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Options For the Potential to Emit Rulemaking

November 3, 1997

MEMORANDUM

SUBJECT: Discussion Paper on Options For the Potential to Emit Rulemaking

FROM: Bruce Buckheit, Director
Air Enforcement Division
Office of Enforcement and Compliance Assurance

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Office of Air Quality Planning and Standards

TO: Clean Air Act Advisory Committee
Subcommittee on Permits/NSR/Toxic Integration

At the August 6, 1997 meeting of the Clean Air Act Advisory Committee's Subcommittee on Permits, NSR and Toxic Integration, EPA presented a range of potential options regarding the definition of "potential to emit." At the request of participants, EPA agreed to provide a brief written summary of the options presented at the meeting, as well as some consequences associated with each.

The requested summary is attached for your review. It should be noted that fewer than five options appear, because some of the options presented on August 6 are shown as subparts of the same option. "Option A" considers whether state-only enforceable limits should be credited, including whether such limits could be created by non-air pollution control agencies and the appropriateness of placing the responsibility for demonstrating the effectiveness of such limits on the source. "Option B" would require federal enforceability, but discusses the idea of allowing sources to obtain state-issued enforceable limits (e.g., issued through non-SIP approved programs), and then "opt in" to the federal enforceability of such limits. Finally, "Option C" sets forth a streamlined version of the traditional approach for federal enforceability.

This discussion paper is intended to stimulate constructive dialogue on how the proposed rule could be fashioned. Consistent with the discussion on August 6, this summary presents options that differ primarily with respect to the question of who should be able to enforce limits on potential emissions, the burden of proof in any enforcement action, and the need for EPA review of State programs that issue limits.

Most of the discussion at the August 6 meeting addressed back-end enforcement concerns (e.g., federal and State versus State-only enforceability), not front-end concerns such as public comment, EPA review or practical enforceability. In evaluating options for the proposal, it is important to consider these front-end issues as well. Though not discussed in detail in this paper, front-end issues will most likely be addressed through a range of approaches that cut across the options outlined in the discussion paper. We encourage you to review the January 1996 discussion paper ("Effective Limits on Potential to Emit: Issues and Options") for additional background on the issues to be addressed in the proposal.

We intend to discuss these issues at the next meeting of the CAAAC's Subcommittee on Permits, NSR and Toxic Integration, scheduled for November 6 in Tampa, Florida. At this time, EPA is most interested in ensuring that the proposal includes discussion of a complete range of options and the expected consequences, and input of that nature would probably be of the greatest short-term benefit. The summary cannot, of course, set forth the entire rationale supporting each option, nor can it explore every possible iteration of how individual issues could be addressed in the proposal. We look forward to continuing this dialogue in the public process that will follow the proposal.

Please submit any brief, preliminary written comments to EPA by November 14. Comments are welcome on legal issues as well as policy issues. We would, however, appreciate it if comments could be limited to 20 pages or less. Comments should be sent to Carol Holmes, Air Enforcement Division, U.S. EPA, 401 M Street, SW, Mail Code 2242A, Washington, D.C. 20460; telephone (202) 564-8709; fax (202) 564-0053.

Attachment

cc: Carol Holmes
Tim Smith
Jim Ketcham-Colwill
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SUMMARY OF OPTIONS FOR
EPA'S POTENTIAL TO EMIT RULEMAKING

Practical Enforceability Criteria

A 1989 EPA memorandum sets forth the most thorough guidance regarding the practical enforceability of permit limits. See Memorandum from Terrell E. Hunt and John Seitz to Regional Offices, "Guidance on Limiting Potential to Emit in New Source Permitting" (June 13, 1989); see also 54 Fed. Reg. 27274, 27283 (June 28, 1989).

As Stated in the January 1996 discussion paper, EPA believes that the potential to emit rulemaking presents an opportunity to clarify this guidance and provide additional certainty by promulgating regulatory language setting forth minimum, objective practical enforceability criteria.

EPA's current thinking is that such objective criteria should apply to all limits restricting a source's potential to emit, regardless of whether that limit is enforceable by EPA and/or the State. The following descriptions of the options will occasionally refer specifically to the criteria. However, stakeholders should consider the appropriateness and need for the practical enforceability criteria under each scenario.

Description of Options

In order to minimize confusion of these options with the numbered options discussed in the January 1996 paper, this summary will refer to the options using letters.

A: Limits that are State-only enforceable would be credited. Under this option, compliance with any permit or enforceable limit on a source's operations could limit its potential to emit. The source would have the responsibility to demonstrate the effectiveness of a State-only enforceable limit, as well as its regular compliance with the limit, in a major source enforcement action. A separate sub-issue is whether such limits should be confined to limits issued and enforced by air quality control agencies.

