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OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

SUBJECT: Guidance an Enforceability Requirements for
Limiting Potential to Emit through SIP and §112 Rules
and General Permits

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Attached is a guidance document developed over the past year by the former Stationary Source compliance Division in coordination with the Air Enforcement Division, Office of Air Quality Planning and Standards, OAR's Office of Policy Analysis and Review, and the Office of General Counsel, as well-as with significant input from several Regions.

A number of permitting authorities have begun discussions with or have submitted programs for review by EPA that would provide alternative mechanisms for limiting potential to emit. Several authorities have submitted SIP rules and at least one State has been developing a state general permit approach.; We believe that this guidance is important to assist the EPA Regions as well as States in approving and developing such approaches.

For additional information regarding this guidance, please contact me or Clara Poffenberger of my staff at (202) 564-8709.

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Air Branch Chiefs, Regions I -X

Enforceability Requirements for Limiting potential to Emit Through SIP and §112 Rules and General Permits

Introduction

As several EPA guidance describe, there are several mechanisms available for sources to limit potential to emit. EPA guidance have also describe the importance of practical enforceability or the means used to limit the Potential to Emit. This guidance is intended to provide additional guidance on practical enforceability for such limits. We provide references for guidance an practical enforceability for permits and rules in general and provide guidance in this document for application of the same principles to "limitations established by rule or general permit," as described in the guidance document issued January 25, 1995, entitled "Options for Limiting Potential to Emit (PTE) of a Stationary Source under section 112 and Title V of the Clean Air Act (Act)." The description is as follows:

Limitations established by rules. For less complex plant sites, and for source categories involving relatively few operations that are similar in nature, case-by-case permitting may not be the most administratively efficient approach to establishing federally enforceable restrictions. One approach that has been used is to establish a general rule which creates federally enforceable restrictions at one time for many sources (these rules have been referred to as "prohibitory" or "exclusionary" rules). The concept of exclusionary rules is described in detail in the November 3, 1993 memorandum ["Approaches to Creating Federally Enforceable Emissions Limits," from John S. Seitz]. A specific suggested approach for VOC limits by rule was described in EPA's memorandum dated October 15, 1993 entitled "Guidance for State Rules for Optional Federally Enforceable Emissions Limits Base Upon Volatile Organic Compound (VOC) Use." An example of such an exclusionary rule is a model rule developed for use in California. (The California model rule is attached, along with a discussion of its applicability to other situations - see Attachment 2). Exclusionary rules are included in a State's SIP or 112 program and generally become effective upon approval by the EPA.

The EPA prefers the term "exclusionary rule" in that this phrase is a less ambiguous description of the overall purpose of these rules.

General permits -A concept similar to the exclusionary rule is the establishment of a general permit for a given source type. A general permit is a single permit that establishes terms and conditions that must be complied with by all sources subject to that permit. The establishment of a general permit could provide for emission limitations in a one-time permitting process, and thus avoid the need to issue separate permits for each source. Although this concept is generally thought of as an element of Title V permit programs there is no reason that a state or local agency could not submit a general permit program as a SIP submittal aimed at creating synthetic minor sources. Additionally FESOP [Federally Enforceable State Operating Permit usually referring to Title I State Operating Permit Programs approved under the criteria established by EPA in the June 28, 1989 Federal Register notice, 54 FR 27274] programs can include general permits as an element of the FESOP program being approved into the SIP. The advantage of a SIP general permit, when compared to an exclusionary rule, is that upon approval by the EPA of the state's general permit program, a general permit could be written for an additional source type without triggering the need for the formal SIP revision process. (January 25, 1995 Seitz and Van Heuvelen memorandum, page 4.)

