

**ENVIRONMENTAL PROTECTION
AGENCY**

40 CFR Parts 51 and 52

[AD-FRL-7780-1; E-Docket ID No. OAR-2002-0068; Legacy Docket No. A-2002-04]

RIN 2060-AM28

Prevention of Significant Deterioration (PSD) and Non-attainment New Source Review (NSR): Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion; Stay

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: A December 24, 2003 order of the U.S. Court of Appeals for the District of Columbia Circuit stayed the effectiveness of the Equipment Replacement Provision (ERP) of the Clean Air Act (CAA) New Source Review (NSR) Routine Maintenance, Repair, and Replacement (RMRR) exclusion. Today's action reflects this stay in the Code of Federal Regulations. This document also sets out EPA's interpretation of the effect of the stay on the Prevention of Significant Deterioration (PSD) federal implementation plans in various state implementation plans. EPA is issuing this final rule without notice and opportunity for public comment because there is good cause to do so within the meaning of the Administrative Procedure Act.

DATES: Effective July 1, 2004.

ADDRESSES: EPA has established a docket for this action under E-Docket ID No. OAR-2002-0068 (legacy docket number no. A-2002-04). This number will also appear at the top of your FR document along with the FRL assigned to your particular FR document]. All documents in the docket are listed in the EDOCKET index at <http://www.epa.gov/edocket>. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The Public Reading Room is open from 8:30

a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

FOR FURTHER INFORMATION CONTACT: Mr. David Svendsgaard, Information Transfer and Program Integration Division (C339-03), U.S. EPA Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina 27711, telephone number (919) 541-2380, facsimile number (919) 541-5509, electronic mail address: svendsgaard.dave@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Today's Final Rule

A. What RMRR Exclusion Is in Effect After the Court's Order?

On October 27, 2003, EPA published amendments to the regulations governing the PSD and NSR programs mandated under parts C and D of title I of the Clean Air Act (CAA). These amendments added an "Equipment Replacement Provision" (ERP) to the Routine Maintenance, Repair, and Replacement (RMRR) exclusion from these programs.¹ This provision was scheduled to take effect on December 26, 2003.

Shortly after publication of the ERP amendments, various parties filed petitions for review of EPA's action in the U.S. Court of Appeals for the District of Columbia Circuit (*State of New York v. EPA*, No. 03-1380 and consolidated cases). Upon the motions of various petitioners, the Court ordered the new provisions stayed pending the completion of its review. The Court issued its order on December 24, 2003. Therefore, the new provisions never became effective.

Today's final rule adds a note to the RMRR provisions due to the fact that the new provisions have been stayed. The effect of the Court's stay order keeps the RMRR provisions in effect as they existed prior to the ERP amendments. We have inserted a note into each affected paragraph of the CFR explaining which portions of the rules are affected by the Court's order. Upon the Court completing its review or otherwise terminating the stay order, EPA will publish an additional notice in the **Federal Register** reflecting the termination of the stay and the status of the ERP.

¹ For an explanation of the development of the new provisions and the reasons for them, see 68 FR 61248 (October 27, 2003), and the docket referenced above.

B. What Amendments Are Necessary for the PSD FIPs Due to the Stay?

On December 24, 2003, EPA promulgated a FIP correction rule, which amended the way in which EPA incorporates § 52.21 into each FIP. The new format incorporates revisions to § 52.21 without further revision to each FIP in each subpart (*see* 68 FR 74483). EPA's new format for incorporating § 52.21 into each FIP states that all of § 52.21 is incorporated except paragraph (a)(1).

Parties to the litigation on the ERP, as well as states not involved in the litigation, asked whether the FIP correction rule would make the ERP effective in states with PSD FIPs, notwithstanding the stay. As previously communicated to all parties on January 8, 2004, it is EPA's opinion that, because the FIPs incorporate sections of 52.21 that have been stayed by the court, these "ERP" sections are not effective in the areas covered by the FIPs (*e.g.*, it does not matter that the FIPs now incorporate § 52.21(cc) because that section is stayed). This result occurs automatically due to the Court's staying of the underlying rule changes at 40 CFR 52.21, and that further action by the Court or EPA is not necessary.

C. What Is the Basis for Finding Good Cause To Make These Amendments Immediately Effective?

The EPA has determined that notice and comment on this amendment to the NSR regulations is not required. Under the Administrative Procedure Act (5 U.S.C. 553(b)(3)(B)), a rule is exempt from notice and public comments requirements "when the agency for a good cause finds (and incorporates the finding and a brief statements of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

The terms of the court order prevented the ERP from coming into effect. In the absence of the ERP, the prior regulatory text remains in effect. Accordingly, this rule is merely a housekeeping measure that reflects the court order. The action does not have any substantive effect.

Public comment could not change the result dictated by the court order, and is therefore unnecessary and impracticable. In addition, delay in issuing this rule amending the existing regulations could result in confusion on the part of state and local air pollution control agencies as well as the public regarding which text is in effect. Notice and comment would therefore be

contrary to the public interest. Accordingly, EPA has concluded that notice and comment on this rule would be impracticable, unnecessary, and contrary to the public interest, within the meaning of 5 U.S.C. 553(b)(3)(B).

The EPA also believes that there is good cause to make today's rule effective immediately, rather than effective within 30 days, within the meaning of 5 U.S.C. 553(d)(3). For the reasons stated above, EPA has determined that it is unnecessary, impracticable and contrary to the public interest to delay this rule. In addition, EPA has balanced the necessity for immediate implementation against principles of fundamental fairness, which require that all affected persons be afforded a reasonable amount of time to prepare for the effective date of this rule. In so doing, EPA has concluded that, because the court order came into effect upon issuance, the benefit to the public of adding to the CFR text a note clarifying the effect of the Court's action immediately outweighs the need, if any, to give affected parties time to adjust their behavior accordingly. Indeed, EPA has determined that, on balance, making this rule effective immediately is in the public interest and affected parties will better be served by the avoidance of confusion.