General considerations regarding the acceptance of State-only enforceable limits:

* Some stakeholders argue that accepting conditions that are State-only enforceable may reduce the administrative process needed to obtain an effective limit. Whether in practice the process for obtaining a State-only enforceable limit will differ from that required to obtain a federally enforceable permit will depend on the State process, which may include front-end procedures common to both types of limits (e.g., public comment, prior EPA review).

* This may reduce the enforcement vehicles available to EPA or citizens. Because EPA and citizens could not enforce the limits themselves, they could only bring enforcement action alleging that the source is violating major source requirements. This approach raises the following concerns for EPA and citizens:

-- An additional element of proof (i.e., that the source's potential emissions exceed the applicable thresholds) would be required before EPA or citizens could abate violations of an emission limitation.

-- Returning the source to compliance with the limit would not be an available remedy. The only available remedy to the Agency or a citizen when a source was shown to have violated its limits would be to require compliance with the appropriate major source requirements (e.g., BACT; LAER; MACT; offsets).

-- Pursuing any action of this nature could possibly require substantial resources on the part of EPA and citizens, and citizens may not have access to information needed to prepare such a case. EPA has found it much more resource-intensive to pursue a major source violation as opposed to enforcing against individual permit terms and conditions.

* It may be more difficult with State-only enforceable limits for EPA and the public to identify the limits a source may be relying on to restrict its potential emissions, and to determine whether the limits are effective. This may be the case, for example, for limits created by State rules and programs that have not been reviewed by EPA, and by State permits that have not been reviewed by the public.

Considerations related to a source's responsibility to demonstrate the effectiveness of a State-only enforceable limit, as well as its compliance with the limit:

* Although a source would have maximum flexibility regarding which limits it could rely on to limit potential emissions, it also would be responsible for demonstrating the

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effectiveness of and regular compliance with those limits in an enforcement action or citizen suit.

* Requiring the source to be responsible for demonstrating the effectiveness of the limit would make enforcement of the major source threshold easier for EPA and citizens. Due to the variety of possible types of limits, it may be reasonable to place the responsibility of showing how such limits are effective on the source. In general, some stakeholders argue that a limit created outside a federally-approved program may be issued with fewer safeguards (e.g., the source may not be required to provide as much information on its compliance). Thus, unless the State requires the same information and processes as federally-approved programs, information regarding the effectiveness of a limit and the source's compliance history may be less accessible to EPA, the State and the public than if the limit were created under a federally-approved program. Thus, some stakeholders believe that the source should be responsible for demonstrating these elements.

* Some stakeholders disagree, however, arguing that many limits issued pursuant to State programs are effective, regardless of whether the State program is part of the SIP. They believe that EPA should credit these limits as it would credit limits issued pursuant to SIP-approved programs and not require the source to assume responsibility for proving the effectiveness of the limit. At this time, however, for the reasons set forth above, among others, EPA favors an approach that places the responsibility for demonstrating effectiveness and compliance on the source.

Considerations related to crediting limits from non-air agencies:

* Some non-air pollution control agency requirements might establish clear limits on a source's potential operations, such as requirements that restrict the number of hours of operation. The Agency has some concern with how limits on hours of operation issued by non-air pollution control agencies would be translated into levels of potential emissions. For example, State "blue laws" dating back to colonial times may theoretically restrict Sunday operations by some facilities, but unless it is clear that such laws can be, are, and will be enforced, these laws cannot reasonably be said to provide a "practically effective" limitation on emissions.

* Where the establishment of emission limits requires engineering expertise to develop an appropriate set of terms and conditions for a given source, non-air quality agencies may not have sufficient expertise to establish effective limits.

* State air pollution control agencies are typically not provided authority to enforce limitations created by other State or local agencies (e.g., blue laws). In addition, such limits could be relaxed or altered without the knowledge of the air pollution control agency, and without any review of whether the relaxation results in the source becoming a major source.

- B: Federal enforceability with an "opt in" approach. Federal recognition and enforcement of effective State and local limits, without a requirement for prior EPA review of the State program or the limit. A source could obtain a limit on its potential emissions that was initially enforceable only in State court (e.g., the same limits it could obtain under Option A) and then "opt in" to the federal enforceability of the limit in order to use the limit to restrict the source's potential emissions and become a synthetic minor source under the federal Clean Air Act.

