EC-G-1998-64

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 14 1983

MEMORANDUM

SUBJECT: Guidance On Enforcement of Prevention of Significant Deterioration Requirements Under the Clean Air Act

FROM: Michael S. Alushin
Associate Enforcement Counsel for Air

Edward E. Reich, Director
Stationary Source Compliance Division

TO: Regional Counsels
Regions I-X

Directors, Air Management Divisions
Regions I, V and IX

Directors, Air and Waste Management Divisions
Regions II-IV, VI-VIII, and X

This guidance discusses enforcement of Part C of Title I of the Clean Air Act, dealing with the prevention of significant deterioration (PSD) of the ambient air quality. The guidance explains the use of Section 167 of the Clean Air Act as an enforcement tool and provides assistance in choosing between §167 and the alternatives available for enforcing against PSD violations. Violations of Part C include construction or operation of a PSD source (as defined under the Act and the PSD regulations) without a permit, construction or operation with an invalid permit, and construction or operation in a manner not consistent with a validly issued permit.

We believe that §167 of the Act provides EPA with a significant enforcement mechanism in addition to §113, the Agency's main enforcement tool, but it does not preclude resort to any remedies available under §§113 or 120. Section 167 should be used in situations where a source is constructing or operating without a valid permit or in violation of a valid permit and EPA's main interest is a quick imposition of injunctive relief to stop the violation. Where time is not of the essence and/or the Agency wishes to collect penalties in addition to exacting injunctive relief, §§113 or 120 provide more appropriate remedies.

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Thus, depending upon the circumstances of a particular case, EPA may commence one or more of the following actions against a source that is in violation of PSD requirements:

(a) Issue an order or seek injunctive relief under §167 to prevent the source from constructing or operating in violation of the PSD requirements;

(b) Issue an order to comply under §113(a);

(c) Seek civil remedies under §113(b);

(d) Seek criminal penalties under §113(c);

(e) Assess and collect noncompliance penalties under §120.

I. Analysis of Section 167

Section 167 of the Clean Air Act provides:

> The Administrator shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction of a major emitting facility which does not conform to the requirements of this part, or which is proposed to be constructed in any area included in the list promulgated pursuant to paragraph (1)(D) or (E) of subsection (d) of Section 107 of this Act and which is not subject to an implementation plan which meets the requirements of this part.
>
> 42 U.S.C. §7477(1978)

Depending upon whether or not EPA has approved a State's Part C (PSD) State Implementation Plan (SIP) provisions under Section 110(a)(2) of the Clean Air Act or delegated the PSD program to the State, Section 167 creates two separate and distinct enforcement obligations for EPA. This is consistent with EPA's policy of allowing the States primacy where they have the main responsibility for a program. In those States that have not been delegated the PSD program or do not have approved SIP PSD provisions as required by §161 (PSD requirements for SIPs), EPA has the authority to regulate the construction of all major emitting sources that are subject to PSD review under the Act. Any person wishing to construct such a source in one of those States will be required by §165 (preconstruction requirements) to obtain a PSD permit from EPA. If the proposed source would violate the provisions of the PSD regulations, EPA must deny the permit. If EPA issues a permit, the Agency will be

responsible for initiating appropriate proceedings should the source subsequently violate any permit provisions. Likewise, the Agency is responsible for taking enforcement action against a source which commences construction without first obtaining a PSD permit.

Once its PSD SIP provisions have been approved or delegated, pursuant to §110(a)(2) and 40 CFR 51.24, the State, rather than EPA, assumes primary responsibility for administering the PSD program. The Agency does not completely relinquish its obligations, however. Rather, it assumes an oversight function. PSD permits issued by the State remain federally enforceable. 40 CFR §§52.02(d), 52.21(r), and 52.23. If the State takes appropriate enforcement action, it is unnecessary for EPA to initiate enforcement proceedings. If the State fails to take appropriate action, however, Section 167 provides that EPA must take measures adequate to prevent the construction of the noncomplying source. EPA can take such action at any time the Agency deems it necessary. The Agency is not forestalled by any action initiated by the State from simultaneously or subsequently taking action against a source that already had commenced construction or operation. Thus, EPA retains PSD enforcement authority and, where appropriate, is expected to initiate PSD enforcement proceedings both before and after the PSD SIP revisions have been approved.[1/]

Additionally, §167 requires EPA to take action directly against a source found being constructed or operating pursuant to a PSD permit that conflicts with the requirements of the Clean Air Act, implementing regulations, or approved SIP requirements. This provision gives the Administrator authority similar to that possessed under §113(a)(5) and (b)(5) to prevent illegal construction or operation of new sources in nonattainment areas.

