



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

MAY 22 2008

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

MEMORANDUM

SUBJECT: PM_{2.5} Clean Data Policy Clarification

FROM: William T. Harnett *William Harnett*
Director, Air Quality Policy Division (C504-01)

TO: Regional Air Division Directors, Regions I-X

It has come to the U. S. Environmental Protection Agency's (EPA's) attention that certain language in the preamble of EPA's particulate matter (PM_{2.5}) implementation rule, 72 FR 20586, 20603 (April 25, 2007), contradicts the regulatory text in section 51.1004(c), which relates to EPA's Clean Data Policy. EPA is issuing this memorandum to eliminate any confusion that could result from this erroneous statement.

Section 51.1004 (c) provides that "Upon a determination by EPA that an area designated nonattainment for the PM_{2.5} national ambient air quality standards (NAAQS) has attained the standard, the requirements for such area to submit attainment demonstrations and associated reasonably available control measures (RACM), reasonable further progress plans (RFP), contingency measures, and other planning state implementation plans (SIPs) related to attainment of the PM_{2.5} NAAQS shall be suspended...."

Section 51.1010 provides in part:

"For each PM_{2.5} nonattainment area, the state shall submit with the attainment demonstration a SIP revision demonstrating that it has adopted all RACM (including reasonably available control technology (RACT) for stationary sources) necessary to demonstrate attainment as expeditiously as practicable and to meet any RFP requirements."

Thus the regulatory text defines RACT as included in RACM, and provides that it is only required insofar as it is necessary to advance attainment. See also section 51.1010(b). As a result, when an area is attaining the standard, the suspension of the

RACM requirement pursuant to 51.1004 (c) necessarily includes the suspension of the RACT requirement.

However, the preamble to the PM_{2.5} implementation rule, including a response to comments, contains language that is at odds with the explicit provisions of the regulatory text. The preamble states that “The EPA wishes to clarify that the Clean Data Policy does not provide for suspension of the requirements for NSR nor for RACT.” 72 FR 20603. (April 25, 2007.)^{*} Thus, the preamble erroneously states that SIP submissions to meet RACT obligations are not suspended, while the regulatory text provides that RACT, as a subset of RACM, is suspended when an area is attaining the standard.[†] The purpose of this section of the preamble was to correct a misstatement in the preamble to the proposed rule concerning the status of NSR requirements in areas subject to the Agency’s Clean Data Policy and to respond to comments on that policy. When this preamble text was drafted, EPA was considering several formulations of RACT, some of which would have resulted in a freestanding RACT requirement beyond RACM for certain areas. 72 FR 20610-20612. Those options were not selected in the final rulemaking, which adopted the formulation found in section 51.1010. EPA thus adopted a combined approach to RACT and RACM. Accordingly, pursuant to section 51.1004(c), areas with clean data are not required to make a RACT submission. However, the contrary draft preamble language inadvertently was not revised to conform to the regulatory option that had been selected. Thus, the preamble language is irreconcilable with and was never intended to interpret the regulatory text that was chosen for the final rule.

This memorandum does not change the regulation published in the Federal Register on April 25, 2007. Because the promulgated regulation is clear, we believe it is clear that the preamble statement is an error. National Wildlife Federation v. EPA, 286 F.3d 554 (D.C. Cir. 2002) (a regulation is controlling over the language of a preamble). Cf. Association of American R.R.s. v. Costle, 562 F.2d 1310, 1316 (D.C. Cir. 1977) (citing Yazoo Railroad Co. v. Thomas, 132 U.S. 174, 188 (1889)) (“Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble.”) However, because the preamble statement could cause confusion, we are issuing this memorandum to explain the misstatement in the preamble and that the regulatory text is controlling.

Please communicate this clarification to your State and local air pollution control agencies with PM_{2.5} nonattainment areas that may use the Clean Data Policy. If your staff has any questions regarding this clarification, please have them contact Butch Stackhouse at (919) 541-5208 or you may contact me at (919) 541-4979.

cc: Stephen Page, OAQPS
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* On the same page, in a response to a comment, EPA states: "The Clean Data Policy does not waive requirements for NSR nor for RACT."

† The statement is accurate as to NSR requirements.