

June 14, 1994

MEMORANDUM

SUBJECT: Offsets Required Prior to Permit Issuance

FROM: John S. Seitz, Director
Office of Air Quality Planning and Standards (MD-10)

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

This memorandum and Attachment A respond to the February 2, 1994 memorandum (Attachment B) from David Howekamp, Region IX, requesting a statement of the Environmental Protection Agency's (EPA's) position on the timing of offset requirements for permitting construction and operation of new or modified major sources under section 173 of the Clean Air Act. Attachment A provides a full discussion of the issues and current EPA policy. As discussed in Attachment A, in most cases offsets must be federally enforceable before a permit to construct and operate may be issued, although the offsetting emissions reductions need not be achieved until the permitted source commences operation. However, because of uncertainties surrounding NO_x reasonably available control technology requirements, EPA established an alternative approach which allowed sources to wait until commencement of operation to secure

federally-enforceable NO_x offsets, rather than require such offsets prior to issuance of a construction permit. See the Nitrogen Oxides Supplement to the General Preamble for Implementation of Title I ("NO_x Supplement") (57 FR 55620, Nov. 25, 1992).

The guidance in Attachment A elaborates on EPA's statements in the NO_x Supplement which enables States to issue new source review construction permits prior to the acquisition of federally-enforceable NO_x offsets. While EPA's guidance continues to allow for the acquisition of federally-enforceable NO_x offsets after permit issuance, it allows such delay primarily in cases where the Federal enforceability of a NO_x offset hinges on EPA approval of a State implementation plan (SIP) revision. Case-by-case situations may also be identified in the future where such a delay would be justified. In all other circumstances, including the draft permit identified in David Howekamp's memorandum, federally-enforceable NO_x offsets must be secured prior to issuance of a construction permit.

Today's policy does not supersede existing Federal or State regulations or approved SIP's. The policy set out in Attachment A is intended solely as guidance and does not represent final Agency action. The policy statement is not ripe for judicial review. Moreover, it is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with the United States. This policy is not binding on EPA or any regulated parties, and may be challenged in judicial review of final Agency action for which it is relevant. The EPA also may change this guidance at any time without public notice.

The Regional Offices should immediately distribute this memorandum with the attachments to States within their jurisdiction in order to provide notice of EPA's clarified NO_x offset policy. Questions concerning specific issues should be directed to the appropriate EPA Regional Office. Regional Office staff may contact Dan deRoeck of the New Source Review Section at (919) 541-5593, if they have any questions.

Attachments

cc: Air Branch Chief, Regions I-X

bcc: NSR Contacts
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ATTACHMENT A

DISCUSSION ON THE TIMING OF NITROGEN OXIDES (NO_x)
OFFSET REQUIREMENTS FOR PERMITTING NEW AND MODIFIED MAJOR SOURCES
UNDER SECTION 173 OF THE CLEAN AIR ACT(ACT)

Region IX has requested a statement of the Environmental Protection Agency's (EPA's) policy on the timing of offset requirements for construction permits issued under section 173 of the Act. The Yolo-Solano Air Quality Management District (Yolo-Solano AQMD) is challenging Region IX's position in connection with a permit to construct and operate a paper recycling plant that MacMillan-Bloedel, Haindl Papier, and HIPP Engineering are proposing to build. According to Region IX, this facility will have the potential to emit major amounts of NO_x and volatile organic compounds (VOC). Region IX further indicated that the Yolo-Solano AQMD and the California Air Resources Board are contesting Region IX's position that specific offsets must be federally enforceable before the permit may be issued and actually must be achieved by the time the source commences operation. This attachment clarifies current Agency policy concerning the timing of offsets.

