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Category: 45 – Criteria for Plan Revisions for Nonattainment Areas

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

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OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Clean Air Act Restrictions Applying to SIP Revisions
Due on July 1, 1982

FROM: Robert M. Perry Copy: original signed by
General Counsel Robert M. Perry

Sonia Crow
TO: Regional Administrator, Region IX

You have asked us three questions relating to the manner in which the Clean Air Act restrictions on new source construction and federal funding apply to states that are required to submit plan revisions by July 1, 1982.

BACKGROUND

1. SIP Revision Requirements

Section 110 of the Clean Air Act requires each state to have in effect a State Implementation Plan ("SIP") to attain the national ambient air quality standards. Prior to 1977, most areas were required to attain these standards by 1975. In 1977, however, Congress recognized that many areas had not yet attained these standards and would need considerably more time to do so. Accordingly, the 1977 Amendments to the Clean Air Act established new attainment dates and additional planning requirements for such "nonattainment" areas. These provisions are found primarily in a new "Part D" to Title I, Sections 171-178.

Section 172(a) (1) establishes December 31, 1982 as the new deadline for attaining the standards in nonattainment areas. Section 172(a) (2) provides for a further extension of this new deadline in areas which demonstrate that they cannot attain either the ozone or carbon monoxide ("CO") standards by December 31, 1982, despite the implementation of all reasonably available measures. Such areas may request an extension to December 31, 1987.

Areas which obtain extensions to 1987 must submit two SIP revisions: one under Sections 172(a) (1) and 172(a) (2), and one under Section 172(c). Under Section 172 (a) (2), the first plan revision must contain the request for an

attainment date extension. It must also require the implementation of all control measures determined to be "reasonably available" in that area, providing for these measures all of the commitments and assurances required under Section 172(b). *Id.* Under Section 172(c), the second plan revision must contain additional "enforceable measures" needed to assure attainment by 1987.

The deadlines for the two plan revisions are found in Section 129(c) of P.L. 95-95, one of the uncodified provisions of the Clean Air Act Amendments of 1977. The revision required under Sections 172(a) (1) and 172(a) (2) must be submitted to EPA by January 1, 1979. The second revision must be submitted on or before July 1, 1982.

2. Restrictions on Growth and Federal Funding

States which fail to revise their plans to meet the part D requirements are subject to three separate restrictions.

Section 110(a) (2) (I) prohibits the construction of major new sources and major modifications of existing sources after July 1, 1979 in any area which does not have in effect a SIP meeting all of the Part D requirements. This construction ban is a mandatory measure.

Section 176(a) requires EPA and the Department of Transportation ("DOT") to withhold funds from any area which needs transportation controls to assure attainment if the Administrator finds that the State has not submitted (or made reasonable efforts to submit) in 1979 or 1982 a plan which considers all of the requirements of section 172. These funding cut-offs are also mandatory measures.

Section 316(b) gives the Administrator discretion to withhold grants for the construction of sewage treatment facilities under the Clean Water Act in any area where a State fails to "have in effect" an approved Part D plan.

DISCUSSION

Because of the number of questions you have asked and the complexity of some of our responses, we will not follow the usual format for a legal memorandum. Instead, we will restate each question in full and follow it with our response. Each response will address separately the construction moratorium, the Clean Air Act and highway funding limitations, and the sewage treatment grant limitations.

Question #1: What discretionary sanctions may be imposed and what mandatory sanctions must be imposed if:

- a) A State fails to submit the required SIP revisions by July 1, 1982?

Response:

- 1) *Construction Moratorium*: The construction moratorium would not apply

if a State failed to submit a SIP revision by July 1, 1982 because that deadline is not a Part D requirement. However, there is a Part D requirement which becomes applicable on the same date. Section 172(c) requires all plans for extension areas to contain, by July 1, 1982, enforceable measures to assure attainment by 1987. Failure to have such measures in effect by that date would trigger the ban. Before the ban could come into effect, the Agency would have to make a finding that a plan does not include the necessary "enforceable measures." This brief response is explained in greater detail below.

a) July 1, 1982 submittal deadlines

Under Section 110(a)(2)(I), the construction moratorium applies where a State does not have in effect a plan that meets all of the requirements of Part D. However, none of the Part D provisions actually require States to submit second plan revisions for extension areas by July 1, 1982. Section 172(c) refers to this second revision, but does not establish a date for its submittal.