1/ Senator Muskie noted this continuing Federal enforcement obligation. He stated: "[o]nce the State adopts a permit process in compliance with this provision, the Environmental Protection Agency role is to seek injunctive or other judicial relief to assure compliance with the law." 123 Cong. Rec. S 9169 (daily ed. June 8, 1977) (remarks of Senator Muskie). Senator Muskie's reference to "injunctive or other judicial relief" should not be construed as precluding resort to an administrative order mechanism. Such an interpretation would conflict with the clear wording of §167. Rather, we believe that Senator Muskie's reference to "other judicial relief" provides clear support for the proposition that EPA may resort to the civil and criminal penalties provisions of §113(b) and (c).

Under Delegation Number 7-38, the Administrator has delegated authority to issue §167 administrative orders to the Regional Administrators and to the Assistant Administrator for Air and Radiation. The Regional Administrators will, in most instances, be the parties to issue §167 orders and, pursuant to Delegation No 7-38, must consult with the Associate Enforcement Counsel for Air and the Director of the Stationary Source Compliance Division before issuing such orders. The Assistant Administrator for Air and Radiation may issue §167 orders in multi-Regional cases or cases of national significance. In addition, the Assistant Administrator for Air and Radiation must consult with the Associate Enforcement Counsel for Air and must notify any affected Regional Administrators or their designees before issuing such orders.

II. Enforcement Actions Under §167 and §113(b)

A. Construction Without a PSD Permit
Construction Not Consistent with a Validly Issued Permit

1. Pre-Operation Remedies

Section 167 will provide a particularly effective enforcement tool against an owner or operator that has commenced construction without having obtained a PSD permit or is constructing in a manner not consistent with a validly issued permit. In this situation, EPA should take action to halt construction of the source immediately. This may be accomplished most quickly under §167 by means of an adminstrative order or by obtaining judicially-imposed injuctive relief.

When using §167, EPA should normally first issue an administrative order. The Agency should then file a civil action if a violating source does not immediately comply with the order. In cases where EPA has good reason to believe that the order would not be obeyed, however, we should file a civil action for injunctive relief immediately, without first issuing an order.

In appropriate instances, EPA may issue an order or file a complaint under §167 while proceeding concurrently, through §§113 or 120 actions, to collect civil and/or noncompliance penalties. Section 167 gives the Administrator the authority to take immediate action without being constricted by the procedural limitations set forth in §113. In all cases where possible, however, EPA should issue the source a notice of violation (NOV), with a copy being sent to the appropriate State agency. The NOV does not have to be issued concurrently with a §167 order, but

the §167 order should be followed up as soon as practical with the NOV. This notice should explain the full range of possible EPA enforcement actions. Even if circumstances require a §167 court filing before meeting NOV procedural requirements, prompt issuance of the NOV will allow EPA to take action under §113 at a later date if the Agency decides to do so.

In many instances, EPA learns that a source is constructing without a PSD permit or in violation of a validly issued permit early enough in the source's construction schedule to allow the agency time to act solely under §113. In these cases, the Agency may choose to commence a civil action under §113 for injunctive relief and/or monetary penalties instead of acting under §167 where remedies are limited to injunctive relief.

Civil penalties are available against a source for violations even prior to the time it has commenced operation. One type of case occurs when a source is being constructed in violation of the terms of its PSD permit. For example, if the owner delays in meeting a schedule to install control equipment or seeks to install equipment that will not meet the emission limits in the PSD permit, the Agency should take action to require the necessary injunctive relief and to recover monetary penalties. Penalties are appropriate even if no pollutants actually have been emitted because the PSD permit is issued pursuant to the SIP, and thus a requirement of the SIP has been violated. EPA should seek penalties for each day that the source is in violation of PSD permit requirements, commencing on the date on which the source began to install the non-conforming equipment, or August 7, 1977, whichever is later, and continuing until the source satisfies the compliance schedule specified in a judgment or in a consent decree.[2/]

Another type of case arises when a source is being constructed without a permit. Here, also, injunctive relief and penalties are appropriate. The penalty period begins with the date that construction began. "Construction" for the purpose of this

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2/ Even if the source has derived no economic benefit by installing the nonconforming equipment, EPA still should seek penalties under §113(b). The Penalty Policy provides for other factors which guide the choice of penalty figures. In addition, EPA has promulgated a specific guideline for permit violation penalty settlements. That guideline is contained in Appendix I to this guidance. The guideline was issued on February 1, 1981, by Jeffrey Miller, then Assistant Administrator for Enforcement. Appendix I updates the 1981 guideline to reflect organizational changes, and to elaborate upon some of the examples.

determination is defined as activity beyond that permitted under the policy enunciated in the December 18, 1978 memorandum from Ed Reich to the Regional Offices entitled, "Interpretation of 'Constructed' as it Applies to Activities Undertaken Prior to Issuance of a PSD Permit." (Copy attached as Appendix II.) The penalty period ends when the permit is granted or is scheduled by EPA to be granted. Even if the source is put on a compliance schedule in a consent decree before then it should not be allowed to enjoy the economic advantage of its violation of PSD requirements.

