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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Office of Air Quality Planning and Standards
Research Triangle Park, North Carolina 27711

MEMORANDUM

DATE: May 9, 1985

SUBJECT: Improved New Source Review/Prevention of Significant Deterioration (NSR/PSD) Program Transfer

FROM: Darryl D. Tyler, Director
Control Programs Development Division

TO: Director, Air Division, Regions I-X

One of EPA's highest air program priorities is the timely transfer of high quality NSR/PSD programs to the States. While EPA has had considerable success in transferring and updating NSR/PSD programs, there are still some State and local review authorities which have not received one or both of these programs. Furthermore, several of the transfers have been incomplete (conditional approvals or partial delegations), have taken too long, or are outdated due to subsequent court cases (e.g., Alabama Power).

I recognize that a large part of the problem may be unavoidable for several reasons. First, transfer is difficult due to the unique level of detail with which the Clean Air At (Act) outlines mandatory NSR/PSD program requirements. Next, many States are reluctant to take, update, or even retain NSR/PSD programs since these programs are believed to be resource intensive to implement and continually evolving as a result of litigation and potential Act changes. Finally, the transferred or updated program must be one of highest quality so the permits issued under these programs will be consistent with the explicit requirements of the Act and will be able to withstand legal challenge. Nevertheless, I believe that our performance in this area can and should be improved.

This memo is intended to help facilitate additional program transfers or upgrades by summarizing most of the considerable but fragmented policy now governing such changes. Outlined below is a compilation of advice which has proven useful in expediting the development and processing of high quality NSR/PSD State implementation plans (SIP) revisions. Each guidance element is described in terms of the specific problems it addresses and incorporates comments made on an earlier version of this package.

Check Lists/Critical Elements

Review of SIP's has often led to lengthy negotiations among Headquarters, Regional Offices, and State officials. These discussions usually come after the Regions have already assured the State in some manner that

NOTE: Attachments A-E are not included in the SIP Guidance Manual.

their SIP is approvable. Part of this problem is caused by a lack of firm guidance up front as to which particular NSR/PSD requirements States must

strictly adhere to and which requirements States have more flexibility in meeting. Accordingly, CPDD has developed two types of check lists to help standardize and focus the review process for NSR/PSD SIP's.

First, comprehensive check lists detailing all elements required in a PSD or NSR SIP submittal have been prepared (see Attachment A). Several Regions are already using these or similar check lists for evaluating State submittals to determine their adequacy relative to the 40 CFR Part 51 requirements and have found them useful.

In order to optimize use of EPA resources and to expedite SIP review, a second form of check list is being formulated (see Attachment B). This check list, which is an evolving product, attempts to outline those elements of NSR/PSD SIP's which are the explicit requirements of the Act, the subject of current litigation, or are otherwise critical to the program (i.e., produce a large impact in terms of emissions capture). The checklist thus serves to indicate where Headquarters will focus its review effort. Attachment C contains several types of State proposals which commonly fail to meet these critical requirements. In an effort to facilitate a timely Headquarters review, I recommend that the technical support documents (TSD) developed by the Regions are arranged such that they, as a minimum, indicate how and where each of the critical elements are met. Similarly, the Federal Register notices themselves need only mention any difficulties with critical elements and defer detailed discussions of these and any other problems to the TSD. To ensure that overall quality of NSR/PSD SIP's does not suffer, Regions will be responsible for working with the State/local agencies to develop rules which you determine to meet all the applicable requirements of 40 CFR Part 51 (i.e., the comprehensive check lists). I will recommend that approvals of Regional packages which meet the critical program elements not be questioned by OAR.

While we will devote the vast majority of our efforts during 14-day review to how the critical NSR elements are addressed in completed rules, we will also be available for some support regarding the development of regulatory language. That is, upon request, Mike Trutna and his staff will assist you in working out appropriate language with a State/local authority in order that their rule will meet the applicable requirements. In doing so, please attach your review of the proposed rule along with the regulation itself. I also stress that when you request this assistance from Mike, you do so early enough in order that adjustments can be made before the time of formal SIP submittal.

The success of this concept of shared review responsibility depends greatly on the content of Attachment B. I invite your continued comments particularly on ways to improve this and the other check lists.

Program Delegation Guidance

About 25 States have taken over responsibility for the PSD program through delegations. State and local agencies have shown an interest in this procedure because it usually results in an expedited program transfer. Full or partial delegation of PSD programs is generally possible in all cases where the reviewing authority requests the program and has the necessary resources. To ensure that we are working from a consistent base with regard to issuing new delegations and updating existing delegation agreements, I would like to restate two major points within the delegation of policy for PSD sources.

