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OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

MEMORANDUM

SUBJECT: Approval Options for Generic RACT Rules Submitted to Meet the non-CTG VOC RACT Requirement and Certain NOx RACT Requirements

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This memorandum discusses the potential rulemaking options for certain volatile organic compound (VOC) and nitrogen oxides (NOx) submissions pursuant to the reasonably available control technology (RACT) requirements under section 182(b)(2) and (f) of the Clean Air Act (Act). Specifically, this document concerns "generic" rules, which are defined as non-CTG VOC RACT or NOx RACT rules that merely require sources to identify RACT-level controls which the State will later submit through the State implementation plan (SIP) process. The rulemaking options laid out in this document provide a guideline for the Environmental Protection Agency (EPA) regional offices in order to determine the most appropriate rulemaking option for these generic rules.

Several Regions received NOx and/or non-CTG VOC RACT submittals from States that consist wholly or in part of a

"generic" rule.¹ A "generic" rule is one that requires or allows certain sources (e.g., non-CTG VOC RACT sources) to submit source-specific RACT rules by a date certain and to comply with RACT by a subsequent date certain.² In other words, the submitted State regulation does not currently have specific RACT requirements established for all major non-CTG VOC and NOx sources; instead there is a general regulatory requirement that certain sources meet RACT and that those RACT plans be submitted to EPA for approval. In many cases in which the State

¹ With respect to VOC RACT, this policy applies only to non-CTG VOC RACT. For other VOC RACT submissions (i.e., CTG RACT), there is sufficient information for States to select category-wide or source-specific RACT controls. The CTGs establish presumptive RACT for specific categories of sources. Hence, the States have a tool for readily ascertaining RACT-level controls. Moreover, since the range of potential sources within the category covered by the CTG was considered in establishing presumptive RACT, the need for source-specific RACT rules is minimized. Therefore, the State should not have submitted and EPA should not be considering approval of generic RACT rules for these sources.

With respect to NOx RACT, this policy generally will not apply to submittals for NOx utility boilers. As an initial matter, EPA's November 1992 guidance identified RACT for wall and tangentially-fired utility boilers, which generally account for the majority of stationary NOx emissions. Several technical documents also exist for other utility boiler types. More importantly, most States have already submitted NOx RACT rules for all types of utility boilers. However, this policy document should not preclude consideration by EPA of any special circumstances that may arise.

² In some cases, the generic rule may also be accompanied by a rule establishing presumptive RACT. If the State regulations do not provide that the presumptive RACT requirement applies unless and until a source receives approval of an alternative RACT limit, the Region should review the submittal in light of this policy. However, this memorandum does not apply to the case where a SIP submission requires all major sources to comply with the presumptive RACT limit unless and until a source receives approval of a source-specific alternative RACT requirement. Under this scenario, all sources are subject to an emission limit submitted by the State as a SIP revision, and the Region should review the submittal to determine whether the presumptive RACT limit meets the RACT requirement of the Act. If so, the submittal should be fully approved. However, the Region should make clear in the notice that any alternative RACT requirement approved by the State will not supplant the presumptive RACT requirement for purposes of Federal enforceability unless and until the alternative is approved by EPA into the SIP.

independently submitted a generic rule, the State simultaneously submitted or has since submitted some portion of the case-by-case RACT submissions.

The EPA has long interpreted the RACT requirement of the Act to mean States must adopt and submit regulations that include emission limitations³ as applicable to the subject sources. In other words, a state would not fully meet the RACT requirement until it established emissions limitations applicable to the appropriate sets of sources. Hence, EPA's policy is that a mere requirement for a source to submit RACT rules does not fully meet the RACT requirement of the Act in the absence of submitted emission limitations. However, it is also commonly recognized that in most instances a generic RACT rule strengthens the SIP. To the extent that a generic rule sets dates by which sources must submit RACT and comply with requirements, those dates are enforceable. Hence approval into the SIP makes those requirements federally enforceable. The SIP is stronger because it has a mechanism that the Federal government and citizens can use to help ensure that sources submit and comply with RACT.

In light of these benefits, it is generally agreed that in most instances it is not in the public interest to fully disapprove a generic RACT submission. However, in determining the approval option that best fits a specific circumstance, the benefit of approving the generic regulation needs to be weighed against the need to continue to provide incentives to ensure adoption and submittal of the source-specific RACT regulations.

In reviewing the range of generic submissions that EPA has received in response to the Act, as amended in 1990, it appears that there are several options for handling generic rules. These options are more fully discussed below. The use of any particular option will depend on the facts of a specific situation, in light of the benefits of approval, and the need to provide continuing incentives for submittal of emission limitations. Moreover, although this document identifies several available options, there may be other options for action that we have not yet identified.

