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MEMORANDUM:

DATE: March 4, 1981

SUBJECT: PSD Applicability to Non-attainment Pollutants

FROM: Director
Division of Stationary Source Enforcement

TO: Julio Morales-Sanchez
Director Enforcement Division, Region II

This is to confirm the telephone conversation on February 23, 1981, between Janet Littlejohn of my staff and William K. Sawyer of your staff. The subject of the conversation concerned the timing of the issuance of a PSD permit to a source locating in an area which has been designated both attainment and non-attainment for different pollutants.

The particular case in question concerns a major source that desires to locate in an area which is currently designated attainment for two pollutants and non-attainment for four pollutants. The source will be major for both attainment and non-attainment pollutants and thus subject to both Part C (PSD) and non-attainment (NSF) review. The question to be resolved then is: may a PSD permit be issued to the source prior to the source satisfying the NSP requirements?

In the June 19, 1978 PSD regulations, the Agency interpreted section 165(a) of the Clean Air Act (CAA) as requiring a source to demonstrate that its emissions would not cause or contribute to a violation of any NAAQS, including any NAAQS for which the area of source location was designated non-attainment. A PSD permit was withheld from a source until it met this requirement by first obtaining a NSP permit and securing offsets where necessary. (See 43 Federal Register 26402)

The Agency, however, was challenged (Alabama Power, et al) on the June 19, 1978 PSD regulations and part of that challenge concerned the applicability of PSD to sources located in non-attainment areas. Judge Leventhal's opinion for the Court in Alabama Power on this subject states:

> "In conclusion, based upon our analysis of the Act, we vacate EPA's regulations extending the permit requirements to section 165 to all sources,
> wherever located, if the emissions from the source have an impact on any clean air area. We do so because they were promulgated pursuant to EPA's reading of Section 165, a reading which we have rejected."

Recognizing this opinion by the Court, together with a revised interpretation of the statutory language, the Agency has re-evaluated its policy in the August 7, 1980 amendments to the PSD regulations. EPA now views PSD and NSP as two distinct review programs. The outcome of this interpretation is that a new source has to meet for its attainment pollutants only the PSD requirements and for its non-attainment pollutants only the NSP requirements. This change in policy is reflected in the preamble of the August 7, 1980 amendments (45 Federal Register 52711) as well as in section 52.21(i)(5) of the amendments. In terms of permitting, this means that a PSD permit may now be issued to a source, which is subject to both PSD and NSP requirements, prior to the source meeting its NSP obligations.

It should be emphasized, however, that although a PSD permit may be

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issued, this in no way relieves the sources from any of its obligations under NSP. Construction and/or operation may not begin until those obligations are met and the source should be so informed.

If you have any further questions or comments regarding this memo, please contact Janet Littlejohn at 755-2564.

Edward E. Reich

cc: Peter Wyckoff (OGC)
Mike Trutna (OAQPS)

bcc: Ann Strickland

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