

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

SEPT. 22, 1987

MEMORANDUM

SUBJECT: Implementation of North County Resource Recovery PSD Remand

FROM: Gerald A. Emison, Director
Office of Air Quality Planning and Standards (MD-10)

TO: Director, Air Management Division, Regions I, III, V, and IX
Director, Air and Waste Management Division, Region II
Director, Air, Pesticides, and Toxics Division, Regions IV and I
Director, Air and Toxics Division, Regions VII, VIII, and X

On June 3, 1986, the Administrator remanded a prevention of significant deterioration (PSD) permit decision, involving the North County Resource Recovery project, to Region IX for their reconsideration. The permit was for a 33-megawatt, 1000 tons-per-day facility to be located in San Marcos, California. At issue was whether appropriate consideration had been given, within the best available control technology (BACT) determination, to the environmental effects of pollutants not subject to regulation under the Clean Air Act (Act). [SEE FOOTNOTE *] The remand strongly affirms that the permitting authority should take the toxic effects of unregulated pollutants into account in making BACT decisions for regulated pollutants. This obligation arises from section 169(3) of the Act, which defines BACT as the maximum degree of emissions decrease which the permitting authority determines is achievable, taking into account "environmental . . . impacts." Essential to this process is the notification to the public of how the effects of toxic air pollutants, including those that are unregulated, have been considered in the PSD review and the subsequent consideration of the comments in making the final BACT decision. The purpose of this memorandum is to advise you of the impact of the remand on PSD permitting and to provide implementation guidance. This document builds upon and makes final the draft guidance of August 1986.

Coverage

Although the Act has given us the authority to review directly the considerable range of regulated pollutants, the remand clearly indicates that the Environmental Protection Agency (EPA) should incorporate consideration of all pollutants within its PSD determinations for all sources subject to PSD. This result is consistent with the fact that the PSD permitting process is charged ". . . to protect public health and welfare from any

[FOOTNOTE *] A "regulated pollutant," or "pollutant subject to regulation under the Clean Air Act," is one which is addressed by a national ambient air quality standard, a new source performance standard, or is listed pursuant to the national emission standards for hazardous air pollutants program.

actual or potential adverse effect . . . from air pollution . . . " and that increases in air pollution should be permitted ". . . only after careful evaluation of all the consequences . . ." [section 160(1) and (2)].

Revisions to State implementation plans (SIP's), to comport with the Administrator's decision, should not be necessary. State or local agencies with delegated PSD programs automatically track this change in policy. Agencies implementing their own SIP-approved programs are also unlikely to need any regulatory changes. This is because the remand is based on an interpretation of Act language, notably the definition of BACT, that is in most cases already contained in the plan. I ask that you confirm this with your States and applicable local agencies.

Transition

As with any change in the way EPA does business, we have developed a transition plan for its implementation. The situations can be addressed most logically by dividing all PSD sources into three groups based on phase of permitting activity: those sources for which permit applications had not been filed, those for which permits had already been granted, and those for which applications had been filed but permits not yet granted.

First, all PSD sources for which complete applications had not been filed as of the Administrator's June 3, 1986, decision are fully subject to the remand's requirements. Earlier applications present more complex policy considerations.

One could argue, since the Administrator's decision is an interpretation of existing Act provisions, rather than a new requirement, that all PSD permits issued under the terms of the 1977 Amendments to the Act should be subject to the remand. However, program stability and equity to sources, in this second group, that have relied upon properly issued PSD permits militate strongly against such an approach. For these reasons, I have decided to exempt from the requirements of the remand all sources holding finally issued permits as of June 3, 1986. (Subsequent major modifications to such existing sources are, of course, subject to PSD review, including the application of the requirements of this remand.)

The third group of sources consists of those for which PSD permits were in the pipeline (i.e., complete application filed but permits not yet issued) as of the date of the remand. It is appropriate that these sources also be subject to the terms of the remand. However, for permit applications which have successfully passed through the public comment period without environmental effects concerns being raised, the Regional Office may, at its discretion, issue these in final without further delay.

