Calcagni

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Office of Air Quality Planning and Standards
Research Triangle Park, North Carolina 27711
March 22, 1991

AIR DIVISION
EPA, REGIO

1991

RECEIVED

MEMORANDUM

SUBJECT: Processing of Pending Revisions to Federally-approved State Implementation Plans (SIP's)

FROM: John Calcagni, Director
Air Quality Management Division (MD-15)

TO: Director, Air, Pesticides, and Toxics Management Division, Regions I, IV, VI
Director, Air and Waste Management Division, Region II
Director, Air Management Division, Regions III and IX
Director, Air and Radiation Division, Region V
Director, Air and Toxics Division, Regions VII, VIII, X

In a memorandum dated December 5, 1990, I requested that you temporarily suspend the processing of State-submitted requests for modification of the federally-approved SIP actions. In that memorandum, I indicated SIP processing could resume after January 15, 1991. As I indicated, the purpose of this hiatus was to provide a short period of time in which the Regional Offices and Headquarters could define the basic requirements and changes imposed by the 1990 Amendments to the Clean Air Act (Act). The purpose of this memorandum is to reinstitute processing of SIP revisions under certain conditions.

A major impact of the Amendments on the preparation of Federal Register notices for all SIP revisions submitted by the State to the Regional Office prior to November 15, 1990 is the requirement that all notices must address the impact of the 1990 Amendments on the approvability of such State submissions. The impact of the Amendments will vary from having no impact to requiring disapproval of actions that previously may have been approvable. All Federal Register notices taking action on a SIP revision request submitted to the Environmental Protection Agency (EPA) prior to November 15, 1990 must contain a statement indicating that EPA has reviewed the submittal in accordance with the 1990 Amendments. I have attached general boilerplate language that should appear in each notice taking action on any State submission received prior to November 15, 1990 (Attachment 1).

With regard to the potential impact of the 1990 Amendments on the processing of specific SIP revisions, the Office of General Counsel and my staff have prepared guidance describing circumstances where the 1990 Amendments affect the approvability of SIP revisions (Attachment 2). This guidance is to be used in reviewing and processing all SIP revisions whether or not the revision was submitted prior to the enactment of the 1990 Amendments. The attached guidance is not intended to address all of the issues that surround SIP approvability under the 1990 Amendments and will certainly require further expansion to address individual circumstances. If you find that the attached does not address a particular case, we will be glad to assist in determining how the Agency should make a final decision.

It is important to notice that the attached paper addresses six main types of SIP revision requests. Many of these situations will result in a determination that the SIP submission does not meet the requirements of the amended Act. The basic reason is a "savings clause" that is part of the 1990 Amendments. The "savings clause" restricts States from relaxing any existing SIP requirement without achieving equivalent emission reductions. In addition, the 1990 Amendments require that all areas prior to being redesignated to attainment have an approved maintenance plan. As a result, you have been asked to notify the affected States by the "RA letter" that pending requests for redesignation to attainment may not be "complete" within context of the 1990 Amendments. Since these requests may not be complete, we do not believe we are required to process the request. While the maintenance requirement is not stated in the Agency's current criteria, we believe the Amendments make such a requirement effective upon enactment. We should urge those States with pending redesignation requests without a maintenance demonstration to withdraw them from consideration unless there are extenuating circumstances that are agreed to by Headquarters.

With regard to bubbles, the final Emissions Trading Policy Statement remains generally in effect. There may, however, be certain circumstances where current bubble requirements should be modified or reinterpreted in light of the changed circumstances brought about by the Amendments. We will be forming a work group within the next month with Regional Office participation to address this issue. If you have a pressing need to process an emission trading action where there are questions regarding approvability, you must discuss this action with Headquarters before proceeding.

It is imperative that we examine the impact of the 1990 Amendments closely as we do not wish to inadvertently approve or disapprove actions and have these issues addressed in judicial review prior to an opportunity to develop appropriate Agency policy. Some of our actions likely will result in disapprovals of SIP revisions that may previously have been approved. It is

important that we understand and communicate to the States that where the Act is clear, it overrides the "grandfathering" policy (54 FR 2219, January 19, 1989) because of the statutory changes that no longer permit us to approve the original submission. If, however, where the Act is vague or for other reasons you believe that a case is to be made for grandfathering a particular action, this must be fully coordinated with the appropriate Headquarters office prior to processing the revision.

