ISSUE FOR COMMENT: USE OF SHUTDOWN CREDITS FOR OFFSETS

In a 1989 rulemaking EPA limited the use for offsets of emissions reductions from source shutdowns or curtailments in States without an approved attainment demonstration to those reductions which occurred on or after the date a new source permit application is filed [40 CFR 51.165(a)(3)(ii)(C)(2)]. The 1990 Amendments created new deadlines and new control requirements for ozone nonattainment areas, which have changed the circumstances that shaped EPA's earlier policy and created a situation unanticipated by the existing regulations. Specifically, many nonattainment areas have new attainment deadlines for submission of attainment demonstrations. In addition, many nonattainment areas are subject to a series of requirements aimed toward insuring continued progress towards attainment.

The issue of whether these changed circumstances represents some change in EPA's shutdown policy was raised at EPA's NSR Simplification Workshop in August of 1992 and by some EPA regions. At a follow-up workshop on March 17, 1993, EPA presented draft guidance prepared by EPA staff proposed to lift the restrictions where States meet the planning milestones of the 1990 Amendments.

Thus, in the following draft memorandum, EPA is proposing to revise conditions under which States may allow the use of creditable emissions reductions from source shutdowns and source curtailments as NSR offsets. Under this staff draft, the temporary lifting of some of the shutdown and source curtailment restrictions in ozone nonattainment areas is conditioned on the State meeting, in a timely manner, the applicable part D planning requirements, including submission of complete NSR rule revisions and a complete emissions inventory as applicable.

EPA is soliciting comments on this staff draft. PLEASE NOTE THAT THE FOLLOWING DOCUMENT IS A STAFF WORKING DRAFT AND DOES NOT REPRESENT OFFICIAL EPA POLICY ON THE ISSUES DISCUSSED. Any questions on the staff draft should be directed to Mike Sewell of the New Source Review Section at (919) 541-0873 (FAX 5509). Comments should be submitted in writing no later than April 23, 1993 to Mike Sewell, U.S. EPA, New Source Review Section (MD-15), Research Triangle Park, North Carolina 27711.

STAFF DRAFT MEMO

SUBJECT: Use of Shutdown Credits for Offsets

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

TO: A. Stanley Meiburg
Director
Air, Pesticides and Toxics Division (6T)

This memorandum responds to your July 27, 1992 memorandum which requests review of the EPA new source review (NSR) rules and guidance concerning the use of shutdown credits. Under the regulations in 40 CFR 51.165(a)(3)(ii)(C)(2), where a State lacks an approved attainment demonstration, emissions reductions from shutdowns or curtailments (other than replacement units) cannot be used as new source offsets unless the shutdown or curtailment occurs on or after the date a new source permit application is filed. Your concern is that because the Clean Air Act Amendments of 1990 (1990 Amendments) have created new schedules for submitting attainment demonstrations,[1] the existing NSR rules restricting the use of so called "prior shutdown credits" may hinder a State's ability to establish a viable offset banking program for several years. You also cite the need for States to be able to establish banking programs, given that States were required to implement more stringent NSR ozone nonattainment area rules by November 15, 1992.

In response to your request and in light of the 1990 Amendments, the Office of Air Quality Planning and Standards has reviewed the shutdown credit policy. This policy, and the regulations in part 51 noted above, were revised in 1989 to allow for the use of prior shutdown credits for offset purposes in those areas having approved attainment demonstration plans [see

[1] For instance, attainment demonstrations are not due until November 15, 1993 for moderate ozone nonattainment areas, and November 15, 1994 for serious and above areas. Attainment demonstrations are not required by the Act for marginal and nonclassified ozone nonattainment areas.

54 FR 27286 (June 28, 1989)]. The Agency, however, retained the shutdown credit restriction in areas without approved attainment demonstrations.

This guidance document does not supersede existing State regulations or approved State implementation plans. The policies set out in this memorandum are intended solely as guidance and do not represent final Agency action. They are not ripe for judicial review for this reason. Moreover, they are not intended, nor can they be relied upon, to create any rights enforceable by any party in litigation with the United States. The EPA officials may decide to follow the guidance provided in this memorandum, or to act at variance with the guidance, based on an analysis of specific circumstances. The Agency also may change this guidance at any time without public notice.