Full Approval. There are at least three cases where a full approval should or could be used. First, full approval should be granted where a State has submitted a generic rule, but now believes that it has submitted all the source-specific rules and has submitted a negative declaration that to its best knowledge, there are no remaining unregulated sources. However, the Region should not take the full approval action until it has also

³ The use of the term emission limitations is not meant to exclude the use of work practice standards or other operation and maintenance requirements that might be determined to be RACT.

determined that the source-specific rules meet the RACT requirement.

The two other cases where this approach may be a viable option concern situations where a limited number of sources may still be unregulated. First, full approval may be appropriate where the generic rule covers only a limited number of sources, with emissions, in the aggregate, that are determined to be de minimis. For the remaining sources, the State has submitted and EPA has approved source-specific, or source-category-specific RACT rules.⁴ Second, full approval may be appropriate where the generic rule has broader applicability but the state has submitted and EPA has approved (or will have approved by the date of final action on the generic rule) source-specific rules for all but a de minimis amount of source emissions.

The EPA will make a determination that the emissions not covered by an appropriate RACT emission limitation are de minimis. However, the basis for EPA's full approval is more appropriately characterized as a de minimis deferral of the State's obligation to have submitted, and EPA to have approved rules with emission limitations for that de minimis set of emissions. This de minimis deferral does not exempt those potentially unregulated emissions from meeting RACT; in fact, the approved SIP will contain an enforceable requirement that sources submit RACT limits. Rather, this approach only defers the State's submission of the RACT requirements for a de minimis level of emissions.

In addition to determining that the unregulated emissions are de minimis, as defined below, other factors may need to be considered in determining whether full approval is an appropriate option. Below, we first provide further guidance on making a de minimis determination and then identify other factors to consider when assessing the full approval option.

De minimis deferral is defined as an amount of either VOC or NOx emissions determined to be insignificant for purposes of the approval of the generic RACT regulation, but where RACT still must eventually be determined and approved by EPA. In order to determine whether a set of emissions is de minimis, there needs to be a baseline against which the emissions are compared. In the case of non-CTG VOC sources, the baseline is the 1990 inventory of VOC emissions from those major stationary sources that were not covered by a CTG at the time of the State submittal of the generic RACT regulation. In the case of NOx, the baseline is the 1990 stationary source NOx inventory, excluding utility

⁴ The use of the term emission limitations is not meant to exclude the use of work practice standards or other operation and maintenance requirements that might be determined to be RACT.

boilers.⁵ In both of these cases, those major sources are still obligated to implement RACT. However, the approval of the generic RACT regulation, which imposes this RACT implementation requirement, can occur prior to the approval of those case-by-case RACT controls for a de minimis portion of the emissions.

The determination of whether the unregulated emissions are de minimis must be made on an area-specific basis. Where the non-approved RACT requirements concern sources whose emissions represent less than 5% of baseline, as described above, it may be appropriate to issue a full approval of the generic RACT regulation prior to the approval of those remaining case-by-case RACT determinations. While 5% should not be considered a firm cut-off point for considering a full approval, the need for coordinating with other Regions will be much more important if the unregulated emissions exceed that amount.

Additionally, EPA may consider a State's overall situation in determining whether or not full approval of a State's generic RACT regulation is warranted. For example, in determining whether the NOx emissions associated with generic provisions are de minimis, EPA may consider the proportion of these emissions relative to area wide emissions in addition to considering their proportion relative to non-utility emissions. In an extreme example of this kind of case, a State may have submitted its RACT proposals for all but one non-utility source. This State's inventory may be such that this single non-utility source's NOx emissions represent more than 5% of the non-utility emissions, and the RACT approval for this source is expected imminently. Similarly, EPA may want to consider whether the submitted RACT rules achieve an aggregate emission reduction greater than the level recommended by EPA policy. In such cases, EPA may decide to grant full approval of the generic provision, provided that the generic regulation contains enforceable provisions that pending RACT rules be submitted to EPA for approval. Other factors may also be relevant in determining whether to grant full approval, such as whether a State has RACT rules or regulations which are currently overdue and whether the unregulated sources have been identified. These factors may have more significance if the emissions from the outstanding RACT regulations exceed 5% of the baseline.

⁵ This situation is distinguishable from that identified in footnote 2. In footnote 2, we recognize that a presumptive rule that affects all non-CTG VOC sources, or all NOx RACT sources should not be considered under this policy. However, for a submittal that establishes presumptive RACT for only a subset of sources and provides that the remainder are subject to the generic RACT provision, the Region should use this policy document to determine what action is appropriate.

In the proposed and final full approval actions, the Region will need to do several things. First, the Region must determine or rely on a State determination that the emissions associated with the remaining case-by-case RACT controls are less than de minimis, as described above. Although this analysis need not be a complicated mathematical determination, the State (or the Region) will need to provide some support for how it made this determination and the basis for it. Second, the Region will need to clearly state that a full approval action will not relieve sources or States of the obligation to ensure that all sources within the regulated area comply with the RACT requirement of the Act, by adopting and implementing emission limitations. This point should be clearly made in both the proposed and final full approval notices. The Region also should specifically recognize that there is a requirement in place for any remaining sources to determine and comply with RACT, and that this requirement is enforceable by EPA and by citizen groups under section 304 of the Act. This point is equally relevant, even where the State has submitted a negative declaration. The Region should make clear that the negative declaration does not affect the obligation of "unknown" sources that may remain unregulated to submit RACT requirements in accordance with the approved generic rule. Furthermore, the Region should recognize that, although the SIP is being fully approved as meeting RACT, if EPA later determines that sources remain unregulated under the federally-approved SIP, EPA could issue a SIP call or, possibly, a finding of non-implementation of the SIP.

