



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

JAN 31 2014

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

MEMORANDUM

SUBJECT: Guidance on Extension of Prevention of Significant Deterioration (PSD) Permits under 40 CFR 52.21(r)(2)

FROM: Stephen D. Page, Director *Michael Kueber*
Office of Air Quality Planning and Standards

TO: Regional Air Division Directors, Regions 1-10

The purpose of this memorandum is to clarify the U.S. Environmental Protection Agency's views on what constitutes adequate justification for an extension of the 18-month timeframe for commencing construction of a source that has been granted a preconstruction permit under the prevention of significant deterioration (PSD) provisions of part C of title I of the Clean Air Act (CAA). Such extensions are authorized by 40 CFR 52.21(r)(2).^{1,2}

This guidance primarily applies to the EPA and delegated permitting authorities. In preparing the guidance, we sought input from regional offices and also informed state and local air agency staff about its main concepts.

For questions on this guidance, please contact Raj Rao at (919) 541-5344, rao.raj@epa.gov or Jessica Montañez at (919)541-3407, montanez.jessica@epa.gov.

BACKGROUND

The permit extension provision at 40 CFR 52.21(r)(2)³ establishes that "approval to construct [a new major stationary source or major modification] shall become invalid if construction is not commenced

¹ This document explains the requirements of the EPA regulations, describes the EPA policies, and recommends procedures for permitting authorities to use to ensure that permitting decisions are consistent with applicable regulations. This document is not a rule or regulation, and the guidance it contains may not apply to a particular situation based upon the individual facts and circumstances. This guidance does not change or substitute for any law, regulation or any other legally binding requirement and is not legally enforceable. The use of non-mandatory language such as "guidance," "recommend," "may," "should" and "can," is intended to describe the EPA policies and recommendations. Mandatory terminology such as "must" and "required" are intended to describe controlling requirements under the terms of the CAA and the EPA regulations, but this document does not establish legally binding requirements in and of itself.

² In 1992, the EPA finalized permit extension provisions in 40 CFR 55.6(b)(4) for sources seeking permits in the Outer Continental Shelf (OCS). The permit extension provisions in 40 CFR 55.6(b)(4) only apply to OCS sources and as such they are not addressed by the clarifications in this memorandum.

³ The CAA does not expressly include the 18-month deadline or any provision for extending that deadline. Thus, the EPA's analysis focuses on the regulatory text.

within 18 months after receipt of such approval, if construction is discontinued for a period of 18 months or more, or if construction is not completed within a reasonable time.”⁴ In addition, this provision states that “the [EPA] Administrator may extend the 18-month period upon a satisfactory showing that an extension is justified.”⁵ This provision gives the EPA discretion to extend the 18-month commencement of construction deadline for PSD permits issued under federal authority where the EPA determines that a “satisfactory showing that an extension is justified” has been made. The PSD regulations indicate that the EPA should exercise this discretion on a case-by-case basis, evaluating whether the showing offered for a particular extension is satisfactory and, accordingly, whether an extension is justified for a particular permit. The text of 40 CFR 52.21(r)(2) does not provide any specific criteria or required process that must be satisfied before the EPA can exercise its discretion to determine that a permit extension is justified.

The EPA has previously considered how it would exercise its discretion in determining whether granting a permit extension was justified under the provision in 40 CFR 52.21(r)(2). In 1988, Wayne Blackard, then Chief of the EPA’s Region 9 New Source Section, issued a policy memorandum⁶ describing how Region 9 intended to exercise its discretion at that time in determining whether granting an extension of the 18-month commencement of construction deadline was justified per 40 CFR 52.21(r)(2). However, the approach described in the 1988 Region 9 policy memorandum is not, and never has been, the exclusive means by which an applicant can show that an extension of the 18-month expiration period is justified. The 1988 Region 9 policy memorandum did not purport to interpret the terms of 40 CFR 52.21(r)(2) and did not state that the provision requires the approach outlined in the memorandum to show that an extension of the 18-month timeframe for commencing construction is justified.

