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

APR 28, 1982

OFFICE OF
AIR, NOISE AND RADIATION

MEMORANDUM

SUBJECT: Federal Enforceability under PSD

FROM: Kathleen M. Bennett
Assistant Administrator for Air, Noise and Radiation

TO: Directors, Air & Waste Management Divisions
Regions I-IV, VI-VIII, X

Directors, Air Management Divisions
Regions V and IX

This memorandum is prompted by a request for clarification of the status of the requirement that to be cognizable under PSD for offset and applicability purposes, emission limitations must be federally enforceable.

On August 7, 1980, EPA published amendments to the PSD and non-attainment regulations which included a provision that emission limitations must be federally enforceable in order to be taken into account for offsets or applicability purposes. The amendments went on to define federally enforceable as:

all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR parts 60 and 61, requirements within any applicable State Implementation Plan, and any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 and 40 CFR 51.24. (40 CFR 52.21(b) (17))

Under a petition for reconsideration of the August 7 rules, which was submitted by several parties, this concept of federally enforceable limitations was challenged. The petitioners maintained that the requirement of federally enforceable limitations was unnecessary.

The Agency decided to reconsider the requirement of federally enforceable emission limitations. In addition to reconsidering the issue, EPA temporarily stayed the federally enforceable requirements (see Federal Register July 15, 1981). The stay expired on October 5, 1981 and the Administrator declined an extension of the stay, thus once again requiring federally enforceable emission limitations.

At the present time, the amendments, as published on August 7, 1980, are in effect and binding. The definition of federally enforceable still stands: emission limitations must be federally enforceable in order to be taken into account for offsets or PSD applicability. As to the definition of federally enforceable, the Agency continues to maintain the position that operating permits not incorporated into a SIP under an approved general bubble rule are not federally enforceable.

During the past six months the Agency has been in the process of negotiating a settlement of the industry challenges to the August 7, 1980 amendments, including the issue of Federal enforceability.

The Agency has offered a settlement proposal, which has been accepted by the industry petitioners that would change the federally enforceable concept. EPA has agreed to propose accepting emission limitations as creditable to the extent that they are enforceable by either Federal, State or local jurisdictions. The word "federally" would be dropped from the term "federally enforceable" as used in the regulations. At the same time the term "enforceable" will be defined as "enforceable under Federal, State, or local law and discoverable by the Administrator and any other person." This change will most likely have the result of making operating permits acceptable for offsets and applicability.

Changes in Federal enforceability, as well as other changes that result from the settlement agreement, must go through general rulemaking procedures. Rulemaking procedure will follow the outline in the February 22, 1982 settlement agreement. The rulemaking may also include some type of grandfathering provisions for the period of the temporary stay. The grandfathering provisions may focus on the commencement of construction during the period of the stay.

Please note that until the rulemaking processes are completed the existing rules are still in effect. If any specific problems concerning Federal enforceability and applicability arise, questions should be referred to Ed Reich at 382-2807.

