



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 15 1988

MEMORANDUM

SUBJECT: Procedures for EPA to Address Deficient New Source Permits Under the Clean Air Act

FROM: Michael S. Alushin *David Rochli for MAushin*
Associate Enforcement Counsel for Air
Office of Enforcement and Compliance Monitoring

John S. Seitz, Director *Richard Biondi for*
Stationary Source Compliance Division
Office of Air Quality Planning and Standards

TO: Addressees

INTRODUCTION

This memorandum transmits the final guidance for your use in addressing deficient new source permits. After we distributed the draft guidance for comment on December 16, 1987, several Regional Offices took action on deficient new source permits. The events surrounding those permit actions, as well as your thoughtful comments on the draft guidance, have shaped the final policy.

RESPONSE TO COMMENTS

We have incorporated most of your comments into the final guidance. As you requested, we have included examples of forms showing a request for permit review under 40 C.F.R. §124.19, a §167 order, and a §113(a)(5) finding of violation.

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ECDC

Some commenters suggested that we include a section on actions that can be taken, not against the source, but against the state issuing the deficient permit. We agree that this topic should be included in the guidance because it surfaces repeatedly in individual cases. Therefore, we have added a section on possible actions against states for issuing deficient permits. We have also clarified the guidance to indicate that EPA should send a state written comments at both the draft and final permit stage when a state is issuing what EPA considers a deficient permit.

Some reviewers requested further elaboration of when to use alternative enforcement responses. We have indicated relevant considerations in determining which action to take. One commenter pointed out that the guidance did not define what was meant by a "deficient permit." This involves a determination that requires the exercise of judgment. However, we have tried to list most of the criteria that will support a finding of deficiency. We realize, however, that we may not have anticipated every deficiency that may present itself to every Regional Office in the future.

Concern was expressed over the requirement to respond to a deficient permit within thirty days. We realize that this is an ambitious objective, but it is a legal requirement for permit review under 40 C.F.R §124, and greatly enhances EPA's equitable position in challenges under §167 and §113(a)(5). It will be easier to meet this deadline if Regional Offices have routine procedures in place for prompt receipt of all permits from their states and for thorough review of permits as they are received.

A few commenters wanted the guidance expanded to apply to "netting" actions and "synthetic minor" sources. We agree that guidance in this area would be useful, but the topic is too broad to be folded into the same document as the guidance on deficient permits. We have begun work to address appropriate enforcement action for improper "synthetic minors" in the context of the Federal Register notice announcing the program for federally enforceable state operating permits. If you think that separate enforcement guidance is needed on this subject, please let us know.

Finally, a few reviewers questioned the guidance regarding EPA directly-issued permits. We agree that, in all cases where we find a deficiency, it is preferable to change the permit by modifying its terms. If the source is amenable, we should do so. However, if EPA cannot get the source to accept new permit conditions, our only options are review under §124.19(b), revocation of the permit, and/or enforcement action. A §124.19(b) review must be taken within 30 days after the permit was issued. The

regulations are unclear on EPA's authority to revoke PSD permits. In an enforcement action to force a source, involuntarily, to accept a permit change when the source has not requested the change or made any modification to its facility or operations, EPA must always keep in mind the litigation practicalities and equities. These make enforcing against a permit we have issued when we are not basing our action on any new information a difficult proposition.

CONCLUSION

We hope that this guidance will help EPA Regions act to challenge deficient new source permits. Many of the practices advocated in this document may be litigated in pending or future cases. We will amend the guidance as necessary in light of judicial developments. If you have any questions, please contact attorney Judith Katz at PTS 382-2843.

Attachment

Addressees:

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Regions I-X

Regional Counsel Air Branch Chiefs
Regionx I-X

Air and Waste Management Division Director
Region II

Air Management Division Directors
Regions I, III, and IX

Air and Radiation Division Director
Region V

Air, Pesticides, and Toxics Management Division Directors
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FROM: Michael S. Alushin *David Rolli for MAlushin*
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John S. Seitz, Director *Richard Bond for*
Stationary Source Compliance Division
Office of Air Quality Planning and Standards

TO: Addressees

I. Introduction

This guidance applies to permits issued for major new sources and major modifications under both the prevention of significant deterioration (PSD) program and the nonattainment new source review (NSR) program. It contains three sets of procedures -- one for permits issued pursuant to EPA-approved state programs (NSR permits and PSD permits in more than half the states) one for permits issued by states pursuant to delegations of authority from EPA, and one for instances where EPA issues the permit directly. An appendix of model forms appears at the end.

The need for this guidance has become increasingly evident in the last two years. Before then, EPA had attempted only once, in 1981, to enforce against sources constructing or operating with new source permits the Agency determined to be deficient. In 1986, EPA litigated Greater Detroit Recovery Facility v. Adamkus et al. No. 86-CU-72910-DT (October 21, 1986). In that case, EPA wanted to enforce against a major stationary source constructing with a PSD permit issued by Michigan under a delegation agreement with EPA. The Agency had first determined that the best available control technology (BACT) determination for SO₂ in the permit was inadequate. Before EPA started formal enforcement action, the source filed suit against the Agency,

arguing that EPA had no authority to "second guess" the BACT determination and that, in any event, we should be equitably foreclosed from challenging the permit because we had remained silent during the two years since we had failed to comment on the permit. The court agreed and granted the source's motion for summary judgment.