It is important to note that even if construction is halted, the violation continues. Naturally, though, priority should be given to cases where injunctive action is required. Equally important, the Agency should not delay issuance of PSD permits for sources of which illegal construction has begun. In such a case, the penalty period is dependent on the speed of EPA's own action. For this reason, the Permit Penalty Policy states that the Agency may consider mitigation of the calculated civil penalty if a source ceases construction within a reasonable time after being notified of the violation and does not resume construction until a valid permit is issued.

2. Post-Operation Remedies

Civil actions under §113(b) will constitute the primary enforcement mechanism against sources that have already commenced operation without obtaining a PSD permit or in violation of a PSD permit. However, in cases where expeditious action is necessary, orders issued pursuant to §167 are available to achieve immediate cessation of operation. They should only be used for operating sources which have failed to get a permit or are committing a violation so egregious that they must be shut down immediately (e.g., failure to install the control equipment or start-up prior to installation of control equipment or where operation causes an increment to be exceeded). Even in these instances, the action under §167 should be accompanied by a §113 action to collect penalties.

When using §167, EPA should normally first issue an administrative order. The Agency should then file a civil action if a violating source does not immediately comply with the order. In cases where EPA has good reason to believe that the order would not be obeyed, however, we should file a civil action for injunctive relief immediately, without first issuing an order.

We believe that a PSD source which is not known to be in violation can be granted up to 180 days after start-up in which to demonstrate compliance with all applicable emission limitations. This provides an opportunity for the owner or operator to make necessary modifications or correct minor equipment defects that are not apparent prior to start-up. The expectation is that the

source will be in compliance as soon as possible, and the decision as to how much time is necessary for fine tuning is to be made on a case by case basis. (The period of 180 days is analogous to the time allowed a source to demonstrate compliance after start-up under the New Source Performance Standard regulations, 40 C.F.R. §60.8.) During the 180-day period, a source should be required, to the extent practicable, to maintain and operate the source including the associated air pollution control equipment in a manner consistent with good air pollution control practice.

B. Construction With an Invalid Permit

EPA will also be able to utilize the provisions of §167 to prevent a source from constructing with a State-issued permit that EPA feels is invalid. There are basically two types of situations involving construction with an invalid permit. In the most common situation, the source can be expected to obtain a valid permit quickly. In other circumstances, however, it cannot be expected that a valid permit can issue soon. Before deciding on a course of action to be taken with a source constructing pursuant to an invalid permit, an EPA Regional Office needs to make a probability assessment as to the likelihood that a source will be able to obtain a valid permit quickly. For the purposes of allowing construction pursuant to an invalid permit, the period of thirty (30) days (the period analogous to that allowed under a Section 113(a) order) should be considered to be "quickly."

In the situation where EPA believes a valid permit will issue quickly, the procedures to be followed should be similar to those used under §113(a)(5) to prevent the construction of new sources in nonattainment areas. Sources should be issued an order, specifying precisely the nature of the defect in the permit, and given 30 days in which to obtain a valid permit while they proceed with construction. Issuance of an immediate cease construction order, while available, usually would be an unnecessary sanction. A source that has obtained a PSD permit, even though invalid, has presumably undergone some preconstruction review. Moreover, since it is the State, rather than the source itself, that is primarily at fault, immediate sanctions might be inappropriate.

In some situations, however, such as those where EPA believes that a source cannot be operated without violating an increment or where construction will foreclose EPA's options in terms of what BACT requirements will apply to a source, an immediate cease construction order under §167 should be issued and construction should not be allowed to commence or continue until a valid permit is issued.

In cases against sources constructing pursuant to an invalid permit, the error is presumed to have been the State's. Therefore, even though construction may be halted, no penalty is appropriate unless the source is somehow at fault or the source does not cooperate after the discovery of the violation. For no-penalty actions, §167 is an effective enforcement tool.

C. Consent Decrees

In civil actions filed under both §167 and §113, against pre-operational as well as post-operational sources, a likely outcome of the actions will be consent decrees. Allowing a violating source to continue construction or commence operation under the provisions of a consent decree lies within the discretion of the court, though the court's decision can be affected, of course, by the recommendation of EPA and the Department of Justice. The terms EPA should seek in actions under both §167 and §113 will vary according to the nature of the violation and the time that will be required to correct it.

There are two types of situations in which consent decrees would be appropriate. The first occurs when the source's violation causes or contributes to levels of pollution that exceed those allowed under §163 of the Act (which establishes the PSD increments). The other situation arises when the source's violation does not cause or contribute to increased levels of pollution beyond those allowed by §163.

When the pollution increments established by §163 would be or are being exceeded, EPA should immediately seek injunctive relief to prevent the source from starting up or continuing in violation of its emission limitations. EPA should determine the nature of the violation and the amount of time that will be needed to correct it. A source should not be permitted to commence or continue operation until it is in compliance through enforceable emission limitations. To allow commencement or continuation of operation out of compliance would defeat the intent of the Act by sanctioning levels of pollution in the PSD area greater than those established by Congress as the maximum allowable limits.

