed under the marginal classification, making the rule more stringent than otherwise required.

Litigation succeeded in striking this part of the Phase I rule (U.S. Court of Appeals for the District of Columbia Circuit's decision in *South Coast Air Quality Mgmt. Dist. v. EPA*). EPA's position is set forth in a letter dated April 29, 2009, from Lawrence E. Starfield, Acting Regional Administrator of EPA Region 6, to Dr. Harold Leggett, Secretary of the Department of Environmental Quality (LDEQ). Relevant passages from this letter follow.

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 [NAAQS] 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." 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's decision in a timely manner.

In accordance with this 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 addition, we interpret the CAA 172(c)(5) and 173 and regulations set forth 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.

[W]e 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.

Because the Baton Rouge area did not meet the June 15, 2005 attainment date, the area was reclassified as "moderate," effective April 21, 2008. For moderate ozone nonattainment areas, the CAA sets the "major stationary source" threshold at 100 tons per year (TPY) of NO_x or VOC and the "major modification significant net increase threshold" at 40 TPY of NO_x or VOC for the purpose of determining whether "netting" is required and if a "net emissions increase" is considered significant. The minimum offset ratio is 1.15 to 1.

LDEQ's NNSR rules, however, are more stringent than otherwise required by the CAA based on the area's 8-hour designation. LAC 33:III.504.M sets the "major stationary source" threshold at 50 TPY of NO_x or VOC and the "major modification significant net increase threshold" at 25 TPY of NO_x or VOC. The minimum offset ratio is 1.2 to 1. Nevertheless, thresholds for severe ozone nonattainment areas are more stringent.

If severe area thresholds were applied, the NNSR "major stationary source" threshold applicable in the BRNA would be reduced to 25 TPY of NO_x or VOC, and consideration of the "net emissions increase" would be required for projects resulting in a NO_x or VOC increase of

only 5 TPY. Further, the minimum offset ratio would increase to 1.3 to 1 (when Lowest Achievable Emission Rate (LAER) is applied) or 1.5 to 1 (when internal offsets are applied in lieu of LAER). Because major stationary sources under NNSR provisions are also major sources under 40 CFR 70, additional sources (i.e., those with potential NO_x and/or VOC emissions of 25 TPY or more and not already classified as “Part 70 sources”) would be required to apply for Part 70 (Title V) permits.

LDEQ encourages permit applicants in the BRNA to carefully consider EPA’s position and guidance in the preparation of air permit applications. Failure to follow this guidance may result in EPA objecting to a proposed permit pursuant to 40 CFR 70.8(c). It should also be noted that the area reached attainment prior to the moderate attainment deadline without the institution of the severe area threshold implementation.

5.2. Section 185 Fees

Section 185 of the CAA requires each major stationary source in any severe or extreme ozone nonattainment area to pay a fee to the state as a penalty for failure to attain the ozone NAAQS. This provision is part of the original 1990 CAA Amendments (Part D, Subpart 2 - Additional Provisions for Ozone Nonattainment Areas) and can be seen as a final, harsh punishment for failure to attain. It is specifically directed towards major stationary sources and not towards nonpoint (area), mobile, or biogenic sources.

When the BRNA failed to reach the applicable attainment date and was bumped-up to the severe classification Section 185 penalty fee rule promulgation was required. The state sought legislative authority to collect these fees if the area did not attain the standard which would immediately require rule implementation. This authority was granted to the agency through Act No 441 of the 2003 Regular Session and Act No 588 of the 2008 Regular Session. Act No. 441 grants the LDEQ authorization with the applicable exceptions for extension years and population densities of less than 250,000. Two separate rulemakings have been proposed, but all rulemaking was stopped with the onset of the 8-hour Phase I implementation rule as this rule did away with the Section 185 requirements.

Lawsuits were filed arguing against many of the components of the Phase I rule. As it applies to Section 185, EPA was of the opinion that Section 185 fees were not a control measure because realized emission reductions were not a direct result of its implementation. The courts

in the South Coast case did not agree with EPA's assertion and the Section 185 fees were re-established as anti-backsliding criteria for those areas that fell under the requirement.

LDEQ staff is currently participating in an EPA workgroup that has been assembled to write implementation guidance for this rule. Once guidance is established, LDEQ will resume rulemaking in this matter; LDEQ believes it is premature to proceed on this control measure until EPA proposes rulemaking or policy on this section of the Act. It would be more beneficial to have industry invest these dollars in programs that would affect realized emission reductions that will help air quality rather than to pay monies as a penalty.

5.3. Reformulated Gasoline

On April 24, 2003, the EPA through final rule, reclassified the Baton Rouge area to severe nonattainment (68 FR 20077). In this notice, the EPA listed the various requirements Louisiana must fulfill in order comply with the CAA. Accordingly, EPA put the area on notice that reformulated gasoline (RFG) would be required in the area beginning one year from the effective date, which was June 23, 2003. The LDEQ requested an extension to this deadline; EPA denied this request. Following the request denial, the Baton Rouge Chamber of Commerce filed suit against EPA in this same matter. EPA's enforcement of this federal RFG requirement was stayed by the U.S. Court of Appeals for the Fifth Circuit on June 18, 2004. EPA agreed to reconsider the requirement for RFG in Baton Rouge and the U.S. Court of Appeals for the Fifth Circuit signed the motion to remand on August 2, 2004.

On July 10, 2009, the US Court of Appeals for the District of Columbia, in Natural Resources Defense Council versus EPA (No 06-1045), ruled that "EPA's decision to address site-specific data and concerns in an individual waiver proceeding, rather than in general rulemaking, is reasonable." Relying on this ruling, the state of Louisiana brings forth the following actions as support for the continuing use of conventional gasoline in the nonattainment area.

(1.) The Baton Rouge area has not yet instituted RFG as a control strategy and has since reached attainment of the 1-hour ozone NAAQS as well as the 1997 8-hour NAAQS. Attainment of these standards without the implementation of RFG stands as a weighted argument against having the area implement this requirement.

(2.) In September 2002, the Energy Information Administration, division of the U.S. Department of Energy, issued a report on transportation fuel issues associated with proposed energy legislation at the request of Senator Jeff Bingaman, Chairman of the Senate Committee on Energy and Natural Resources. RFG was covered in this report.

According to the report, the use of Tier 2 low-sulfur gasoline would meet or exceed the NO_x emission reductions of RFG in either the conventional or reformulated form. The report continues to say that with the use of Tier II, the only benefit from RFG would be VOC and toxic reductions. Therefore the Baton Rouge area meets the requirements of 211(k)(2)(A) by default.

(3.) Furthermore, in February 2006, EPA amended the RFG regulations to remove the oxygen content requirement and the associated compliance requirements. The effective date for this rule was May 5, 2006.

(4.) According to the CAA, the benzene content of the RFG shall not exceed 1.0 percent by volume. (Sect 211(k)(2)(C)) However, the conventional gasoline benzene requirements were lowered by energy legislation in 2007. New benzene requirements put the annual average benzene standard at 0.62 percent by volume, which is more stringent than the requirements of the CAA.

(5.) Beginning January 1, 1996, the CAA banned the sale of leaded fuel for use in on-road vehicles. Therefore, gasoline sold in the Baton Rouge area meets Sec 211(k)(2)(D).