Accordingly, the 1988 Region 9 policy memorandum should not be viewed as a controlling EPA interpretation of 40 CFR 52.21(r)(2), but rather should be regarded as a prior Region 9 policy statement for PSD permit extensions. This 1988 Region 9 policy memorandum asked the permittee to submit a complete re-analysis of PSD permit requirements and stated that the Region would conduct another comprehensive PSD review. This comprehensive PSD review was to include a re-analysis of the best available control technology (BACT), a re-analysis of air quality impacts and PSD increment consumption, and an analysis of any new PSD requirements. The 1988 Region 9 policy memorandum also called for a public participation process under 40 CFR 124 in order to determine that a PSD permit extension was justified under 40 CFR 52.21(r)(2).

In addition to the 1988 Region 9 policy memorandum described above, in 1985 an EPA headquarters office developed a draft policy addressing PSD permit extension requests that was distributed for review among the EPA staff.⁷ This EPA headquarters office also developed a similar (but not identical) draft policy dated June 11, 1991.⁸ However, these documents were never issued in final form. Because these

⁴ This guidance is specifically intended to clarify our current views on processing requests to extend the 18-month timeframe for commencing construction under 40 CFR 52.21(r)(2). It does not address the two other aspects of 40 CFR 52.21(r)(2), i.e., the provisions pertaining to discontinuing construction and completion of construction within a reasonable time. Requests pertaining to these provisions occur less frequently, and may present different considerations, than requests for extension of the deadline for commencing construction. The EPA will exercise its discretion to address these requests on a case-by-case basis.

⁵ For phased construction projects, the provision also states that “each phase must commence construction within 18 months of the projected and approved commencement date.”

⁶ Memorandum from Wayne Blackard, Chief, New Source Section, EPA Region 9 Policy on PSD Permit Extensions (September 8, 1988). See <http://www.epa.gov/ttn/naaqs/aqmguides/collection/nsr/extnsion.pdf>.

⁷ Memorandum from Darryl D. Tyler, Director, Control Program Development Division, Revised Draft Policy on Permit Modifications and Extensions (July 5, 1985). See <http://www.epa.gov/ttn/naaqs/aqmguides/collection/nsr/permmod.pdf>.

⁸ See <http://www.regulations.gov/#/documentDetail;D=EPA-R09-OAR-2013-0190-0010>.

documents were drafts that were never finalized, they did not establish a controlling interpretation of the text in 40 CFR 52.21(r)(2). These draft EPA headquarters policies called for public notice and comment for PSD permit extensions and a substantive re-analysis of BACT and in some instances other PSD requirements. The draft policies discussed the role of the permit expiration requirement in ensuring that PSD analyses, in particular BACT, be current for PSD-permitted projects. These draft policies were based on the idea of allowing extensions readily but requiring substantive review to ensure that the BACT limits and other conditions in the original permit remained current. The EPA developed these draft approaches as alternatives to other approaches, such as requiring a showing of the inability of the source to construct due to various reasons including but not limited to economic or legal constraints. In the 1985 and 1991 draft policy memoranda, the EPA explained that the latter approaches presented varying degrees of subjectivity and certain difficulties in the factual analysis, which these draft policies sought to avoid.

THE EPA'S POLICY ON PSD PERMIT EXTENSIONS

After further consideration of the practical impact of these earlier policies, the EPA has determined that it is more appropriate and consistent with the terms of 40 CFR 52.21(r)(2) to evaluate on a case-by-case basis whether an applicant has shown that an extension of the deadline for commencing construction of a PSD permit is justified. This analysis would include a case-by-case consideration of the appropriate factors and process to be employed in determining whether to grant such request. As 40 CFR 52.21(r)(2) does not specify that any particular criteria must be satisfied or process followed, this case-by-case approach is consistent with the provision and the discretion that it provides to the EPA.