If the source is exceeding or will exceed its own emission limitation but the increment set forth in §163 is not being or will not be exceeded, EPA has more flexibility in devising a consent decree. While it need not adhere to a strict rule of no start-up until a source is in compliance, the Agency still must take all necessary action to ensure that corrections are made as quickly as possible and must not allow a source to commence operation unless start-up is pursuant to a consent decree.

The actual terms of a consent decree will vary from case to case. The only provisions that must be contained in every decree are a schedule that requires compliance as expeditiously as practicable, monitoring and reporting procedures, and a stipulated contempt fine provision. These fines should be established at a level sufficiently high to ensure compliance with the terms of the decree. (More detailed guidance on provisions to be included in consent decrees is contained in the October 19, 1983 memorandum from Courtney Price, GM-16.)

III. Additional Enforcement Remedies

A. Criminal Penalties Under §113(c)

Section 113(c) is available, where appropriate, against all types of PSD violations, both pre- and post-operation.

Section 113(c) authorizes the Administrator to commence a criminal action to seek monetary penalties and/or imprisonment for knowing violations of applicable regulations and EPA orders. The key requirement is that the Administrator must be able to demonstrate that the violation was "knowing."

A distinction should be drawn between a source that refuses to comply with applicable requirements and one that merely has failed to comply. Refusal to meet any increments of progress of the final compliance date of an administrative order or to meet consent decree or permit requirements should be considered for criminal referral to DOJ. If the source merely is late in complying, however, criminal penalties would not generally be appropriate. Additionally, it is our belief that resort to criminal penalties does not preclude the initiation of concurrent or subsequent civil proceedings for monetary penalties and/or injunctive relief. Questions concerning the possibility of criminal action should be referred to Peter Beeson, Associate Enforcement Counsel for Criminal Enforcement (FTS 382-4543).

B. Noncompliance Penalties Under §120

By the terms of §120, noncompliance penalties can be assessed whenever a source is in violation of an emission limitation, emission standard, or compliance schedule under an applicable SIP. These penalties are based upon the economic benefit the source has derived from noncompliance. Section 120 penalties can be assessed regardless of whether civil and/or criminal sanctions available under §113 are also sought. More discussion of the use of noncompliance penalties appears in regulations published July 28, 1980 (45 FR 50086).

If you have a question about this guidance, please call Judy Katz of the Air Enforcement Division (382-2843) if it is a legal question or Rich Biondi of the Stationary Source Compliance Division (382-2831) if it is a technical question.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

APR 28 1982

PSD

MEMORANDUM

SUBJECT: Federal Enforceability under PSD

FROM: Kathleen M. Bennett
Assistant Administrator for Air, Noise and Radiation

TO: Directors, Air & Waste Management Divisions
Regions I-IV, VI-VIII, X

Directors, Air Management Divisions
Regions V and IX

This memorandum is prompted by a request for clarification of the status of the requirement that to be cognizable under PSD for offset and applicability purposes, emission limitations must be federally enforceable.

On August 7, 1980, EPA published amendments to the PSD and non-attainment regulations which included a provision that emission limitations must be federally enforceable in order to be taken into account for offsets or applicability purposes. The amendments went on to define federally enforceable as:

> all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR parts 60 and 61, requirements within any applicable State Implementation Plan, and any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 and 40 CFR 51.24. (40 CFR 52.21(b)(17))

Under a petition for reconsideration of the August 7 rules, which was submitted by several parties, this concept of federally enforceable limitations was challenged. The petitioners maintained that the requirement of federally enforceable limitations was unnecessary.

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CONCURRENCES

SYMBOL	EN-341	EN-341						
SURNAME	[illegible]	[illegible]	[illegible]	Wilson	[illegible]			
DATE	4/6/82	4/11/82	4-8-82	4/9	4/5			

The Agency decided to reconsider the requirement of federally enforceable emission limitations. In addition to reconsidering the issue, EPA temporarily stayed the federally enforceable requirements (see Federal Register July 15, 1981). The stay expired on October 5, 1981 and the Administrator declined an extension of the stay, thus once again requiring federally enforceable emission limitations.

At the present time, the amendments, as published on August 7, 1980, are in effect and binding. The definition of federally enforceable still stands: emission limitations must be federally enforceable in order to be taken into account for offsets or PSD applicability. As to the definition of federally enforceable, the Agency continues to maintain the position that operating permits not incorporated into a SIP under an approved general bubble rule are not federally enforceable.

During the past six months the Agency has been in the process of negotiating a settlement of the industry challenges to the August 7, 1980 amendments, including the issue of Federal enforceability.

The Agency has offered a settlement proposal, which has been accepted by the industry petitioners, that would change the federally enforceable concept. EPA has agreed to propose accepting emission limitations as creditable to the extent that they are enforceable by either Federal, State or local jurisdictions. The word "federally" would be dropped from the term "federally enforceable" as used in the regulations. At the same time the term "enforceable" will be defined as "enforceable under Federal, State, or local law and discoverable by the Administrator and any other person." This change will most likely have the result of making operating permits acceptable for offsets and applicability.