This was discussed under the heading "Voluntary acceptance of the federal enforceability of State limits" within Approach 2 of the January 1996 discussion paper.

A source would have maximum flexibility regarding what limits it could rely on to restrict its potential emissions, and the procedure for opting in would be simple, perhaps involving only submittal of notice to the appropriate permitting agency (and perhaps, but not necessarily, EPA) that the source is relying on the State limit to restrict its potential emissions and agrees to the federal enforceability of the limit.

Compliance incentive effectiveness and public confidence in the resulting limit should be enhanced due to the ability of EPA and the public, as well as the State, to enforce the limits.

EPA approval (through a SIP or otherwise) of the State programs under which the limits would be issued would not be a requirement. Nor would EPA review or approve individual limits.

Unlike Option A, if the source has not "opted in" to federal enforceability, then the limit would not be credited by EPA, and EPA and citizens would have the right to take the source to court for violation of major source requirements, irrespective of the existence of the State permit.

- C: Streamlined version of current approach. Under this option, EPA would reinstate the federal enforceability requirement, but streamline the system to address the court's concerns in NMA. Sources would still need to obtain a federally enforceable State operating permit (FESOP) or other federally-enforceable limit, but EPA

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would streamline the system in two ways, as referred to in "Approach or Option 2" in the January 1996 memorandum:

* EPA would explicitly accept State-only enforceable limits during the period when EPA is acting to approve a State's program.

* EPA would provide substantial flexibility to States on the types of limits that require up-front EPA and public review, consistent with the efforts currently underway in the part 70 rulemaking.

This approach provides for the maximum level of EPA and citizen involvement and enforcement, as well as increased flexibility in enforcement actions. For example, enforcement cases could be more narrowly tailored to ensure compliance with the limit, rather than being directed only towards major source violations.

In addition, because enforcement of emission limits generally requires less resources than enforcement of major source requirements, EPA and citizens would probably be able to pursue more emission limitation cases than they could major source cases. This added enforcement potential may increase compliance incentives.

May be least disruptive to existing State and local programs, because most States have adopted some mechanism for creating federally enforceable limits.

May be more burdensome on sources obtaining limits and agencies issuing limits than the other Options, especially in States which have not yet established mechanisms for creating federally enforceable limits.

Discussion Questions

1. Title V permits are intended to provide a benefit to all involved by establishing a central repository for a source's obligations. It has been suggested that a source already subject to Title V because it is a major source for one pollutant should be required to consider any limit on its potential to emit that the source wants to take to avoid other major source requirements a federally applicable requirement that must be contained in the Title V permit. For example, under this approach, if a source were major for nitrogen oxides (NOx), but a synthetic minor for hazardous air pollutants (HAP), its Title V permit should contain the synthetic minor limits for HAPs as a federally applicable requirement. This approach seems appropriate for these reasons: (1) the source is a major source subject to major source requirements, including Title V, and (2) the procedure for putting the limits in the Title V permit should be a negligible element of the entire Title V permitting process. What additional burdens, if any, would such an approach place on a Title V source and/or the permitting agency? How else could a citizen track limits on a Title V source's potential emissions?
2. Where limits on hours of operation created by non-air pollution control agencies (e.g., a local ordinance limiting hours of operation) are present, is there a need for a demonstration on how and whether these limits create synthetic minor status? If Option A were selected, should the rule require that a source limited in this manner translate the limit on its hours into potential emissions and submit it to the air pollution control agency? Similarly, would there need to be a showing that the other agency possessed equivalent enforcement authority and history as the State air quality control agency and that the rules were actually enforced (e.g., blue laws)? In addition should the non-pollution control agency be bound by the EPA-State air control agency enforcement agreements and policies?
3. Under Option A, EPA is considering requiring sources relying on non-federally enforceable limits to submit a notice of its reliance on these limits so that EPA, the State and citizens could track these limits, and could determine whether the limit should be considered a valid PTE limit, or whether it should be changed. Moreover, EPA is considering whether such a notice should include a stipulation of major source status but for compliance with the State-only enforceable limit. How would such a requirement help alleviate citizen group concerns with limits that are only State-only enforceable? What type and level of burdens, if any would such a requirement place on a source?
4. In fashioning a reasonable solution, should there be a relationship between front-end and back-end issues? For example, under Option A, where sources are responsible for demonstrating that limits adhere to objective criteria, should there be less EPA and citizen involvement in fashioning the limit? Additionally, if practical enforceability requirements are general in nature, is there a greater need for up-front review than if practical enforceability requirements are more specific in nature?
5. If EPA were to propose Option C, in what additional ways could streamlining be accomplished?