



ASSISTANT ADMINISTRATOR FOR AIR AND RADIATION

WASHINGTON, D.C. 20460

July 1, 2026

MEMORANDUM

SUBJECT: Guidance on Clean Air Act Nonattainment New Source Review Emissions Offsets

FROM: Aaron Szabo, Assistant Administrator
Office of Air and Radiation

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TO: Regional Administrators, Regions 1-10

I. Introduction

This memorandum provides guidance on the New Source Review (NSR) air permitting requirements for emissions offsets in nonattainment areas under Clean Air Act (CAA) section 173.¹ Specifically, this memorandum addresses when and how offsetting emissions reductions, or “emission reduction credits” (ERCs), must be shown to be federally enforceable to ensure compliance with the CAA and clarifies that the CAA allows for a nonattainment NSR (NNSR) permit to be issued before offsetting emission reductions have been specifically secured, so long as certain conditions are met.

This memorandum is not a final Agency action, is not legally binding or enforceable, and does not change or substitute for any law, regulation, or any other legally binding requirement. The guidance contained herein is not intended, and cannot be relied upon, to create any rights enforceable by any party in litigation with the United States. The U.S. Environmental Protection Agency (EPA) acknowledges that case-by-case permitting decisions are made by State, local, and Tribal permitting authorities for the vast majority of permits in the United States. This guidance does not direct permitting authorities, including the EPA in the limited circumstances where the Agency serves as the permitting authority, to reach particular outcomes. Permitting decisions are case-specific and this guidance may or may not apply to a particular situation based upon the relevant facts and circumstances.

II. Background

The NSR permit program requires owners and operators of new or modified major stationary sources of air pollution to obtain preconstruction permits consistent with CAA requirements.² For areas that fail to attain the National Ambient Air Quality Standards (NAAQS) (*i.e.*, nonattainment areas), Part D of Title I of the CAA establishes air pollution control requirements, including the requirement to obtain an

¹ 42 U.S.C. § 7503(a), (c).

² 42 U.S.C. §§ 7502(c)(5), 7503.

NNSR permit meeting the requirements of CAA section 173 before constructing a new or modified major stationary source in a nonattainment area. Consistent with CAA section 173(a), an NNSR permit may be issued only if, among other requirements, the permitting authority determines that: (1) the owner or operator of the source will obtain sufficient offsetting emission reductions before operating, (2) the proposed source is required to comply with the lowest achievable emission rate (LAER), (3) the owner or operator of the source has demonstrated that all major stationary sources owned or operated by such person in the State are subject to emission limitations and are in compliance, or on a schedule for compliance, with all applicable CAA emission limitations and standards, and (4) an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification.³ This memorandum focuses on the requirement to obtain sufficient offsetting emission reductions.

With regard to offsetting emission reductions, CAA section 173(a)(1) states that an NNSR permit may be issued if, among other things:

[B]y the time the source is to commence operation, sufficient offsetting emissions reductions have been obtained, such that total allowable emissions from [new and existing sources in the area] and from the proposed source will be sufficiently less than total emissions from existing sources . . . prior to the application for such permit to construct or modify so as to represent . . . reasonable further progress.⁴

CAA section 173(c) similarly requires that offsetting emission reductions:

[S]hall be, by the time a new or modified source commences operation, in effect and enforceable and shall assure that the total tonnage of increased emissions of the air pollutant from the new or modified source shall be offset by an equal or greater reduction, as applicable, in the actual emissions of such air pollutant from the same or other sources in the area.⁵

Further, ERCs must be obtained “from the same source or other sources in the same nonattainment area,” or, under limited circumstances, from another nonattainment area, and the CAA prohibits use of “[e]mission reductions otherwise required by [the CAA]” for offset purposes.⁶

These provisions are designed to ensure that an offset transaction results in the improvement of air quality in the relevant nonattainment area, such that construction (or modification) of the source is consistent with reasonable further progress toward attainment.⁷ Neither the CAA nor the EPA’s implementing regulations specify what it means for emission reductions to be “obtained” and “in effect and enforceable,” but the Agency has previously interpreted CAA section 173(a)(1)(A) and (c) to mean

³ 42 U.S.C. § 7503(a).

⁴ 42 U.S.C. § 7503(a)(1)(A). CAA section 171 defines “reasonable further progress” to mean “such annual incremental reductions in emissions of the relevant air pollutant as are required by [Part D, Title I of the CAA] or may reasonably be required by the [EPA] Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date.” 42 U.S.C. § 7501(1).

⁵ 42 U.S.C. § 7503(c).