Changes in Federal enforceability, as well as other changes that result from the settlement agreement, must go through general rulemaking procedures. Rulemaking procedure will follow the outline in the February 22, 1982 settlement agreement. The rulemaking may also include some type of grandfathering provisions for the period of the temporary stay. The grandfathering provisions may focus on the commencement of construction during the period of the stay.

Please note that until the rulemaking processes are completed the existing rules are still in effect. If any specific problems concerning Federal enforceability and applicability arise, questions should be referred to Ed Reich at 382-2807.

APPENDIX I

Penalty Policy for Violations of Certain Clean Air Act Permit Requirements for the Construction and/or Modification of Major Stationary Sources of Air Pollution

I. Introduction

EPA's existing Civil Penalty Policy, dated July 8, 1980, applies inter alia, to stationary sources of air pollution which violate requirements enforceable under Section 113 of the Clean Air Act when such violations are the result of a failure to make capital expenditures and/or failure to employ operation and maintenance procedures which are necssary to achieve initial compliance. The Civil Penalty Policy does not, however, specifically address violations of permit requirements related to the construction or modification of major stationary sources under the prevention of significant deterioration (PSD) program and the nonattainment area new source review program (including the Offset Interpretative Ruling and Section 173).

This document outlines a penalty policy which applies to certain permit-related violations of the Clean Air Act and is intended to establish a method of calculating a minimum settlement amount for such violations. The "Permit Penalty Policy" does not replace or limit the present Civil Penalty Policy in any way, but has been developed to deal with a subject area not covered by the existing policy. As illustrated by the following examples, the failure of a source to satisfy a new source requirement may result in one violation subject to this Permit Penalty Policy, and a second violation subject to the Civil Penalty Policy.

It is important to note that this Permit Penalty Policy is intended to provide guidance on determining a minumum civil penalty settlement figure, as opposed to penalty requests in complaints. As a general rule, civil complaints alleging Clean Air Act violations, including permit-related violations, should always request the statutory maximum penalty of $25,000 per day of violation. In addition, the policy is not intended to suggest that civil penalties are the only, or even the primary, remedy where a source is in violation of Clean Air Act requirements. In such cases, a claim for civil penalties is an adjunct to seeking appropriate injunctive relief. A claim for costs should also be considered.

It is also important to note that the policy outlined in this document, like the Civil Penalty Policy, is used to set a minimum settlement figure. Therefore, the penalty actually negotiated for can always be higher than the figure derived through use of this Permit Penalty Policy.

II. The Permit Penalty Policy

The Permit Penalty Policy covers cases involving sources which begin construction or operation without first obtaining the required PSD permit, as well as those which construct or operate in violation of such valid permits. Construction proceeding in compliance with an invalid permit is considered to be, in the context of this penalty policy, construction without a permit. A primary motivation behind the Permit Penalty Policy has been the recognition that economic savings can be difficult to quantify when the violation involves permit requirements. The Permit Penalty Policy has been designed to provide a method for determining a penalty amount which will be sufficient to deter illegal construction or other permit violations, and yet not be so high as to be unreasonable or unrealistic.

The policy is built around use of a matrix for calculation of the minimum settlement amount. Construction in the absence of a permit or in violation of a permit has been assigned a scale of dollar values. The matrix also provides for the assessment of an additional penalty for certain specified violations of substantive permit pre-conditions or requirements. The appropriate dollar value for a violation is dependent on an estimate of the total cost of air pollution control at those facilities of the source for which the permit is required.[1/] This value is then multiplied by the number of months of violation.[2/] When there are multiple permit-related violations, a penalty figure is calculated for each violation and the individual penalty figures are added together to produce one minimum settlement figure. In those cases where a source subject to a valid permit violates only the requirements of Section 173(1) and/or Section 173(3) (requirements for

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1/ "Total cost of air pollution control" should include, where relevant, pollution control equipment costs, design costs, operation and maintenance costs, differential cost of complying fuel v. noncomplying fuel, and other costs pertaining to adequate control of the new source. Total cost is to be determined by examination of what would have been required as BACT (for a PSD violation) or LAER (in the case of an Offset Policy or Part D violation). When construction is done in phases, the operative amount is the total cost of air pollution controls for the entire project.

2/ Month-by-month accrual of penalties was selected for purposes of convenience and for consistency with the Civil Penalty Policy. Any fraction of a month in violation is counted as a full month of violation unless circumstances present a case for mitigation of this rule.

construction permits in nonattainment areas) or the corresponding requirements under the Offset Policy, the appropriate penalty amount is determined by reference only to the matrix column(s) citing the violation(s).