As you are aware, the 1990 Amendments created new deadlines and new control requirements which have dramatically changed the circumstances that shaped EPA's 1989 decision regarding the use of shutdowns credits. All ozone nonattainment areas classified as moderate and above are now required to submit new attainment demonstrations and all nonattainment areas are subject to new attainment deadlines. Indeed, in ozone nonattainment areas, the 1990 Amendments imposes a series of planning requirements and milestones to mark progress towards attainment. The amended Act allows States with moderate ozone nonattainment areas, for instance, to submit revised control measures, revised NSR rules, and a 1990 emissions inventory, and allows until Nov. 15, 1993 to submit additional control measures and an attainment demonstration plan that achieves at least a 15% reduction in VOC emissions. Serious and above areas are now required to submit numerous new or revised control measures, revised NSR rules, and a 1990 emission inventory by Nov. 15, 1992; additional control measures and a 15% reduction plan by Nov. 15, 1993; and the full attainment demonstration plans by Nov. 15, 1994.

In 1983, EPA proposed lifting nearly all restrictions on the use of prior shutdown credits. In making that proposal, EPA presumed that by the time it took final action on the proposal, areas would either have in place approved attainment demonstrations or be subject to a construction moratorium (see 54 FR 27292). However, by the time EPA took final action -- some six years later -- this proved not to be the case. Many SIPs neither fully demonstrated attainment nor were subject to a construction moratorium. Thus, in justifying the decision to continue restrictions on the use of prior shutdowns in areas without an attainment demonstration, EPA explained that "the

attainment areas requiring but lacking attainment demonstrations . . . are at the center of EPA's current concern regarding the shutdown credit issue. . . ." Id.

Specifically, EPA explained that the unrestricted use of shutdown credits would lead to offset transactions where there was no nexus between the decision to shut down the existing source or unit and the decision to construct new capacity. Instead, shutdowns that would occur regardless of any potential to sell the resulting emissions reduction would be lost for reasonable further progress (RFP) and instead would fuel additional emissions growth in the nonattainment areas. In the face of a State's failure to adopt an attainment plan long past the statutory deadline for submitting an approvable plan, EPA determined that the unrestricted approach was inconsistent with the requirements of RFP. Accordingly, EPA retained its restrictive shutdown policy for such areas in order to guarantee to the extent possible that the new source would secure the offsetting reduction out of the area's existing capacity and thus assure RFP. Id. at 27293. On the other hand, where the SIP contained a demonstration of attainment -- "and hence an independent assurance of RFP" -- EPA would be satisfied with a "more attenuated link" between the shutdown and the new construction. Id.

Another factor favoring retention of the narrow shutdown policy in areas needing but lacking approvable attainment demonstrations was EPA's intention at the time to impose substantial planning burdens on many States for their failure to meet the December 31, 1987 attainment date for ozone and carbon monoxide. At the time EPA published the 1989 shutdown regulations, it believed that many States would be facing the prospects of adopting Draconian measures to respond to EPA's finding that their present efforts at achieving RFP and attainment were substantially inadequate. Under those circumstances, EPA believed "that it would be inappropriate even to hold out the possibility that States could obtain approval at this time for expanded use of shutdown offset credits in areas with inadequate plans." Id. at 27294. At a minimum, States would need an approved inventory so that EPA could verify the proposed use of a prior shutdown credit. Id.

The passage of the 1990 Amendments changes this landscape dramatically. At this point in time, States have been given new attainment deadlines and new dates for submitting attainment demonstrations. No State can be said to have missed the overall attainment deadline or the date for submitting attainment

demonstrations for ozone as required by the 1990 Amendments. Instead, States are in the process of developing new attainment demonstrations based on the specific planning requirements of the new provisions of the 1990 Amendments. As discussed, these provisions include not only specific emission reduction strategies that must be implemented, but requirements that areas demonstrate periodically that the reductions are occurring and that specific progress towards attainment has been made. In addition, the "General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990" (General Preamble) [see 57 FR 13498 (April 16,1992)] includes a specific methodology for reconciling prior shutdowns with the 1990 ozone inventory and assures that these reductions must be taken into account when submitting the attainment demonstration and when showing compliance with the various RFP milestones (see General Preamble, pp. 13507-13509).[2]

