

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
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Monitoring

John S. Seitz, Director
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 After we distributed the draft guidance for comment on December 16, 1987, several Regional Offices took action on deficient new source permits. The events surrounding those permit actions, as well as your thoughtful comments on the draft guidance, have shaped the final policy.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. Section 124.19, a Section 167 order, and a Section 113(a) (5) finding of violation.

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 Section 124, and greatly enhances EPA's equitable position in challenges under Section 167 and Section 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 Section 124.19(b), revocation of the permit, and/or enforcement action. A Section 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 FTS 382-2843.

Attachment

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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 judgement.

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. Section 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. Section 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. Section 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. Section 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. Section 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 Section 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. Section 124.19(a) or (b) within 30 days of the date the final permit was issued to review deficient provisions of the permit.
 - a. Section 124.19(a) is an appeal, which may be taken by any person who commented during the public comment period.

- b. Section 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 Section 124.19(b) over Section 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 Section 124.19(b). In some instances, however, the third party role for a Regional Office, through 40 C.F.R. Section 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 Section 124.19(b), it should ask that its memorandum be considered as a petition for review under Section 124.19(a) should review under Section 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 Section 124.19(a).
3. If the 30 day period for appeal has run and strong equities in favor of enforcement exist, issue a Section 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 Section 124.19.
2. If the permit was issued more than 30 days previously, issue a Section 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 Section 167 order is issued. Section 167 orders may be used both for sources which have and have not commenced construction. However, because the Section 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 Section 167 contains no penalty authority. Note that strong equities for enforcement must exist before taking this step. EPA can issue both a Section 167 order requiring immediate injunctive relief and a NOV if we decide that both are appropriate.
4. Follow up with judicial action under Section 167 and Section 113(b) (2) if construction continues without a new permit.

C. Note that the appeal provisions of 40 C.F.R. Section 124.19 apply to all delegated PSD programs even if Section 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 Section 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 Section 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 Section 167, Section 113(b) (5), or, if NOV issued, Section 113(b) (2). If penalties are appropriate, issue NOV and later amend complaint to add a Section 113 count when 30 day statutory waiting period has run after initial action is filed under Section 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. Section 124.19(b).
2. If permit has been issued for more than 30 days, issue Section 167 or Section 113(a) (5) order preventing startup 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. Section 124.19, if possible. If action under 40 C.F.R. Section 124.19 not possible, first revoke permit and then act as set forth in Section IV.

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Appendix

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