The Detroit case was an example of the need for prompt and thorough EPA review of and written comments on new source permits. Our ability to influence the terms of a permit, both informally and through legal procedures, diminishes markedly the longer EPA waits after a permit is issued before objecting to a specific term. This is due both to legal constraints, that is, tight time limits for comments provided in the regulations, and to equitable considerations that make courts less likely to require new sources to accept more stringent permit conditions the farther planning and construction have progressed. Accordingly, as a prerequisite to successful enforcement action, it is imperative that EPA review all major source permit packages on a timely basis and provide detailed comments on deficiencies. If EPA does not obtain adequate consideration of those comments, it is also important for EPA to protect air quality by prompt and consistent enforcement action against sources whose permits are found lacking.

Because PSD permits are issued on a case-by-case basis, taking into consideration individual source factors, permitting decisions involve the exercise of judgment. However, although not an exhaustive list, any one of the following factors will normally be sufficient for EPA to find a permit "deficient" and consider enforcement action:

1. BACT determination not using the "top-down" approach.
2. BACT determination not based on a reasoned analysis.
3. No consideration of unregulated toxic pollutants in BACT determination.
4. Public notice problems - no public notice & comment period or deficiencies in the public notice.
5. Inadequate air quality modeling demonstrations.
6. Inadequate air quality analysis or impact analysis.
7. Unenforceable permit conditions.
8. For sources that impact Class I areas, inadequate notification of Federal Land Manager or inadequate consideration of impacts on air quality related values of Class I areas.

In NSR permitting, each of the following factors, while not necessarily an exhaustive list, are grounds for a deficient permit:

1. Incorrect LAER determination, i.e., failure to be at least as stringent as the most stringent level achieved in practice or required under any SIP or federally enforceable permit.
2. No finding of state-wide compliance.
3. No emissions offsets or incorrect offsets.
4. Public notice problems - no public notice and comment or deficiencies in public notice.
5. Unenforceable permit conditions.

II. Timing of EPA Response

A. Comment

Although EPA should know about every permit, at least by the time it is published as a proposal, the Agency sometimes does not learn about a permit during its development prior to the time the final permit is issued. If we do become aware of the permit and have objections to any of its terms, we should comment during the developmental stage before the permit becomes final.

State agencies should send copies of all draft permit public notice packages and all final permits to EPA immediately upon issuance. (The requirements for contents of public notice packages are set forth at 40 C.F.R. §51.166(q)(2)(iii).) The Regional Office should review all draft permit public notice packages and final permits during the 30 day comment periods provided for in the federal regulations. It should write detailed comments whenever Agency staff does not agree with the terms of a draft or final permit. To make sure they get permits in time for review, Regional Offices should consider requiring states with approved new source programs, through Section 105 Grant Conditions, to notify them of the receipt of all major new source permit applications. They should also require states to send them copies of their draft permits at the beginning of the public comment period.

Final permits should be required to be sent to EPA immediately upon issuance. (Note that the requirement for Regions to review draft and final permits is contained in guidance issued by Craig Potter on December 1, 1987.) Regions should carefully check their agreements with delegated states. These agreements require

states to send draft permits to EPA during the comment period. In addition, 40 C.F.R. §52.21(u)(2)(ii) requires delegated agencies to send a copy of any public comment notice to the appropriate regional office. Pursuant to 40 C.F.R. §124.15, a final permit does not become effective until 30 days after issuance, unless there are no comments received during the comment period, in which case it becomes effective immediately. Regions should make sure that delegated states know about permit appeal procedures at 40 C.F.R. §124 and, if necessary, issue advisory memoranda notifying them that EPA will use these procedures if the Agency determines a permit is deficient.

B. Formal Enforcement Action

If the permit was issued under a delegated program, it is important to initiate formal review or appeal within 30 days after the final permit is issued. (This response is set forth in Section IV below. The 30 day period is required by the regulations at 40 C.F.R. §124.19). When enforcing against permits issued under state programs, the same legal requirement to initiate enforcement within 30 days does not exist, but it is still extremely important to act expeditiously.

III. Enforcement Against the Source v. Enforcement Against the State

If a state has demonstrated a pattern of repeatedly issuing deficient permits, EPA may consider revoking the delegation for a delegated state or acting under Section 113(a)(2) of the Act to assume federal enforcement for an approved state. It is not appropriate to issue a §167 order to a state. Revocations of delegated authority as to individual permits and revocations of actual permits are theoretically possible, but they are unnecessary where EPA can act under Part 124 (i.e. within 30 days of issuance). Revocation may be appropriate where Part 124 appeals are unavailable, but likely will be subject to legal challenge.

IV. Procedures to Follow When Enforcing Against Deficient Permits in Delegated Programs

A. If possible, the following actions before construction commences:

1. Take action under 40 C.F.R. §124.19(a) or (b) within 30 days of the date the final permit was issued to review deficient provisions of the permit.

- a. §124.19(a) is an appeal, which may be taken by any person who commented during the public comment period.