Requiring substantive review of a prior PSD permitting decision and conducting an additional public participation process in the context of PSD extension requests has resulted in little or no practical distinction between the extension of an existing PSD permit and an applicant having to apply for a new permit. The 1985 and 1991 draft policies did not consider how this approach could obscure the distinction between extension of an existing permit and requiring the applicant to apply for a new permit. The intensive substantive review and associated public participation process called for in the 1988 Region 9 policy memorandum further illustrates this tension between a permit extension and a new permit. The EPA believes it is important to give meaning to the extension provision in the PSD regulations.

The 1985 and 1991 draft policy memoranda did not recognize other potential downsides of the approach they described, such as the potential for substantial further delay or the significant resource burden that may result from substantive re-analysis of the permit in the context of even a relatively brief extension request. The EPA's recent experience is that improvements in pollution control technology for criteria pollutants have not been occurring as rapidly as was anticipated at the time of the earlier draft EPA policies on permit extensions. Thus, the time and resource burdens involved in reviewing an earlier permitting decision after the initial 18 months do not produce as much value in this context. The earlier draft documents also did not demonstrate that re-evaluation of permit conditions was necessary when other factors may otherwise provide a reasonable justification for an extension, such as litigation over the PSD permit or a lack of other approvals that precludes a source from commencing construction. In recent years, the EPA has noticed an increase in the number of PSD permits subject to judicial review and the time required to complete this process, particularly in the U.S. Courts of Appeals. The earlier draft policies expressed concern with subjectivity and difficulties in verifying facts showing the inability of the source to construct due to various reasons such as economic or legal constraints. However, the EPA has not encountered such difficulties in its more recent reviews of permit extension requests or

received information indicating that other PSD permitting authorities are frequently experiencing such difficulties.

With regard to soliciting public comment on an extension request, the earlier Region 9 and draft headquarters policies deemed this process advisable in the context of other elements of the policies that called for substantive review of PSD requirements such as BACT before granting the extension. When this kind of substantive review is not conducted, the EPA does not see the same basis for providing an opportunity for public comment on an extension of the deadline for commencing construction. A later section of this memorandum discusses the issue of the appropriate process for granting a permit extension in more detail.

As a policy matter, the EPA generally intends to exercise its discretion, in accordance with 40 CFR 52.21(r)(2), to make a case-by-case evaluation of whether a source's showing is satisfactory and, therefore, whether an extension is justified for a particular permit.⁹ The text of 40 CFR 52.21(r)(2) does not provide any specific criteria or required process that must be satisfied before the EPA can exercise its discretion to determine that a permit extension is justified. Therefore, the elements outlined below represent various aspects of permit extension situations that the EPA Regions, and state, tribal or local programs that issue permits on behalf of the EPA in accordance with 40 CFR 52.21(u) ("delegated permitting authorities"), should generally consider in determining whether a particular permit extension is justified. However, these aspects do not represent the only factors that may be relevant when considering whether a particular permit extension is justified. Consistent with 40 CFR 52.21(r)(2), the EPA may in a particular case exercise its discretion to determine that another type of showing is sufficient or necessary to justify a permit extension. If a delegated permitting authority is considering issuing a permit extension, the delegated permitting authority should coordinate with the EPA to ensure that the approach being considered is consistent with 40 CFR 52.21(r)(2).

WHEN AN EXTENSION REQUEST SHOULD BE MADE

While 40 CFR 52.21(r)(2) does not specify a deadline for requesting a PSD permit extension, sources are strongly encouraged to request a permit extension in advance of the end of the 18-month period for commencing construction. The EPA and delegated permitting authorities should strive to make PSD permit extension decisions as expeditiously as possible.

LENGTH OF EXTENSION

The EPA's regulations do not state the time period for a permit extension granted under 40 CFR 52.21(r)(2). However, we believe that PSD permit extensions generally should be available for an additional 18-month period following the initial 18-month timeframe for commencing construction set forth in 40 CFR 52.21(r)(2), and should be based on adequate justification for the length of the permit extension. Permit extensions for shorter or longer time periods may be granted depending on the particular demonstration that an extension of the commencement of construction deadline is justified.