The July 1, 1982 deadline appears in section 129(c) of P.L. 95-95, one of several uncodified provisions of the Clean Air Act Amendments of 1977. Section 129(c) requires States to adopt and submit by July 1, 1982 plans for extension areas that meet all of the requirements of Sections 172(b) and (c). Since Section 129 (c) is not physically located in Part D, it is possible to argue that a failure to submit a plan revision by July 1, 1982 would not trigger the construction moratorium.

The legislative history of the 1977 Amendments supports this argument. The Senate Bill placed the July 1, 1982 deadline for extension areas and the substantive requirements for such areas in a new "Section 110(h)". The Senate Report explained that all of the requirements of Section 110(h) were to be considered as "preconditions" for new source construction in carbon monoxide or ozone nonattainment areas. S. Rep. No. 95-177, 95th Cong., 1st Sess. at 56 (1977).

However, the Conference Bill separated the deadlines from the substantive requirements. The Conference Bill placed all the substantive requirements for SIP revisions for nonattainment areas into Section 129(b), which became Part D. The deadlines for submitting plans to meet these requirements were placed in Section 129(c), which was not inserted into Part D. This suggests that Congress did not intend the July 1, 1982 deadline to be a Part D requirement.

b) Enforceable measures requirement:

Although the July 1, 1982 plan submittal deadline will not trigger the construction ban, there is a Part D requirement which becomes applicable on the same date. Failure to meet this requirement could require EPA to impose the ban in extension areas. This requirement is found in Section 172(c), which requires SIPs for extension areas to include, by July 1, 1982,

"enforceable measures" needed to attain the standards by 1987.¹ A failure to provide needed measures by July 1, 1982 would trigger the construction ban, because the measures are Part D requirements.

EPA recently concluded that, prior to imposing the ban, EPA must review approved (or conditionally approved) Part D plans to determine whether Part D requirements have been met. This gives the Agency more flexibility in timing the imposition of the ban. Further details are provided in our response to your question #2, concerning procedures for applying the restrictions.

2) *Limitations on Clean Air Act and transportation grants:* Although the July 1, 1982 deadline is not a Part D requirement, Section 176(a) would apply. Section 176(a) specifically states that EPA and DOT must withhold funds if EPA finds that a State failed to submit (or to make reasonable efforts to submit) a plan by the July 1, 1982 deadline.²

However, EPA and DOT do not have to start withholding funds on July 1. Section 176(a) provides that no funds need to be withheld so long as EPA finds that a state is making "reasonable efforts" to submit the required SIP revision. This can provide significant flexibility. For example, EPA imposed funding limitations in only two States for failure to submit 1979 plan revisions, even though most States failed to meet the July 1, 1979 deadline. In effect, EPA determined that most States were making reasonable efforts to submit the necessary revisions. Ultimately, EPA found that only California and Kentucky were not making "reasonable efforts" to submit approvable plans, because legislatures in these States continually failed to enact the legal authority necessary for a vehicle inspection/maintenance program. EPA did not make this finding until December 1980, a year and a half after the statutory deadline for submittal of a 1979 plan revision.³

¹ Section 172(c) requires these enforceable measures to be "in effect" by July 1, 1982. The measures would have to be approved by EPA before they would be "in effect." Thus, as a practical matter, Section 172(c) requires States to submit these measures to EPA well before July 1, 1982.

² Section 176(a) also requires that an area must need transportation controls to attain the standards. As a practical matter, however, virtually every area that has received an attainment date extension will need transportation control measures. Extensions are available only for the ozone and CO deadlines. Mobile sources emit significant amounts of ozone and CO. It is highly unlikely that any of the areas which have obtained extensions could demonstrate attainment without relying on some control of transportation sources.

