

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
215 Fremont Street
San Francisco. Ca. 94105

Dec. 17, 1985

Ref: NSS 1-1

Mr. James D. Boyd
Air pollution Control Officer
California Air Resources Board
1102 "Q" Street
Sacramento, CA 95814

Dear Mr. Boyd:

The enclosed letter provides clarification regarding which permits may be federally enforceable. This is especially important in determining major source status under the PSD, NSR, and construction ban regulations and in determining the potential for federal enforcement when a source is in violation.

Please note that three major tests must be passed for a permit your agency issues to be considered federally enforceable. First, the permit itself must be enforceable. In other words, it must contain emissions limits with a reasonable averaging period (usually not exceeding three hours), a method for determining compliance on a regular basis (annual stack tests are the minimum here), and adequate record keeping. Secondly, the permit program must have been approved under federal regulations at 40 CFR 51.18 (although not necessarily under 51.18(j)). Finally, the permit and the permitting procedures must fully comply with or exceed the requirements of the federally approved rule.

If you have any questions regarding the legal aspects of Federal Enforceability please contact Nancy Marvel of our Office of Regional Counsel at (415) 974-8905. All other questions regarding permitting should be directed to Matt Haber of our New Source Section at (415) 974-8209.

Sincerely,

Thomas W. Rarick, Chief
Air Operations Branch
Air Management Division

Enclosures

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
215 Fremont Street
San Francisco, Ca. 94105

November 6, 1985

G. William Frick, Esq.
Lathrop, Koontz, Righter,
Clagett & Norquist
2600 Mutual Benefit Life Bldg.
2345 Grand Avenue
Kansas City, MO. 64108

Dear Mr. Frick:

In response to your letter of July 9, 1985, to the General Counsel, I have reevaluated my letter of June 14, 1985, to Mr. Richard O'Connell of the Hawaiian Electric Company ("HECO"). Our letters concerned the "federal enforceability" of a new source review ("NSR") construction permit issued by the State of Hawaii to HECO.

After considering the issues you raised, I have decided to withdraw my earlier letter and to revise some of my initial conclusions.

First, I agree that a State NSR permit program can be approved and included in a State Implementation Plan ("SIP") under 40 CFR Sections 51.18(a)-(i), even though it may not satisfy the additional requirements of Sections 51.18(j) or (k). Sections 51.18(a)-(i) specify the minimum criteria that must be met for an NSR program to satisfy the requirement of section 110(a)(2)(D) of the Clean Air Act that a SIP include "a permit or equivalent program to assure . . . that national ambient air quality standards are achieved and maintained." Sections 51.18 (j) and (k) establish additional criteria that an NSR program must meet to satisfy the separate requirements of the Act for nonattainment and PSD areas, respectively. See Title I, Parts C and D of the Clean Air Act, respectively.

However, nothing in Section 51.18 requires a State NSR program satisfying section 110(a)(2)(D) to also meet the requirements of Sections 51.18 (j) or (k). In fact, EPA has indicated in the past that an NSR program may be approved under Sections 51.18(a)-(i) for inclusion in a SIP without meeting those additional requirements. 48 Fed. Reg. 38752 (August 25, 1983). Accordingly, if a State NSR permit program has been approved under Sections 51.18(a)-(i), any requirement in a permit issued under that program ordinarily would be "federally enforceable," as that

term is defined in 40 CFR Parts 51 and 52. 1/

In this case, as I stated in my earlier letter, Hawaii's NSR rules were approved for inclusion in the Hawaii SIP as being "in accordance with 40 CFR Part 51." 48 Fed. Reg. 37402 (Aug. 18, 1983). Further investigation of EPA files reveals that these rules were originally approved in 1972 and were found to satisfy the requirements of 40 CFR Section 51.18. See 37 Fed. Reg. 10860 (May 31, 1972). EPA's 1983 approval of Hawaii's SIP revisions did not change that approval status. See 48 Fed. Reg. at 37402, col. 2. Therefore, Hawaii's NSR rules were approved pursuant to 40 CFR Section 51.18, even though they did not address Sections 51.18(j) or (k).