The sum produced through use of the matrix represents the minimum amount for which a case normally can be settled. However, it is recognized that equitable considerations, including but not limited to recalcitrance, degree of environmental harm[3/] and likelihood of success should the case be filed, may make an increase or decrease in the matrix figure appropriate. Similarly, a source owner who agrees to make approved expenditures for pollution control above and beyond expenditures made to comply with all existing legal requirements may reduce the amount of the penalty owed. Any such additional expenditures designed as credits to satisfy or offset civil penalties will be evaluated in accordance with the provisions of the Civil Penalty Policy. Regional Offices wishing to modify the figure indicated by the matrix in consideration of the total equities presented by a case or to reduce the penalty because of a credit should do so in accordance with the procedures discussed in Section III of this Policy.

It is recognized that there may also be cases where the economic value of a violation covered by this policy is reasonably quantifiable. Where the quantifiable economic savings figure exceeds the penalty amount established by the attached matrix, the Regional Office should negotiate for the higher calculated econcomic savings figure rather than the matrix figure.

The period of civil penalty liability will, of course, depend upon the nature and circumstances of the violation. For example, if a source has begun actual construction without a required permit or under an invalid permit, the penalty period begins on the date the source began construction and continues either until the source obtains a valid permit or notifies the State or EPA that it has permanently ceased construction and the project has been abandoned.[4/] A temporary cessation in construction does not

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3/ E.g., significant consumption of a PSD increment by a source that has not received a permit, violation of a Class I increment or serious aggravation of a nonattainment problem.

4/ The period of liability is not to be confused with the period of continuing violation for Section 113 notice of violation (NOV) purposes. A source which constructs without a valid permit is in continuing violation of the Clean Air Act for NOV purposes until it receives a valid permit or it dismantles the new construction.

toll the running of the penalty period. The Agency may, however, consider mitigation of the calculated civil penalty if a source ceases construction within a reasonable time after being notified of the violation and does not resume construction until a valid permit is issued. If a source violates a permit condition, the period of penalty liability for purposes of calculating a settlement figure begins on the first date the violation can be documented and will cease when the violation is corrected.

III. Procedure

Authority to approve minimum settlement figures calculated for cases covered by this Permit Penalty Policy rests with the Assistant Administrator for Enforcement and Compliance Monitoring. (Delegation 7-22-C) The Assistant Administrator has, in practice, called upon the Associate Enforcement Counsel for Air to review settlement figures. Therefore, an indication of the minimum settlement figure, including an explanation of the derivation of the figure obtained from the matrix and any modification of that figure based upon subjective factors, should either be included in the litigation report covering the facility or should be forwarded by memorandum to the Associate Enforcement Counsel for Air.

If a case involves violations that are within the existing Civil Penalty Policy's coverage, as well as a permit-related violation, the Permit Penalty Policy should be used to find the minimum settlement figure for the permit violation(s) and the Civil Penalty Policy should be used to establish a penalty amount for the other violation(s). These two figures should be added together to produce an appropriate overall settlement amount.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 18 1978

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Interpretation of "Constructed" as it Applies to Activities Undertaken Prior to Issuance of a PSD Permit

FROM: Director
Division of Stationary Source Enforcement

TO: Enforcement Division Directors
Regions I-X

Air and Hazardous Materials Division Directors
Regions I-X

The issue addressed in this memorandum is where on the continuum from planning to operation of a major emitting facility does a company or other entity violate the PSD regulations if it has not yet received a PSD permit. (It is assumed here that such a permit is required by the PSD regulations.) This question has arisen several times in particular cases and general guidance now appears necessary.

The statute and regulations do not answer this question. The Clean Air Act states simply that, "[n]o major emitting facility... may be constructed... unless-(1) a permit has been issued... [and various other conditions have been satisfied]." Section 165(a). Similarly, the PSD regulations state that, "[n]o major stationary source or major modification shall be constructed unless the [various PSD requirements are met]." 40 CFR 52.21(i)(1), 43 FR 26406. "Construction" is defined in the regulations as "fabrication, erection, installation, or modification of a source." 40 CFR 52.21(b)(7), 43 FR 26404. This accords with Section 169(2)(C) of the Act, but it does not explicitly answer the question posed above. To our knowledge, the legislative history of the Act does not treat this issue. Thus the term "constructed" seems to be open to further interpretation by EPA.

Commencement of construction is quite specifically defined in both Section 169(2)(A) of the Clean Air Act and 40 CFR 52.21(b)(8), 43 FR 26404. However, that definition is for the purpose of deciding the threshold question of the applicability of the PSD regulations. Therefore, we are not bound by it in deciding what activities may be conducted prior to receiving a necessary PSD permit.

DSSE's response to date has been that the permitting authority should make the determination on a case-by-case basis, after considering all the facts of the individual situation. For example, we said that site clearing might be inappropriate for a source proposed to be constructed in a heavily forested Class I area, but permissible for a source proposed to be constructed on a junk-strewn lot in a heavily industrialized Class III area.

