



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

SEP - 7 2005

OFFICE OF
AIR AND RADIATION

MEMORANDUM

SUBJECT: Revisions to the State Implementation Plan (SIP) Consistency Process

FROM: William L. Wehrum *[Signature]*
Acting Assistant Administrator

TO: Air Division Directors, Regions I - X

The original State Implementation Plan (SIP) Consistency process was established in 1995 as part of the delegation to Regional Administrators of SIPs and SIP revision approval/disapproval actions. A number of Regions have used this process to gain feedback and consensus from other regions and headquarters on proposals to deviate from established national policy on an individual action or to otherwise set precedent. However, the process failed to establish definitive time frames for decision making or to define procedures for resolving apparent impasses. Due to these deficiencies, it has not been fully utilized over the last several years, a fact which could compromise the delegation.

The Regional Air Division Directors requested that Regional Air Program Managers, with the assistance of OAQPS, review the existing SIP Consistency process and make recommendations for its improvement. Over the last several months, a revised process has been developed and approved by all involved, including the Office of General Counsel. The revised consistency process (Attachments A, B & C) is attached to this memo.

To ensure the delegation process is adhered to in all SIP approval/disapproval actions, a Region should address the issue of consistency in the action memo that accompanies the Federal Register notice (or by whatever mechanism the Region uses to inform its Regional Administrator of a planned SIP action.) Once a Region decides that it wishes to pursue a proposal to set a new precedent, it must follow the revised consistency process.

Should you have any questions on the SIP Consistency process, please contact Donald Cooke, Co-chair, National SIP Processing work group (617) 918-1668, or Jerry Stubberfield, OAQPS at (919) 541-0876.

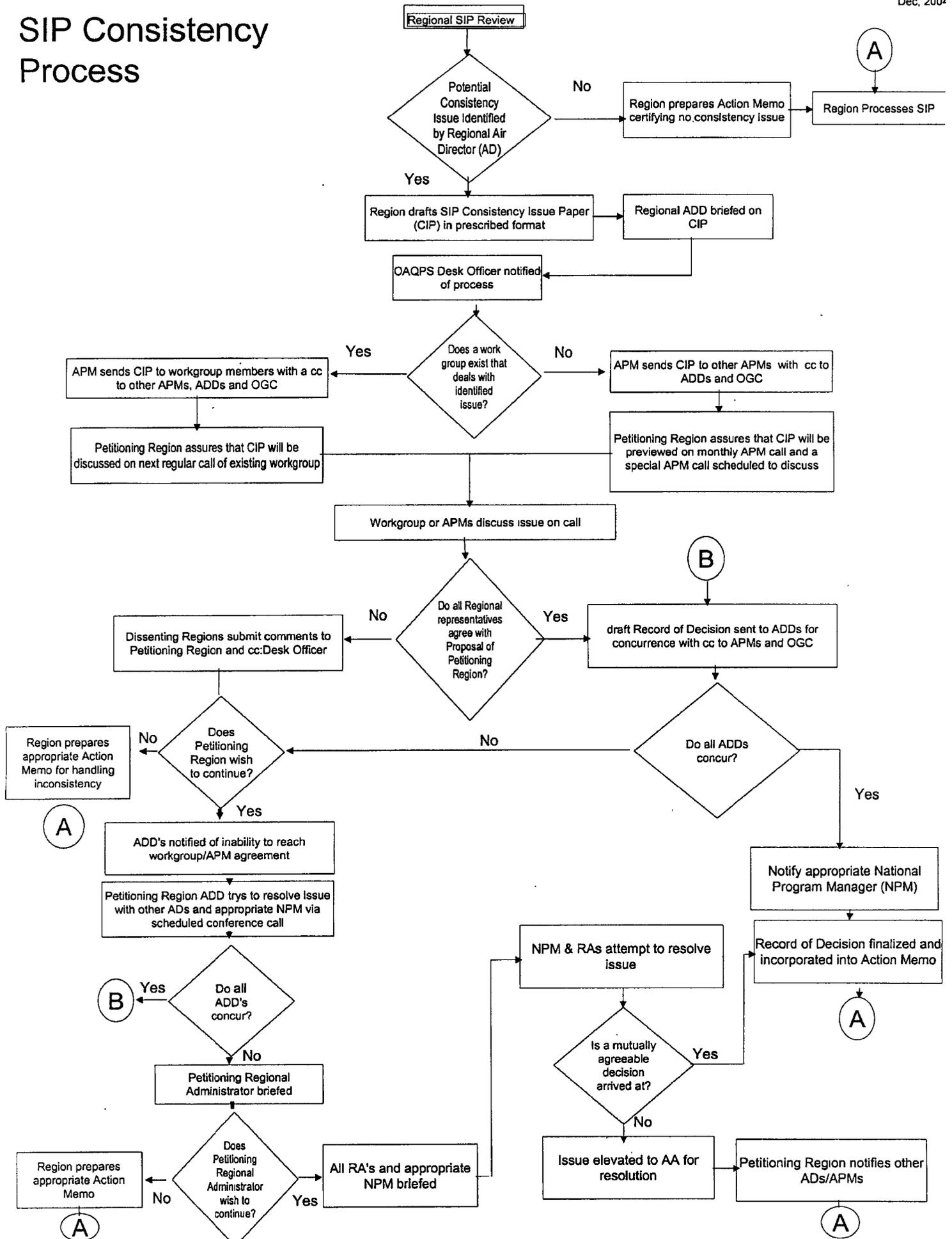
Attachment A: SIP Consistency Process Flowchart