SIP or §112 Rules

Source-category standards approved in the SIP or under §112, if enforceable as a practical matter, can be used as federally enforceable limits on potential to emit. Such provisions require public participation and EPA review. Once a specific source qualifies under the applicability requirements of the source category rule, additional public participation is not required to make the limits federally enforceable as a matter of legal sufficiency since the rule itself underwent public participation and EPA review. The rule must still be enforceable as a practical matter in order to be considered federally enforceable. A source that violates this type of rule limiting potential to emit below major source thresholds or is later determined not to qualify for coverage under the rule, could be subject to enforcement action for violation of the rule and for constructing or operating without a proper permit (a. part 70, a New Source Review permit, or operating without meeting §112 requirements, or any combination thereof).

General Permits

The Title V regulations set out provisions for general permits covering numerous similar sources. The primary purpose of general permits is to provide a permitting alternative where

the normal permitting process would be overly burdensome, such as for area sources under section 112. General permits may be issued to cover any category of numerous similar sources, including major sources, provided that such sources meet certain criteria laid out in 40 CFR part 70. Sources may be issued general permits strictly for the purpose of avoiding classification as major source. In other words, general permits may be used to limit the potential to emit for numerous similar sources. However, general permits must also meet both legal and practical federal enforceable requirements.

With respect to legal sufficiency, the operating permit regulations provide that once the general permit has been issued, after opportunity for public participation and, EPA and affected State review, the permitting authority may grant or deny a source's request to be covered by a general permit without further public participation or EPA or affected State review. The action of granting or denying the source's request is not subject to judicial review. A general permit does not carry a permit shield. A source may be subject to enforcement action for operating without a part 70 permit if the source is later determined not to qualify for coverage under the general permit. Sources covered by general permits must comply with all part 70 requirements.

State SIP or 112(1) General Permits

Another mechanism available to limit potential to emit is a general permit program approved into the SIP or under section 112(1), the hazardous air pollutant program authority. This mechanism allows permitting authorities to issue and revise general permits consistent with SIP or 112(1) program requirements without going through the SIP or 112(1) approval process for each general permit or revision of a general permit. The program is also separate from title V, like Title I state operating permits, and issuance and revisions of the permits are to comply with title V procedures.

Once a program is approved, issuing and revising general permits should be significantly less burdensome and time-consuming for State legislative and rulemaking authorities. The EPA review should also be less burdensome and time-consuming. After a program is approved, permitting authorities have the flexibility to submit and issue general permits as needed rather than submitting them all at once as part of a SIP submittal. Given the reduced procedural burden, permitting authorities should be able to issue general permits to small groups or categories of sources rather than attempt to cover broad categories with a generic rule. We anticipate that specific permit requirements or general permits may be readily developed with the assistance of interested industry groups.

The state general permit approach may allow sources to meet the federal the federal enforceability requirements more easily than other approaches. However, to use this approach, states must have a federally enforceable program that provides the state the authority, to issue such permits; to accomplish this, EPA must approve the program into the SIP or pursuant to section. 112(1) of the Clean Air Act.

Enforceability Principles

In 1989, in response to challenges from the Chemical Manufacturers Association and other industry groups, EPA reiterated its position that controls and limitations used to limit a source's Potential to emit must be federally enforceable. See 54 FR 27274 (June 28, 1989). Federally enforceable limits can be established by Clean Air Act programs such as NSPS, NESHAPs, MACTs, and SIP requirements. However, source-specific limits are generally set forth in permits. Generally, to be considered federally enforceable, the permitting program must be approved by EPA into the SIP and include provisions for public participation. "In addition, permit terms and conditions must be practicably enforceable to be considered federally enforceable. EPA provided specific guidance on federally enforceable permit conditions in a June 13, 1989 policy memo "Limiting Potential to Emit in New Source Permitting" from John Seitz and in the June 28, 1989 Federal Register notice (54 FR 27274) Additional guidance Can also be found in United states v. Louisiana Pacific, 682 F. Supp 1122 (D. Colo. 1987) 682 F. Supp 1141 (D. Colo.1988), which led to these guidance statements and a number of other memoranda covering practicable enforceability as it relates to rolling averages, short-term averages, and emission caps. See "Use of Long Term Rolling Averages to Limit Potential to Emit," from John B. Rasnic to David Kee, February 24, 1992; "Limiting Potential to Emit;" from Mamie Miller to George Czerniak, August, 1992; "Policy Determination an Limiting Potential to Emit for Koch Refining Company's Clean Fuels Project", from John B. Rasnic to David Kee, March 13, 1992; and "3M Tape Manufacturing Division Plant, St. Paul, Minnesota" from. John B. Rasnic to David Kee, July 14, 1992.

