EPA

GOOD PRACTICES MANUAL FOR DELEGATION OF NSPS AND NESHAPS

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OFFICE OF AIR QUALITY PLANNING AND STANDARDS
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February 1983

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SECTION 1

INTRODUCTION

The Clean Air Act, as amended, requires under Section 111 that performance standards be set for source categories which in the judgement of the Administrator cause or contribute significantly to air pollution. Section 112 requires that emission standards be established for hazardous air pollutants. Sections 111 and 112 also provide the Administrator of the Environmental Protection Agency (EPA) with the authority to delegate to State agencies the implementation and enforcement of both these standards.

This guideline provides some recommendations on the items a Regional Office (RO) should consider in evaluating a State's request for delegation. The specific documentation necessary for a RO to demonstrate that a State agency is ready and able to assume the authority for the program will vary and depend on the past relationship between the RO and State agency. This guideline also discusses the mechanisms used in the past by some RO's and provides a series of sample letters and Federal Register notices. This guideline incorporates and updates the guidance with respect to New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAPS) in the 1973 Division of Stationary Source Enforcement (DSSE) Guideline S-13--Delegation of Authority to the States - NSPS and NESHAPS and portions of the Office of Air Quality Planning Standards (OAQPS) Guideline 1.2-045 dealing with NSPS and NESHAPS delegation.

SECTION 2

STATEMENT ON NSPS AND NESHAP DELEGATION

The Clean Air Act precisely states that the States should have the primary authority for implementing the NSPS and the NESHAPS programs. The Clean Air Act sets very few conditions on the transfer of this authority (see Section 3.3). The transfer of this authority or "delegation" of these programs can and should be a simple and flexible process because for each NSPS and NESHAPS there exists an unambiguous, enforceable Federal emission regulation that is both legally binding on a source and ultimately enforceable by EPA. The transfer of NSPS and NESHAPS authority to a State in no way precludes EPA from enforcing NSPS or NESHAPS in Federal court should the State fail or be unable to pursue legal action in their own State court system.

Therefore, delegation of NSPS and NESHAPS should be viewed as EPA transferring to the State agency the primary authority for implementing these programs. This transfer can include the entire program, individual standards, or portions of individual standards. The criteria to be used by the EPA RO's in determining when they should transfer these programs are flexible. The major requirement is that the State must affirm their intent to implement and enforce the programs and show that they are able to do so both legally and programmatically. The specific documentation necessary for a RO to convince itself that the State is ready and able to assume the responsibility for the program will vary and depend on the past relationship between the RO and the State. Each RO will review their delegation decisions periodically through program audits. To avoid ambiguity and confusion, EPA will publish a notice in the Federal Register indicating the standards for which the State has been delegated authority.

SECTION 3

BACKGROUND

On August 17, 1972, under EPA Order 1150.18, the Administrator delegated to the Regional Administrators responsibility for approving State procedures for implementing and enforcing NSPS and NESHAPS and for delegating authority to the States to implement and enforce NSPS and NESHAPS. In 1973, DSSE issued Guideline S-13--Delegation of Authority to the States - NSPS and NESHAPS. This guideline provided information to the Regional Administrators on the requirements for approval of State requests for delegation of authority. This guideline established agency policy on delegation and provided a sample cover letter and sample Federal Register notice to facilitate the delegation of these programs. The guideline indicated that it was the Agency's policy to encourage and facilitate requests for delegation to the maximum extent permissible under the Clean Air Act. The RO personnel were encouraged to work closely with their States to develop adequate delegation procedures. It was the Agency's intent in issuing the guideline to allow the States to implement and enforce the NSPS and NESHAPS in whatever manner they considered the most effective, as long as the procedures were appropriately designed to assure compliance and the procedures were consistent with the Act and the associated NSPS and NESHAPS regulations.