⁶ *Id.*

⁷ See CAA section 173(a)(1)(A) and (c); 42 U.S.C. § 7503(a)(1)(A), (c); see also *NRDC v. EPA*, 571 F.3d 1245, 1267 (D.C. Cir. 2009) (noting “CAA section 173’s mandate that total reductions ‘represent . . . reasonable further progress’”).

that the required emission reductions must “actually occur” by the time the source commences operation.⁸

Additionally, CAA section 173(a) requires that “[a]ny emission reductions required as a precondition of the issuance of a permit under paragraph (1) shall be federally enforceable before such permit may be issued.” Neither the CAA nor the EPA’s implementing regulations specify how the emission reductions required under CAA section 173 must be shown to be federally enforceable.⁹ Previously, the EPA has found this requirement to be met when a permit applicant confirms the source(s) of the ERCs, quantifies the ERCs to be obtained from the identified source(s), and accepts enforceable permit conditions that ensure the required emissions reductions will be “in effect” – *i.e.*, actually occur – by the time the new or modified source commences operation.¹⁰

In prior guidance, the EPA expressed the Agency’s view at the time that it is generally not appropriate to issue an NNSR permit until creditable¹¹ emission reductions are identified, quantified, and secured in a federally enforceable requirement.¹² This conclusion was based largely on “sound policy” and concerns that for “reasons of equity” it would be difficult to stop a source that was ready to operate even if all offsetting reductions had not been secured.¹³ The EPA also stated, however, that under certain circumstances an NNSR permit may be issued before ERCs have been secured, provided the permit applicant is subject to (1) a federally-enforceable commitment to secure federally-enforceable ERCs by the time the source is ready to commence operation, and (2) a federally-enforceable permit provision that “expressly prohibit[s] the commencement of any actual operations until such time as the necessary offsetting emissions reductions have been identified, approved, and secured with appropriate permit restrictions on the source[s] providing the [offsetting emission reductions].”¹⁴ The EPA indicated such an approach to meeting the Federal enforceability requirement in CAA section 173(a) may be appropriate for NO_x offset purposes, where NO_x ERCs had been identified, quantified, made enforceable under State law, submitted to the EPA for approval into the relevant State Implementation Plan (SIP), and the only step remaining to make them federally enforceable was the Agency’s approval of the SIP submission.¹⁵

⁸ See, e.g., Memorandum dated June 14, 1994, from John S. Seitz, Director, Office of Air Quality Planning and Standards, to Air Division Directors, EPA Regions 1-10, Subject: “Offsets Required Prior to Permit Issuance” (“1994 Seitz Memo”) at 1, 4 (quoting General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990, 57 FR 13498, 13553 (Apr. 16, 1992)).

⁹ The EPA’s NSR regulations define “federally enforceable” to mean “all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR parts 60 and 61, requirements within any applicable State implementation plan, any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR part 51, subpart I” 40 CFR 51.165(a)(1)(xiv).

¹⁰ See 1994 Seitz Memo at 3-6.

¹¹ Generally, to be “creditable” for NSR offset purposes, ERCs must be “surplus, permanent, quantifiable, and federally enforceable.” 40 CFR 51.165(a)(3)(ii)(C)(I) and 40 CFR part 51, appendix S, section IV.C.3(i)(1) (“Emission Reduction Credits from Shutdowns and Curtailments”).

¹² 1994 Seitz Memo at 1, 2.

¹³ *Id.* at 4, 5.

¹⁴ *Id.* at 5 (quoting NO_x Supplement to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990 (“NO_x Supplement”), 57 FR 55620, 55624 (Nov. 25, 1992)).

¹⁵ *Id.*

III. Clarifications Regarding Offsetting Emissions Reductions

The CAA provides that ERCs do not have to be “obtained” or “in effect” until the source commences operations. However, the EPA understands that there may be questions from stakeholders, air permitting authorities, and the public about what exactly must occur before the permit is issued – *i.e.*, when the offsetting emission reductions must be identified, and how to satisfy the requirement in CAA section 173(a) that emission reductions be “federally enforceable” before the permit is issued. Two points in time are significant for purposes of complying with the requirements for offsets in CAA section 173: (1) before the permit is issued, emission reductions required as a precondition of permit issuance must be “federally enforceable,” and (2) by the time the source commences operation, the required emission reductions must be “obtained” and “in effect.”

CAA section 173 clearly states that emission reductions required to meet the offset requirement “shall be federally enforceable before such permit may be issued.” The CAA does not, however, directly address how, or at what level of specificity, the required emission reductions must be shown to be “federally enforceable.” Although the EPA has previously stated that, generally, an NNSR permit should not be issued until ERCs have been identified, quantified, and secured with enforceable permit restrictions, the Agency also provided alternative approaches to compliance with the CAA’s offset requirements by allowing sources to wait until commencement of operation to secure federally-enforceable offsets, subject to appropriate conditions in their permits.¹⁶ While the EPA no longer agrees that an NNSR permit should not be issued until ERCs have been identified, quantified, and secured with enforceable permit restrictions, even the latter approach provided within the previous guidance allowed deviations from that requirement and is consistent with the plain text of the CAA. The phrase “emission reductions required as a precondition” in CAA section 173(a) is best read to mean a permittee’s obligation to obtain sufficient ERCs prior to operation. So long as the permittee’s obligation to obtain the required ERCs prior to operation is federally enforceable, a permit may be issued. The CAA thus allows for an enforceable commitment along with a related prohibition on operations in the permit to serve as the vehicle to meet the Federal enforceability requirement in CAA section 173(a). Such permit conditions become federally enforceable when included in an NNSR permit issued pursuant to EPA-approved NNSR SIP regulations.¹⁷