1. If States proposing to implement the program generally will be assumed to have dedicated appropriate resources for purpose and should be given the opportunity to proceed without detailed predelegation approvals of staffing plans.

2. The EPA's role should be to provide technical assistance as requested and to review State performance for overall adequacy and consistency, comments on individual permits should be limited to identification of explicit legal or technical deficiencies. The EPA is to avoid routine second guessing on State-issued permits.

SIP Classification and Processing

There seems to be some confusion on how to apply previous memos on SIP classification and processing to PSD and NSR rules. To ensure national consistency, the proposal stage for almost all PSD and NSR SIP's or parts thereof must be classified as major actions. Some special cases, as well as some final actions, may be classified as minor. This does not include, however, finals of proposals which have been changed due to significant comment unless all commenters have had a chance prior to the final package to review the changed version.

A matrix that shows how this guidance applies to PSD and NSR SIP's is included in this package as Attachment C. We are also encouraging parallel processing of these SIP's as we realize it is much easier to make changes in rules at early stages of the State's regulatory development process.

Incorporation-by-Reference

A complaint often voiced by Regions on behalf of States is that the NSR/PSD SIP development and approval process taxes too long or the rules take too long to write because of the comprehensive Federal requirements which must be met. One solution to such problems is to use model incorporation-by-reference language. As you can see in Attachment D (guidance and sample regulation), the State rules using incorporation by reference can be quite abbreviated. Attachment C indicates that if a State uses the model language, the package can be classified as direct final which will shorten the review processing time.

Planned Changes in Rules

As we all know, changes are continually occurring in the Part C and D SIP requirements. These changes generally happen in response to court decisions or out-of-court settlements. I wish to repeat now we should process SIP actions which are affected by certain litigation and pending rulemaking actions for which there is already established EPA policy. Policies are still under development due to litigation on topics such as tall stacks and vessel emissions. Such guidance, of course, will be released as appropriate.

An important event affecting Part C and D SIP requirements is the Chemical Manufacturers Assn. vs. EPA (CMA) settlement. This settlement states that EPA has agreed to propose several changes to the SIP requirements. These changes include the deletion of the requirements that all emission reductions used for netting or offsets be Federally enforceable and that emissions reductions caused by shutdowns or curtailments which are to be used for offsets may only be allowed if the reduction occurs after August 7, 1980 and the new facility is a replacement for the old facility. Although the proposed rulemaking on most of these issues was published in the Federal Register on August 25, 1983, when approving SIP's, we may not presume that the CMA settlement provisions have already occurred. In fact, on October 22, 1984, EPA promulgated a final rulemaking on certain CMA proposals which affirmed the original regulations. Therefore, if a State SIP has a provision that would be approvable if the CMA negotiated changes are promulgated, but the SIP is not approvable under the current 40 CFR Part 51 provisions, the SIP may not be fully approved. Typically, these SIP's are conditionally approved. This condition should contain the requirement that relevant provision(s) will be cha nged within a year to meet w hatever Federal requirements are in effect at that time. The State must also make an enforceable commitment (e.g., a letter from the State Attorney General) to implement their regulations to meet with the current 40 CFR Part 51 requirements in the interim period (i.e., without the CMA settlement changes.)

This system will limit the legal vulnerability of these SIP approvals. If such a conditional approval is not acceptable to the state, the Office of General Counsel (OGC) continues to support a Regional strategy to defer action on the relevant provisions if the State currently has an approved Part D SIP. If the Region chooses to defer action, then the Federal Register provision again, and 2) prospective permitees of their

responsibility to meet the Federally approved SIP requirements in the interim. The Region may also selectively disapprove the variant provisions if the provisions relax a previously Federally approved SIP.

In the November 2, 1983, Federal Register package containing EPA's policy on compliance with the statutory provisions of Part D of the Act, footnote 4 provides guidance on State responsibility for updating SIP's to comply with the current requirements (stated in the August 7, 1980, Federal Register). States which currently have conditions of PSD or NSR SIP's must meet all the conditions that are unrelated to the CMA settlement. For the conditions that could be affected by the CMA settlement, EPA will extend

the conditions until the CMA proposal is completed. For these CMA affected conditions, the State must agree to an enforceable interim implementation agreement to ensure that the current requirements contained in 40 CFR Part 51 will be met until the CMA final notice.

