MEMORANDUM July 21, 1993

SUBJECT: Use of Shutdown Credits for Offsets

FROM: John S. Seitz, Director
Office of Air Quality Planning and Standards (MD-10)

TO: Addressees

This memorandum and attachment respond to issues involving the Environmental Protection Agency's (EPA's) new source review (NSR) rules and guidance concerning the use of shutdown credits. The attachment provides a full discussion of the issues and this policy. The regulations in 40 CFR 51.165(a)(3)(ii)(C)(2) provide that where a State lacks an approved attainment demonstration, emissions reductions from shutdowns or curtailments cannot be used as new source offsets unless the shutdown or curtailment occurs on or after the date a new source permit application is filed. A concern raised is that because the Clean Air Act Amendments of 1990 (1990 Amendments) have created new schedules for submitting attainment demonstrations,[1] the existing NSR rules restricting the use of so called "prior shutdown credits" may be read as unnecessarily hindering a State's ability to establish a viable offset banking program for several years. Since this situation was not accounted for in EPA's prior policy statement, EPA determined it was appropriate to reconsider its position in light of the 1990 Amendments.

The reconsideration led to the conclusion that States should be able to follow, during the interim period between the present and the date when EPA acts to approve--or--disapprove an attainment demonstration that is due, the shutdown requirements applicable to areas with attainment demonstrations. This interpretation only extends to those otherwise creditable shutdowns and curtailments actually occurring during the time period from enactment of the 1990 Amendments (November 15, 1990) through the period until EPA acts to approve--or--disapprove

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[1]For instance, attainment demonstrations are not due until November 15, 1993 for moderate ozone nonattainment areas, and November 15, 1994 for serious and above areas. Attainment demonstrations are not required by the Clean Air Act (Act) for marginal and nonclassified ozone nonattainment areas and for ozone attainment and unclassifiable areas in the ozone transport region (OTR).

an attainment demonstration that is due. This policy cannot be extended to situations where an attainment demonstration is lacking. In addition, to be sure that the State remains on track for attainment, the lifting of the shutdown restrictions is conditioned on the State meeting other applicable part D planning requirements as discussed in the attachment to this memorandum.

If the State's submittal is delinquent for any of the reasonable further progress (RFP) milestone submissions identified in the attachment or the State's attainment demonstration is disapproved, the restrictions on use of shutdowns will again apply. To be creditable, the shutdowns or curtailments being used as offsets must have occurred on or after November 15, 1990; the emissions from the shutdown or curtailment must be included in the emissions inventory for attainment demonstration and RFP milestone purposes; and the amount of the credit must be the lower of actual or allowable emissions for the source. Pursuant to EPA's existing regulatory framework, the shutdown or curtailment must be permanent, quantifiable, and federally enforceable.

For marginal ozone nonattainment areas and for the attainment and unclassifiable ozone areas in the OTR, EPA's present interpretation is that these areas should be allowed to follow the less-restrictive shutdown policies applicable to areas in compliance with the attainment demonstration requirements. Since these areas are not required by the 1990 Amendments to submit attainment demonstrations, it would be inconsistent with EPA's purposes in adopting the shutdown restrictions to treat these areas as if they had failed to make this demonstration. The RFP will be protected by the mandatory bump-up provisions applicable to marginal ozone areas and by the requirement that ozone nonattainment areas in the OTR continue to meet RFP milestones in order to qualify for this interim policy.

States may interpret their own regulations or, when necessary, make a State implementation plan (SIP) submittal in accordance with this policy. This policy statement is limited to ozone nonattainment areas and ozone attainment and unclassifiable areas in the OTR. States may wish to seek relaxation of the policy for other pollutants. We will consider these requests on a case-by-case basis. It should be noted that at least some attainment demonstrations are in fact due.[2]

This guidance document does not supersede existing Federal or State regulations or approved SIP's. The policies set out in this memorandum and attachment are intended solely as guidance during the interim period as specified in this memorandum and do not represent final Agency action. This policy statement is not ripe for judicial review. Moreover, it is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with the United

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[2]For instance, attainment demonstrations in moderate carbon monoxide areas were due on November 15, 1992; attainment demonstrations for moderate PM-10 (particles with an aerodynamic diameter of less than or equal to a nominal 10 micrometers) areas were due on November 15, 1991.

States. Agency officials may decide to follow the guidance provided in this memorandum, or to act at variance with the guidance, based on an analysis of specific circumstances. The EPA also may change this guidance at any time without public notice. The EPA presently intends to address further the matters discussed in this document in its forthcoming NSR rulemaking regarding regulatory changes mandated by the 1990 Amendments and will take comment on this interpretation of the shutdown provisions in light of the 1990 Amendments as part of that rulemaking.