In March of 1976, OAQPS issued Guideline 1.2-045 on delegation of new source review authority to State and local agencies. The main purpose of this guideline was to set forth procedures for delegation of authority to enforce EPA regulations for the review of new and modified sources. The new source review regulations subject to delegation included those promulgated to implement Sections 110, 111, and 112 of the Clean Air Act, as amended. This guideline incorporated the S-13 guideline and made some additional modification to the policies and procedures set forth in S-13. These included the ability to delegate directly to the local agencies if the State did not accept delegation and the development of "automatic" delegation of authority to avoid the

requirement for States to request new delegation of authority each time new NSPS (or NESHAPS) were issued.

OAQPS Guideline 1.2-045 also stated that it was EPA's policy to encourage State agencies to request and accept delegation because it would: (1) relieve EPA of the resource requirements for enforcing the NSPS and NESHAPS requirements, (2) avoid duplication of effort in many cases, and (3) put enforcement in the hands of the States where the Clean Air Act intended it to be. Thus, the delegation of the NSPS and NESHAPS programs has been and continues to be a priority item in EPA's program plans and it is the Agency's goal to delegate the NSPS and NESHAPS programs to all the States as soon as possible.

There are no regulations defining whether a submitted State procedure should be considered adequate for the purpose of delegation of NSPS or NESHAPS. Approval of a State's NSPS or NESHAPS procedures should be based on an evaluation of the State's ability to implement and enforce the NSPS and NESHAPS programs. Flexibility is the key to delegation.

3.1 STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

Section 111 of the Act, "Standards of Performance of New Stationary Sources," requires EPA to establish Federal emission standards for source categories which cause or contribute significantly to air pollution. These standards, established for both new and modified stationary sources, reflect the degree of emission reduction achievable through the application of the best system of continuous emission reduction which, taking into account the cost of achieving such reduction and any nonair quality, health, and environmental impact and energy requirements, the Administrator has determined to be adequately demonstrated. Since December 23, 1971, the Administrator has promulgated a number of NSPS regulations (40 CFR 60) pursuant to Section 111 (see Appendix A). Both the pollutants regulated and their associated emission limits vary for each NSPS promulgated and include particulate matter (PM), sulfur dioxide (SO_2), carbon monoxide (CO), nitrogen oxides (NO_x), volatile organic compounds (VOC), acid mist, total reduced sulfur (TRS), and fluorides (F).

3.2 NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS

Section 112 of the Act, "National Emission Standards for Hazardous Air Pollutants," requires EPA to establish Federal emission standards for non-criteria air pollutants which in the judgment of the Administrator cause or contribute to air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness. These standards apply to new, modified, and existing sources and are set at levels to protect public health with an ample margin of safety.

On April 6, 1973, the Administrator promulgated the first NESHAPS regulations (40 CFR Part 61) pursuant to Section 112 for regulating asbestos, beryllium, and mercury. On October 26, 1976, the Administrator promulgated a national emission standard for vinyl chloride. To date, these standards regulate emissions from 20 source categories (see Appendix B).

3.3 AUTHORITY FOR DELEGATION

The authority for delegation, for both the implementation and enforcement of NSPS and NESHAPS is contained in 111(c) and 112(d), respectively, of the Clean Air Act.

Section 111(c) of the Clean Air Act, as amended, provides that:

> "(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this Act to implement and enforce such standards."

Section 112(d) of the Act provides that:

> "(d)(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing emission standards for hazardous air pollutants for stationary sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this Act to implement and enforce such standards."

SECTION 4

REQUIREMENTS FOR TRANSFER OF AUTHORITY

In order to delegate its authority, EPA must make a finding that the State's procedures for implementing and enforcing NSPS and NESHAPS are adequate. While delegation is a serious legal responsibility, the Agency, nonetheless, should adopt a flexible approach in evaluating delegation requests. For example, EPA should not demand that the program be administered in precisely the same way in each State, nor should EPA necessarily insist that the States use the same procedures that EPA would use. Rather, the focus should be on environmental results and the potential for each State's program to work.

