

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
Office of Air Quality Planning and Standards  
Research Triangle Park, North Carolina 27711

FEB 15 1989

MEMORANDUM

SUBJECT: Guidance on Early Delegation of Authority for the Nitrogen Dioxide (NO<sub>2</sub>) Increments Program

FROM: Gerald A. Emison, Directors  
Office of Air Quality Planning and Standards

TO: Louis F. Gitto, Director  
Air Management Division, Region I

This is in response to your memorandum of December 23, 1988 to Don Clay, in which you requested guidance on the procedures to be followed in advancing the effective date of 40 CFR Part 52 for the NO<sub>2</sub> prevention of significant deterioration (PSD) increments to enable States seeking delegation of authority to implement the NO<sub>2</sub> increments prior to November 17, 1990. Specifically, you requested guidance on two questions:

1. How do States with delegated authority initiate the process of advancing the general effective date of 40 CFR 52.21?
2. What are the appropriate Environmental Protection Agency (EPA) rulemaking procedures for carrying out a State's request?

As you noted in your memorandum, the preamble to the NO<sub>2</sub> increments regulation promulgated on October 17, 1988, gave delegated States the opportunity to request authority to implement the requirements of the NO<sub>2</sub> increments regulation as early as the effective date of the 40 CFR 51.166 regulation (October 17, 1989). Otherwise, the NO<sub>2</sub> increment requirements do not become effective in delegated States until 25 months after promulgation (November 17, 1990).

The Office of General Counsel (OGC) and the Office of Air Quality Planning and Standards (OAQPS) have jointly developed the procedures outlined herein for advancing the date at which delegated States can assume responsibility for implementing the NO<sub>2</sub> increment requirements. This explanation should answer your specific questions regarding the procedures to use.

In answer to your first question, a State desiring delegation of the NO<sub>2</sub> increment provisions of the revised 40 CFR Part 52 PSD program must submit an amended PSD delegation agreement to its Region for review and approval. The form of this proposed amendment may follow that of the PSD delegation agreement now in force. It should contain an explanation of how the State plans to meet the new NO<sub>2</sub> increment requirements. In particular, it must demonstrate that the State has adequate legal authority under State law to accept the delegation. Also, the amended delegation agreement must address how increment consumed since the February 8, 1988 baseline date will be determined and possible exceedances corrected, and how increment consumption in the future will be tracked. In addition, in accordance with the discussion in the preamble to the final rule (53 FR 40659), the amended delegation agreement or an accompanying document must contain a stipulation by the appropriate State official that the State does not intend to submit the necessary Part 51 SIP revisions within 21 months of the promulgation of the NO<sub>2</sub> increment regulations. Such a stipulation would not, however, prevent the State from later changing its mind and submitting Part 51 revisions within the allotted time.

Some States may not be able to demonstrate adequate legal authority under State law to accept delegation. For example, a State may be prohibited from adopting any rule more stringent than EPA's, and this could be interpreted by the State to preclude accepting delegation of EPA rules which, although they have been promulgated, are not yet in effect. There is no mechanism available to EPA to enable such States to adopt the NO<sub>2</sub> increments prior to EPA's effective date.

As to the second question, when an acceptable application for early delegation has been received from a State, the Region should place a direct-final notice in the Federal Register, unless it anticipates adverse public comment. Although Headquarters' review of NO<sub>2</sub> PSD SIP revisions is not required, we would be willing (and OGC would like) to review at least the first of these notices. The notice should explain that the effective date of 40 CFR Part 52 is being advanced for that State as provided for in EPA's promulgation of the NO<sub>2</sub> increments regulation. An accompanying revision to the Part 52 subpart for the State in question should provide that: "The provisions of section 52.21 (b) through (w), including revisions promulgated on October 17, 1988, at 53 FR 40671, are hereby incorporated and made a part of the applicable State plan for the State of \_\_\_\_\_."

Regardless of whether a State desires delegation of the NO<sub>2</sub> increment regulations prior to (or on) the general effective date of the revised 40 CFR 52.21, the Region should use that opportunity to review the current delegation and revise it, as appropriate, to ensure consistency with EPA policies.

If you have any questions about the guidance provided in this memorandum, please contact Eric Noble at FTS 629-5362, Gary McCutchen at FTS 629-5592, or Greg Foote at FTS 382-7625.

cc: D. Clay  
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Air Division Director, Regions II-X