⁹ We note that the EPA Region 9 has previously applied the reasoning reflected in this guidance in making a case-specific determination, in the context of a particular request to extend the deadline for commencement of construction in a PSD permit. Information concerning this determination can be found at 78 FR 40968 (2013). *See* <http://www.gpo.gov/fdsys/pkg/FR-2013-07-09/pdf/2013-16334.pdf>

PSD PROGRAMS UNDER APPROVED STATE IMPLEMENTATION PLANS (SIPs)

We note that while the 18-month timeframe for commencing construction appears in the EPA's rules in 40 CFR 52.21, neither the CAA nor the EPA's rules in 40 CFR 51.166, which govern SIP-approved PSD programs, contain this 18-month deadline. Accordingly, SIP-approved programs are not required to include the 18-month construction deadline, and nothing in this guidance should be read to indicate that SIP-approved PSD programs need to be revised consistent with this guidance. Nonetheless, we encourage permitting authorities with SIP-approved PSD programs that incorporate the 40 CFR 52.21(r)(2) provision by reference or that implement a provision similar to 40 CFR 52.21(r)(2) to apply this policy or a policy that is similar to that included in this memorandum. Owners or operators of facilities seeking extensions of PSD permits issued by state, tribal or local authorities with SIP-approved programs should contact their PSD permitting authority for information on the applicable requirements.

EXTENSION OF MINOR SOURCE PERMITS

This permit extension guidance does not address minor New Source Review (NSR) permit extension requests (other than requests for certain sources in Indian country¹⁰) because the provision in 40 CFR 52.21(r)(2) does not apply to minor NSR sources. Owners or operators of facilities with questions on minor source permit extensions should contact their minor NSR permitting authority.

FIRST PERMIT EXTENSION REQUEST

In accordance with 40 CFR 52.21(r)(2), a permittee's first PSD permit extension request should include a detailed justification of why the source cannot commence construction within the initial 18-month deadline. For example, relevant factors for this justification could include ongoing litigation over the PSD permit, natural disasters that directly affect the facility, significant or unusual economic impediments (including inability to secure financial resources necessary to commence construction) and/or delays in obtaining other required permits.

Furthermore, the EPA believes that in order to give meaning to the extension provision in 40 CFR 52.21(r)(2), review or redo of substantive permit analyses such as BACT, air quality impacts analysis (AQIA) or PSD increment consumption analyses should generally not be necessary for a first permit extension request.

SECOND PERMIT EXTENSION REQUEST

The EPA believes that in most cases a request for a second extension of the commencement of construction deadline should include a substantive re-analysis and update of PSD requirements. Only in rare circumstances would a detailed justification of why a source cannot commence construction by the current deadline (as is recommended above for the purpose of requesting the first extension) be sufficient to support a second extension. Generally, the benefits of conducting an updated substantive review of the PSD requirements after 36 months from the initial issuance of the PSD permit would

¹⁰ Since PSD sources in Indian country are currently permitted under 40 CFR 52.21 and the permit extension provisions for minor sources in Indian country (40 CFR 49.155(b)) are identical to those in 40 CFR 52.21(r)(2), this guidance also extends to the EPA's consideration of sources seeking extensions of the deadline for commencing construction in PSD and minor NSR permits in Indian country until such time as a tribe develops and the EPA approves a tribe's PSD or minor NSR Tribal Implementation Plan (TIP).

outweigh the considerations discussed above that favor an initial extension without such analysis. While the EPA's experience is that pollution control technology for criteria pollutants has not been advancing at the same rate that it once was, the EPA believes that it is more likely that technology and air quality considerations will become outdated when construction does not begin until 36 months or longer after the EPA has taken final action to issue a PSD permit. Therefore, when a second extension of the deadline for commencing construction is requested, the EPA will evaluate on a case-by-case basis whether a second permit extension is justified. In some cases, the EPA may ask the permittee to apply for a new PSD permit rather than conduct its review through a permit extension proceeding.