Attachment B: SIP Consistency Process

Attachment C: Consistency Process Record

cc: Steve Page
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Kevin McLean
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Jerry Stubberfield
Regional Air Program Managers, Regions I - X
OAQPS Desk Officers

SIP Consistency Process



Attachment B

SIP Consistency Process

(Revised June 2005)

When a Region wishes to pursue an action that may require a change in the way a regulation or policy has been applied in the past, change a current Agency interpretation, or pursue an action where a policy has not yet been developed, the Region is to follow the process as described in the attached flowchart. (Attachment A)

Operating Principles

- To gain resolution pertaining to a SIP action, the initiating Region should work with their OAQPS Desk Officer¹ once the Region decides that the Consistency Process should be used. The initiating Region should use the format described in Attachment B to develop a Consistency Issue Paper (CIP). The Desk Officer working with the initiating Region should determine if there is an applicable work group to address the CIP, or if it should be addressed by the Air Program Managers². The initiating Region and the Desk Officer should develop a general schedule for discussing the CIP, including procedures for keeping all Division Directors³, appropriate HQ and Regional Officer managers, and OGC informed and if necessary, ensuring that Regional Administrators are kept abreast of issues in the event resolution must occur at the National Program Manager or higher level.
- The initiating Region should prepare a Consistency Process Record (see Attachment C) documenting the results of the decision, including any potential remaining policy and/or legal issues, and distribute it to the other Regions and Headquarters Offices. OAQPS will add the decision document to the on-line SIP Processing Manual and to the Lotus Notes Quick Place site, AirComm.
- In the Action Memorandum prepared to accompany a SIP action, the Region shall include either a certification that the SIP Consistency Process is not applicable or summarize the conclusions derived from having invoked the Consistency Process.

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¹The OAQPS Desk Officers have been designated, per the SIP Improvement Workgroup Final Report and subsequent briefings with the Assistant Administrator, to serve as objective facilitators of the consistency process. Their role is to serve as a resource of information regarding the process, ensuring that the steps of the process are being followed, that issues are addressed in a timely manner, and that all decisions on proposed Alternative Interpretations are properly documented by the initiating Region

² There may be situations where there is no existing workgroup to deal with a specific issue. In this case, the Region raising the issue, should use the Air Program Managers (APM) as the group to initiate discussion and request that it be discussed during the next monthly APM conference call

³ When a Regional Office initiates the SIP Consistency Process, the Division Directors of the other Regions and Headquarters program offices involved have agreed to make a good faith effort not to prejudge the initiating Region's rationale for an Alternative Interpretation until the Division Directors have had a chance to discuss the proposal in a collective deliberation. The Directors will give the initiating Region a reasonable opportunity to explain the merits of its interpretation before concluding their deliberations on the proposal.

