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Category: 27 – Solids Applied/Transfer Efficiency

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Office of Air Quality Planning and Standards
Research Triangle Park, North Carolina 27711

14 FEB 1980

MEMORANDUM

SUBJECT: Equivalent Control Efficiency for Reasonably Available Control Technology (RACT) Rules

FROM: John Silvasi, Chief
Policy Implementation Section (MD-15)

TO: Tom Hansen, Chief,
Mobile Source Planning Section, Region IV

THRU: G. T. Helms, Chief
Ozone/Carbon Monoxide Programs Branch (MD-15)

On January 5, 1990, I sent you a memorandum on the same subject, in which I indicated that a clause relating to equivalent control efficiency in the Georgia SIP may be approved. The premise upon which I based my opinion was that the clause in question in the Georgia regulation could be approved in a Federal Register notice that indicated that we were not approving the change as a generic regulation and that the State must submit each action under the provision as a SIP revision.

I received a number of concerns from other offices concerning the memorandum. In particular, Bill Repsher of the Office of Enforcement and Compliance Monitoring (OECM) made a particularly cogent argument. He indicated that the phrase, "system demonstrated to have a control efficiency equivalent to or greater than provided under [requirements for low solvent technology or 90 percent control by incineration] . . ." could be interpreted by the State to include such ways of determining compliance as transfer efficiency credit.

Mr. Repsher has been involved in a number of enforcement cases where courts have ruled against EPA and interpreted that our approval of such a clause allows a State to approve equivalency schemes based on transfer efficiency credit without EPA's approval. These include at least one case where such interpretation was made notwithstanding a final Federal Register approval of a rule that included a preamble statement that EPA approval--as a SIP revision--of such an exercise of director's discretion was required. Mr. Repsher indicated that in an enforcement case, courts will often accept a State's interpretation of a SIP rule in preference to EPA's interpretation.

Based on OECM's concerns, my January 5, 1990 memorandum is no longer acceptable guidance, and that the phrase referred to in that memorandum is to be considered a "director discretion" clause, and therefore unacceptable under "Blue Book" guidance.

I apologize for any inconvenience this may have caused you. I am sure, however, that you share our concerns that all SIP rules and regulations be granted only when they are consistent with Clean Air Act enforceable and that SIP relaxations be requirements and only through rulemaking procedures that are open to all parties.

cc: W. Repsher
Air Branch Chiefs, Regions I-X
L. Kesari
J. Calcagni