³ Even if EPA finds that a State is not making reasonable efforts to submit a 1982 plan, there are exemptions that can greatly reduce the economic impact of the funding restrictions. Section 176(a) exempts funds for transportation projects with safety, mass transit or air quality benefits. Moreover, although the statute does not specifically exempt any Clean Air Act projects, EPA has established exemptions for Clean Air Act grants with air

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3) *Limitations on sewage treatment construction grants:* Section 316(b) gives the Administrator discretion to withhold grants for the construction of sewage treatment facilities under the Clean Water Act in any area where a State fails to "have in effect" an approved part D SIP. Accordingly, Section 316 could apply if EPA disapproved a plan for failure to have in effect the "enforceable measures" required under Section 172(c). However, The Agency is not required to impose this restriction.

EPA has stated that it will use this discretionary authority only where it finds that a State is not making "reasonable efforts" to meet SIP requirements. Moreover, even if EPA decides to impose a funding cut-off, it will exempt funds for projects which are needed to protect the public health. See EPA's "Policy and procedures for Section 316(b)" (45 Fed. Reg. 53382, August 11, 1980).⁴

Question #1. What discretionary sanctions may be imposed and what mandatory sanctions must be imposed if:

- b) A state submits the required revision, but the submittal indicates attainment by a date later than the 1987 deadline?

Response:

1) *Construction moratorium:* Sections 172(a) (2) and 172(c) require plan revisions for extension areas to provide for attainment no later than December 31, 1987. Because this deadline is a Part D requirement, the moratorium would apply in any area where a State has submitted a plan that does not provide for attainment by 1987.

However, before imposing the ban, EPA would have to review each submittal to determine whether it in fact failed to provide for attainment by 1987. Accordingly, the ban would not apply until sometime after July 1, 1982. For further information on the procedures involved, see our response to Question #2.

2) *Limitations on Clean Air Act and transportation grants:* Since attainment by 1987 is a requirement of Section 172, the funding restrictions in Section 176(a) would apply if a State has not submitted a

³(...continued)
quality benefits. See the joint EPA/DOT "Final Policy and Procedures for Section 176(a)" (45 Fed. Reg. 24692, April 10, 1980). Using these exemptions, DOT has funded transportation projects in California worth \$1.2 billion, and EPA has awarded all of the Clean Air Act grants California requested.

⁴ The literal language of section 316(b) does not provide any exemption for a State that is making reasonable efforts to submit a required plan revision or for projects needed to protect public health. However, Section 316(b) gives the Administrator complete discretion to decide when to cut-off sewage treatment funds. Accordingly, these exemptions merely describe the circumstances under which the Administrator will exercise this authority.

plan or made reasonable efforts to submit a plan that demonstrates attainment by 1987.

The "reasonable efforts" provision may enable a State to escape these funding restrictions if it submits a plan showing that it cannot attain by 1987 despite the implementation of all available (or all reasonably available) control measures.

The legislative history of Section 176(a) provides some support for this interpretation. Senator Gravel, who introduced an amendment inserting the "reasonable efforts" language into Section 176(a), explained that he wanted to prevent EPA from restricting funds in a state where it was impossible to meet the ozone or CO attainment deadline. See 3 Legis. Hist. of the Clean Air Act at 1060-1063 (1977). EPA could probably support a decision to refrain from using Section 176(a) if it found that a State was making every effort to provide for attainment by 1987.

If EPA decided to impose this funding restriction, the exemptions described in our response to Question #1(a) above would be available.

3) *Limitations on sewage treatment grants:* As described in our response to Question #1(a), this restriction is discretionary. Accordingly, although EPA could impose these funding limitations if it found that a State did not have "in effect" a plan which provided for attainment by 1987, it would not be required to do so.

Question #2. What is the procedure for implementation of sanctions, and does it vary depending upon whether the sanctions are mandatory or discretionary?

Response:

EPA's procedures do vary, but the variations do not depend on whether the restrictions are mandatory or discretionary. Further detail is provided below.