After consulting with the Office of General Counsel, we are now amending this policy in order to minimize the administrative burden on the permitting authority and to adopt what we believe now to be the better legal interpretation. The new policy is that certain limited activities will be allowed in all cases. These allowable activities are planning, ordering of equipment and materials, site-clearing, grading, and on-site storage of equipment and materials. Any activities undertaken prior to issuance of a PSD permit would, of course, be solely at the owner's or operator's risk. That is, even if considerable expense were incurred in site-clearing and purchasing equipment, for example, there would be no guarantee that a PSD permit would be forthcoming.

All on-site activities of a permanent nature aimed at completing a PSD source for which a permit has yet to be obtained are prohibited under all circumstances. These prohibited activities include installation of building supports and foundations, paving, laying of underground pipe work, construction of permanent storage structures, and activities of a similar nature.

The new policy has several advantages. First, it will be easy to administer, since case-by-case determinations will not be required. Moreover, it assures national consistency and permits no abuse of discretion. Finally, it appears to be the most legally correct position. The policy has the undeniable disadvantage of allowing a good deal of

activity at sites which may be highly susceptible to environmental impact. We feel that on balance, however, the advantages of the policy outweigh the disadvantage.

If you have any questions, please feel free to contact David Rochlin of my staff, at 755-2542.

Edward E. Reich

cc: Peter Wyckoff, OGC
Richard Rhoades, OAQPS
Linda Murphy, Region I
Ken Eng, Region II
Jim Sydnor, Region III
Winston Smith, Region IV
Steve Rothblatt, Region V
Don Harvey, Region VI
Bob Chanslor, Region VII
Dave Joseph, Region VIII
Bill Wick, Region IX
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In March of 1981, the Regional Office learned that the source did not install controls on a certain piece of process equipment and therefore did not actually "obtain" the offsets as specified in the State permit. On April 1, 1981, the Region issued an NOV for failure to comply with the terms of the permit by not obtaining offsets prior to start-up. At an April 15, 1981, conference between EPA and the source, the source agreed to meet the terms of its permit and to certify compliance. On May 15, 1981, the offsets were finally obtained.

In this example, the violation covered by the matrix is the source's failure to obtain the required offsets (because the source had obtained the requisite permit and its only violation of the permit consisted of a failure to obtain the offsets by start-up). The failure to obtain offsets, however, is covered by both the Permit Penalty Policy (for the failure of the new source to obtain offsets prior to start-up) and the Civil Penalty Policy (for the failure of the existing source to comply with the offset requirement).

The calculation of the minimum settlement figure in this case under the Permit Penalty Policy begins with an assessment of the total cost of air pollution control equipment at the modification. For purposes of this example, assume LAER costs $110,000. Since the source operated from start-up on December 1, 1980, until May 15, 1981, without the necessary offsets, the period of violation was six months. Under these circumstances, the matrix yields a penalty figure of $84,000. (6 x $14,000 = $84,000).

As in the PSD example above, this matrix figure is a minimum settlement number. EPA is free to negotiate for a higher amount. There is also the opportunity for a reduction of this figure based upon the surrounding circumstances in accordance with the procedures outlined in the policy.

The calculation of a minimum settlement figure under the Civil Penalty Policy is dependent upon the economic benefit to the source of delaying the capital costs necessary to satisfy the offset requirement for a period of six months, and upon the other factors set out in the policy. Because the offsets were obtained from a facility owned by the new source, a total minimum civil penalty settlement figure is calculated by adding the amounts obtained under the Permit Penalty Policy and the Civil Penalty Policy. (If the offsets were obtained from a facility not owned by the new source, once the offset is established and made part of the SIP, the existing source is subject to the amount calculated under the Civil Penalty Policy added to the amount calculated under the Permit Penalty Policy).

EXAMPLE CASES

The following hypothetical cases illustrate how the matrix is used to continue to calculate a minimum settlement figue.

PSD Source

On July 1, 1980, an existing major source began actual construction of a modification to its plywood manufacturing plant. The modification will result in a significant net emission increase of particulate mater. The source had not obtained or filed for a PSD permit as of the date actual construction began.

On July 2, 1980, EPA investigators discovered the construction during a routine inspection of the plywood plant. The EPA Regional Office determined that the modification was subject to PSD review and issued a Notice of Violation on August 1, 1980. The NOV cited the PSD regulations and outlined possible enforcement alternatives.

The source received the NOV on August 5, 1980, and contacted the Regional Office on August 10, 1980. On August 30, 1980, the Region and the source held a conference at which the source stated that it had not been aware of the need for PSD review and permitting prior to construction. The source also stated that it would file an application for review but that it would not cease construction during the review process.

On October 1, 1980, the source filed a PSD application. During the review process the Region discovered that the source had no plans to install pollution control devices. The Region also determined that without BACT, the modification's particulate emissions would result in an exceedance of the particulate matter increment in the source's area of impact. The source, when informed of the BACT problem, indicated it would install the necessary controls.

However, throughout the review process the source continued construction of the modification. On December 1, 1980, the source began operation of the modified source without the required permit and without controls.