PSD PERMIT EXTENSIONS INVOLVING GRANDFATHERED REQUIREMENTS OR REQUIREMENTS THAT TAKE EFFECT DURING THE INITIAL 18-MONTH PERMIT TERM

In certain circumstances, the EPA has not imposed PSD requirements resulting from a newly regulated pollutant or a new or revised national ambient air quality standard (NAAQS) or PSD increment on permit applicants that have already submitted complete PSD permit applications or on projects for which draft PSD permits have already been issued at the time when a new requirement would otherwise go into effect. These sources and modifications have been "grandfathered" from having to demonstrate compliance with the new or revised PSD regulatory requirements. Thus, the EPA has used grandfathering as a means of transition to new PSD requirements.

Current PSD regulations do not speak specifically to whether an extension of the initial 18-month commencement of construction deadline may be justified where a project has been grandfathered in the initial PSD permit decision from PSD requirements that would otherwise have applied. Therefore, the EPA believes it is appropriate and consistent with the terms of 40 CFR 52.21(r)(2) and the discretion provided by those terms to evaluate on a case-by-case basis whether and under what circumstances a PSD permit extension is justified in the context of such a source. Therefore, a source that was grandfathered from PSD requirements that seeks a permit extension is encouraged to address in its permit extension request and justification the significance of the grandfathering and whether the EPA's basis for grandfathering the permit still applies to the source.

Similarly, the PSD regulations do not specifically address situations where a new pollutant is regulated or a NAAQS is promulgated or revised after a permit is issued but before the expiration of the 18-month deadline for commencing construction. In its 1988 policy memorandum, Region 9 called for a PSD permit extension application to address the new PSD permitting requirements that became applicable in this 18-month period. However, considering the extension language of 40 CFR 52.21(r)(2) and the value of giving an extension meaning independent of a new permit application, the EPA believes that a permitting authority has the discretion to evaluate on a case-by-case basis whether and under what circumstances it would be justified to issue a PSD permit extension without requiring the source to meet a new requirement that took effect during the term of the initial permit.¹¹ Thus, applications for permit extensions should address this issue, if applicable.

¹¹ The EPA has explained elsewhere that a PSD permit issued before a new requirement takes effect does not need to be reopened. 75 FR 31514, 31593 (June 3, 2010).

PSD PERMIT EXTENSIONS FOR AREAS THAT HAVE BEEN REDESIGNATED FROM ATTAINMENT TO NONATTAINMENT

Part D of the CAA contains the general and pollutant-specific requirements applicable to all areas that are designated nonattainment of the NAAQS. However, neither the CAA nor the regulatory text at 40 CFR 52.21(r)(2) provides any specific criteria or required process for PSD permit extensions in areas that have been redesignated from attainment to nonattainment for a particular pollutant following PSD permit issuance.

On March 11, 1991, John S. Seitz, then Director of the Office of Air Quality Planning and Standards, issued a policy memorandum concerning certain transitional issues related to changes to the NSR requirements of the PSD and nonattainment area programs resulting from the CAA Amendments of 1990. Among other things, this memorandum stated, without detailed discussion, that it would be inappropriate to extend the PSD permit expiration deadline for permits issued to sources in areas that have been designated as nonattainment following permit issuance.