SIP CONSISTENCY ISSUE PAPER (CIP)

Issue:

Making the Case:

Is the situation unique (explain)?

Will the new or different application of the regulation/policy/interpretation/guidance set precedent?

Any Pending Litigation or Historical Litigation:

**Prepared by Region _____
(Date)**

Date and Citation of FR rulemaking notices:

Procedures for Completing the SIP CONSISTENCY ISSUE PAPER (CIP)

1. Please include the language provided regarding the fact that the document is pre-decisional and deliberative. All recipients are to treat it as such.

2. Issue: Describe the first time approach* or the different approach/application to existing EPA regulation/policy/interpretation/guidance that is facing the Region with regard to approving/disapproving or advising a state on the content of a SIP revision. Include name of state, the applicable regulation/policy/interpretation/guidance, pollutant(s), attainment versus nonattainment area, etc.

* This term means that in so far as the Region is aware, no other Region has yet taken any form of SIP action or provided advice to states on the issue/subject and no regulation/policy/interpretation/guidance exists. It does not mean the first time a Region advises or takes action to implement a regulation/policy/interpretation/guidance.

3. Making the case: Describe the circumstances that led the Region to believe that its preferred “first time” or “alternative” application of EPA regulation/policy/interpretation/guidance is warranted for this SIP revision. What are the consequences of not allowing the “alternative” application? Include the time frame by which the Region needs a decision.

4. Is the situation unique or will this “first time” approach or “alternative” application of the regulation/policy/interpretation/guidance set precedent? Describe the unique situation/extenuating circumstances that would allow EPA to make the case that a first time or different application of guidance/regulation/policy/interpretation for this particular SIP revision would not then cascade to other situations. Can the first time or alternative approach be “walled off” such that it does not set a precedent (simply by being first) or constitute a precedent setting change in that EPA regulation/policy/interpretation/guidance?

5. If this “first time” approach or “alternative” application of the regulation/policy/interpretation/guidance does for all practical purposes set precedent, what has been the initial reaction you have already received on this topic from other Regions? Describe why the time may have come to allow for a change in regulation/policy/interpretation/guidance. Describe, to the extent known, whether there is any adverse impact (environmentally/legally/politically or associated with implementation or enforcement) to another Region. Has another Region insisted on their states adhering to the regulation/policy/interpretation/guidance in the face of similar circumstances? What would a change in regulation/policy/interpretation/guidance mean in that Region now?

6. Any pending litigation or historical litigation: Is EPA currently in litigation, or has it litigated in the past, issues covered by the regulation/policy/interpretation/guidance? For example, has EPA disapproved or approved a SIP revision anywhere in the county with this regulation/policy/interpretation/guidance as its rationale, and then been sued? Is that litigation pending? If completed, how does the settlement agreement (Consent Degree) or Court’s opinion treat the issue?

7. Prepared by Region __ (Date)

8. Date and Citation of FR rulemaking notices: This section would be completed later and not at the time of the inter-regional discussion of 2 - 7, above. If a Region gets the green light and proceeds to rulemaking implementing the first time or different approach, it would add the dates and citations of its rulemaking notices for the SIP revision to the one-pager here. These one-pagers will be housed in a password protected location for future reference.

Attachment C

Consistency Process Record

Consistency Issue Title:

Identifier: ____ - ____
seq# - yr

Brief Description of Issue:

Consistency Process Invoked By: (Provide Region)

Date Consistency Process Concluded:

Description of the Outcome: (This description should document the decision itself and include information as to what level in the Consistency Process the outcome was reached and by whom).

Implementation of Outcome:

If decision was to move ahead with the “alternative” approach, please provide dates and citations of FR - Proposed and Final Rules that approved the SIP

If decision was made to not allow the “alternative” approach, please describe the mechanism by which the Region informed the state. e.g., verbally on (date) by whom to whom, letter dated ____ from whom to whom, or dates/citations of FR notices that disapproved the SIP.

Consistency Process Record Prepared By: (Name and Number)

Date: