

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV - ATLANTA, GEORGIA

DATE: AUG 11 1983

SUBJECT: Requirement to Publish All Significant Final Actions Under Title I
of the Clean Air Act

FROM: Chief, Air Management Branch

TO: Section Chiefs
Unit Chiefs
Team Leaders
Bruce Miller
Roger Pfaff

As some of you may recall from one of the sessions at the recent Southern Pines meeting, there was a discussion concerning the publication of certain Agency actions in the Federal Register. The discussion primarily dealt with NESHAPS, NSPS and PSD applicability determinations.

The attached policy memoranda describe certain types of final agency actions which we are supposed to be publishing in the Federal Register. I would like for you to consider the impact or these requirements on our program and the steps we should be taking to satisfy this guidance. Each of you should ensure that all applicable Branch activities, as described in the attached memoranda, for which you have responsibility are published in the Federal Register. Also, we should try to obtain example Federal Register notices from other Regions if this would help us in preparing our own notices. A few examples are attached.

Regarding the applicability determinations under NSPS, NESHAPS, and PSD, it would seem that some of the cases where we would need to publish these items include, but are not limited to, the situations described below:

- (1) Situations where the regulations do not provide clear guidance concerning the applicability of certain regulations to a source, and
- (2) When we have received an official request from a source or control agency to make an applicability determination.

In addition, based upon recent communications between members of our staff and headquarters staff, we should also be publishing alternative NSPS test methods and other alternative NSPS test procedures in the Federal Register, regardless of the source category, if any one of the following conditions exists:

- (1) The alternative test method/procedure involves a substantive change from the promulgated method/procedure. This is a decision that has to be based upon good judgement, and only those alternative methods/procedures that involve de minimis or insignificant changes do not need to be published in the Federal Register.
- (2) The alternative test method/procedure is likely to be utilized at additional emission sources in the future. If the alternative method/procedure will most likely never be applied at any other source in the future and will probably be used in only one isolated case, this type of situation would not need to be published in the Federal Register.
- (3) If we anticipate that the alternative test method/procedure is likely to be challenged or questioned, then we should publish it in the Federal Register.

Typically, an alternative procedure would be promulgated in the Federal Register out of George Walsh's office in Durham if it were going to have national, long-term effects. However, Regional Offices would need to initiate Federal Register notices describing the use of alternative procedures when one of the above conditions exists and when the procedure in question has not been promulgated as an acceptable alternative method.

Please implement these guidelines immediately. Also, please publish all past items covered by these memoranda which are likely to be involved in enforcement actions or other litigation. You should consult with the appropriate attorneys on these decisions. If you need additional guidance, I suggest that you contact Earl Salo (FTS 382-7632) with questions regarding NSPS or Sarah Schneeberg (FTS 382-7730) with questions regarding PSD/NSR. They are staff attorneys in EPA's Office of General Counsel.

James T. Wilburn

Attachments

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

OFFICE OF
LEGAL AND ENFORCEMENT COUNSEL

MEMORANDUM:

DATE: February 23, 1983

SUBJECT: Requirement to Publish All Significant Final Actions Under Title I
of the Clean Air Act

FROM: Robert M. Perry
Associate Administrator and General Counsel

TO: Regional Counsels
Regions I-X

The purpose of this memorandum is to reiterate the Agency policy that Clean Air Act applicability determinations must be published in the Federal Register. Applicability determinations under NSPS, NESHAP, and PSD, issuance and denial of PSD, NESHAP, and new source review permits, and issuance and denial of Section 111(j) waivers are final agency actions. As such, each of these determinations must be published in the Federal Register.

DISCUSSION

This procedure was first set forth in a memorandum dated September 1, 1979, from the General Counsel, the Assistant Administrator for Air, Noise and Radiation and the Assistant Administrator for Enforcement (copy attached).

One major reason for requiring these actions to be published in the Federal Register is to limit sources to a 60 day period in which to challenge them in Circuit Court under the provisions of Section 307(b)(1). That section provides that the 60 day period for obtaining judicial review of any final action runs from the date on which notice appears in the Federal Register. By starting the 60 day period for judicial review, publication forces interested persons to seek review promptly or not at all.

In practice, regional offices are now carrying out the dictates of the September 1979 memo in an inconsistent manner, some routinely publishing every applicability determination and some publishing almost none at all. The Agency is now in litigation with a source which, in the middle of an enforcement action, has

raised the question of the correctness of an NSPS applicability determination. We are faced with the possibility of first having to litigate the correctness of our applicability determination in Circuit Court and then having to return to district court for a case to determine appropriate remedies. Such action would delay any review of appropriate remedies substantially and double the burden to EPA and DOJ attorneys.

We do not want this kind of situation to recur in other enforcement actions. Therefore, please make sure that your regional offices are publishing all of the above-captioned final actions.

Attachment

cc: Kathleen M. Bennett
Office of Air, Noise and Radiation

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

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

DATE: September 1, 1979

SUBJECT: Federal Register Publication of Significant Final Actions Under
Title I of the Clean Air Act

FROM: General Counsel
Assistant Administrator for Air, Noise and Radiation
Assistant Administrator for Enforcement

TO: Regional Administrators
Director, Office of Air Quality Planning and Standards
Associate General Counsel for Air, Noise and Radiation
Director, Stationary Source Enforcement Division

POLICY

Effective immediately, notice of significant final actions under Title I of the Clean Air Act must be promptly published in the Federal Register. The significant actions that are not now routinely noticed in the Federal Register and which are the primary focus of this memo, are: applicability determinations under NSPS, NESHAP and PSD, issuance and denial of PSD, NESHAP and new source review permits; and issuance and denial of Section 111(j) waivers. Guidance on publishing notice of action under Title II will be circulated later.