As with the other older policy memoranda discussed in this document, this 1991 Seitz memorandum does not purport to interpret the terms of 40 CFR 52.21(r)(2) and does not state that the regulation requires the approach outlined therein in all circumstances to determine whether an extension of a PSD permit's commencement of construction deadline is justified in areas that have been redesignated as nonattainment following PSD permit issuance. In addition, the memorandum does not discuss how PSD continues to apply to pollutants for which the area remains designated attainment while nonattainment NSR becomes applicable only to the pollutants for which the area is designated as nonattainment. Considering this distinction, the EPA believes that it is appropriate and consistent with the terms in 40 CFR 52.21(r)(2) to evaluate on a case-by-case basis whether an extension of the PSD permit is justified in situations where one or more pollutants have been redesignated nonattainment following PSD permit issuance and the PSD permit contains other pollutants for which the area remains in attainment. However, for the pollutant(s) for which the area changed to nonattainment, these pollutant(s) should be evaluated by the appropriate permitting authority under the applicable nonattainment NSR permit requirements prior to commencing construction if construction will be delayed beyond the 18-month deadline.¹² We do not believe it is consistent with the purposes of the nonattainment NSR program to use an extension of the deadline for commencing construction in a PSD permit for the pollutants that remain in attainment as a shield against the requirements to obtain a major nonattainment NSR permit, if applicable, for the pollutant(s) for which the area has become nonattainment.

PUBLIC NOTICE AND COMMENT ON PSD PERMIT EXTENSION ACTIONS

Public notice and comment is not necessary for permit extension actions that would simply extend the deadline for commencing construction without reconsideration or amendment of the substantive conditions of the permit.

The EPA has considered the question of whether PSD permit extension actions pursuant to 40 CFR 52.21(r)(2) are subject to the procedures in the EPA's permitting regulations at 40 CFR Part 124. The provisions in 40 CFR Part 124 do not reference extensions of PSD permits. The EPA notes that section

¹² 40 CFR 51.165 and 40 CFR 49.166 include the regulatory text for state/local and tribal nonattainment permitting programs, respectively. 40 CFR Appendix S contains the nonattainment NSR requirements for areas newly designated nonattainment for which a revised SIP or TIP is not in place yet.

124.15 does state that a “final permit decision” includes a decision to “modify” a permit, but the EPA has not yet promulgated more specific provisions regarding modifications of PSD permits. *See* 40 CFR 124.5(g). Thus, the precise scope and meaning of the term “modify” as applied to a PSD permit is not clear from the Part 124 regulations.

In the absence of controlling regulations, the EPA views the modification of a PSD permit to include material changes to substantive terms and conditions that govern the construction and operation of the source. We do not interpret the term “modify” in this context to include the decision to issue an administrative amendment to extend the deadline for commencing construction under the PSD permit without reconsideration or amendment of the substantive conditions of the permit. Therefore, the EPA has determined that permit extension actions that would simply extend the deadline for commencing construction without reconsideration or amendment of the substantive conditions of the permit are not subject to the procedures in Part 124. We also believe that a public notice-and-comment period for a permit extension request would generally be unnecessary where no re-analysis of substantive PSD permit conditions and terms (such as BACT, air quality impact analysis, or PSD increment analysis) would be conducted, as would likely be the case for a first permit extension request. However, the EPA (or the delegated permitting authority) retains the discretion to provide for public notice and comment on a case-by-case basis if it determines that doing so would be appropriate.

As stated above, the EPA views the modification of a PSD permit, as that term is used in the Part 124 regulations, to include material changes to substantive terms and conditions that govern the construction and operation of the source. Therefore, when these types of changes to a permit are being analyzed, it would be appropriate to follow the public notice and comment procedures in 40 CFR Part 124.

Once an EPA regional office or delegated permitting authority has issued a permit extension pursuant to 40 CFR 52.21, we encourage the permitting authority to notify the public of the final permit extension decision, particularly when the public expressed significant interest in the underlying PSD permit proceeding that preceded the extension request. The means of notification could include but are not limited to: (1) posting the decision on the permitting authority’s website; (2) sending notification letters about the decision to the permit extension applicant and interested parties (e.g., parties who commented on the underlying PSD permit, or litigants if the underlying PSD permit remains under litigation); or (3) publishing a notice of the final decision on the permit extension request in the *Federal Register*.¹³

¹³ Footnote 9 above cites an example of a *Federal Register* notice for a permit extension. In the case of an extension issued by a delegated permitting authority, the corresponding EPA regional office would initiate a *Federal Register* notice.