In total, these provisions provide the "independent assurance of RFP" that EPA pointed to before as being necessary to allow liberal use of prior shutdown credits. Of course, if a State misses any of the SIP submission dates, the rationale for a more restrictive policy returns. For this reason, we believe that any loosening of its policy can only be allowed where State submissions meet the statutory planning mandates and air quality improvement milestones. As is described more fully below, should a State fail to make timely submissions or to meet a RFP benchmark, the restrictions on the use of shutdown credits should resume.[3]

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[2] The increased offset ratios for VOCs and other criteria pollutants [see, eg., CAA § 182(b) - (e)] and the new requirement that all offsets be based on actual emissions reductions [§173(c)] provide further assurances that new source increases will in fact be counterbalanced by real reductions in actual emissions.

[3] At this time this policy statement is limited to ozone nonattainment areas. States may wish to seek relaxation of the policy for other pollutants. We will consider these requests on a case-by-case basis. It should be noted that at least some attainment demonstrations are in fact due. (For instance, attainment demonstrations in moderate CO areas were due on November 15, 1992; attainment demonstrations for moderate PM-10 areas were due on November 15, 1991.) This policy cannot be extended to situations where an attainment demonstration is lacking.

Because the 1990 Amendments have temporarily created a situation unanticipated by the regulatory scheme for shutdowns adopted by EPA prior to the 1990 Amendments, we believe that States may temporarily lift the restrictions placed on shutdown credits by § 51.165(a)(3)(ii)(C)(2) for areas without approved attainment demonstrations. However, this interpretation only extends to those creditable shutdowns and curtailments actually occurring during the time period from the passage of the 1990 Amendments through the period when the attainment demonstration is due (and extending beyond this date to the date of EPA approval -- or disapproval -- of a timely attainment demonstration). In addition, to be sure that the State remains on track for attainment, the lifting of the shutdown restrictions is conditioned on the State meeting the applicable Part D planning requirements as discussed in the following paragraph. Once a State fails to meet any of these milestones, EPA cannot be assured that the safeguards in the Act guaranteeing proper progress towards attainment are sufficient.

States may interpret their own regulations or, when necessary, make a SIP submittal in accordance with this policy. The State policy or submission must provide that this lifting of the restriction is temporary and that the restrictions are automatically restored if the State fails to make any required part D submission, including an attainment demonstration or has its attainment demonstration disapproved. In ozone nonattainment areas, this means that the temporary lifting of the restrictions is subject to the following conditions as they apply and as they come due:

- The State has submitted a completed emission inventory as required by section 182(a)(1);

- The State has submitted complete revisions to its NSR program as required by section 182(a)(2)(C);

- The State submits the 15% reduction plan required by section 182(b)(1)(A) for moderate and above areas, and

- The State submits the attainment demonstration required by section 182(c)(2) for moderate and above areas.

If a State has failed to make any of these submissions that are due, or if they are deemed to be incomplete, or any of these

submissions are disapproved, emission reductions from shutdowns or curtailments can no longer be used for NSR offsets unless the criteria laid out in 40 CFR 51.165(a)(3)(ii)(C)(2) are met. Where there is an emission reduction credit bank in place, banked credits from all shutdowns or curtailments will be frozen until the State submits these required SIP elements.

- The shutdown or curtailment being used as an offset occurred in or after 1990, the associated actual emissions from the shutdown or curtailment were reported in the 1990 base year emissions inventory and the amount of the credit is the lower of actual or allowable emissions for the source;

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In addition, pursuant to EPA's existing regulatory framework, the shutdown or curtailment must be permanent, quantifiable and federally enforceable. Also, the emissions reductions can not be otherwise required by the Act, EPA regulations, or rules adopted by the State under the Act or to meet any other regulatory requirements.

Finally, the State cannot rely on an emission reduction credit in its overall attainment plan and rely on the same credit in the issuance of a new source review permit (i.e., no "double counting"). Where appropriate, the shutdown must be discounted to reflect reasonably available control technology, new source performance standards, or any other reasonably foreseeable Act requirement applicable to the shut down source at the time of the use of the shutdown credit.