- b. §124.19(b) is a review of the terms of the permit by the Administrator under his own initiative. Regional Offices informally request the Administrator to take this action. They need not have commented during the public comment period. The Administrator has demonstrated a preference for using §124.19(b) over §124.19(a). In the four instances thus far when he was given the choice of acting under (a) or (b), he chose (b). However, the Administrator may not have sufficient time to act within 30 days in every situation in the future.
2. In the majority of situations, it is more appropriate for the Agency to act as one body to initiate review under §124.19(b). In some instances, however, the third party role for a Regional Office, through 40 C.F.R. §124.19(a) may be preferable. Regions should pick (a) or (b). However, if both provisions are legally available, they should request, in the alternative, that the Administrator act under the provision other than the one chosen by the Region should he deem it more appropriate. In particular, if a Region requests the Administrator to act under §124.19(b), it should ask that its memorandum be considered as a petition for review under §124.19(a) should review under §124.19(b) not be granted within 30 days. This is to protect the Regions' right to appeal a permit if the Administrator does not have sufficient time to act. Therefore, all memoranda requesting review should be written to withstand public scrutiny if considered as petitions under §124.19(a).
3. If the 30 day period for appeal has run and strong equities in favor of enforcement exist, issue a §167 order and be prepared to file a civil action to prohibit commencement of construction until the source secures a valid permit. (See Section IV B(2)) below.

B. For sources where construction has already commenced:

1. If the permit was issued less than 30 days previously take action under 40 CFR §124.19.
2. If the permit was issued more than 30 days previously, issue a §167 order requiring immediate cessation of construction until a valid permit is obtained. This

step should only be taken if extremely strong equities in favor of enforcement exist. Regions should be keeping state and source informed of all informal efforts to change permit terms before the \$167 order is issued. \$167 orders may be used both for sources which have and have not commenced construction. However, because the \$124.19 administrative appeal and review process is available in delegated programs, it is greatly preferred for challenging deficient permits in states where it can be used.

3. If EPA determines that penalties are appropriate, issue a NOV under Section 113(a)(1) of the Act for commencement of construction of a major source or major modification without a valid permit. This is necessary because \$167 contains no penalty authority. Note that strong equities for enforcement must exist before taking this step. EPA can issue both a \$167 order requiring immediate injunctive relief and a NOV if we decide that both are appropriate.
4. Follow up with judicial action under \$167 and \$113(b)(2) if construction continues without a new permit.

C. Note that the appeal provisions of 40 C.F.R. \$124.19 apply to all delegated PSD programs even if \$124.19 is not specifically referenced in the delegation.

V. Procedures to Follow When Enforcing Against Permits in EPA-Approved State Programs (All NSR and More Than Half of the PSD Programs)

- A. Issue \$113(a)(5) order (for NSR) or 167 order (for PSD) as expeditiously as possible, preferably within 30 days after the permit is issued, requiring the source not to commence construction, or if already started, to cease construction (on the basis that it would be constructing with an invalid permit), and to apply for a new permit. Note that EPA should issue a \$167 order if it has determined that there is a reasonable chance the source will comply. Otherwise, the Region should move directly to section V.D below.
- B. From the outset of EPA's involvement, keep the source informed of all EPA's attempts to convince the permitting agency to change the permit.
- C. Issue an NOV (113(a)) as soon as construction commences if EPA determines penalties are appropriate.

D. If source does not comply with order, follow up with judicial action under §167, §113(b)(5), or, if NOV issued, §113(b)(2). If penalties are appropriate, issue NOV and later amend complaint to add a §113 count when 30 day statutory waiting period has run after initial action is filed under §167.

VI. For EPA-issued Permits (Non-delegated).

- A. If source submitted inadequate information (e.g., misleading, not identifying all options) and EPA recently found out about it,
1. If within 30 days of permit issuance, request review by the Administrator under 40 C.F.R. §124.19(b).
 2. If permit has been issued for more than 30 days, issue §167 or §113(a)(5) order preventing start-up or, if appropriate, immediate cessation of construction.
 3. Issue NOV if construction has commenced and EPA determines penalties to be appropriate.
 4. If necessary, request additional information from source; if source cooperates, issue new permit.
 5. Consider taking judicial action if appropriate.

EPA recognizes the distinction between permits based on faulty and correct information only for EPA directly-issued permits. This distinction is necessary for EPA permits due to equitable considerations.

B. If source submitted adequate information and EPA issued faulty permit, we should attempt to get source to agree to necessary changes and accept modification of its permit. However, if source will not agree, only available options are revoking the permit and enforcing. Consolidated permit regulations are unclear about EPA's authority to revoke PSD permits. Because of this and the equitable problems associated with enforcing against our own permits, unless new information about health effects or other significant findings is available, we may choose to accept the permit. If faulty permit produces unacceptable environmental risk, act under 40 C.F.R. §124.19, if possible. If action under 40 C.F.R. §124.19 not possible, first revoke permit and then act as set forth in Section IV.

Addressees:

Regional Counsels
Regions I-X

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Region II

Air Management Division Directors
Regions I, III, and IX

Air and Radiation Division Director
Region V

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David Buente, Chief
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Department of Justice

Appendix

1. Request for Review under 40 C.F.R. §124.19
2. §167 Order
3. §113(a)(5) finding of violation and accompanying §113(a)(1) Notice of violation

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION II

DATE: DEC 8 1 1987

SUBJECT: Request for Administrator to Initiate Review of
PSD Permit for Camden County Resource Recovery FacilityFROM: Christopher J. Daggett
Regional AdministratorTO: Lee M. Thomas
Administrator

I am requesting that, pursuant to 40 C.F.R. 124.19, you review the PSD portion of the air pollution permit issued to Camden County Energy Recovery Associates for construction of the Camden County Resource Recovery Facility in Camden, New Jersey (CCRRF). The failure of the New Jersey State Department of Environmental Protection (DEP) to include an emission limit for PM_{10} in the permit, to address BACT adequately for PM_{10} and to provide for public comment on PM_{10} as a PSD affected pollutant are grounds for reviewing the DEP's actions in issuing the permit and for staying the effectiveness of the permit until all PSD requirements have been met. As explained below, if you agree that review of this permit is appropriate, you will have to notify the permittee by January 11, 1988, that you are initiating review of the PSD portion of the permit.

