

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

OFFICE OF
AIR, NOISE, AND RADIATION

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SUBJECT: Impact of Clean Air Act Nonattainment Sanctions

FROM: David G. Hawkins, Assistant Administrator
for Air, Noise and Radiation (ANR443)

MEMO TO: Regional Administration, Regions I-X

There is substantial concern and confusion over what will happen to new construction on July 1, 1979, if States have not by then satisfied the State Implementation Plan (SIP) requirements of Part D of Title I of the Clean Air Act. Regional Administrations should take action to inform the States and the concerned public that, although very few State plans will have been approved by July 1, construction of major air pollution sources will not stop as of that date. In addition, there will be no immediate curtailment of State program grants or other Federal funds. In fact, I do not expect major disruptions of industrial or State activities where States are making reasonable and expeditious efforts toward submitting an approvable State Implementation Plan revision.

This memorandum sets forth Agency policy and procedures regarding the July 1, 1979 sanctions. Three main topics are addressed: Construction Prohibitions (permit processing, sources affected and geographic applicability); SIP Approvals (area specific approval, conditional approval, and area redesignation); and Federal Funding Sanctions (discretionary aspects).

Summary

The imposition of the Clean Air Act sanctions depends on whether by July 1, 1979, a State has an approved State Implementation Plan that meets the requirements of Part D of the Act. The first step in the SIP approval process involves State development and submission of a State plan. The EPA Regional Office then evaluates the submitted plan and publishes in the Federal Register a proposal for final action on the State plan. This starts a 30-to-60-day period for public comment. After reviewing the comments, the EPA Administrator will take final actions: approval of the nonattainment plan as a whole, approval of the plan for specific areas, conditional approval of the plan, disapproval of the plan as a whole, or disapproval for a specific areas. Most States will not have final approvals on July 1. However, although the areas subject to sanctions are defined based on their status on July 1, the impact of the sanctions in those areas is not immediate.

The Act establishes two kinds of sanctions--new major source construction sanctions and funding sanctions for Federal programs and facilities. The construction prohibition sanction becomes applicable on July 1, and remains in effect until a final Federal Register notice is issued approving or conditionally approving the SIP for the area in question. The construction prohibition applies only to permits applied for after June 30, 1979. Because a typical permit requires approximately three months for processing, it is unlikely that this sanction would have any impact until September or October 1979. Also, although the administrative process for Federal funding sanctions must begin on July 1 for the Section 176 transportation and air pollution control related funds, actual withholding will not occur for at least two to four months after July 1. Any discretionary withholding of sewage treatment construction funds under Section 316 will not occur for at least the same length of time.

Construction Prohibitions

The Clean Air Act's prohibition against construction applies to a major new or modified source for which a complete permit application is submitted to the permit review agency after June 30, 1979. Therefore, any complete permit application postmarked or received on or before June 30, 1979 will not be subject to any construction prohibition.* The permit review agency may process all such permit applications received on or before June 30, 1979. No source which receives such a permit and which commences on a program of continuous construction will be subject to the construction sanction.

After June 30, 1979, sources may continue to submit New Source Review permit applications to the permit review agency. The submission of a permit application will enable the review agency to process the permit so that administrative time is not lost while a State nonattainment plan is being reviewed. Because the administrative time for reviewing a major source can take three months or longer, in many cases, we expect to have SIPs approved by the time the major source permit would itself be ready for approval. If any State intends to issue a permit to a source to which the construction prohibition applies, the permit must contain a condition which prohibits construction until SIP approval is obtained. For a source to be able to construct as soon as a SIP is approved, the permit conditions would have to be consistent with the requirements that are eventually approved in the SIP.

The EPA Regional Offices will continue to process and issue PSD permits (under 40 CFR 52.21, Regulations for the Prevention of Significant Deterioration of Air Quality) even while awaiting receipt or approval of nonattainment SIP revisions. A PSD permit is required whenever a major

* When an applicant can show a reasonable and good faith effort to submit all information necessary for permit issuance, the permitting authority may consider a substantially complete permit application

source, (defined for PSD purposes at 40 CFR 52.21(b)), impacts an area with air quality better than NAAQS. This affects sources both inside and outside designated nonattainment areas. When a PSD source will be subject to the Part D prohibition against construction the EPA-issued PSD permit will be conditional. A permit condition will be included which will make the following statement:

This source will significantly impact a nonattainment problem in an area currently designated as violating the National Ambient Air Quality Standard for _____, and for which the Clean Air Act currently prohibits construction of this source until a State submits and receives approval of a State Implementation Plan which meets the requirements of Part D of the Act. This permit is issued conditional on your receipt of an appropriate State permit issued pursuant to regulations approved by the Administrator as meeting the requirements of Part D of the Clean Air Act. Source construction is prohibited until the State Implementation Plan is approved by the Administrator as meeting such requirements for the nonattainment area that this source will impact. You will be notified by mail when the necessary State regulations have been approved.

The construction prohibition affects any major new or modified source that would cause or contribute to a National Ambient Air Quality Standard violation in the designated nonattainment area within the State in which the source proposes to locate. EPA believes that this prohibition applies, as a matter of law, to sources whose permits are applied for after June 30, 1979. The Administrator is expected to publish a ruling to this effect in the Federal Register in the near future. A major source that would cause a new NAAQS violation outside of a designated nonattainment area or that would significantly contribute to a NAAQS violation only in another State is subject to the Offset Interpretative Ruling of January 16, 1979 (44 FR 3274) but is not subject to a construction prohibition.

The Agency intends to propose, in the Federal Register, that the Part D prohibition on construction should apply equally for sources outside designated nonattainment areas as it applies to a major source locating inside a designated nonattainment area. EPA will also propose that only sources with a significant impact on a violation be subject to the construction prohibition. A source will generally be considered to contribute significantly to a NAAQS violation if its modeled impacts exceed the significance levels found in the Offset Interpretive Ruling of January 16, 1979 (44 FR 3274, at 3283). However, any major source of a designated nonattainment pollutant that proposes to locate at a site already violating NAAQS within the designated nonattainment area is presumed to contribute significantly to the violation without regard to modeled impacts. The rule would be proposed to apply to any major source outside a designated nonattainment area if the source would significantly contribute to a NAAQS violation within a designated nonattainment area.

State Implementation Plan Approvals

Source specific and area specific impacts of the Part D sanctions are discussed above. This next section addresses Federal Register actions that alleviate sanction imposition: area specific SIP approvals, conditions SIP approvals, and nonattainment area redesignations. First, however, a summary of relevant Federal Register actions is appropriate.

A list of nonattainment areas was published March 3, 1978 in the Federal Register (43 FR 8962). A number of modifications have been made or proposed for changes to the initial listing. SIP approvability guidance was published in the Federal Register on May 19, 1978 (43 FR 21673) and February 9, 1979 (44 FR 8311). The General Preamble for proposed rulemaking on the approval of plan revisions for nonattainment areas was published April 4, 1979 (44 FR 20372).

Once a State plan for a designated nonattainment area is approved as meeting Part D requirements, the construction or funding sanctions that would or may have taken effect after June 30, 1979 no longer apply. The Agency will approve SIP revisions meet the requirements of Part D of the Act. Thus, a State plan submission of several designated nonattainment areas may be approved while plan development or

approval may still be underway for other areas. This would in effect be an area specific approval of the SIP, as revisions for other areas would remain necessary. Sanctions would only affect those areas for which the plan remains inadequate. Thus, if there are three designated SO₂ nonattainment areas and SIP revisions are approved for two, the Part D sanctions apply only with regard to the remaining nonattainment area.