The nine elements listed below must be considered in order to support a finding that a State agency can indeed implement and enforce the NSPS and NESHAPS programs effectively. These program elements need not be discussed in exhaustive detail in a State's request for delegation. In many cases a reference to the specific regulation, legal authority, or procedure will be sufficient evidence to enable the RO to substantiate the adequacy of the State's program. This section discusses these elements and any associated conditions that must be considered by the RO in making a finding of adequacy. These elements are:

- Emission limits consistent with Federal regulations
- Test methods consistent with Federal regulations
- Reporting and monitoring requirements
- Enforcement
- Waivers (variance) procedures
- Surveillance
- Public notification and disclosure of information
- Resources
- Reporting (to EPA)

4.1 EMISSION LIMITS CONSISTENT WITH FEDERAL REGULATIONS

State regulations dealing with NSPS and NESHAPS must be consistent with the Federal regulations as outlined in 40 CFR Parts 60 and 61. Emission limits or standards must be at least as stringent as NSPS and NESHAPS. Immunities not granted by Federal regulations must not be granted by the State agency.

4.2 TEST METHODS CONSISTENT WITH FEDERAL REGULATIONS

The State must agree to use the test methods published in 40 CFR 60 and 61 or any equivalent or alternative test method that has been approved by EPA. If a State agency has adopted its own test methods that they consider to be equivalent to the methods in 40 CFR 60 and 61 or adequate for determining compliance with the standards in 40 CFR 60 and 61, then these methods may be submitted to EPA for approval under the provisions of 40 CFR 60.9. The EPA methods must be used until formal approval of the methods is issued by EPA.

To ensure uniformity and technical quality in the enforcement of national standards, EPA will not delegate the authority for approving any equivalent or alternative test methods. In some cases, a State agency may find that design or operating conditions at a given site may preclude the use of the exact procedures set forth in 40 CFR 60 and 61. In these cases the State may need to make some modifications to the procedures on a case-by-case basis in order to conduct the required test. EPA may delegate the provisions in 40 CFR 60.8(b)(1) and (f) where some adjustment in the test method procedure is warranted.

4.3 REPORTING AND MONITORING REQUIREMENTS

State agencies should have a mechanism to implement the reporting and monitoring requirements set forth in the NSPS and NESHAPS. In many cases, the States have adequate reporting procedures, and these should be used wherever possible to avoid duplicating reporting requirements for NSPS and NESHAPS.

4.4 ENFORCEMENT AGAINST NONCOMPLYING SOURCES

The enforcement authority portion of the delegation must indicate that the agency has the authority to enforce NSPS and NESHAPS in its State court

system. The agency should also have the authority to levy penalties and seek injunctive relief. Because of the wide variation in State laws, the RO's are encouraged to work closely with the States and their respective Attorneys General in making their determination that the State agency has adequate enforcement provisions.

4.5 WAIVER PROCEDURES

The NESHAPS program provides for waivers (variances) in the compliance dates for meeting future standards. The authority to evaluate and grant these waivers can be delegated to the State agency if enforcement and implementation procedures are adequate.

4.6 SURVEILLANCE

The State procedure must, as a minimum, provide for monitoring, recordkeeping, and reporting as required by Federal regulations. Required reports and notices from sources will be submitted to States to which authority has been delegated. A notice of address change must be published in the Federal Register. In addition, an adequate State procedure must include a field investigation system for detecting violations and for conducting or observing source emission tests. The State procedure may require sources to keep records and make reports not required by Federal regulations. The RO must make a finding concerning the adequacy of surveillance procedures and resources before delegating the NSPS and NESHAPS programs. Upon delegation, all results of performance tests conducted by the affected sources and excess emission reports completed by the affected sources should be submitted directly to the delegated agency. Test results and excess emission reports should be filed in such a way as to be readily accessible for future reference.