In 1987, EPA laid out enforceability criteria that SIP rules must meet. see "Review of State Implementation Plans and Revisions for Enforceability and Legal Sufficiency," from Michael Alushin, Alan Eckert, and John Seitz, September 3, 1987 (1997 SIP memo). The criteria include clear statements as to applicability, specificity as to the standard that must be met, explicit statements of the compliance time frames (e.g. hourly, daily, monthly, or 12-month averages, etc.), that the time frame and method of compliance employed must be sufficient to protect the standard involved, record keeping requirements must be specified, and equivalency provisions must meet certain requirements.

Based on these precedents this guidance describes six enforceability criteria which a rule or a general permit must meet to make limits enforceable as a practical matter. In general, practical enforceability for a source-specific permit term means that the provision must specify (1) a technically accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation (hourly, daily, monthly, annually); and (3) the method to determine compliance including appropriate monitoring, record keeping and reporting. For rules and general permits that apply to categories of sources, practical enforceability additionally requires that the provision (4) identify the categories of sources that are covered by the rule; (5) where coverage is optional, provide for notice to the permitting authority of the source's election to be covered by the rule; and (6) recognize the enforcement consequences relevant to the rule.

This guidance will address requirements (4) "and (5) first as they are concepts that are unique to rules and general' permits.

A. Specific Applicability

Rules and general permits designed to limit potential to emit must be specific as to the emission units or sources covered by the rule or permit. In other words, the rule or permit must clearly identify the category(ies) of the sources that qualify for the rule's coverage. The rule must apply to categories of sources that are defined specifically or narrowly enough so that specific limits and compliance monitoring can be identified and achieved by all sources in the categories defined.

A rule or general permit that covers, a homogeneous group of sources should allow standards to be set that limit potential to emit and provide the specific monitoring requirements. (Monitoring is more fully addressed in section D.) The State can allow for generic control efficiencies where technically sound and appropriate, depending on the extent of the application and ability to monitor compliance with resultant emission limits. Similarly, specific and narrow applicability may allow generic material usage or limits on hours of operation to be sufficient. For example, a rule or general permit that applies to fossil fuel fired boilers of a certain size may allow for limits on material usage, such as fuel-type and quantity. A rule or general permit that applies, only to standby diesel generators or emergency generators may allow restrictions on hours of operation to limit potential to emit. The necessary compliance terms (i.e., monitoring or record keeping) associated with any of these limits, such as with hours of operation, can readily be specified in the rule or the general permit itself.

General permits under Title V are assumed to include this

enforceability principle because the Part 70 regulations set out specific criteria that states should consider in developing their general permit provisions (See 57 FR 32278). These factors include requirements that

"categories of sources covered by general permits should be generally homogenous in terms of operations, processes, and emissions. All sources in the category should have essentially similar operations or processes and emit pollutants with similar characteristics."

Another factor stated is "sources should be subject to the same or substantially similar requirements governing operation, emissions, monitoring, reporting, or record keeping." Examples of source categories appropriate for general permits include: degreasers, dry cleaners, small heating systems, sheet fed printers, and VOC storage tanks (see 57 FR 32278).