The Regional Offices have the primary responsibility for ensuring that each Federal Register notice is reviewed for conformance with the provisions of the 1990 Amendments and for inserting the appropriate language with regard to EPA's review of the applicability of the 1990 Amendments. This will require that each Regional Office examine all Table 3 SIP actions, make the changes as indicated in the attachment, and incorporate the appropriate language indicating EPA review. I would encourage you to be cautious on any approval and suggest your staff coordinate with the specific Headquarters program staff or attorney prior to a final decision to approve these types of actions. I would also remind you that where the issues may be more complicated than described here, you may reclassify a Table 3 action to either Table 2 or Table 1.

It will be the primary responsibility of each Regional Office to review all unpublished Table 2 actions. For Table 2 actions that were held in Headquarters pending this memorandum, I am initiating a new review cycle. Due to the number of actions involved and in order to provide sufficient time for Headquarters reviewers to re-examine these actions, I am establishing a Headquarters review completion date 45 days from the date of this memorandum for these actions. Headquarters reviewers will, as appropriate, provide comments to the Regional Office. Please be aware that all actions submitted prior to November 15, 1990 must have the appropriate boilerplate language added prior to signature by the Regional Administrator. This comment will be appended to the review comments on all Table 2 SIP actions. All Table 2 actions which have previously completed the 30-day Headquarters review must be reviewed by the Regional Office for consistency with the attached guidance and must have the appropriate boilerplate added prior to signature by the Regional Administrator. I encourage you, if there is any doubt regarding the approvability of Table 2 actions that will not again receive Headquarters review, to contact the Headquarters program and legal staff prior to publication of any such action.

With regard to Table 1 actions that have not yet been published, while we will not physically return these notices to the Regional Office, I am requesting that you review each action for applicability under the 1990 Amendments. Where the action taken by the existing notice is still appropriate, my staff will work with the Regional Office staffs to insert the attached

boilerplate language. In some cases, Table 1 notices will be returned to the Regional Office for redrafting on the basis that the Agency action is no longer appropriate. My staff will work with you to make the changes and proceed as quickly as possible to publication of Table 1 notices.

Questions regarding the approvability of a specific action or additional areas of policy that are not addressed in the attachment should be directed to the appropriate program branch within AQMD in coordination with the program attorney in the Office of General Counsel.

If you have any questions regarding the above process or if we can otherwise assist in expediting the process of determining the approvability of any action based upon the 1990 Amendments, please contact either Johnnie Pearson, (FTS) 629-5691, Pam Johnson, (FTS) 629-5270, (AQMD), or Jan Tierney, (FTS) 382-7709 (OGC), for assistance.

Attachments

cc: Regional Air Program Branch Chiefs
Regional Counsel, Regions I - X
Ron Campbell, OAQPS
Denise DeVoe, OAQPS
Gene Durman, Office of the Administrator
Alan Eckert, OGC
Greg Foote, OGC
Barry Korb, OPPE
Rich Ossais, OGC
John Rasnic, SSCD
John Seitz, OAQPS
Mike Shapiro, OAR
Lydia Wegman, OAQPS
Larry Weinstock, OAR
AQMD Branch Chiefs

Attachment 1

Approval Boilerplate

The Agency has reviewed this request for revision of the federally-approved State implementation plan for conformance with the provisions of the 1990 Amendments enacted on November 15, 1990. The Agency has determined that this action conforms with those requirements irrespective of the fact that the submittal preceded the date of enactment.

Disapproval Boilerplate

The Agency has reviewed this request for revision of the federally-approved State implementation plan for conformance with the provisions of the 1990 Amendments enacted on November 15, 1990. The Agency has determined that this action does not conform with the statute as amended and must be disapproved. The Agency has examined the issue of whether this action should be reviewed only under the provisions of the law as it existed on the date of submittal to the Agency (i.e., prior to November 15, 1990) and has determined that the Agency must apply the new law to this revision.