II. Statutory and Executive Order Reviews

This final rule merely conforms the CFR to the terms of the *State of New York v. EPA* Court's order of December 24, 2003. In so doing, this rule has no substantive effect. Therefore, under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and is therefore not subject to OMB review. Because this action is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute, it is not subject to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) or sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4). In addition, this action does not significantly or uniquely affect small governments. This rule does not have tribal implications, as specified in Executive Order 13175 (63 FR 67249, November 9, 2000). This action will not have federalism implications, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant. This action is not subject to Executive Order 13211, "Actions Concerning Regulations That

Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866. This action does not involve technical standards; thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. The Office of Management and Budget (OMB) approved the information collection requirements contained for the NSR regulations that are in effect as a result of the court order under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060-0003, EPA ICR number 1230.10.

III. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the Agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Parts 51 and 52

Environmental protection, Administrative practices and procedures, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: June 23, 2004.

Michael O. Leavitt,
Administrator.

■ 40 CFR parts 51 and 52 are amended as follows:

PART 51—[AMENDED]

■ 1. The authority citation for part 51 continues to read as follows:

Authority: 42 U.S.C. 7401-7671q.

■ 2. Section 51.165 is amended by adding notes to paragraphs (a)(1)(v)(C)(1), (a)(1)(xliii), (a)(1)(xliv), (a)(1)(xlv), (a)(1)(xlvi), and (h) to read as follows:

§ 51.165 Permit requirements.

- (a) * * *
- (1) * * *
- (v) * * *

(C) * * *

(1) * * *

Note to paragraph (a)(1)(v)(C)(1): On December 24, 2003, the second sentence of this paragraph (a)(1)(v)(C)(1) is stayed indefinitely by court order. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the **Federal Register** advising the public of the termination of the stay.

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(xliii) * * *

Note to paragraph (a)(1)(xliii): By a court order on December 24, 2003, this paragraph (a)(1)(xliii) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the **Federal Register** advising the public of the termination of the stay.

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(xliv) * * *

Note to paragraph (a)(1)(xliv): By a court order on December 24, 2003, this paragraph (a)(1)(xliv) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the **Federal Register** advising the public of the termination of the stay.

(xlv) * * *

Note to paragraph (a)(1)(xlv): By a court order on December 24, 2003, this paragraph (a)(1)(xlv) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the **Federal Register** advising the public of the termination of the stay.

(xlvi) * * *

Note to paragraph (a)(1)(xlvi): By a court order on December 24, 2003, this paragraph (a)(1)(xlvi) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the **Federal Register** advising the public of the termination of the stay.

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(h) * * *

Note to paragraph (h): By a court order on December 24, 2003, this paragraph (h) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the **Federal Register** advising the public of the termination of the stay.

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■ 3. Section 51.166 is amended by adding notes to paragraphs (b)(2)(iii)(a), (b)(53), (b)(54), (b)(55), (b)(56) and (y) to read as follows:

§ 51.166 Prevention of significant deterioration of air quality.

* * * * *

- (b) * * *
- (2) * * *
- (iii) * * *
- (a) * * *

Note to paragraph (b)(2)(iii)(a): On December 24, 2003, the second sentence of this paragraph (b)(2)(iii)(a) is stayed indefinitely by court order. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the **Federal Register** advising the public of the termination of the stay.

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(53) * * *

Note to paragraph (b)(53): By a court order on December 24, 2003, this paragraph (b)(53) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the **Federal Register** advising the public of the termination of the stay.

(54) * * *

Note to paragraph (b)(54): By a court order on December 24, 2003, this paragraph (b)(54) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the **Federal Register** advising the public of the termination of the stay.

(55) * * *

Note to paragraph (b)(55): By a court order on December 24, 2003, this paragraph (b)(55) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the **Federal Register** advising the public of the termination of the stay.

(56) * * *

Note to paragraph (b)(56): By a court order on December 24, 2003, this paragraph (b)(56)

is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the **Federal Register** advising the public of the termination of the stay.

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(y) * * *

Note to paragraph (y): By a court order on December 24, 2003, this paragraph (y) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the **Federal Register** advising the public of the termination of the stay.

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

■ 2. Section 52.21 is amended by adding notes to paragraphs (b)(2)(iii)(a), (b)(55), (b)(56), (b)(57), (b)(58) and (cc) to read as follows:

§ 52.21 Prevention of significant deterioration of air quality.

* * * * *

- (b) * * *
- (2) * * *
- (iii) * * *
- (a) * * *

Note to paragraph (b)(2)(iii)(a): By court order on December 24, 2003, the second sentence of this paragraph (b)(2)(iii)(a) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the **Federal Register** advising the public of the termination of the stay.

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(55) * * *

Note to paragraph (b)(55): By a court order on December 24, 2003, this paragraph (b)(55)

is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the **Federal Register** advising the public of the termination of the stay.

(56) * * *

Note to paragraph (b)(56): By a court order on December 24, 2003, this paragraph (b)(56) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the **Federal Register** advising the public of the termination of the stay.

(57) * * *

Note to paragraph (b)(57): By a court order on December 24, 2003, this paragraph (b)(57) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the **Federal Register** advising the public of the termination of the stay.

(58) * * *

Note to paragraph (b)(58): By a court order on December 24, 2003, this paragraph (b)(58) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the **Federal Register** advising the public of the termination of the stay.

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(cc) * * *

Note to paragraph (cc): By a court order on December 24, 2003, this paragraph (cc) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the **Federal Register** advising the public of the termination of the stay.

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