1) *Construction moratorium:* As previously explained, a failure to submit a SIP revision on July 1, 1982 will not trigger the construction moratorium. However, the moratorium will apply if a State fails to have in effect by July 1, 1982 "enforceable measures" needed to assure attainment by 1987. If a state submits a 1982 plan, the determination whether the state has satisfied the "enforceable measures" requirement would be made in the course of approving or disapproving the plan. If a state does not submit a plan, EPA still would have to make a finding that the "enforceable measures requirement was not satisfied, in order to activate the construction- moratorium.⁵

⁵ EPA has recently interpreted Section 110(a)(2)(I) to pre- include the application of the construction moratorium in any area with an approved or conditionally approved Part D SIP, unless EPA determines, after first providing notice and an opportunity to comment, that the SIP no longer satisfies Part D. EPA announced this interpretation in an Interpretive Rule
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Moreover, because such a finding amounts to a disapproval of the SIP, and activates the construction moratorium, it would have to be made in accordance with the procedure governing informal rule makings, like all other SIP actions.⁶ Generally, these procedures require public notice and an opportunity to submit comments. It might be possible to make "class" findings for all extension states which failed to submit 1982 SIPs and dispense with notice and comment on the basis that it would be "impracticable" or "unnecessary", since it is reasonably clear that 1979 SIPs for extension areas would not satisfy the "enforceable measures" requirement. See 5 U.S.C. 553(b). However, the Agency would not be obligated to conduct such an abbreviated rule making, and could decide to follow normal rule making procedures.

The Agency could choose to use the notice of deficiency mechanism to make these determinations. Sections 110(a)(2)(H) and 110(c) provide for the issuance of a Notice of Deficiency where EPA finds that an approved SIP has become "substantially inadequate" to provide for attainment of one of the national ambient air quality standards. Under Section 110(c) (1) (C), the notice must provide at least 60 days for the State to respond before EPA takes further action. If a State failed to cure the deficiency or to convince EPA that its finding of deficiency was in error, EPA would disapprove the plan.

b) Funding limitations:

EPA and DOT have developed detailed procedures for the implementation of Section 176(a). See 45 FR 24692 (April 10, 1980). EPA has adopted the same procedures for Section 316(b). See 45 FR 53382 (August 11, 1980). Briefly, these procedures require an opportunity for negotiations between EPA, DOT, and State and local agencies, a thirty-day comment period, and the publication of a final determination in the Federal Register before funds can be withheld.

Question #3. What is the statutory or regulatory authority under which sanctions are imposed?

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informing the States that the moratorium will not apply in areas which were required to revise their new source review ("NSR") regulations to conform with EPA's August 7, 1980 NSR rule, until EPA has reviewed each SIP and determined that previously-approved NSR rules are not adequate to meet the August 1980 regulations. (46 Fed. Reg. 62651, December 28, 1981).

⁶ Actions involving SIPs have been held to be informal rule- makings requiring notice and comment. See *Buckeye Power Co. v. EPA*, 481 F.2d 162 (6th Cir. 1973), See also *U.S. Steel Corp. v. EPA*, 598 F.2d 915 (5th Cir. 1979), *Sharon Steel Corp. v. EPA*, 597 F.2d 377 (3rd Cir. 1979), *State of New Jersey v. EPA*, 626 F.2d 1038 (D.C. Cir. 1980), *WOGA v. EPA*, 9th Cir. No. 78-1941 (1980), and *U.S. Steel Corp. v. EPA*, 8th Cir. No. 78-1302 (1981), remanding Agency rules promulgated without prior notice and opportunity to comment.

Response:

1) *Construction moratorium*: Section 110(a)(2)(I) requires all SIPs to contain a construction moratorium. EPA published an interpretive rule that inserted the ban into all SIPs on July 2, 1979 (44 Fed. Reg. 38473). This SIP provision is now codified at 40 CFR 52.24 (1981).

The interpretive rule of December 28, 1981 (46 Fed. Reg. 62651) suggests that the ban would apply only after EPA makes a determination that a SIP does not meet a Part D requirement.

2) *Limitations on Clean Air Act and transportation grants*: Section 176(a) requires EPA and DOT to withhold these funds. EPA and DOT published a joint "Final Policy and Procedures for Section 176(a)" on April 10, 1980 (45 Fed. Reg. 24692).

3) *Limitations on sewage treatment grants*: Section 316(b) gives EPA discretion to withhold these grants. EPA published a final policy on August 11, 1980 (45 Fed. Reg. 53382). In that notice, EPA announced that it would follow the rule making procedures it had adopted for funding cut-offs under Sections 176(a).