4.7 PUBLIC NOTIFICATION AND DISCLOSURE OF INFORMATION

The Agency's request for delegation should provide for making all emission data as well as all other nonconfidential source information available to the public. If State law does not allow for the disclosure of this information, EPA may delegate Section 114 authority to a State along with the NSPS or NESHAPS delegation. The Federal Register notice designating NSPS or

NESHAPS transfer of authority should also include the delegation of Section 114 authority where applicable. If the State cannot accept Section 114 authority, the NSPS or NESHAPS transfer of authority can be conditioned upon a cooperative effort between EPA and the State agency whereby the State can release the information to EPA, and EPA can then release the information requested by the public.

4.8 RESOURCES

To the extent that current State NSR regulations apply to the same sources as the NSPS and NESHAPS regulations and that many of these State regulations have similar regulatory requirements as the NSPS and NESHAPS, there should be, in general, no additional resource burden as a result of the delegation of NSPS or NESHAPS programs. The RO, however, must be assured that there will be sufficient resources to perform the required reviews and to take the appropriate action necessary to implement and enforce NSPS and/or NESHAPS.

In the past, resource-oriented problems were frequently noted as a main reason for not accepting delegation, and this problem can be expected in the future. To ensure that adequate resources are available, it is appropriate to condition a portion of a State's grant based on the acceptance of the NSPS and NESHAPS programs. In addition to the direct grant mechanism, contractual assistance can also be provided by EPA on an as-needed basis to alleviate resource constraints. Contractual assistance can take the form of direct resources to assist in such activities as observing stack tests or indirect resources in the form of workshops and seminars to assist the State agency in incorporating NSPS and NESHAPS requirements into their program. Workshops can address areas such as procedural requirements, technical review and permitting, surveillance, and implementation of specific standards.

4.9 REPORTING (TO EPA)

All State agencies receiving grant funds and delegated program authority must currently report on the status of their funds or programs according to a schedule established by the RO's. The Federal regulations (40 CFR 51) require a quarterly report as a minimum, however, many States report to the RO

on a monthly basis. Current reporting practices should be modified to include NSPS and/or NESHAPS sources.

SECTION 5

MECHANICS OF DELEGATION

The following is a brief discussion of the items that should be considered with respect to delegating the NSPS and NESHAPS programs. Basic procedural requirements for program assumption are presented in this section along with various mechanisms that can be used to facilitate the delegation of future standards, i.e., automatic delegation, adoption by reference, and use of permit conditions. Also presented in this section is a discussion of delegation to local agencies. In addition, Appendix C contains example correspondence and Federal Register notices for accomplishing a number of the actions described in this chapter. These examples are provided to assist the States and RO's in requesting and granting the delegation of NSPS and NESHAPS programs.

Examples are provided for the following:

- Letter notifying the State agency of delegation of NSPS and NESHAPS.
- Automatic delegation letter notifying the State agency of new Federal standards.
- Letter notifying the State agency of delegation of new Federal standards after the State requested delegation for the new standards.
- Federal Register notice for delegation of NSPS and NESHAPS to a State agency.
- Federal Register notice for supplemental delegation of NSPS and NESHAPS to a State agency published as an informational notice (no proposal necessary).

5.1 PROGRAM ASSUMPTION

Certain steps must be followed for a State to assume the NSPS and NESHAPS programs. These steps are:

1. The Governor of the State or his designee shall submit to the appropriate Regional Administrator of the Environmental Protection Agency a written request for delegation of authority pursuant to Section 111(c) or 112(d) or both. The request must describe the State procedure that will be followed in implementing and enforcing one or more NSPS or NESHAPS, identify the State officers or agencies responsible for carrying out the State procedure, and demonstrate the adequacy of the State procedure with respect to the criteria set forth in this statement of requirements.

2. The request may seek a delegation of authority to implement and enforce any NSPS or NESHAPS which has been finally promulgated at the time of the request. If automatic delegation is to be implemented, see Section 5.1.2. The request should specify the source categories for which delegation is sought and may be approved with respect to one or more such categories and denied with respect to others.

3. The Regional Administrator shall notify the Governor or his designee in writing whether and to what extent the request has been approved or disapproved. If the request is disapproved in whole or in part, the notification to the Governor shall specify the reasons for such disapproval.