The EPA's general policy is that emissions offsets for a major new or modified stationary source must be federally enforceable prior to the issuance of a part D new source review (NSR) construction permit. This position is consistent with congressional intent as reflected in the changes made to the Act under the 1990 Amendments. Nevertheless, on November 25, 1992, EPA published special guidance for obtaining NO_x offsets in the NO_x Supplement to the General Preamble for Implementation of Title I ("NO_x Supplement") [see 57 FR 55620 at 55624 (Nov. 25, 1992)]. Today's policy statement elaborates that the offset policy provided in the NO_x Supplement is generally limited to situations where States are generating offsets through State implementation plan (SIP) measures that EPA must process as a SIP submission in order for the measures to be fully enforceable by EPA. This policy may also apply in other specific circumstances for NO_x offsets, on a case-by-case basis. The EPA further intends to solicit comment on this policy in its forthcoming rulemaking implementing changes to the NSR program under the 1990 Amendments.

In the 1990 Amendments, Congress added or changed statutory language in section 173 in three places regarding the timing of offsets. In section 173(a)(1)(A), Congress added language to specify that the permitting authority may issue a permit to construct and operate if it determines that by the time the source is to commence operation "offsetting emissions reductions have been obtained." At the end of section 173(a)(1), Congress changed language to explicitly provide that the offsets required as a precondition of permit issuance under paragraph (a)(1) "shall be federally

enforceable before such permit may be issued." This clarified prior law which stated that the offsets must be "legally binding" before the permit may be issued. Finally, in new section 173(c)(1), Congress specified that offsetting emission reductions "shall be, by the time a new or modified source commences operation, in effect and enforceable."

The EPA had actually proposed to delete the federally-enforceable requirement pursuant to a settlement in Chemical Manufacturers' Association (CMA) v. EPA, (No. 79-1112) (D.C. Cir.); 48 FR 38742 (August 25, 1983) (proposal pursuant to "CMA Exhibit A"). While EPA ultimately rejected deleting the federally-enforceable requirement, 54 FR 27274 (June 28, 1989), Congress had reason to clarify this issue and codify its position.

The EPA's fundamental position, that offsets for nonattainment pollutants must be federally enforceable before a construction permit may be issued, pre-dates the 1990 Amendments; the Agency understands that most States have incorporated this requirement into their nonattainment NSR programs [see 40 CFR 51.165(a)(3)(ii)(E) and Appendix S]. As explained in the General Preamble for the Implementation of Title I:

The 1990 Amendments clarified the existing requirement by requiring that the offsets be federally enforceable before permit issuance [see revised section 173(a)]. Accordingly, while it is possible for a State to issue a permit to construct once sufficient emissions offsets have been identified and made federally enforceable (generally through a permit condition made to the permit of the existing source), the State must also ensure that the required emissions reductions actually occur no later than the date on which the new source or modified source would commence operation.

[see 57 FR 13498, 13553 (April 16, 1992)].

The requirement that offsets be federally enforceable is based on sound policy, as well. Federal enforceability for the source making the offsetting reductions ensures that the Agency may hold the reducing source responsible in an enforcement action for failure to make the reductions. It further ensures that the criteria for fully-creditable offsets (quantifiable, surplus, permanent) are addressed before construction may commence. After commencement of construction, the equity considerations shift in favor of the new or modified source needing offsets. Once constructed, it may become more difficult for EPA or a State to prevent that source from commencing operation even though the offsetting reductions are not yet identified, quantified, and secured with federally-enforceable restrictions.

As a result of new requirements established by the 1990 Amendments, NO_x emissions must be regulated similarly to VOC as precursors to ozone under the nonattainment NSR requirements. That is, sources of NO_x locating in a nonattainment area for ozone must meet the part D nonattainment permit requirements, including the applicable requirements for offsets. On

November 25, 1992, EPA published special guidance for obtaining NO_x offsets in the NO_x Supplement. There, the Agency explained that some sources had expressed concern that the delay in adopting rules for reasonably available control technology (RACT) applicable to utility boilers and other stationary sources might make efforts to locate offsets more difficult for new or modified major sources needing offsets. This was purportedly because uncertainty over the eventual NO_x RACT limit could lead existing NO_x sources to retain NO_x emissions reductions for their own use.