Where appropriate, the Agency intends to grant conditional approvals of SIP revisions. A SIP containing minor deficiencies will be approved on the condition that the State submit corrections by a specific date. A conditional approval would not result in sanctions unless the State failed to submit corrections by the specified date, or unless the corrections were ultimately determined to be inadequate. However, proposing in the Federal Register to conditionally approve a SIP does not act to alleviate Part D sanctions. The required imposition of Part D sanctions ends only with final SIP approval or conditional approval. Conditional approval will not be granted without strong assurance by the appropriate State officials that the deficiencies will be corrected. The form of this assurance may vary from State to State, but it must nevertheless represent a commitment on the part of the State. A conditional approval will require specific schedulers for correcting deficiencies.

Another mechanism that would act to alleviate the Part D sanctions is that of revising a previous designation of nonattainment. In developing a SIP revision for a designated nonattainment area, the State may determine that the existing designation is inappropriate. If this occurs, the State may submit to EPA a revised designation with supporting material. Until EPA finds the revised designation acceptable and promulgates it, the July 1 deadline for approval of a SIP revision satisfying Part D, and the attendant sanctions, will continue to apply. However, the SIP submittal may simply demonstrate that the standard is attained and that no additional emission reductions or preconstruction review requirements need to be included in the SIP. Also, a source is exempt if in fact it would not cause or contribute to a violation, regardless of the applicable designation.

Federal Funding Sanctions

Air pollution control program grants, Federal highway funds, and wastewater treatment facility grants do not immediately stop as of July 1, 1979, where nonattainment SIP revisions have not been approved. Required and authorized restrictions on grants and funds where SIPs are inadequate are found in Sections 176(a) and 316 of the Act.

Federal funding limitations required by Section 176(a) will only be applied if the EPA finds after July 1, 1979, that the Governor has not submitted, or is not making reasonable efforts to submit, a SIP which considers each of the elements required by Section 172 of the Act. The EPA is authorized to make the same finding with respect to the 1982 SIP revisions required in areas that cannot attain National Ambient Air Quality Standards by 1982. In cases where a finding is made by EPA, project approvals and grants authorized by Title 23 (Highways), United States Code, and the Clean Air Act must be withheld from air quality control regions where transportation control measures are needed to attain NAAQS. An exception to this Federal assistance limitation is that safety, mass transit, and transportation improvement projects related to air quality attainment or maintenance may be approved and funded.

EPA and the Department of Transportation (DOT) are preparing a Federal Register notice proposing policy procedures for applying Federal assistance limitations in Section 176(a). Public comment will be invited and considered in finalizing the policy. EPA will propose to make case-by-case determinations of good faith efforts based on the State's efforts to submit a SIP satisfying pertinent guidance issued by EPA. negotiations with affected State and local agencies will precede any decision to apply funding limitations. EPA intends to propose initial Section 176(a) finding between September 1 and October 31, 1979 in the Federal Register and invite public comment prior to promulgating a final list of affected areas. However, the funding limitations would be effective on the date of publication of the proposed list. Removal of funding limitations will also be done through Federal Register publication and an opportunity for public comment will be provided prior to final action.

Section 316 of the Act provides that the Administrator may condition, restrict or withhold EPA grants for the construction of sewage treatment works in any area where a SIP has not been approved or where the SIP does not account for the direct or indirect emissions from the treatment works. Unlike the new source construction prohibition, the implementation of any action pursuant to Section 316 is not mandatory on July 1, but is at the discretion of the Administrator. EPA is preparing a Federal Register notice inviting public comment on the development of an administrative mechanism to implement the provisions of Section 316. The interim policy for the implementation of Section 316, while revisions to existing construction grant regulations are being completed, will be proposed in July. Further guidance on this matter will be forthcoming in the next several weeks.

Any decision to stop grant funding under any provision of the Act will be made only after coordination among the Regional Office, Headquarters, and affected States and local agencies.

Federal Register Notice

In order to assure through dissemination of Agency policy and procedures regarding the requirements and impacts of Part D of the Act, I am having this memorandum published in the Federal Register.

cc: The Administrator

M. Durning

J. Bernstein

W. Barber

Director, Air & Hazardous Materials Division, Regions IX