This permit was issued under various authorities including EPA's PSD permit authority, 40 C.F.R. 52.21, which is delegated to DEP. Due to the promulgation of the new NAAQS for PM_{10} on July 1, 1987, the emissions of particulate matter from the CCRRF became subject to the PSD rules. Particulate matter was not previously subject to PSD because the area was classified as nonattainment for the now withdrawn NAAQS for total suspended particulate (TSP). My staff has concluded that the permit and the permit review procedures do not adequately address PM_{10} under the applicable PSD regulations.

DEP was aware several months before it issued the permit that the new PM_{10} NAAQS for particulate matter would require PSD review. Nevertheless, the permit does not include an emission limitation for particulate matter expressed as PM_{10} emissions from the facility. Also, the analysis of the control technology fails to demonstrate that the system selected would provide the best degree of emission control currently available for PM_{10} particulates. Finally, there is a procedural problem with the permit as well. DEP did not provide notice and an opportunity for the public to comment on the PM_{10} aspect of the permit, contrary to the regulatory requirements and the express advice of Region II.

The Delegation of PSD Authority to DEP

EPA Region II delegated PSD new source review authority to DEP pursuant to 40 C.F.R. 52.21(u). The PSD permitting authority delegated to the DEP is not restricted in any way. The delegation is general in nature and includes all PSD requirements as they are from time to time revised by rulemaking.

Applicability of PM₁₀ Requirements to CCRRF Permit

The application for the CCRRF air pollution control permit was submitted on April 30, 1986. The DEP required the application to be augmented until the application was considered complete and the DEP noticed the permits for public comment on April 28, 1987. A public hearing was held on May 28, 1987, in Camden, New Jersey, and the public comment period ended on June 12, 1987.

PSD requirements are applicable to this permit for particulate matter because it is not in the class of permits and permit applications that are covered by the grandfathering exemptions of the PM₁₀ promulgation. No PSD application addressing particulate matter was submitted for the CCRRF before July 31, 1987. At the time of the notice period, the facility was required to undergo preconstruction review under the SIP for TSP because the area was nonattainment (secondary) for TSP but Federal and State permits were not issued until December 7, 1987. Only sources with PSD applications for particulate matter or with all Federal and State preconstruction approvals or permits before July 31, 1987, are exempt from PSD review for PM₁₀. See, 40 C.F.R. 52.21(c)(4)(ix) and (x) (52 Fed. Reg. 24714, July 1, 1987).

We reminded the DEP, both orally and in writing, of the need to satisfy the PSD requirements at 40 C.F.R. 52.21 for sources of particulate matter as a result of the PM₁₀ promulgation. The DEP was informed that the CCRRF was not grandfathered and required additional PSD review to account for PM₁₀.

BACT Emission Limit Necessary for PM₁₀

The permit has no emission limitation for PM₁₀. BACT is, by definition, an emissions limitation rather than merely specified types of equipment. 40 C.F.R. 52.21(b)(12). (The only exception is when there are technological or economic limitations on the application of measurement methodology.) Clearly the grandfathering provisions were meant to limit the class of major new sources for which the particulate emission limit is expressed

as TSP under the Clean Air Act. Without an express limit on PM_{10} as a permit condition, we are concerned that there will be no sufficiently stringent, enforceable limit on particulate matter for this facility.

Even if the difference between the actual rate of particulate matter emissions smaller than 10 microns in size occurring as a result of the TSP limit now in the permit and the PM_{10} limit that should be in the permit proves to be small or nonexistent, failing to correct this permit will leave a muddled and uncertain basis for future enforcement. EPA regulations clearly require that particulate matter emissions be addressed under the PSD regulations for this permit and that an emission limit be expressed in terms of PM_{10} . Region II is concerned that a TSP emission limit in an instance where PM_{10} was the PSD regulated pollutant may be unenforceable especially in light of EPA's conclusion that the NAAQS which triggers PSD for particulate matter in the case of CCRRF's permit is the new PM_{10} NAAQS. See, 52 Fed. Reg. 24694.

The State BACT Analysis

The DEP'S Hearing Officer found that there is no predictable difference between a baghouse and an electrostatic precipitator (ESP) with respect to PM_{10} collection efficiency and, therefore, concluded that the ESP determined adequate for TSP is also adequate as BACT for PM_{10} . Region II considers the BACT analysis by which the DEP reached its conclusion to be unacceptably thin in its review of available data. The only analysis which appears to be available is in a report submitted by letter from the permittee dated November 16, 1987, responding to a November 2, 1987, request from DEP.

Our review of the BACT analysis shows that it is incomplete and an inadequate basis for making necessary technical judgments. Some questions are so fundamental that we cannot make meaningful technical comments. For example:

1. What are the sources of the engineering and economic data?
2. Why is there no comparison of the particulate size and garbage characteristics at the cited facilities and what is anticipated at CCRRF?
3. What were the test methods employed in obtaining the emissions data from the cited facilities?
4. Why were three United States facilities referenced but not considered in the analysis?