4. If the request is approved in whole or in part, the Regional Administrator shall delegate to the Governor or his designee authority to carry out the approved portions of the State procedure. Such delegation shall be effective upon receipt by the Governor or his designee of a written Notice of Delegation. The Notice of Delegation shall identify the approved State procedure by reference to the request and to any additional submission by the Governor or his designee supplementing or modifying the State procedure and shall specify which portions of the proposed State procedure, if any, are disapproved. The Notice of Delegation will subsequently be published in the Federal Register.

5. A delegation of authority pursuant to Section 111(c) or 112(d) shall not authorize implementation and enforcement of NSPS or NESHAPS according to a State procedure which is different from the approved State procedure identified in the Notice of Delegation unless a revised State procedure is submitted by the Governor or his designee and approved by the Regional Administrator. Notice of the approval of any revised State procedure will be published in the Federal Register. This provision applies only to the adequacy of State procedures for implementing and enforcing Federal standards, and is not meant to be in derogation of State authority pursuant to Section 116.

6. As additional NSPS or NESHAPS are promulgated, EPA may notify the Governor or his designee of the new standards and their delegation to the State or the State may submit additional requests for delegation of authority in accordance with the foregoing procedure.

5.1.1 Extent of Delegation

Although EPA encourages the State agencies to accept full delegation of all aspects of the implementation and enforcement of NSPS and NESHAPS, there are situations where States are either unwilling or unable to assume all responsibility for implementing these programs. In these cases, EPA may grant partial delegations to requesting agencies indicating one of the following:

1. Delegation of authority may be given for only a portion of the State or regulatory area.

2. Delegation of authority may be given for only the applicable portion of the source categories involved. Specific source categories or parts thereof might be omitted (e.g., NSPS for petroleum refineries in Iowa, since no refineries are expected in Iowa. Likewise, authority may be delegated for only certain facilities covered by a particular standard (e.g., some States have not accepted delegation of the demolition standard under the asbestos NESHAP).

3. Authority may be delegated for selected parts of the procedural responsibility in implementing standards with EPA acting as a partner in completing the remaining actions. For example, delegation of authority can be provided with regard to the administrative/technical portion of the implementation, with EPA providing the enforcement should action become necessary. The administrative/technical portion of the review includes reception of the source's request for approval and evaluation of that request. It may also involve advising the source of the results of that evaluation. The actual approval/disapproval action would be performed by the EPA RO. Enforcement actions, including litigation, under these delegations, would be initiated by EPA.

5.1.2 Automatic Delegation

Automatic delegation refers to a process where agencies assume responsibility for the implementation and enforcement of current and future NSPS and NESHAPS. Without automatic delegation, a separate request for delegation is needed every time a standard is promulgated. In order to promote the delegation of the NSPS and NESHAPS programs to the State and local agencies, an automatic delegation process was introduced to avoid individual requests for delegation for each standard that would be promulgated. Automatic delegation simplifies the role of the State agency in obtaining authority for newly promulgated NSPS and NESHAPS.

Automatic delegation is initially accomplished by State agencies requesting the authority to review and enforce all future NSPS and NESHAPS standards. A notice of automatic delegation is then issued in the Federal Register when new standards are developed. This notification delegates the standards to the State based on the previous request for automatic delegation. This does not require response by the State agency and if no negative declaration is received from the State the delegation is final. The purpose of this Federal Register notice is to inform the public that the delegation has taken place and to indicate where the source notification and other reports should be sent. EPA will notify the State agencies of the promulgation of additional standards through correspondence similar to that in Appendix C.

5.1.3 Adoption by Reference

One alternative for those States with problems in accepting automatic delegation would be delegation by reference. Under this procedure, newly promulgated NSPS and NESHAPS would be adopted directly into the State codes by reference to the Federal law. This would considerably decrease the administrative and economic burdens associated with major regulatory changes.