Conditional Approval. If full approval is not a viable option because more than a de minimis level of emissions remain unregulated, then conditional approval may be suitable if certain conditions are met. Most importantly, a conditional approval cannot be granted unless the State agrees to submit source-specific RACT rules for all major sources subject to the generic RACT rule.⁶ The State must agree to submit these source-specific RACT rules by a date certain, but no later than one year following the final conditional approval notice.

In addition, the State must agree to submit either: (1) a declaration that to the best of its knowledge it has submitted source-specific RACT rules for all sources subject to the generic rule, or (2) a demonstration that the State's RACT rules cover all but a de minimis amount of source emissions.

As stated earlier, there are benefits to having a federally enforceable generic rule. Therefore, any conditional approval should ensure that, if the conditional approval converts to a

⁶ As provided in footnote 1, there may be special circumstances where EPA will consider a broader baseline for NOx RACT sources.

disapproval, the generic rule will remain a part of the federally enforceable SIP. The best approach to use is similar to that used for a limited approval/disapproval, substituting the conditional approval for the disapproval aspect. Hence, the proposed and final actions would provide that EPA is approving the entire submission (i.e., the generic rule and the commitment) for its strengthening effect and EPA is also conditionally approving the entire submission based on the commitment of the State. If the State fails to meet the commitment, EPA will convert the conditional approval to a disapproval. At that point, the State would have a limited approval/disapproval of the generic rule and the associated commitment. Both the generic rule and the State commitment will remain a part of the federally enforceable SIP because the limited approval is not affected by the conversion. The incorporation by reference (IBR) language in the regulatory text of the final rule should also make clear that the generic rule and the State commitment are being granted both a limited approval and a conditional approval.

The preamble to the proposed and final action also should make clear the process for converting the conditional approval to a full approval or to a limited approval/disapproval. If the State makes no submittal in order to meet its commitment, the Region should convert the limited approval/conditional approval to a limited approval/disapproval by sending a letter to the State. This letter would be analogous to a finding of failure to submit letter, and the sanctions clock would start on the day the letter is sent. In general, if the State makes a submittal for purposes of meeting the commitment, the conditional approval will remain effective until EPA either: (1) finds the State submittal incomplete, or (2) approves or disapproves the submission. If the Region finds the submittal incomplete or disapproves it, that action will convert the conditional approval to a disapproval and will start the sanctions clock. A full approval will result in the fully approved rules replacing the conditionally-approved commitment.

⁷ A practical problem with a commitment to submit "all" source-specific RACT proposals by a future date is that the state may not have time to complete SIP processing for major sources it discovers before that date (e.g., during the one year commitment period). To overcome this practical difficulty, EPA may propose conditional approval if the state commits to submit source-specific RACT SIPs for all sources that are known as of a given date (no earlier than the date of the commitment letter). However, if the state opts for this approach, the proposed rulemaking notice should make clear that the conditional approval cannot convert to a full approval unless EPA determines that EPA-approved RACT rules cover all but a de minimis amount of source emissions.

Limited Approval and Disapproval. This approach may be used for submittals that do not meet the criteria for a full approval or for a conditional approval -- there is a greater than de minimis emission reduction that is not accounted for by approved source-specific regulations, and the State has not submitted a commitment consistent with the criteria identified above (e.g., no commitment or a commitment that would extend more than a year past final conditional approval). In determining how to approach a limited approval/disapproval, the Region should consult the July 9, 1992 policy, "Processing of State Implementation Plan (SIP) Submittals" and the March 22, 1991 policy, "Processing of Pending Revisions to Federally-approved State Implementation Plans (SIP's)." In general, while the limited approval and disapproval should be taken at the same time, there may be a basis in some instances to sever these two actions. However, the Act does provide that EPA action on a SIP submittal should be completed within 12-months of a determination of completeness. An 18-month sanctions clock would start on the effective date of the disapproval portion of this action.

Disapproval. There may be situations where a Region determines that a generic rule would not strengthen the SIP. In such a circumstance, disapproval would be an appropriate option.

CONCLUSION

If your Region has received a generic RACT submission from a State, you should consider the options identified in this memorandum in assessing what type of approval action to take. The option you select should depend on the circumstances presented by a specific submittal. If you are taking an approach that is not addressed by this memorandum or which deviates from this guidance, you should resolve the issue through the SIP consistency process.

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 NOx Policy Workgroup
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