The Regional Offices should send this memorandum with the attachment to their States. Questions concerning specific issues and cases should be directed to the appropriate EPA Regional Office. Regional Office staff may contact Mr. David Solomon, Chief, New Source Review Section, at (919) 541-5375, if they have any questions.

Attachment

Addressees
Director, Air, Pesticides and Toxics, Regions I, IV and VI
Director, Air and Waste Management, Region II
Director, Air, Radiation and Toxics Division, Region III
Director, Air and Radiation Division, Region V
Director, Air and Toxics Division, Regions VII, VIII, IX and X

cc: Air Branch Chief, Regions I-X

Attachment

FULL DISCUSSION ON USE OF PRIOR SHUTDOWNS

In response to concerns regarding use of pre-application shutdowns that have arisen by virtue of the Clean Air Act Amendments of 1990 (1990 Amendments), the Office of Air Quality Planning and Standards has reviewed the policy on the use of prior shutdown credits. This policy, and the regulations in part 51, were revised in 1989 to allow for the use of prior shutdown credits for offset purposes in those areas having approved attainment demonstration plans [see 54 FR 27286 (June 28, 1989)]. The Agency, however, retained a restriction on the use of prior shutdown credits in areas without approved attainment demonstrations. All of these areas had failed to attain the national ambient air quality standards by the statutory deadline.

The 1990 Amendments created new deadlines and new control requirements which have dramatically changed the circumstances that shaped EPA's 1989 decision regarding the use of shutdown credits, such that a literal reading of the 1989 regulation would now be inconsistent with EPA's underlying policy in some circumstances. All nonattainment areas are subject to new attainment deadlines, and all ozone nonattainment areas classified as moderate and above are now required to submit new attainment demonstrations. Indeed, in ozone nonattainment areas, the 1990 Amendments impose a series of planning requirements and milestones to mark progress towards attainment. For instance, the amended Clean Air Act (Act) required States with moderate ozone nonattainment areas to submit revised control measures, revised new source review (NSR) rules, and a 1990 emissions inventory by November 15, 1992, and allows States until November 15, 1993 to submit additional control measures and an attainment demonstration plan that achieves at least a 15 percent reduction in volatile organic compounds (VOC) emissions. Serious and above ozone areas were required to submit numerous new or revised control measures, revised NSR rules, and a 1990 emissions inventory by November 15, 1992; additional control measures and a 15 percent reduction plan by November 15, 1993; and full attainment demonstration plans by November 15, 1994.

In 1983, EPA proposed to lift nearly all restrictions on the use of prior shutdown credits. In making that proposal, the Agency presumed that by the time it took final action on the proposal, areas would either have in place approved attainment demonstrations or be subject to a construction moratorium (see 54 FR 27292). However, by the time EPA took final action--some 6 years later--this proved not to be the case. Many States neither fully demonstrated attainment nor were subject to a construction moratorium. Thus, in justifying the decision to continue restrictions on the use of prior shutdowns in areas without an attainment demonstration, EPA explained that "the nonattainment areas requiring but lacking attainment demonstrations . . . are at the center of EPA's current concern regarding the shutdown credit issue . . . " (Id.).

Specifically, EPA explained that the unrestricted use of shutdown credits would lead to offset transactions where there was no nexus between the decision to shut down the existing source or unit and the decision to construct new capacity. Instead, shutdowns that would occur regardless of any potential to sell the resulting emissions reduction would not be available for

reasonable further progress (RFP), but instead would be used to accommodate additional emissions growth in the nonattainment area. In the face of a State's failure to adopt an attainment plan long past the statutory deadline for submitting an approvable plan, EPA determined that the unrestricted approach was inconsistent with the requirements of RFP. Accordingly, EPA retained its restrictive shutdown policy for such areas in order to guarantee to the extent possible that the new source would secure the offsetting reduction out of the area's existing emissions and thus assure RFP (Id. at 27293). On the other hand, where the State implementation plan (SIP) contained a demonstration of attainment--"and hence an independent assurance of RFP"--EPA would be satisfied with a "more attenuated link" between the shutdown and the new construction (Id.).

Another factor favoring retention of the narrow shutdown policy in areas needing but lacking approvable attainment demonstrations was EPA's intention at the time to impose substantial planning burdens on many States for their failure to meet the December 31, 1987 attainment date for ozone and carbon monoxide. At the time EPA published the 1989 shutdown regulations, it believed that many States would be facing the prospect of adopting severe measures to respond to EPA's finding that their present efforts at achieving RFP and attainment were substantially inadequate. Under those circumstances, EPA believed "that it would be inappropriate even to hold out the possibility that States could obtain approval at this time for expanded use of shutdown offset credits in areas with inadequate plans" (Id. at 27294). At a minimum, States would need an approved inventory so that EPA could verify the proposed use of a prior shutdown credit (Id.).

The 1990 Amendments changed this landscape dramatically. The Act as amended gives States new attainment deadlines and new dates for submitting attainment demonstrations.[3] No State can be said to have missed the overall attainment deadline or the date for submitting attainment demonstrations for ozone as required by the 1990 Amendments. Instead, States are in the process of developing new attainment demonstrations based on the specific planning requirements of the new provisions of the 1990 Amendments. As discussed, these provisions include not only specific emissions reduction strategies that must be implemented, but requirements that areas demonstrate periodically that the reductions are occurring and that specific progress towards attainment has been made. In addition, the "General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990" (General Preamble) [see 57 FR 13498 (April 16, 1992)] includes a specific methodology for reconciling prior shutdowns with the 1990 ozone inventory, and assures that these reductions must be taken into account when

[3]Some areas subject to offset requirements (such as marginal ozone nonattainment areas and attainment areas in the ozone transport region) are not even required to submit attainment demonstrations.

submitting the attainment demonstration and when showing compliance with the various RFP milestones (see General Preamble, pp. 13507-13509).[4]

In total, these provisions provide the "independent assurance of RFP" that EPA pointed to before as being necessary to allow generous use of prior shutdown credits. Of course, if a State misses any of the RFP milestones, the rationale for a more restrictive use of shutdown credits returns. For this reason, EPA's position is that use of pre-application shutdown credits as offsets can only be allowed where State submissions have met and continue to meet the statutory planning mandates and air quality improvement milestones. As described below, once a State fails to meet any of the milestones in its SIP or to meet a RFP benchmark, EPA cannot be assured that the safeguards in the Act guaranteeing proper progress towards attainment are sufficient, and the restriction on use of pre-application shutdowns and curtailments must automatically resume until the delinquent planning provisions are submitted.[5]

In ozone nonattainment areas, this means that the temporary lifting of the restrictions under this policy is subject to the following conditions as they apply and as they come due:

- The State has submitted a completed emissions inventory as required by § 182(a)(1);

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[4]The increased offset ratios for VOC and nitrogen oxides in ozone nonattainment areas [see, e.g., § 182(a) - (e)] and the new requirement that all offsets be based on actual emissions reductions [§ 173(c)] provide further assurances that new source increases will in fact be counterbalanced by real reductions in actual emissions.

[5]In the General Savings Clause (§ 193), Congress required EPA to retain all regulations and other requirements in effect at the time of the passage of the Act, "except to the extent otherwise provided under this Act [or] inconsistent with any provisions of this Act." The EPA views the new deadlines for attainment and for the submittal of an attainment demonstration as creating sufficient inconsistencies to justify changing--during the short interim period until the date EPA acts on an attainment demonstration that is due--its pre-enactment position on shutdowns. This is especially true in the few nonattainment areas that are no longer subject to the attainment demonstration requirement and can never qualify for the more relaxed shutdown policy under the existing regulations.

! The State has submitted complete revisions to its NSR program as required by § 182(a)(2)(C);

! The State submits the 15 percent VOC reduction plan required by § 182(b)(1)(A) for moderate and above areas; and

! The State submits the attainment demonstration required by § 182(c)(2) for moderate and above areas.

Under this policy, if any of these submissions are delinquent, or if any of these submissions are deemed incomplete or disapproved, emissions reductions from shutdowns or curtailments can no longer be used for NSR offsets unless the criteria laid out in 40 CFR 51.165(a)(3)(ii)(C)(2) are met. Where there is an emissions reduction credit bank in place, banked credits from prior shutdowns or curtailments will be frozen until the State submits the delinquent SIP elements.

Furthermore, the emissions reductions represented by the shutdown or curtailment cannot be otherwise required by the Act, EPA regulations, or rules adopted by the State under the Act. In other words, the State cannot rely on emissions reductions credits in its overall attainment plan and rely on the same credits in the issuance of a NSR permit (i.e., no "double counting"). Consequently, where appropriate, emissions reductions from source shutdowns or curtailments must be discounted to reflect reasonably available control technology (RACT), new source performance standards, or any other Act requirement applicable to the source or reasonably foreseeable at the time of the use of the emissions reductions as offsets. For example, a State may have already developed RACT rules that would require compliance by a source in 1995. Any reductions at the source that would be necessary to meet the upcoming RACT requirement would need to be excluded in computing the offsets that would be available by a complete shutdown of the source.

It is possible that, during review of a permit application that uses emissions reductions from prior shutdowns or curtailments as offsets as allowed under this policy, a State may become delinquent in meeting the planning provisions outlined above. At such time as a State becomes delinquent, the restrictions for offsets are automatically restored. However, in such cases, States may allow offsets to remain creditable if the permit application was complete (as determined in writing by the reviewing authority) before the State became delinquent. Alternatively, States may use a later point in the permitting process for determining if these offsets are creditable.