Provided the permit applicant has complied with all other statutory and regulatory requirements for permit issuance, the permitting authority may issue an NNSR permit that contains: (1) a federally-enforceable commitment by the permit applicant to secure the requisite amount of federally-enforceable ERCs by the time the source is ready to commence operation, and (2) a federally-enforceable permit provision that expressly prohibits the commencement of any actual operations until such time as the necessary offsetting emissions reductions have been identified, approved, and secured with appropriate federally-enforceable restrictions on the source(s) providing the ERCs (*e.g.*, a source-specific SIP or permit condition).¹⁸

¹⁶ See generally 1994 Seitz Memo.

¹⁷ See CAA sections 113 (Federal enforcement of CAA requirements) and 304 (citizen suits), 42 U.S.C. §§ 7413, 7604; see also 40 CFR 52.23 (“Violation and enforcement”) (failure to comply with “any permit condition or permit denial issued pursuant to approved or promulgated [NSR] regulations . . . , shall render the person . . . so failing to comply in violation of a requirement of an applicable implementation plan and subject to enforcement action under section 113 of the Clean Air Act”).

¹⁸ The approach in this memorandum differs from the primary recommendation in the 1994 Seitz Memo, which is that ERCs generally should be identified and secured before permit issuance, except under the limited circumstances described therein.

Similarly, if a single permit authorizes multiple phases of construction, the permit applicant need not specifically identify and secure offsets for the entire facility at the time the permit is issued. Instead, provided the applicant has complied with all other statutory and regulatory requirements for permit issuance, the permitting authority may issue an NNSR permit containing: (1) a federally-enforceable commitment by the permit applicant to secure, for each phase of construction, federally-enforceable ERCs by the time the source commences operation of that phase, and (2) a federally-enforceable permit provision that expressly prohibits actual operation of each phase until such time as the necessary offsetting emissions reductions for that phase have been identified, approved, and secured with appropriate permit restrictions on the source(s) providing the ERCs.¹⁹

In all cases, the permitting authority should determine, on a case-by-case basis, the types of supporting documentation that is necessary to ensure that the required amount of creditable offsetting emission reductions will actually occur by the time the source commences operations, consistent with the requirements of CAA section 173.

IV. Conclusion

In summary, the CAA allows for an NNSR permit to be issued before offsetting emission reductions have been specifically secured, provided the NNSR permit contains (1) an enforceable commitment by the permittee to obtain the necessary emission reductions before commencing operation, and (2) an express prohibition on commencing operations until the required ERCs are identified, approved, and secured with appropriate permit restrictions. The EPA expects that such enforceable permit conditions would meet the CAA's requirement for federally enforceable offsetting emission reductions if they are contained in an NNSR permit issued pursuant to regulations approved into a SIP and adequately supported in the permit record and would alleviate any perceived equity or other concerns raised in previous EPA guidance.

Please share this memorandum to relevant staff within your office as well as with stationary source CAA permitting authorities in your EPA Region. This memorandum can also be found in the New Source Review Policy and Guidance Document Index (<https://www.epa.gov/nsr/new-source-review-policy-and-guidance-document-index>). If you have any questions regarding the memorandum, please contact Paul Almodóvar in the Permitting and Program Support Division of the Office of State Air Partnerships at almodovar.paul@epa.gov.

Given the 1994 Seitz Memo was a nonbinding guidance document, the Agency does not believe it generated any significant reliance interests.

¹⁹ The EPA Environmental Appeals Board has found use of a “phased” approach to obtaining offsets permissible under CAA section 173(a) under differing factual circumstances. See *In Re Campo Landfill Project, Campo Band Indian Reservation*, NSR Appeal No. 95-1 (June 19, 1996) (finding CAA section 173(a) provides “flexibility to implement phased offsets in an appropriate case . . . so long as [the EPA] ensures that sufficient offsets will be acquired to fulfill the statutory mandate of ‘reasonable further progress’”), available at [https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/New%20Source%20Review%20\(NSR\)%20Decisions%20\(CAA\)/762EDE41B82E688385257069005F7C52/\\$File/campo.pdf](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/New%20Source%20Review%20(NSR)%20Decisions%20(CAA)/762EDE41B82E688385257069005F7C52/$File/campo.pdf).