The EPA took the position that in order to ameliorate this situation, it would approve NSR SIP revisions that require the acquisition of federally-enforceable NO_x offsets, but allow sources to delay their acquisition up to the time that the new or modified source commences operation, thus enabling sources to wait out any initial uncertainties regarding the NO_x emissions reduction market. The EPA stated that it would not object if States were to issue permits to sources on the basis of an enforceable commitment to secure federally-enforceable offsets by the time the source is ready to commence operation. However, the NO_x Supplement further stated that construction permits would have to contain "federally-enforceable provisions that expressly prohibit the commencement of any actual operations until such time as the necessary offsetting emissions reductions have been identified, approved, and secured with appropriate permit restrictions on the source providing the offset." Finally, EPA intended in the NO_x Supplement that construction permits could be issued based on a commitment to secure offsets before commencement of operation only for NO_x offsets.

The EPA is concerned both about the consistency of this approach with Act requirements, and the potential abuse of it in practice. As discussed above, once a new or modified major source has completed construction and is ready to operate, it may be very difficult for reasons of equity for EPA or a State indefinitely to prevent the source from operating pending acquisition of sufficient creditable offsets that have been secured with federally-enforceable restrictions. In general, therefore, EPA does not believe it is appropriate to allow a construction permit to be issued until creditable offsets are identified, quantified, and made federally enforceable.

Still, EPA understands that in particular circumstances States have been prompted to adopt SIP measures to generate NO_x offsets, and that the only step remaining to ensure that EPA can enforce the measures is EPA approval of the SIP submission. In such circumstances, creditable offsets have been identified, quantified, adopted as a matter of State law, and submitted to EPA, but the EPA administrative process to approve the measure may not be completed by the time the source seeks to commence construction. This was precisely the situation recently in a case where the State of Maine adopted an extended enhanced vehicle inspection/maintenance program to generate NO_x offsets that would be used, in part, to provide offsets for new construction (see letter from Linda Murphy, EPA Region I, to Dennis Keschl, Maine Department of Environmental Protection, dated March 1, 1994). In such cases, it may not be feasible for EPA's administrative process needed to make the offsets federally enforceable to be completed within the ordinary timeframe for issuing a construction permit. Thus, EPA believes it is appropriate in these cases to retain the policy announced in the NO_x Supplement that a construction permit may be issued on the basis of a federally-enforceable commitment that the

source may not commence operation until the offsets are made federally enforceable by EPA approval of the SIP measure. That is, the construction permit would have to contain a federally-enforceable condition that expressly prohibits the commencement of any actual operations pending EPA approval of the SIP measure.

The EPA recognizes that there may be circumstances other than SIP measures awaiting EPA approval where sufficient creditable offsets have been identified and certain administrative obstacles remain to making the offsets federally enforceable. The EPA believes that it may be appropriate, on a case-by-case basis, to extend similar treatment to these sources, allowing them to obtain a construction permit that contains an explicit condition prohibiting operations until the offsets are made federally enforceable.

In the case of the Yolo-Solano AQMD's draft permit for the recycling plant, however, there is no pending SIP revision awaiting EPA approval that would generate federally-enforceable NO_x offsets. Indeed, apparently offsets have not yet even been identified. Further, the draft permit appears not to meet even the minimal guidance calling for a federally-enforceable condition prohibiting the commencement of operation until federally-enforceable offsets are actually accomplished, as set forth in the NO_x Supplement. The draft permit contains only a condition that, "[p]rior to initial reliability testing, [the source] shall submit to the District evidence of mitigation of all oxides of nitrogen and volatile organic compounds emitted." In light of the noted deficiencies in the Yolo-Solano AQMD's draft permit, the issuance of the final construction permit for the recycling facility is not acceptable.