Attachment 2

The Effect of the Clean Air Act Amendments of 1990 on Pending SIP Revision Requests

The Effect of the Clean Air Act Amendments of 1990 on Pending SIP Revision Requests

The enactment of the Clean Air Act Amendments of 1990 raises the question of how these new provisions will affect SIP revision requests currently pending before EPA. While the Amendments extend the date for attaining the national ambient air quality standards (NAAQS), they place restrictions on relaxing any existing or planned compliance requirements. The EPA receives several common types of SIP revision requests: relaxations from Reasonably Available Control Technology (RACT), alternative RACT, extensions of the compliance date, bubbles (relaxations from RACT that are offset by at least equivalent reductions elsewhere), and strengthenings of the SIP that do not meet all of the applicable requirements of the Act.

This paper examines the effect of various provisions in the Amendments on the types of SIP revision requests listed above, as well as redesignation requests. In general, the Amendments place more stringent requirements on nonattainment areas that are seeking to alter requirements under a SIP. It will be necessary for these changes to be addressed in any action EPA takes on these requests. In most instances, EPA may be required only to address the changes and interpret why they support a conclusion the Region has already reached. We anticipate that in some instances, the Amendments may require EPA to disapprove an action EPA originally considered approving. In either case, however, it will be necessary for the Region involved to articulate in the Federal Register notices the effect of the Amendments as explained in the guidance set forth below.

BACKGROUND

The Amendments provide from 3 to 20 years for nonattainment areas to meet the NAAQS, depending on the pollutant and the classification of the area. Although the attainment deadlines may be extended, this is not meant as a means of relieving nonattainment areas of the burden of reducing emissions as expeditiously as practicable. Rather, the attainment deadlines were extended because some of the deadlines under the 1977 Act had passed, and many areas still had not attained. Therefore, the attainment deadline extensions are provided as more realistic dates for attainment based on future reductions beyond what has already occurred. Weakening existing SIP's is inconsistent with that goal. As discussed below, several provisions of the Amendments indicate that nonattainment areas still must comply with certain requirements of the pre-amended Act.

First, the provision specifically addressing SIP revisions prohibits EPA from approving any SIP revision that would interfere with any requirement concerning attainment, reasonable further progress (RFP), or any other requirement of the Act [§110(l)]. As with the pre-amended Act, attainment of the ozone NAAQS must be reached as expeditiously as practicable [see

§172(a)(2)(A); §181(a)(1)]. Therefore, any SIP revision that postpones the attainment date previously approved as part of the SIP without demonstrating that the attainment date is impracticable must be rejected.

Beyond that, under the pre-amended Act, all nonattainment area SIP's were required to provide for the implementation of RACT as expeditiously as practicable [§172(b)(3) (incorporating the definition of RFP in §171 which refers to the requirement in §172(a) for attainment as expeditiously as practicable)]. The general nonattainment provisions of the Amendments apply the same requirement (although in somewhat different form) [§172(c)(1) ("implementation of reasonably available control measures (RACM) as expeditiously as practicable including . . . reasonably available control technology . . . ")]. For ozone nonattainment areas, the Amendments expressly provide that these areas correct or add RACT that was required under the pre-amended Act [§182(a)(2)(A)]. This requirement indicates that the Amendments were not intended to override previous RACT requirements, but rather to ensure they remain in place. New RACT requirements under the Amendments are intended to supplement RACT requirements that should already be in the SIP.

Beyond the RACT requirements, the savings clause (§193) specifically states that changes to the SIP that result in fewer emissions reductions may not be approved unless "equivalent" emission reductions are met elsewhere:

> No control requirement in effect, or required to be adopted by an order, settlement agreement, or plan in effect before the date of the enactment of the Clean Air Act Amendments of 1990 in any area which is a nonattainment area for any air pollutant may be modified after such enactment in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant.

The savings clause indicates that the Amendments are meant as a means not of by-passing previous requirements, but rather of ensuring equivalent or greater reductions in emissions.

We are inclined to construe the term "equivalent reductions" to mean that the emission reductions must occur during the same time period in which it would have been reasonable for the source to comply with the SIP. In the case where EPA agrees that it was not reasonable for the source to meet the existing SIP requirements (including the compliance date), equivalent reductions are required for the prospective term of the relaxation (i.e., the remaining time following EPA action on the revision that the relaxation will be in effect). Where EPA has determined that it was reasonable for the source to meet the SIP requirements, the equivalent reductions must occur during the

same time period that the source was originally required to meet the limit.

In either case, the equivalent offsetting emission reductions must be surplus, enforceable, permanent, and quantifiable as defined in EPA's Emissions Trading Policy Statement (ETPS) (51 FR 43850, December 4, 1986) to be valid. As mentioned under item 4, EPA is forming a work group to address how the Amendments affect the ETPS. In the interim, however, the criteria in the ETPS should be used to evaluate the acceptability of offsetting emission reductions.

In addition, the reductions must come from sources in the same nonattainment area as the source(s) seeking the modification to the control requirement. Other criteria may apply for other pollutants (e.g., modeling to ensure continued attainment and maintenance). We also interpret the savings clause to apply only to nonattainment areas within a State, not the entire State, and to apply only to such pollutants for which the area is designated nonattainment.

The following discussion attempts to apply these requirements to specific types of common SIP revisions. The discussion sets forth several independent factors to be considered in analyzing these revisions. Much of it, however, could logically apply to analogous types of SIP revisions for other pollutants.

1. Relaxation from RACT

A request to relax RACT requirements seeks to relieve a source from complying with what EPA has determined to be RACT and which is already contained in the SIP. In this context, we are referring to a permanent release from existing RACT requirements already in the SIP by application of something less than RACT and without equivalent offsetting emission reductions. [NOTE: if this had included equivalent offsetting reductions, it might be considered a bubble (discussed in 4 below), which EPA historically has said may meet the statutory requirement.]

--Under §110(l), EPA cannot approve revisions that interfere with meeting the RACT requirements of §172(c)(1) and §182(a)(2)(A). Since this would be a relaxation to a level that is not as stringent as RACT, it interferes with the ability of the SIP to meet the RACT requirements. Specifically for nonattainment areas subject to the ozone subpart, §182(a)(2)(A) requires these areas to correct or add RACT requirements so as to comply with pre-amended §172(b). In light of this specific requirement to upgrade RACT to, at a minimum, that required under the pre-amended Act, it would be inconsistent to allow any weakening from that level of RACT. This would be one ground for disapproval of a RACT relaxation.

This paragraph only applies if the source in question was required to meet RACT under the Act immediately prior to enactment of the 1990 Amendments. For instance, areas that did not receive post-1982 attainment date extensions and that did not receive a post-1982 SIP call were only required to adopt RACT rules for major (greater than 100 tons per year) sources in the Group I and II Control Techniques Guidelines (CTG) categories. Any smaller source in such an area would not have been required to meet RACT and, therefore, would not be covered by this paragraph. The savings provision discussed below would still apply.

--Second, under the savings clause, an equivalent reduction must be made in order for the SIP revision to be acceptable. The reductions, in this case, must occur during the same time period as required by the SIP. Failure to provide for such reductions would be an additional independent ground for disapproval.

2. Alternative RACT

Alternative RACT involves a different type of control from what EPA and the State previously determined to be RACT and which is already contained in the SIP. A source or State will argue that the previously-selected RACT is not RACT; rather, they suggest, and EPA agrees, that a different type of control is the "true" RACT. Here we are discussing alternative RACT that does not achieve an amount of reductions equivalent to what would be achieved by the previously-selected RACT which is already in the SIP.

--Under the savings clause, any alternative RACT that is less stringent than the RACT set by EPA must be supported by emission reductions elsewhere to achieve emission reductions at least equivalent overall in the nonattainment area. The EPA is prohibited from approving an alternative RACT that decreases emission reductions, unless equivalent reductions are made elsewhere within the same nonattainment area. Thus, the absence of such equivalent reductions requires disapproval.

As discussed in the "Background," where EPA has agreed with the State's alternative RACT evaluation, the emission reductions must be obtained for the duration of the relaxation. For alternative RACT this will generally require a permanent reduction from the time of approval of the revision.

3. Compliance Date Extensions

Compliance date extensions are similar to relaxations from RACT. They are distinguishable in that they provide for the implementation of RACT, but extend the compliance date that EPA previously approved as being as expeditious as practicable. The extension may not cause the nonattainment area to miss its

attainment date, but additional net emissions will occur during some period of time before the attainment date.

--Under §110(l), SIP revisions cannot interfere with attainment, reasonable further progress (RFP), or any other requirement of the Act. Compliance date extensions (to dates other than what was as expeditiously as practicable) interfere with the requirement that RACT be implemented "as expeditiously as practicable" [§172(c)(1)]. This is one ground for disapproving such extensions.

--Beyond that, for ozone nonattainment areas, if RACT that was required under EPA's guidance interpreting §172(b)(3) of the pre-amended Act is not in place, it must be corrected or added [§182(a)(2)(A)]. The EPA's guidance on RACT under pre-amended §172(b)(3) called for implementation of RACT as expeditiously as practicable. Where a SIP meets that guidance, this provision prevents a relaxation from the guidance. Thus, under §110(l), any compliance date extension to a date later than what was as expeditious as practicable interferes with the requirement to correct RACT per EPA's pre-enactment guidance. This is a supplemental ground for disapproval (related to the first ground).

--In addition, under the savings clause (§193) equivalent offsetting emission reductions must be obtained. Where EPA has determined that the original SIP compliance date was reasonable, the emission reductions must occur during the same time period as required by the original SIP compliance date. Where EPA determines that the SIP schedule was unreasonable, the reductions must be achieved for the remainder of the extension period, starting from the date of EPA's approval. (Where the new compliance date has already passed by the time EPA acts on the revision, no reductions are required for the period before or after EPA's action on the extension.) The EPA must disapprove the revision if it does not provide for the required emission reductions.

4. Bubbles

A bubble involves an increase in emissions (above traditional RACT levels) that is compensated by a decrease in emissions at another point in the nonattainment area, with equivalent or better ambient air results.

--We have determined tha the final ETPS remains generally intact and meets the "equivalent reduction" test set out in §193 of the amended Act and the RACT requirements of the amended Act. We have not yet prepared boilerplate language articulating the rationale. There may be, however, certain situations where current bubble requirements should be modified or reinterpreted in light of changed circumstances brought about by the 1990

Amendments. We will be forming a work group within the next month with Regional Office participation to address these issues. Meanwhile, Regions should consult closely with Headquarters when processing bubble actions, particularly where these actions involve (1) approvals in attainment or unclassified areas slated for redesignation as nonattainment, (2) approvals in nonattainment areas where the bubble involves more than one CTG source category (or both CTG and non-CTG sources), (3) approvals involving nitrogen oxides (NOx) bubbles in areas that are designated attainment for NOx but nonattainment for ozone, (4) disapprovals in nonattainment areas lacking an approved attainment demonstration where those disapprovals stem only from the failure to meet the special "progress requirements" applicable to bubbles in those areas, and (5) any case where it is unclear whether an area is a nonattainment area needing but lacking an approved demonstration (unless the requirements of the ETPS for such an area are met).

5. Strengthenings of the SIP

In many instances, a State's submission of a SIP or SIP revision will include a provision that does not comport with one or more applicable requirements of the Act. Some submittals, however, will serve to improve air quality by providing progress toward attainment, RFP, and/or RACT[1]. Prior to the adoption of the 1990 Amendments, EPA followed a policy of approving certain SIP provisions for their strengthening effect even though the provisions did not meet all of the requirements of Part D. We have termed such an action to be a "limited approval." A limited approval, however, is not a complete action on the SIP submittal. To complete the action, EPA must, at the same time it grants a limited approval (or at some time thereafter, as discussed below), issue a limited disapproval whereby the Agency disapproves the SIP revision request for failing to meet one or more requirements of the Act.