On January 15, 1981, the source was issued a PSD permit. On February 28, 1981, the source ceased operation of the plywood plant to install the pollution control equipment called for in the PSD permit. The source resumed operation on March 15, 1981, in a manner consistent with the PSD permit conditions.

The penalty calculation for this example begins with an assessment of the total cost of air pollution control equipment at the modification. For purposes of this example, assume BACT costs $140,000.

Next, the type and number of matrix categories must be determined. In this example the source (1) began actual construction without a permit, (2) operated the plant without a PSD permit and (3) exceeded the growth increment for particulate matter. Therefore, this source is subject to both of the columns of dollar values under the heading "PSD Sources."

In addition to the permit violations described above, commencement of operation prior to the installation of BACT constitutes a separate violation subject to the Civil Penalty Policy. (The Civil Penalty Policy should be used to determine an additional appropriate minimum settlement amount for the period of time the source operated without BACT.)

Once the type, number and dollar values of the penalty are determined, these figures are multiplied by the number of months in violation. The sums are then added together to produce the matrix penalty amount.

In this example, the source's period of construction without a permit runs from July 1, 1980, until the valid permit was issued in January of 1981 (7 months). The period of operation at variance with the BACT permit condition runs from the time the permit was issued in January 1981, to the date the source ceased operation on February 28, 1981 (2 months). The source also exceeded the area growth increment for particulate matter during the period of operation from December 1, 1980, to February 28, 1981 (3 months).1/

1/ It is important to note that some of the considerations detailed in the matrix do not necessarily track the statutory provisions regarding violations. For example, there is no Clean Air Act provision which makes increment exceedance, in and of itself, a violation by an individual source. (The SIP must protect the increment. The method used is PSD review with permit conditions such as BACT, fuel use limitations, etc.) However, as a consideration of environmental harm, and in considering the seriousness of the violation if a source operates and thereby violates a State's increment due to failure to go through PSD review as or when required, an added penalty is appropriate.

The matrix penalty figure for this source's PSD related violations, based on a $140,000 total cost of control estimate, is:

- for the 7 month period of construction without a permit,
  7 x $4,000 = $28,000
- for the 2 month period of operation without a permit,
  2 x $4,000 = $8,000
- for the 3 month period of operation during which the increment was exceeded,
  3 x $11,000 = $33,000
- matrix penalty figure =
  $28,000 + $8,000 + $33,000 = $69,000

As noted in this policy, this figure represents a minimum settlement figure. EPA may, at any time, negotiate for a higher settlement figure. A lower minimum settlement figure may also be available depending on the circumstances of the particular case. See the policy for procedures regarding possible reductions.

In addition to the permit violations described above, commencement of operation prior to the installation of BACT constitutes a separate violation subject to the Civil Penalty Policy. (The Civil Penalty Policy should be used to determine an additional appropriate minimum settlement amount for the period of time the source operated without BACT).

Section 173 or Offset Policy Sources

On December 1, 1980, a plywood manufacturing company began operation of a modification at its plant which is located in a nonattainment area for particulate matter. The modification is subject to Section 173 review permitting and, in fact, the source has obtained a valid Section 173 permit from the State. The permit specifies 1) that the applicant has demonstrated that all other major stationary sources owned or operated by the applicant in the State are in compliance with the Act, 2) what constitutes required LAER, and 3) what offsets (internal) would be required to be obtained prior to start-up or commencement of operation.

PERMIT PENALTY POLICY MATRIX
MINIMUM SETTLEMENT PENALTIES
(per month of violation)

PSD SOURCES

TOTAL COST OF AIR POLLUTION CONTROL FOR NEW OR MODIFIED SOURCE ($ THOUSANDS)	CONSTRUCTION OR OPERATION WITHOUT A PERMIT OR IN VIOLATION OF A VALID PERMIT	INCREMENT EXCEEDED
less than 50	$ 2,000	$ 7,000
50-150	4,000	11,000
150-500	7,000	16,000
500-1,500	11,000	22,000
1,500-5,000	16,000	29,000
5,000-15,000	22,000	37,000
15,000-50,000	29,000	46,000
over 50,000	37,000	56,000

PART D OR OFFSET INTERPRETATIVE RULING SOURCES

TOTAL COST OF AIR POLLUTION CONTROL FOR NEW OR MODIFIED SOURCE ($ THOUSANDS)	CONSTRUCTION OR OPERATION WITHOUT A PERMIT OR IN VIOLATION OF A VALID PERMIT	FAILURE TO SATISFY §173(1) OR OBTAIN OFFSETS	VIOLATION OF SECTION 173(3) OR CONDITION 2
less than 50	$ 2,000	$ 9,000	$ 5,000
50-150	5,000	14,000	9,000
150-500	9,000	20,000	14,000
500-1,500	14,000	27,000	20,000
1,500-5000	20,000	35,000	27,000
5000-15,000	27,000	44,000	35,000
15,000-50,000	35,000	54,000	44,000
over 50,000	44,000	65,000	54,000

(Add numbers when multiple categories apply)