The above enunciated transition policy applies directly to all EPA permit issuance procedures and also to those used by State agencies issuing PSD permits under a delegation of authority agreement pursuant to 40 CFR 52.21(u). This transition policy does not automatically apply to PSD

permit decisions by States under SIP-approved PSD programs, except to the extent that environmental effects issues are raised by commenters. The policy does apply prospectively in a uniform fashion to all applications filed after June 3, 1986. States with SIP-approved PSD programs are, of course, responsible for enunciating reasonable transition schemes and I ask that you encourage them to adopt policies consistent with this one. These transition schemes, as with the substantive program itself, are unlikely to require rulemaking; however, the policies should be set forth in formal statements so as to further the goals of public awareness and consistent application. These policies and their implementation will be reviewed within the National Air Audit System to assess the need to require greater conformance.

Required Analyses

The BACT requirement outlined in section 169(3) of the Act contemplates a decision process in which the best available controls are defined for each regulated pollutant that a PSD source would emit in significant amounts. This case-by-case process is to take into account energy, environmental, and economic impacts and other costs. The toxic effects of unregulated pollutants are to be accounted for in deciding if the BACT otherwise being prescribed for regulated pollutants still represents the appropriate level and type of control. If the reviewing authority judges the potential environmental effects of such unregulated pollutants to be of possible concern to the public, then the final BACT decision for regulated pollutants should in all cases address these effects and reflect, as appropriate, control beyond what might otherwise have been chosen.

A recent remand determination made by the Administrator in another case provides further elucidation of the BACT process. In that case, Honolulu Program of Waste Energy Recovery (H-Power), PSD Appeal No. 86-6, Remand Order (June 23, 1987), the Administrator ruled that a PSD permitting authority has the burden of demonstrating that adverse economic impacts are so significant as to justify the failure to require the most effective pollution controls technologically achievable as BACT.

The broad mandate with respect to toxics that is presented by the remand is not readily amenable to highly detailed national guidance that provides the appropriate permitting requirement in each case. There is no specific formula for making BACT decisions; this is a case-by-case process involving the judgment of the reviewing authority. While it may be possible to develop a framework of guidance based upon such factors as risk assessment and reference doses, this would entail a large effort that seems inappropriate at this time. It is more practical, however, for EPA to develop guidance for specific source categories that are of particular importance. The EPA has recently provided such BACT guidance with respect to municipal waste combustors. See memorandum entitled "Operational Guidance on Control Technology for New and Modified Municipal Waste Combustors," from Gerald A. Emison, Director, Office of Air Quality Planning and Standards, dated June 26, 1987. Guidance on other source categories may be issued from time to time as appropriate.

Today's policy charges the PSD review authority with analyzing at the outset the environmental impacts of proposed construction projects with respect to air toxics which might be of concern, even if such matters are not initially raised by the public. Other types of environmental effects should also be addressed in response to public concerns, within the limits of the ability to do so. For PSD reviews consistent with this policy, each applicable permitting authority should initiate an evaluation of toxic air pollutants (unregulated as well as regulated) which the proposed project would emit in amounts potentially of concern to the public. The review authority should evaluate unregulated pollutants for both carcinogenic and noncarcinogenic effects. The National Air Toxics Information Clearinghouse (NATICH) data base contains considerable information relevant to evaluating the effect, sources, and control techniques available for unregulated pollutants. I encourage you to urge permitting authorities to use NATICH as a source of information as they conduct the analyses. Further information may be obtained by calling the NATICH staff at 629-5519.

The response to the Administrator made by EPA Region IX in its analysis of the North County permitting decision is attached. Although this example illustrates only one of several acceptable approaches, it is a well thought out analysis that provides a useful example to consider for future permitting exercises.

Headquarters has several other mechanisms in effect to support analyses with respect to toxics. These include a recent report which helps to estimate toxic air emissions from various sources (Compiling Air Toxics Emission Inventories, EPA-450/4-86-010). The burden of proof regarding emissions estimates, of course, rests with the applicant, but the techniques discussed in the document should be useful in determining if the applicant's estimates are reasonable and address appropriate pollutants. In addition, the Office of Research and Development (ORD) has released a control technology manual which is valuable in evaluating how control devices for particulate matter and volatile organic compounds differ in their abilities to control various toxic species of these criteria pollutants (Control Technologies for Hazardous Air Pollutants, EPA-625/6-86/014).