Common Errors in NSR/PSD SIP's

During the review of SIP revisions, my staff has observed several problems that occur frequently, impact critical elements , and must be avoided in order to fully approve a NSR/PSD rule. These are listed in the right-hand column of Attachment E. To avoid further difficulty with some of the more common errors, I wish to clarify EPA's policy in these areas.

1. EPA-Approved Models. To comply with the Act, all SIP's must state that if a party wishes to use a nonguideline air quality model during a PSD air quality analysis, then they must receive permission from EPA.

2. Class I Area Protection. All SIP's for State and local agencies whose jurisdiction comes within 100 kilometers (km) of a Class I area must pertain all contain all the Class I protection provisions. These include identification of Class I areas, notification to their Federal land manager (FLM) or EPA of any PSD source located within 100 km of a Class I area on or before its application is considered complete, protection of Class I increment (including protection from various exemptions such as portable sources and sources with proposed innovative control technology waivers) and sending copies of all materials to FLM's as they become available. If no Class I area is located within 100 km, then an enforceable commitment should be made that if a new Class I area is created within 100 km, the State will add these provisions to its SIP.

3. Offsets and Reasonable Further Progress (RFP). All SIP's must state explicitly that each offset transaction must be consistent with the RFP demonstration. Also, if a SIP allows exemptions from offsets, the SIP must require that any emissions resulting from these exemptions will also be consistent with RFP.

4. General Exemptions. Many SIP's contain general exemptions from all PSD and NSR requirements. I can only allow these exemptions if the SIP explicitly states that these general exemptions cannot be used to exempt any major source or major modification, as defined in 40 CFR Part 51, from any requirements in Part 51.

5. Baseline Date. A SIP may not contain a baseline date from the past unless the date was set by a complete PSD application or if the relevant reviewing authority demonstrates that the approach taken is at least as stringent as the one identified under the Federal definitions.

6. Jurisdiction on Indian Lands. Several issues have recently emerged regarding the extent that States have SIP jurisdiction over Indian lands contained within their State. The Office of Federal Activities has

advised the Office of Air and Radiation that States presumptively do not have this authority. Thus, unless a State can show that it has authority on Indian lands, EPA must state in the CFR that EPA retains authority for issuing PSD permits in Indian lands. If the State wishes to accept

jurisdiction over Indian lands, the demonstration proving this authority must be approved by EPA prior to proposing approval of the PSD SIP.

7. Jurisdiction of Existing PSD Permits. When EPA approves a PSD SIP, it is necessary to determine jurisdiction over any existing PSD permits previously issued by EPA. If the State wishes to have responsibility for these permits and will commit to reissue these permits under the State program, EPA should announce the transfer of authority in the Federal Register. If the State wishes to have responsibility for these permits and either will not or cannot commit to reissue these permits, EPA can still transfer control by retaining 40 CFR 52.21 in the SIP and delegating authority to the State (i.e. using a memorandum of understanding as in a program delegation). In this case, the supplementary information in the final rulemaking Federal Register notice should announce the delegation of priority for the existing permits. If a State declines the opportunity to take responsibility for EPA-issued permits, EPA will again retain CFR 52.21 authority for these permits. In either of these last two cases, the CFR language contained in the final Federal Register promulgation package should contain provisions which retain EPA's authority and exclude the State's authority for these existing permits.

Equivalent State/Local Rules

Our current system for measuring the approvability of candidate State/local rules is based on line-by-line equivalence with the 40 CFR Part 51 regulations for NSR (Section 51.18(j)) and PSD (Section 51.24). Both sets of requirements contain the program requirements mandated by the Act as well as additional requirements not specifically contained in the Act but needed to make the permitting process operative. Yet, to date we have allowed language deviation only where they could be shown that the proposed variant provisions would cause no difference in terms of real world impact. Specifically, approval of a State/local rule which contained a combination of weaker and stronger provisions (as compared to 40 CFR Part 51 requirements was not allowed, even if this rule were more stringent overall. Considerable analysis considering alternative approaches pertaining to this subject has been done. However, the Regional Offices, OGC, and CPDD question the need for completing this project. To date, the most promising use of an overall rule equivalence policy is to rationalize conditional approval of qualifying rules during which time EPA and the State pursue the need to make regulatory amendments. Accordingly, until a more definite need is determined, we are not recommending further action on the equivalency issue.

I hope that this guidance will be helpful. Any comments on these actions, including other ideas or concerns you may have on improving NSR/PSD

programs transfer, should be forwarded to Mike Trutna at 629-5591. I look forward to seeing continued improvements in NSR/PSD program development and transfer.

Attachments

cc: G. Emison
B. Pedersen
E. Reich
P. Wyckoff