B. Reporting or Notice to Permitting Authority

The rule or general permit should provide specific reporting requirements as part of the compliance method. Although the compliance method for all sources must include record keeping requirements, the permitting authority may make a determination that reporting requirements for small sources would provide minimal additional compliance assurance. Where ongoing reporting requirements are determined not to be reasonable for a category of sources, the rule or general permit should still provide that the source notify the permitting authority of its coverage by the rule or the permit. In the limited situation where all the sources described in a source category are required to comply with the all of the provisions of a rule or general permit, notice is not needed. However, where there are no reporting requirement's and no opt-in provisions, the permitting authority must provide the public with the names and locations of sources subject to the rule or permit.

For Title V general permits, Part 70 requires sources to submit an application for a general permit which must be approved or disapproved by the permitting authority. For SIP or §112 rules and SIP or §112 general permits, in response to receiving the notice or application, the permitting authority may issue an individual permit, or alternatively, a letter or certification. The permitting authority may also determine initially whether it will issue a response for each individual application or notice, and may initially specify a reasonable time period after which a source that has submitted an application or notice will be deemed to be authorized, to operate under the general permit or SIP or §112 rule.

C. Specific Technically Accurate Limits

The rule or general permit issued pursuant to the SIP or §112 must specify technically accurate limits on the potential to emit. The rule or general permit must clearly specify the limits that apply, and include the specific associated compliance monitoring. (The compliance monitoring requirements are discussed further in the next section.) The standards or limits must be technically specific and accurate to limit potential to emit, identifying any allowed deviations.

The 1987 policy on SIP enforceability states that limitations "must be sufficiently specific so that a source is fairly on notice as to the standard it must meet." For example, "alternative equivalent technique" provisions should not be approved without clarification concerning the time period over which equivalency is measured as well as whether the equivalency applies on a per source or per line basis or is facility-wide.

Further, for potential to emit limitations, the standards set must be technically sufficient to provide assurance to EPA and the public that they actually represent a limitation on the potential to emit for the category of sources identified. Any presumption for control efficiency must be technically accurate and the rule must provide the specific parameters as enforceable limits to assure that the control efficiency will be met. For example, rules setting presumptive efficiencies for incineration controls applied to a specific or broad category must state the operating temperature limits or range, the air flow, or any other parameters that may affect the efficiency on which the presumptive efficiency is based. Similarly, material usage limits such as fuel limits, as stated above, require specifying the type of fuel and may require specifying other operating parameters.

A rule that allows sources to submit the specific parameters and associated limits to be monitored may not be enforceable because the rule itself does not set specific technical limits. The submission of these voluntarily accepted limits on parameters or monitoring requirements would need to be federally enforceable. Absent a source-specific permit and appropriate review and public participation of the limits, such a rule is not consistent with the EPA's enforceability principles.

D. Specific compliance Monitoring

The rule must specify the methods to determine compliance. Specifically, the rule must state the monitoring requirements, record keeping requirements, reporting requirements, and test methods as appropriate for each potential to emit limitation; and clarify which methods are used for making a direct determination of compliance with the potential to emit limitations.

"Monitoring" refers to many different types of data collection, including continuous emission or opacity monitoring, and measurements of various of Parameters of process or control devices (e.g. temperature, pressure drop, fuel usage) and record keeping of parameters that been limited, such as hours of operation, production levels, or raw material usage. Without a verifiable plantwide, verifiable emission limits must assigned to each unit or group of units subject to the subject to he rule or general permit. Where monitoring cannot be used to determine emissions directly, limits on appropriate operating parameters must be established for the units or source, and must the monitoring must be sufficient to yield data form the relevant time period that is representative of the source's compliance with the standard or limit. Continuous emissions monitoring, especially in the case of smaller sources, is not required.