This procedure has been endorsed, at least implicitly, by one circuit court [State of Michigan v. Thomas, 805 F.2d 176 (6th Cir. 1986) (EPA may properly approve a rule for "maintenance of air quality" while disapproving it under Part D)]; but see Abramowitz v. U.S. EPA, 832 F.2d 1071 (9th Cir. 1988) (holding that where a State has made a required submittal and the due date for the submittal has now passed, EPA may not approve part of the submittal for its strengthening effect if it takes no action on whether the submittal meets other applicable requirements of the

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[1] These cases may be distinguished from those under categories 1, 2, and 3 because they involve a strengthening of what is already included in the SIP. In the other three categories, the SIP revision request proposes an alternative that weakens the existing SIP requirements.

Act; but not addressing whether EPA may simultaneously approve part of a SIP for its strengthening effect and disapprove it for failure to comply with those requirements). We have determined that the amended Act neither alters EPA's prior interpretation of the law nor overrules the State of Michigan v. Thomas or Abramowitz v. U.S. EPA decisions. Rather, the Amendments expand the language concerning approval of all or part of a SIP without addressing the issue of whether EPA may approve provisions that strengthen the SIP but do not meet all of the requirements of Part D.

Partial Approval: Section 110(k) guides the Agency's action on plan submissions. Once EPA determines that a plan submission is complete, the Agency must approve or disapprove the submission within 12 months [§110(k)(2)]. Section 110(k)(3) expressly provides for the circumstance where the entire submittal meets all applicable requirements of the Act, or a separable portion of the submittal meets all applicable requirements. In such circumstances, EPA must approve those portions that meet all the applicable requirements of the Act and disapprove those that do not[2].

Limited Approval: Section 110(k)(3), however, leaves a gap; a submittal may contain provisions which are not separable, but that meet the requirements of the Act. Under the general authority of §301(a) to adopt regulations necessary to implement the Act, and in furtherance of the goals of the Act "to protect and enhance" the quality of the air [§101(b)(1)], we interpret §110(k)(3) also to allow "limited approval" of SIP provisions that have a strengthening effect, but that do not meet all requirements of the Act[3].

Time Limit for EPA Action: EPA's use of limited approval must correspond with the Act's new provisions that place time

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[2] We do not read this to override the Bethlehem Steel Corp. v. Gorsuch, 742 F.2d 1028 (7th Cir. 1984), and Indiana & Michigan Elec. Co., 733 F.2d 489 (7th Cir. 1984), decisions, which overturned partial approvals where the approved parts were integrally related to the remainder (e.g., an emissions limit and an averaging period, or an emissions limit and a test method). For situations such as this, however, a limited approval may be appropriate.

[3] The Regions should consult with Headquarters on a case-by-case basis as to whether as a policy matter, EPA should grant such a limited approval to a SIP submittal.

limits on EPA's approval or disapproval of SIP submittals[4]. Hence, when granting limited approval EPA should act within 12 months of making a completeness determination. The EPA may give a limited approval to SIP submittals (for their strengthening effect) at one point in time and delay a formal finding that the submittal does not meet all of the applicable requirements. The Agency's failure to make that formal finding (and thereby take final action) prior to expiration of the 12-month period, could subject EPA to a lawsuit to compel such an action[5].

Currently, many SIP revision requests that do not meet all of the requirements of the amended Act are pending before the Regions. Most of the SIP submittals required under the amended Act are not yet due. Where the submittal is made before it is due, EPA may grant a limited approval to the whole submittal. As an alternative, EPA may approve certain provisions that meet prospective requirements of the Act and request the State to voluntarily withdraw the other portions that are insufficient to meet future requirements. In either case, the State is not relieved from submitting an entire approvable plan by the statutorily-required submittal date.

Activating Sanctions: The timing of the submittal will affect the consequences of limited approval. If a State files the submittal after it was due, and EPA approves it for its strengthening effect, the additional finding that the submittal does not meet all applicable requirements would amount to a disapproval under §179(a)(2). The disapproval, therefore, would

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[4] Under §110(k)(2), once EPA determines that a submittal is complete, it must complete action on the submittal within 12 months. Until EPA promulgates the completeness criteria required pursuant to §110(k)(1)(A) [by August 15, 1991], the remaining timing deadlines in §110(k) do not come into effect. Until that time, EPA action on SIP revision requests is guided by the "reasonable time" principle of the Administrative Procedures Act. Beyond that, during this interim period, the Regions should continue to make completeness determinations under the existing criteria promulgated February 16, 1990, 55 FR 5824.