- 4 -
5. Was the removal efficiency data based on a system comparable to CCRRF's which includes a dry scrubber before the electrostatic precipitator or baghouse?

These are just some of the questions that we have and which we would normally review with a PSD permit applicant before public comments are solicited. With the date of the submission being November 16, 1987, and the permit issuance date being December 7, 1987, we do not believe that any meaningful questioning of the permittee's analysis was done by the DEP. The mere three weeks between the submission of the report and permit issuance did not allow the Region a meaningful opportunity to resolve EPA concerns.

Public Comment on PM₁₀ PSD Review

In early November, 1987, DEP informed Region II that it had completed the necessary PSD analysis for PM₁₀ but needed to issue the permit with little or no time for a public comment period with respect to PM₁₀ because of an impending financing deadline. On the basis of DEP assurances that PM₁₀ had been adequately addressed, Region II staff suggested to DEP staff that DEP might be able to justify a shortened public comment period, but emphasized that an opportunity for public comment to review the PM₁₀ analysis was necessary. (EPA's OGC and OAQPS orally concurred with Region II's position.) DEP acknowledged the need for public comment and agreed to follow appropriate, but shortened, procedures. Region II received a copy of and began to review the permittee's November 16, 1987, submission. With no notice for public comment and no further notice to EPA, DEP issued the air permits to CCRRF along with SPDES and solid waste permits on December 7, 1987.

Region II's advice with respect to the comment period assumed adequate treatment of PM₁₀ under PSD requirements. Having subsequently reviewed the BACT analysis and the permit itself, we now believe that these do not meet the requirements of PSD and any reason to allow less than 30 days for public comment on the PM₁₀ analysis would be unjustified.

Recommendation

I am asking that you initiate review of the CCRRF permit with respect to compliance with PSD review procedures applicable to PM₁₀. Specifically, the review should address:

1. The failure to include BACT expressed as a PM₁₀ emission limit in the permit.

2. The adequacy of the review of available technology in establishing BACT.

3. The failure to provide for public comment regarding the PM₁₀ limitations.

A December 1, 1987, memorandum from Craig Potter, Assistant Administrator for Air and Radiation, calls for regional offices to monitor state compliance with preconstruction reviews to prevent instances such as this. We have done so in this case but were not consulted by the DEP when it decided to reject EPA's direction and issue the permit. We expect that the DEP and the permittee will correct this action rather than go through the entire review process but the issuance of the permit leaves us with no choice but to seek to commence review to prevent the action taken by DEP from becoming final action.

We are prepared to continue working with the DEP to act on the permit expeditiously should the DEP and the permittee agree to remedy the deficiencies discussed above. We have also explained to the DEP that, if appropriate, Region II could request a stay of EPA's permit review proceedings in the interim. In this regard, the DEP has contacted Region II and is exploring ways to take valid legal action on their own which would eliminate the need for you to act on this request for review by January 11. If the DEP should take such action, we will notify you immediately. I request that you alert me before you issue an order under §124.19(c).

Procedures and Time Limitations

We are concerned that review procedures be initiated within the time period allowed by the regulations, 40 C.F.R. Part 124, so that we are not foreclosed from raising these important issues. Under §124.19(a), if this is construed as a petition for review, the petition must be filed within 30 days of service of the notice by the DEP of its final permit decision and the Administrator must issue an order granting the review within a reasonable time. §124.19(c). If for any reason you determine that §124.19(a) is not the proper procedure, we would request you to initiate review on your own initiative under §124.19(b), which appears to require you to act within the initial 30 days.

Based on the issuance of the permit on December 7, 1987, we calculate that the 30 day period from the issuance of the permit will end on January 11, 1988. Pursuant to §124.20(a), the time began to run on the day after permit issuance. Since service of the DEP notice was by mail, we have added three days to the prescribed time in accordance with §124.20(d). The thirty-third day after December 7, 1987, is January 9, 1988, which is a Saturday, and §124.20(c) provides that the time period is extended to the next working day which is Monday, January 11, 1988. If this is construed as a review on your

own initiative, notice must be given by this date and we recommend that notice granting review in either case be provided by January 11, 1988.

The regional office filed comments on the draft permit within the DEP's public comment period. See, Hearing Officer's Report, December 7, 1987, Appendix B. We construe the definition of person in §124.41 to include an EPA regional office. Therefore the Region, as a person who filed comments, is a proper party to file a petition for review under §124.19(a).

By whichever means review is initiated, the review procedure is intended to prevent raising facts or issues on appeal that were not raised in the public comment period. See, 45 Fed. Reg. 33411, Col. 3 (May 19, 1980). Section 124.19(a) requires a statement that the issues being raised for review were raised during the comment period to the extent required by Part 124. A person's obligation is to "raise all reasonably ascertainable issues and submit all reasonably available arguments . . . by the close of the public comment period." §124.13. The issues raised herein were not required to be raised earlier since these issues could not have been known at the time the comment period closed on June 12, 1987. Indeed, we had advised the DEP that a public comment period should be provided so that public comments could be received on the PM₁₀ permit decision.