Support will also be available on a case-by-case basis from the Office of Air Quality Planning and Standards (OAQPS) and ORD. In particular, we have formed a control technology center to provide assistance to the review authority in determining BACT. This center can offer a range of activities, including evaluation of source emissions, identification of control techniques, development of control cost estimates, identification of operation and maintenance procedures, and, in a few situations, in-depth engineering assistance on individual problems. Other planned activities include the publication of technical guidance to assist in the evaluation of selected types of sources. Contact points for the control technology center are Lee Beck in OAQPS (629-0800) and Sharon Nolen in ORD (629-7607). We expect this support to limit the effort required of PSD reviewing authorities.

Public Participation

One of the most important features of this policy is the requirement that the affected public be fully informed of the potential toxic emissions from a proposed project and of what the reviewing authority has done to minimize this potential within the BACT decision. A specific discussion of toxics concerns in a technical support document might be helpful in accomplishing this information transfer. Additional concerns related to the environmental effects of unregulated pollutants raised by commenters must then be addressed in the final BACT determination. This process is of central importance to PSD permitting and comments received must be adequately addressed in the final decision. Strong public participation is consistent with the PSD goals contained in section 160 of the Act, which relate to informing the public of increased air pollution, including that due to unregulated pollutants.

It should be noted that although these analyses are used in the BACT decision, they will not be used as the basis for disapproving a project that has agreed to apply BACT. In other words, today's policy requires that toxics be considered in the control of the proposed project only to the extent that the level of control chosen as BACT is achievable.

Enforcement

In the case of delegated (as opposed to SIP-approved) PSD programs, EPA has various enforcement tools. Pursuant to 40 CFR 124.19, any party that participated in the public proceedings with respect to a proposed permit may, within 30 days of the final permit decision, petition the Administrator of EPA to review any condition of that permit decision. The Administrator may also seek to review any such permit condition on his own initiative. Should this appeals procedure be unavailable in a particular case, EPA has the authority, depending upon the facts of the case, to withdraw the delegation with respect to an individual permit that is being or has been issued inconsistently with the terms of that delegation. Thus, EPA may be able to directly intervene in the issuance of a PSD permit to ensure implementation of today's policy. This withdrawal of delegation is not the preferred course of action but it may be available if needed.

The consideration of air toxics in PSD permitting is a requirement of the Act and, through the definition of BACT, is incorporated in the SIP's. Therefore, violation of this policy would constitute a SIP violation and be enforceable by EPA. Section 113(a) of the Act provides for Federal issuance of a notice of violation in the case of a violation of a SIP. If the violation continues for more than 30 days, section 113(b) provides that the Administrator shall commence an action for injunction or civil penalty, or both. In addition, section 167 of the Act specifically provides that EPA take legal action to prevent the construction of a major emitting facility that does not conform to the requirements of PSD. Under section 167, EPA can issue an administrative order or commence a civil action. Since no

notice of violation would be necessary, in this case, EPA can use section 167 to order immediate cessation of construction or operation. Note also that this section has been construed as providing EPA with authority to take enforcement action against sources out of compliance with PSD even if they have already been constructed. These remedies are more likely to be used in the case of SIP-approved programs than with delegated programs, for which an appeal under 40 CFR Part 124 would generally be the preferred course of action.

Enforcement actions are pursued after reviewing a range of factors relevant to each particular case. For this reason, I am not setting forth detailed provisions as to required enforcement measures. There are, however, certain situations in which enforcement action is generally appropriate. These include procedural deficiencies, such as failure to solicit public comment on air toxics issues for applicable permits, and failure to address the air toxics concerns raised by public comment. Enforcement with respect to permits already in the pipeline should follow the transition scheme in today's policy for delegated programs and the State or local agreement established with EPA for SIP-approved programs.

The Act and the PSD regulations require that States submit a copy of the public notice for proposed permits to EPA. I urge the Regional Offices to ensure that such notices are submitted and are reviewed for conformance with the criteria contained in this document. Although enforcement mechanisms are available to address noncomplying sources, our efforts to implement today's policy will be much more effective if taken prospectively and in coordination with the State permitting process.

Conclusion

Today's guidance summarizes the broad ranging impact of the June 3, 1986, remand and provides some insight into the analyses and public disclosure that now should take place. We will continue to support and monitor subsequent decisions and to assess the need for more detailed or expansive guidance. Questions on today's guidance should be addressed to Michael Trutna (629-5345) or Kirt Cox of OAQPS (629-5399).

Attachment

cc: C. Potter
A. Eckert
D. Clay
Regional Administrator, Regions I-X
Air Branch Chiefs, Regions I-X