E. Practicably Enforceable Averaging Times

The averaging time for all limits must be practicably enforceable. In other words, the averaging time period must readily allow for determination of compliance. EPA policy expresses a preference toward short term limits, generally daily but not to exceed one month. However, EPA policy allows for rolling limits not to exceed 12 months or 365 days where the permitting authority finds that the limit provides an assurance that compliance can be readily determined and verified. See June 13, 1989 "Guidance on Limiting Potential to Emit," February 24, 1992 memorandum "Use of Long Term Rolling Averages to Limit Potential to Emit" from John Rasnic to David Kee and March 13 1992 "Policy Determination on Limiting Potential to Emit for Koch Refining Company Clean Fuels Project" from John B. Rasnic to David Kee, stating that determinations to allow an annual rolling average versus a shorter term limit must be made on a case by case basis. Various, factors weigh in favor of allowing a long term rolling average, such as historically unpredictable emissions. Other factors may weigh in favor of shorter term limit, such as the inability to set interim limits during the first year. The permitting agency must make a determination as to what monitoring and averaging period is warranted for the particular source-category in light of how close the allowable emissions would be to the applicability threshold.

F. Clearly Recognized Enforcement

Violations of limits imposed by the rule or general permit that limit potential to emit constitute violations of major source requirements. In other words the source would be violating a "synthetic minor" requirement which may result in the source being treated as a major source under Titles I and V. The 1989 Federal Register Notice provides for separate enforcement

and permitting treatment depending on whether the source subsequently chooses to become a major or remain minor. Thus violations of the rule or general permit or violation of the specific conditions of the rule or general permit subjects the source to potential enforcement under the Clean Air Act and state law. The operating permit rule states that notwithstanding the shield provisions of part 70, the source subject to a general permit may be subject to enforcement action for operating without a part 70 permit if the source is later determined not to qualify or the conditions and terms of the general permit. Moreover, violation of any of the conditions of the rule or general permit may result in a different determination of the source's potential to emit and thus may subject the source to major requirements and to enforcement action for failure to comply with major source requirements from the initial determination.

G. Rule Requirements for State General Permit Programs

As discussed above, general permit programs must be submitted to EPA for approval under SIP authority or under section 112(1), or both, depending on its particular pollutant application. SIP and §112(1) approval and rulemaking procedures must be met, including public notice and comment. The specific application of the enforceability principles for establishing State SIP or §112(1) general permit programs require that the rule establishing the program set out these principles as rule requirements. In other words, these principles must be specific rule requirements to be met by each general permit.

The rule establishing the program must require that (1) general permits apply to a specific and narrow category of sources; (2) sources electing coverage under general permits where coverage is not mandatory, provide notice or reporting to the permitting authority; (3) general permits provide specific and technically accurate (verifiable) limits that restrict the potential to emit; (4) general permits contain specific compliance requirements; (5) Limits in general permits are established based on practicably enforceable averaging times; and (6) violations of the permit are considered violations of the state and federal requirements and result in the source being subject to major source requirements.

In addition, since the rule establishing the program does not provide the specific standards to be met by the source, each general permit, but not each application under each general permit, must be issued pursuant to public and EPA notice and comment. The 1989 Federal Register notice covering enforceability of operating permits requires that SIP operating permit programs issue permits pursuant to public and EPA notice and comment. Title V requires that permits, including general permits, be issued subject to EPA objection.

Finally, sources remain liable or compliance with major source requirements if the specific application of a general permit to the source does not limit the source's potential to emit below major source or major modification thresholds. (The limits provided in these mechanisms may actually limit the potential to emit of sources but may not limit the potential to emit for some sources to below the threshold necessary to avoid major source requirements. For example, a general permit for industrial boilers may in fact provide limits that are sufficient to bring a source with only two or three boilers to below the subject thresholds but a source with more than three boilers may have a limited PTE but not limited below the major source threshold.) Also, where the source is required to use another mechanism to limit potential to emit, i.e., a construction permit, the general permit may not be relied upon by the source or the State, to limit potential to emit.

Permits issued pursuant to the approved program, meeting the above requirements, are adequate to provide federally enforceable limits on potential to emit for New Source Review, title V, and §112 programs as long as they are approved pursuant to SIP (section 110) and section 112(1) authorities.