Notice of the initiation of the review procedures should be sent to:

Mr. Robert Donahue
President
Camden County Energy Recovery Associates
110 South Orange Avenue
Livingston, New Jersey 07039

Mr. Richard T. Dewling
Commissioner
New Jersey State Department of
Environmental Protection
401 East State Street
CN-027
Trenton, New Jersey 08625

Mr. Gary Pierce
Chief
Bureau of Engineering and
Regulatory Development
Division of Environmental Quality
New Jersey State Department of
Environmental Protection
401 East State Street
CN-027
Trenton, New Jersey 08625

Enclosed are copies of the following documents upon which this request is based:

1. PERMIT TO CONSTRUCT, INSTALL, OR ALTER
CONTROL APPARATUS OR EQUIPMENT AND TEMPORARY
CERTIFICATE TO OPERATE CONTROL APPARATUS OR EQUIPMENT
AND PREVENTION OF SIGNIFICANT DETERIORATION PERMIT
December 7, 1987
2. HEARING OFFICER'S REPORT FOR THE
APPLICATION BY CAMDEN COUNTY ENERGY RECOVERY ASSOCIATES
TO CONSTRUCT AND OPERATE
A SOLID WASTE RESOURCE RECOVERY FACILITY
December 7, 1987
3. Letter from Robert F. Donahue, President, Camden
County Energy Recovery Associates to Jorge H.
Berkowitz, New Jersey State Department of Environmental
Protection, Subject: Camden County Resource Recovery
Facility PM₁₀ BACT Analysis, with enclosure
November 16, 1987

Enclosures (3)

cc: Thomas L. Adams, LE-133
Francis S. Blake, LE-130
J. Craig Potter, ANR-443
Ronald L. McCallum, A-101

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

In the matter of:)
)
LAKE COUNTY WASTE TO ENERGY FACILITY)
) Order
OKAHUMPKA, FLORIDA)
PROCEEDINGS UNDER)
SECTION 167 OF THE CLEAN)
AIR ACT, AS AMENDED, 42 U.S.C. §7477)

ADMINISTRATIVE ORDER

This Administrative Order is issued this date by the Regional Administrator, Region IV, United States Environmental Protection Agency (EPA), pursuant to Section 167 of the Clean Air Act (the Act), 42 U.S.C. §7477.

FINDING OF FACT

1. The NRG/Recovery Group, Inc., proposes to construct and operate a Lake County Waste to Energy Facility (Lake County) in Okahumpka, Lake County, Florida. The Lake County facility will consist of two mass burn incinerators which will each incinerate approximately 250 tons per day of municipal solid waste. These incinerators will be fueled with a combination of municipal solid waste and wood chips. These incinerators will emit particulate matter, sulfur dioxide (SO₂), nitrogen oxides, carbon monoxide, volatile organic compounds, lead, beryllium, fluoride, sulfuric acid mist, mercury, dioxins,

dibenzofurans, and hydrogen chloride. All of the above-mentioned pollutants are regulated by the Act except dioxins, dibenzofurans, and hydrogen chloride.

2. The area of construction of the Lake County Waste to Energy Facility is located in an attainment area for all pollutants regulated by the Act. [40 Code of Federal Regulations (C.F.R.) §81.310] The facility is considered a major stationary source because its potential emissions (which are subject to regulations under the Act) are above the Prevention of Significant Deterioration (PSD) of Air Quality threshold level. Consequently, this facility is regulated under the PSD rules and regulations.

3. On March 11, 1986, the NRG/Recovery Group applied to the Florida Department of Environmental Regulation (DER) for a PSD permit to construct and operate two 250 tons per day municipal solid waste energy recovery units at its Lake County facility located on Jim Rogers Road in Okahumpka, Florida, pursuant to the Florida State Implementation Plan (SIP) [Florida Administrative Code (F.A.C.) Rule 17-2.500 et seq.].

4. On May 20, 1986, in response to said PSD application, the Florida DER issued a Preliminary Determination which contained, in the State's judgment, the Best Available Control Technology (BACT) for the proposed incinerators. The BACT Determination contained emission limits for all applicable pollutants regulated by the Act and contemplated that a baghouse (to control particulates) in combination

with a scrubber (to control acid gases) constituted BACT.

5. On July 2, 1986, EPA notified the Florida DER that the SO₂ emission limit contained in the Florida DER BACT Determination may not adequately reflect BACT (i.e., proposed SO₂ emission limit not sufficiently stringent) and that the BACT Determination should also consider the effect of controlling SO₂ on unregulated pollutants such as hydrogen chloride and dioxin. Furthermore, EPA informed DER that it was EPA policy that the control of nonregulated air pollutants may be considered in imposing a more stringent BACT limit on regulated pollutants, if there is a reduction in the nonregulated air pollutants which can be directly attributed to the control device selected for the abatement of the regulated pollutants.

6. On August 15, 1986, DER issued a second PSD Preliminary Determination with a modified BACT Determination. The modified BACT Determination no longer contained the requirement for acid gas controls, but only required that the applicant leave space for the acid gas control equipment in the event there would be a future state rule change for resource recovery facilities. Removal of the requirement to employ acid gas control meant the modified BACT Determination could not adequately address EPA's concern about a more stringent SO₂ emission limit.

7. On September 19, 1986, EPA notified DER that EPA was not persuaded by Lake County's contention that municipal solid waste incineration with acid gas control is not

economically feasible.

8. On September 24, 1986, the Florida DER issued its Final Determination and PSD permit to the NRG/Recovery Group for the proposed Lake County facility. The Final Determination and State PSD permit did not require the installation of acid gas control.