5.1.4 Use of Permit Conditions

A third approach to delegating the NSPS and NESHAPS programs is through the use of permit conditions as part of a State agency's preconstruction and operating permit program. This approach may be used where there are obstacles to other types of delegation.

If a State or local agency has an approved preconstruction and operating permit program, the State or local agency can impose the emission limits and other requirements consistent with the NSPS or NESHAPS programs as a legally enforceable permit condition, but only if the agency has the legal authority to enforce those permit conditions. By imposing these requirements as a permit condition, the State agency would not necessarily have to formally adopt the NSPS or NESHAPS emission limits or requirements. They could, however, impose the NSPS or NESHAPS requirements almost automatically after they have been promulgated without any formal changes to their existing permit programs.

To implement this type of delegation procedure, a State agency would notify the RO of its intent to use their existing permit programs to ensure

that the applicable NSPS or NESHAPS requirements were being implemented and enforced. The State would indicate how they intended to impose the permit conditions and how they would enforce the permit conditions if a source failed to comply with these conditions. All other requirements for delegation (i.e., consistent test methods, reporting, and monitoring, etc.) would have to be satisfied as well.

5.1.5 Regulatory Revision

In some areas neither automatic delegation nor delegation by reference may be available to a State agency because of legal or political constraints. If the legal and procedural issues cannot be resolved, additional NSPS and NESHAPS source categories must be delegated on a case-by-case basis through revisions to State regulations. This approach is the least desirable because of the increased economic and administrative requirements. If, on the other hand, this is the only technique a State agency can use to assume responsibility for newly promulgated NSPS and NESHAPS, the State should be encouraged to seek delegation through the regulatory revision approach. If the State chooses this approach, parallel processing can be used to process these regulatory revisions to eliminate duplication of effort and decrease the overall processing time for the revision.

This technique for assuming responsibility of a newly promulgated NSPS or NESHAPS entails submitting an additional delegation request for each new NSPS or NESHAPS as well as incorporating the Federal regulations directly into the State or local regulations.

5.2 LOCAL PROGRAM DELEGATION

Although Section 111 does not specifically authorize it, common practice has been to delegate to local agencies where they are adequately qualified. Three possible local agency delegation request mechanisms for NSPS and NESHAPS exist: (1) a State agency can request delegation on behalf of a local agency, (2) a local agency can request delegation directly with the written consent of the State agency, and (3) a local agency can request delegation directly without the consent of the State agency.

When a State has no objection to direct delegation to a local agency, as in the first two cases, there is little impediment to the delegation process.

EPA retains the ultimate responsibility to implement and enforce the NSPS and NESHAPS. Therefore, if a court rules that EPA lacks the authority to delegate to a local agency, the local agency delegations can be revoked and EPA would once again, have sole responsibility for the delegated programs.

The third case, where a State is opposed to EPA delegation to a local agency, can potentially cause a problem with respect to EPA's ability to work with an individual State. Because of the wording of Subsections 111(c) and 112(d), a State may raise the issue of EPA's legal authority to delegate the NSPS and NESHAPS programs to a local agency. The State's objections to having a local agency accept the authority for delegation should be thoroughly investigated to determine if the objections have merit or if the delegation would cause significant problems that would make the delegation inappropriate. Because EPA's clear authority lies in delegation to the State, a State submittal (or proposed imminent submittal) of a satisfactory request for delegation must be granted over a direct EPA delegation to local agency. This authority also warrants the revocation of a local agency delegation once the State submits an adequate request for delegation. Thus, any objection from the State with respect to a local agency's delegation must be carefully considered, and the State should be urged to either request delegation itself or withdraw its objections. If, however, the State neither accepts delegation nor withdraws its objections, the local agency may receive the delegation as long as it understands that a future delegation by EPA to the State could by its terms transfer any delegated authority from the local agency to the State.

5.3 QUESTIONS AND ANSWERS CONCERNING DELEGATION

Over the past several months a number of questions have been raised concerning the delegation of the NSPS and NESHAPS programs. A compilation of these questions and the corresponding answers is presented in Appendix D.