On the second major issue you raised, I agree that the definition of "federally enforceable" does not require that a particular limitation in a permit issued under approved NSR rules must be specifically mandated by, or included in, the SIP to be enforceable by EPA. EPA's definition only requires, in such a case, that the limitation be established "under regulations approved pursuant to 40 CFR 51.18 . . . " E.g., 40 CFR Section 52.21(b) (17). Thus, once EPA has approved a State's NSR permit regulations under Section 51.18, any permit limitation issued under those State regulations would be federally enforceable, even if the limitation was not specifically required by the SIP.

This interpretation is consistent with 40 CFR Section 52.23, which makes "any permit condition . . . issued pursuant to approved . . . regulations for the review of new or modified stationary . . . sources" enforceable by EPA under section 113 of the Clean Air Act, without regard to whether the condition is otherwise required. 2/ Moreover, as you pointed out, this interpretation is also consistent with the August 7, 1980, Federal Register notice announcing, inter alia, the "federal enforceability" definitions. In that notice, EPA stated that source operators could voluntarily "agree to source-specific permit limitations," 45 Fed. Reg. 52689

1/ "Federally enforceable" permit limitations include "any permit requirements established . . . under regulations approved pursuant to [Section] 51.18 . . ." E.g., 40 CFR Section 51.18(j) (1) (xiv).

2/ This interpretation is also consistent with 40 CFR Section 52.21(r) (4) which requires that a source that becomes major because of "a relaxation in any enforceable limitation" on its emitting capacity be subjected to PSD review. Again, nothing in 52.21(r) (4) limits its applicability to limitations that are mandated by the SIP.

(Aug. 7, 1980), that could be federally enforceable. EPA intended by this to allow operators to agree to permit limitations that might not otherwise be required.

Accordingly, with regard to the HECO permit limitation in question, if that limitation was issued under the Hawaii NSR rules, the limitation could still be federally enforceable even though not required by the Hawaii SIP.^{3/}

If you need any additional information on the matters I have discussed, please feel free to contact Nancy Marvel of my staff at (415) 974-8905.

Very truly yours,

Karl R. Morthole
Regional Counsel

cc: Regional Administrator
General Counsel
OAQPS
Air Management Division, Reg. IX

^{3/} Of course, if the permit limitation (sulfur-in-fuel) is not enforceable as a practical matter, then the limitation would not be federally enforceable. I cannot express any opinion on that point at this time.

**PORTER, WRIGHT,
MORRIS & ARTHUR**

ATTORNEYS AT LAW
41 SOUTH HIGH STREET, COLUMBUS, OHIO 43215
TELECOPIER: (614) 227-2100
TWX: (810) 482-1702
DIRECT DIAL: (614) 227-2242

December 5, 1985

ROBERT A. MEYER, JR.

Freedom of Information Officer
United States Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Re: Freedom of Information Act Request

Dear Sir or Madam:

This is a request, pursuant to the Freedom of Information Act, 5 U.S.C. Section 552, and the Environmental Protection Agency's implementing regulations, 40 CFR Part 2, for copies of documents which identify each instance in which a requirement reflecting or purporting to reflect "best available control technology" ("BACT") and set forth in any final permit under the prevention of significant deterioration ("PSD") provisions of the Clean Air Act and implementing regulations, was changed, adjusted, or revised after issuance of a final permit. As used in this request, the term "identify" means to provide the date, subject, source, and nature of any such revision or adjustment.

If there is one single document which identifies all BACT revisions or adjustments, you need only provide that document in response to this request. If such revisions are identified in more than one document, please provide the fewest number of documents necessary to fully respond to this request.

You may take this letter as our agreement to pay any lawful costs you incur in responding to this request, up to a maximum of \$100.00. Please contact me by telephone before incurring costs in excess of this amount.

If you have any questions regarding this request or if further information is necessary, please contact me. Thank you in advance for your prompt cooperation.

Very truly yours,

Robert A. Meyer, Jr.

RAM:klr