[5] In those States within the Ninth Circuit (Alaska, Hawaii, Washington, Oregon, Idaho, Montana, Nevada, California, and Arizona), the failure to take final action on the SIP revision request within the 12-month review period may have stronger implications. Under the Abramowitzv. U.S. EPA ruling, a court may invalidate EPA's limited approval, on all aspects of the submittal, if final action is not taken during the applicable 12-month period. (Arguably, Abramowitzv. U.S. EPA requires that all action be taken simultaneously so that the limited approval must be accompanied by a formal finding that the submittal does not meet all of the Act's requirements.)

Try to get this language out of Lowell's memo - if not, just work with it.

trigger the sanctions provisions. Under §110(m), EPA would have discretion to apply sanctions immediately upon making such a finding (although EPA would have to have given notice of, and an opportunity to comment on, its intention to do so). Under §179, as to provisions required by Part D or in response to a SIP call, disapproval starts the 18-month countdown to the mandatory application of sanctions.

If a State makes (and EPA acts on) a submittal prior to the time that it is due, the sanctions process will not yet apply. In such a circumstance, EPA would be approving the submittal for its strengthening effect for at least the time before which the State must comply with new requirements in the Act. The sanctions clock would not start running because sanctions for disapproval only apply if the disapproval involves elements currently due under the Act [see §179(a)(2)].

Conditional Approval: Finally, under any circumstances in which a Region is considering limited approval, the Region should also consider whether a conditional approval, as defined by new §110(k)(4), would be a practical option. The EPA may conditionally approve a plan upon a commitment of the State[6] to adopt the necessary specific enforceable measures by a date not more than 1 year from the date of approval. The EPA's finding that the State failed to meet the commitment within that year would automatically convert the conditional approval into a disapproval. Obtaining such a commitment and granting a conditional approval would benefit the Agency by providing a concrete path toward curing the deficiency. Moreover, a conditional approval would benefit the State by alleviating the possibility of sanctions for that 1-year period.

6. Redesignation to Attainment

Under §107(d)(3), every area that is currently designated nonattainment will need to meet several requirements before it will be eligible for redesignation to attainment. Among these is the requirement of §107(d)(3)(E)(iv) that the State submit a plan demonstrating maintenance of the relevant standard in accordance with new §175A. (That section requires, among other things, that maintenance plans include certain contingency measures.) Beyond that, each area that is subject to requirements of Part D will need to receive approval of a plan meeting those requirements

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[6] The Act does not explicitly require that the commitment be set forth in the SIP. We are still considering whether States may pursue another form of written commitment (e.g., a letter or a supplemental SIP submission) to take advantage of the conditional approval approach.

before it is eligible for redesignation to attainment [§107(d)(3)(E)(ii), (v)][7].

Most areas of the country that are subject to a pending redesignation request have not addressed (let alone met) the maintenance plan prerequisite for redesignation to attainment. For that reason, we asked that you notify the affected States by the "RA Letter" that their pending requests are not "complete" within the meaning of §107(d)(3)(D), and that for that reason EPA does not believe it is required to process them at this time. Headquarters will be developing guidance regarding maintenance plan requirements under the new Act to assist States in making the necessary changes to plans that are not deemed complete. Once a State submits a complete maintenance plan, its request for redesignation is renewed.

We understand that some States have submitted redesignation requests which include maintenance plans or have extenuating circumstances. The Regional Office should consult with Headquarters regarding the adequacy of the maintenance plan, or if there are any extenuating circumstances, in order to determine whether it meets the criteria of §175A of the Act. In cases where these criteria are met, as well as the other criteria of §107(d)(3), processing of the request can continue.

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[7] For example, ozone nonattainment areas with a design value of at least .121 ppm will need to meet all of the requirements for marginal areas before they are eligible for redesignation. Also, areas that qualify as "transitional" under §185A are relieved only from the requirements of the ozone subpart. They must still meet whatever requirements of the general subpart 1 of Part D that EPA decides still apply [e.g., the RACT requirement of §172(c)(a)] and the maintenance requirements of §175A.