9. On October 23, 1986, EPA notified the Florida DER that EPA did not concur with DER's Final Determination regarding the issue of BACT. EPA recommended that the Final Determination and the Florida DER permit be reissued with a BACT Determination which reflects state-of-the-art technology (acid gas control and more stringent emission limitations for particulate matter and SO₂).

10. On January 30, 1987, EPA-Region IV prepared an independent BACT analysis, which varied from DER's Final Determination, in that it contained more stringent emission limitations for particulate matter and SO₂ (achieved through the use of high efficiency particulate emission and acid gas controls).

11. On February 11, 1987, EPA notified Florida DER that the DER PSD permit issued to the NRG/Recovery Group for the Lake County facility on September 24, 1986, was deficient and that EPA may initiate appropriate enforcement action against the Lake County facility to prevent or delay the construction of the facility.

12. On February 11, 1987, EPA notified the NRG/Recovery

Group that the Florida DER PSD permit was deficient and that unless the DER PSD permit was modified to reflect what EPA considers BACT, EPA may initiate appropriate enforcement action to prevent or delay the construction of the facility.

CONCLUSIONS OF LAW

1. The Administrator of the EPA pursuant to his authority under Section 109 of the Act, 42 U.S.C. §7409, promulgated National Primary and Secondary Ambient Air Quality Standards (NAAQS) for certain criteria pollutants, including total suspended particulate matter, sulfur oxides (SO₂), nitrogen oxides, carbon monoxide, ozone, and lead. (40 C.F.R. §§50.4 - 50.12)

2. Pursuant to Section 110 of the Act, 42 U.S.C. §7410, the Administrator of EPA, in 45 Federal Register 52676 (August 7, 1980), promulgated amended regulations for PSD in areas where the existing air quality is better than said ambient standards and incorporated said regulations into the various implementation plans of each state. The relevant regulations are codified at 40 C.F.R. §51.24.

3. The Florida SIP contains federally approved PSD regulations, based on the above-referenced PSD regulations, for such attainment or "clean air" areas. (F.A.C. Rule 17-2.500)

4. The area of construction for the Lake County Waste to Energy facility is an attainment area for NAAQS for all pollutants. (40 C.F.R. §81.310)

5. NRG/Recovery Group is the owner and operator of the major emitting resource recovery facility in Lake County, Florida, and proposes to construct at that site pursuant to the PSD permit issued to the Lake County Waste to Energy facility by Florida DER on September 24, 1986.

6. EPA finds the Florida DER PSD permit issued to the Lake County Waste to Energy facility to be deficient in that it fails to require the installation of acid gas control. The Florida DER PSD permit also fails to require more stringent emission limitations for particulate matter and SO₂. These deficiencies invalidate the State-issued PSD permit.

7. The construction of the Lake County Waste to Energy facility pursuant to an invalid permit will violate Section 165(a) of the Act, 42 U.S.C. §7475(a), and 40 C.F.R. §51.24. Consequently, the issuance of this order, pursuant to Section 167 of the Act, 42 U.S.C. §7477, is required to prevent such construction.

8. The authority of the Administrator of EPA pursuant to §113(a) of the Act, 42 U.S.C. §7413(a), to make findings of violation of the Florida SIP, to issue notices of violation and to confer with the alleged violator has been delegated, first, to the Regional Administrator [earlier delegation consolidated to Delegations Manual, No. 7-6 (July 25, 1984)] and second, to the Director, Air, Pesticides, and Toxics Management Division, Region IV [earlier delegation consolidated

in Region IV Delegation Manual, No. 4-2 (March 15, 1985)].

9. The authority of the Administrator of EPA to issue orders pursuant to Section 167 of the Act, 42 U.S.C. §7477, was delegated to the Regional Administrator [earlier delegation consolidated to Delegations Manual, No. 7-38 (July 25, 1984)]. The Regional Administrator, Region IV, has also consulted with the Associate Enforcement Counsel for Air and the Director of the Stationary Source Compliance Division pursuant to delegation requirement.

ORDER

Consequently, based upon investigation and analysis of all relevant facts, including any good faith efforts to comply, and pursuant to Section 167 of the Clean Air Act, 42 U.S.C. §7477, the NRG/Recovery Group, Inc. (Lake County Waste to Energy facility), is hereby ORDERED:

1. effective immediately upon receipt of this Order, not to commence any on-site construction activity of a permanent nature on its two 250 tons per day municipal solid waste energy recovery units, including, but not limited to, installation of building supports and foundations, paving, laying of underground pipe, construction of permanent storage structures and activities of a similar nature.

2. not to commence any on-site construction activity until it has received a Prevention of Significant Deterioration (PSD) permit and Final Determination that incorporates all

the requirements for PSD pursuant to and in accordance with the provisions of Part C, Subpart 1 of the Clean Air Act, as amended, 42 U.S.C. §7470 et. seq., the regulations promulgated thereunder at 40 C.F.R. §51.24 and/or the regulations of the federally enforceable Florida State Implementation Plan, Rule 17-2.500 of the Florida Administrative Code, and Chapter 403 of the Florida Statutes including EPA's Best Available Control Technology analysis, dated January 30, 1987 (which addresses acid gas control and more stringent emission limitations for sulfur dioxide and particulate matter), and;

