

05/25/1979

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Category: 45 – Criteria for Plan Revisions for Nonattainment Areas

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C. 20460

Office of Enforcement

25 MAY 1979

MEMORANDUM

SUBJECT: Submission of State Air Permits as SIP Revisions

FROM: Richard G. Rhoads, Director
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TO: Director, Air and Hazardous Materials Division
Regions I-X

A question has been raised concerning the need for States to submit construction and operating air permits as revisions to State implementation plans (SIP). Of particular concern is the Federal enforceability of State-issued air permits that have not been incorporated individually within a SIP by means of an EPA approval through rulemaking.

Federal enforcement of construction permits issued under procedures complying with the requirements of 40 CFR 51.18 (new source review) is provided in 40 CFR 52.02(d) which reads, in part, as follows:

...all permit conditions or permit denials issued pursuant to approved or promulgated regulations for the review of new or modified stationary or indirect sources, are enforceable by the Administrator...in accordance with...assigned responsibilities under the plan.

Thus, State construction permits which have been issued in accordance with SIP procedures approved by EPA as satisfying 40 CFR 51.18, and which satisfy the interpretative ruling of the requirements of 40 CFR 51.18 (the emission offset policy), 44 Fed. Reg. 3274 et seq. (January 16, 1979), are enforceable by EPA. (However, if emission reductions to meet Condition 3 of the emission offset policy are obtained from existing sources other than those controlled by the owner of the proposed new source, Section V.B. of the policy provides that these "external" offsets must be effectuated through a SIP revision.) The provisions of 40 CFR 52.02(d) also provide for EPA enforcement of prevention of significant deterioration construction permits which have been issued by States under procedures complying with 40 CFR 52.21.

The conditions upon construction contained in these permits which are needed to meet federal requirements (e.g., the source must achieve the lowest achievable emission rate, or operate best available control technology) have continuing application to a source built under the permit. Any State limitations upon the effective duration of a State construction permit is deemed to effect only the authorization to construct under the permit. Once a source is actually built, it must continue to meet the conditions imposed upon its construction unless they are modified by a federally approved SIP revision.

Operating permits present some special problems. Since State procedures for the issuance of operating permits to new sources are not required under 40 CFR 51.18 or 40 CFR 52.21, State new source operating permits are not federally enforceable under 40 CFR 52.02(d). Of course, to the extent the behavior required in new source operating permits is consistent with the behavior required in the SIP (including any previously issued construction permit enforceable by reason of 40 CFR 52.02(d)), EPA can enforce the behavioral requirement on the basis of noncompliance with the SIP. In addition, EPA can enforce, on the basis of noncompliance with the SIP, behavioral requirements contained in operating permits for existing sources to the extent that the permit requirements are the same as the SIP requirements. However, if the provisions of an operating permit differ from the SIP, the permit must, at the present time, be approved as a SIP revision before it is enforceable (or recognized) by EPA. If an operating permit condition more stringent than the SIP is necessary to assure attainment or maintenance of a national ambient air quality standard, failure to revise the SIP accordingly results in the SIP being inadequate. Therefore, we are advising each Regional Office to notify the States of this potential need to revise their SIPs. States which do, in fact, need to revise their SIPs to incorporate individual operating permits which are necessary to assure attainment and maintenance of a national ambient air quality standard should do so as soon as possible.

Some State-issued operating permits may not indefinitely require individual EPA approval through rulemaking in order to be considered part of the SIP. Section 110(a)(2)(d) of the Clean Air Act requires SIPs to include "a program to provide for the enforcement of emission limitations and regulation of the modification, construction, and operation of any stationary source, including a permit program as required in parts C and D and a permit or equivalent program for any major emitting facility..." In addition, Section 172(b)(6) of the Act provides that SIPs must "require permits for the construction and operation of new or modified major stationary sources..." Although no regulations implementing these sections yet exist, a working group is developing a regulatory proposal requiring SIPs to contain an operating permit program (or its equivalent) and establishing the standards for EPA approval of such a program. The issue of the federal enforceability of State-issued operating permits will be addressed by these regulations. In the interim, States are encouraged to submit permits as SIP revisions as appropriate.

cc: Director, Enforcement Division Regions I-X
Michael James, OGC