RATIONALE

A number of considerations support the policy of publishing final actions in the Federal Register. First, section 307(b)(1) now provides that the 60 day period for obtaining judicial review of any final action runs from the date on which notice appears in the Federal Register. By starting the 60 - day period for judicial review, publication forces interested persons to seek review promptly, or not at all. This gives finality to our actions, and avoids litigation

over stale issues. (We are now defending the issuance of a PSD permit in a lawsuit filed a year after the permit was issued.)

Second, under the Administrative Procedure Act, if we publish our final actions, we can rely on them as precedent in subsequent cases. See 5 U.S.C. Section 552(a)(2).

Third, publication of final actions will support our position that all final actions are directly reviewable in the courts of appeals. Although both the plain language and the legislative history of Section 307(b)(1) support this position, a recent decision of the United States Court of Appeals for the Fifth Circuit held that an NSPS applicability decision was reviewable in the district court. *PPG Industries v. Harrison*, 587 F.2d 237 (1979). Publication of the determination in the Federal Register might have helped us persuade the Court that it was a final action and the result of an established deliberative process. We expect that other persons affected by final Agency actions will seek judicial review in the district courts, where they may obtain lengthy discovery and a trial, rather than be limited to a review of the record made by the Agency. Publication of the actions in the Federal Register will strengthen our position that review is in the courts of appeals.

Fourth, publication of actions will tend to insure consistent decision-making throughout the Agency. Congress has stressed the importance of such consistency in Section 301(a)(2)(A) of the Act.

IMPLEMENTATION

We do not expect that giving notice of these significant actions in the Federal Register will impose great resource burdens on your offices. In the case of the significant actions listed above, the responsible office normally makes a written determination, including a statement of the facts and the rationale for the determination. All that is required is to put the determination into Federal Register format. If the determination seems too long to be published verbatim, the Federal Register notice could merely summarize it, and give notice of how interested persons can obtain the full text. Permit determinations will probably be the only actions lengthy enough to be candidates for this abbreviated approach.

Federal Register notices of final action may not reveal information that is entitled to treatment as confidential. You should remind regulated persons that a notice will be

published, and that they should clearly indicate in their submission what information they want to be treated as confidential. See 40 C.F.R. Part 2, Subpart B, "Confidentiality of Business Information."

If you feel that sending individual notices of final actions to the Federal Register is a resource burden, you could accumulate them and send them in batches. You must send such batches at least every month.

Note that this policy is prospective. We do not require that past actions be published, although they cannot be relied on as precedent unless they are published.

If you need any help in interpreting or implementing this policy, please contact one of the following persons on our staffs:

Office of General Counsel - Earl Salo, 755-0763

Office of Air, Noise and Radiation - Dick Rhoads, 629-5251

Office of Enforcement - Martha Prothro, 755-2523

In particular, please advise us if you need guidance on the proper format for these Federal Register notices. Also, please advise us if you think there are additional categories of significant final actions under Title I that we have not listed.

We are also considering which actions under Title II should be noticed in the Federal Register. We welcome any suggestions on this question.

Attached as an example is a Federal Register notice of the issuance of a PSD permit.

Attachment

ENVIRONMENTAL PROTECTION AGENCY

Region I

Notice of Approval of PSD Permit to Lime Products Corporation

Notice is hereby given that on June 19, 1979, the Environmental Protection Agency issued a Prevention of Significant Deterioration (PSD) permit to Lime Products Corporation for approval to construct an asphalt batch plant in Warren, Maine. This permit has been issued under EPA's Prevention of Significant Air Quality Deterioration (40 CFR Part 52.21) regulations applicable to the asphalt batch plant subject to certain conditions, including:

1. Particulate matter emission limitation shall not exceed 0.05 gr/dscf (10 lbs/hr.)
2. Retrofit with air pollution control equipment as specified in application.
3. The aggregate used to be comprised of limestone and/or dolomite (pH greater than 7).

The PSD permit is reviewable under Section 307(b)(1) of the Clean Air Act only in the First Circuit Court of Appeals. A petition for review must be filed on or before _____ (60 days from publication in the Federal Register).

Copies of the permit are available for public inspection upon request at the following locations:

Environmental Protection Agency
Region 1, Air Branch, Room 1903
JFK Federal Building
Boston, Massachusetts 02203

Department of Environmental Protection
Bureau of Air Quality Control
State House
Augusta, Maine 04330

Date [2 July 1979]

Rebecca W. Hanmer, Acting
Regional Administrator, Region I

[See the following Federal Register notices for samples:

- 1) Vol. 48, No. 42, 3/30/83, p. 12358, "PSD Permit for Trnasgulf Pipeline Co., Final Decision".
- 2) Vol. 48, No. 108, 6/5/81, p. 30194, "Prevention of Significant Deteriation of Air Quality (PSD); Determination of Exemption; Medical Area Total Energy Plant, Boston, Massachussetts."
- 3) Vol. 48, No. 5, 1/8/81, pp. 2189-2191.]