3. to submit, no later than ten (10) days after receipt of this Order, certification that the prohibition in paragraph one (1) of this Order has been observed and will continue to be observed until the permit referenced in paragraph two (2) of this Order has been issued. Such certification shall be submitted to:

Winston A. Smith, Director
Air, Pesticides, and Toxics
Management Division
United States Environmental
Protection Agency
345 Courtland Street, N.E.
Atlanta, Georgia 30365
(404) 347-3043

JUN - 3 1987

Date



Jack E. Ravan
Regional Administrator

UNITED STATE ENVIRONMENTAL PROTECTION AGENCY

REGION V

IN REGARDING:)

Indiana Department of Environmental)
Management)
St. Joseph County Health)
Department)
Air Pollution, Permit to Operate)
Dated February 6, 1986, to)
A.M. General Coporation)

FINDING OF VIOLATION
EPA-5-86-A-50

A PROCEEDING PURSUANT TO)
SECTION 113(a)(5) OF THE)
CLEAN AIR ACT, AS AMENDED)
(42 U.S.C. Section 7413 (a)))

INTRODUCTION

On February 6, 1986, the St. Joseph County Health Department, as duly authorized delegate of the State of Indiana, issued a permit to operate several air pollution sources operated by AM General Corporation located at 13200 McKinley, Mishawaka, Indiana.

FINDING OF VIOLATION

For reasons set forth below, the Administrator finds that the permit to operate, issued by the St. Joseph County Health Department on February 6, 1986, to AM General Corporation, (AMG) failed to comply with the requirements of Indiana Air Pollution Control Regulation APC-19 Section 4 and 8 that the St. Joseph County Health Department, as duly authorized delegate of the State of Indiana, did not act in compliance with those requirements.

The permit to operate issued by St. Joseph County Health Department on February 6, 1986, to AM General Corporation increased the Volatile Organic Compounds (VOC) emissions from 197.3 tons per year to 377.0 tons per year. This VOC emission increase of 179.7 tons per year allowed to AMG, subjects the facility to Regulation APC-19.

Regulation APC-19 Section 4 b(4) requires any person proposing the construction, modification or reconstruction of a major facility which will impact on the air quality of a nonattainment area or which will be located in a nonattainment area, shall comply with the requirement of Section 8 of this regulation, as applicable.

Regulation APC-19 Section 8 requires the same person to demonstrate along with other requirements:

- (1) Increased emissions of the pollutant are to be offset and are equal to 90 percent or less of the offsetting emissions.
- (2) Application of emissions limitation devices or techniques such that the Lowest Achievable Emission Rate (LAER) for the pollutant will be achieved.

This document serves as notification that the Administrator, by duly delegated authority, has made a finding under Section 113(a)(5) of the Clean Air Act, as amended, 42 U.S.C 67413(a)(5), and is served on both the State of Indiana and its delegate, the St. Joseph County Health Department, as well as AM General Corporation to provide an opportunity to confer with the Administrator prior to initiation of a civil action pursuant to Section 113(b)(5). By offering the opportunity for such a conference or participating in one, the Administrator does not waive his right to commence a civil action immediately under Section 113(b).

Date: 11/19/88


David Kee, Director
Air Management Division

REGION V

In the Matter of:

AM GENERAL CORPORATION
MISHAWAKA, INDIANA

NOTICE OF VIOLATION
EPA-5-86-A-49

Proceedings Pursuant to
Section 113(a)(1) of the
Clean Air Act, as amended
[42 U.S.C. Section 7413(a)(1)]

STATUTORY AUTHORITY

This Notice of Violation is issued pursuant to Section 113(a)(1) of the Clean Air Act, as amended, [42 U.S.C. Section 7413(a)(1)]; hereafter referred to as the "Act".

FINDINGS OF VIOLATION

The Administrator of the United States Environmental Protection Agency (U.S. EPA), by authority duly delegated to the undersigned, finds:

1. Indiana Air Pollution Control Board (IAPCB) Regulation APC-19 dealing with Permits, PSD, Emission Offsets, is part of the applicable implementation plan for the State of Indiana approved by U.S. EPA on February 16, 1982, at 47 Federal Register 6621 and establish operating and construction permit requirements pertaining to AM General Corporation's facility located at 13200 McKinley Highway, Mishawaka, Indiana.

2. As indicated more specifically below:

AM General Corporation (AMG) operates a miscellaneous metal part coating facility in Mishawaka, Indiana which is in violation of IAPCB regulation APC-19 as given below:

(a) On February 6, 1986 AM General Corporation was issued a permit to operate, by St. Joseph County Health Department. This permit to operate allows AMG, to increase its volatile organic compounds (VOC) emissions from 197.3 tons per year to 377 tons per year. This VOC emission increase of 179.7 tons per year allowed to AMG subject the facility to IAPCB regulation APC-19.

(b) This permit to operate issued to AMG, failed to comply with the requirements of IAPCB regulation APC-19, Section 4 and 4.11:

- (i) the applicant did not apply emission limitation devices or techniques such that the Lowest Achievable Emission Rate (LAER) for VOC was not achieved.
- (ii) the increased VOC emissions were not offset by a reduction in VOC emission by existing facilities.

NOTICE OF VIOLATION

The Administrator of the U.S. EPA, by authority duly delegated to the undersigned, notifies the State of Indiana and the AM General Corporation, that the facility described above is in violation of the applicable implementation plan as set forth in the Finding of Violation.

DATE

JUN 19 1985



David Kee, Director
Air Management Division