

November 2, 1994

Mr. Jason Grumet
Executive Director, Northeast States
for Coordinated Air Use Management
129 Portland Street
Boston, Massachusetts 02114

Dear Mr. Grumet:

This is in response to Mr. Michael Bradley's March 22, 1994 letter to Mary Nichols seeking clarification of the Federal enforceability of State's existing minor new source review (NSR) programs. It is my understanding that some of the NESCAUM States are interested in using their existing minor NSR programs to limit a source's potential to emit so as to allow sources to legally avoid being considered a major source for title V purposes.

In my November 3, 1993 memorandum entitled "Approaches to Creating Federally-Enforceable Emission Limits," I described approaches that States could use to limit a source's potential to emit for title V purposes. While a number of approaches are acceptable, the Environmental Protection Agency (EPA) has promoted the use of State operating permits programs approved under sections 110 and 112(l), pursuant to the criteria set forth in the June 28, 1989 Federal Register. Among other things, these criteria include an opportunity for public and EPA review and require that permit conditions be practically enforceable. Several States have followed EPA's recommendation and have either adopted these requirements or are in the process of doing so.

The Agency recognizes the use of other approaches as well. In response to your question, EPA's position is that minor NSR permits issued under programs that have already been approved into the State implementation plan (SIP) are federally enforceable. Thus, EPA allows the use of federally-enforceable minor NSR permits to limit a source's potential to emit provided that the scope of a State's program allows for this and that the minor NSR permits are in fact enforceable as a practical matter.

Because minor NSR programs are essentially preconstruction review programs for new sources and modifications to existing sources, minor NSR programs can generally be used to limit

a source's potential emissions when such limits are taken in conjunction with a preconstruction permit action. In addition, please note that the term "modification" generally encompasses both physical changes and changes in the method of operation at an existing source (see Clean Air Act section 111(a)(4)). Thus, the scope of some, though not all, minor NSR programs is broad enough to be used to also limit a source's potential to emit for nonconstruction-related events. This occurs where the modification component of State programs extends to both physical changes and changes in the method of operation. In these cases, where a voluntary reduction in the method of operation (e.g., limit in hours of operation or production rate) by itself is considered a modification for minor NSR permitting, a source may reduce its hours of operation or production rate and make such a change federally enforceable through limits in its minor NSR permit.

Some States' minor NSR programs are written so as to preclude a source from limiting its potential to emit absent an increase in emissions. There may be other limitations on the scope of these programs as well. Since there is considerable variation among State minor NSR programs, a review of any individual State program would be necessary to determine its ability to limit a source's potential to emit. It may be beneficial for States to contact the appropriate EPA Regional Office if there are questions about the scope of the SIP-approved minor NSR program.

Minor NSR programs have generally been used in the past to limit a source's potential to emit for criteria pollutants. There is a growing need for sources to limit their potential to emit for toxic pollutants as well. The EPA is currently considering ways in which a State may limit the potential to emit of toxic pollutants, including possible uses of existing minor NSR programs. I plan to keep you and others aware of our efforts in this regard.

You should also be aware that a recent court ruling has called into question the Federal enforceability of a State minor NSR permit that does not meet the public participation requirements of current EPA regulations despite SIP approval of the State's program [see *United States v. Marine Shale Processors*, No. 90-1240 (E.D. La.) (bench ruling), June 15, 1994]. In that case involving extensive alleged violations of the permit terms, the court held that EPA could not enforce the terms of the minor NSR permit. The court subsequently ruled that the company could not rely on the permit to limit its potential to emit, and thus was liable for having failed to obtain a major

NSR permit. The outcome of this case suggests that States should proceed cautiously in relying on minor NSR programs to limit potential to emit where the program does not actually provide public participation.

In summary, EPA has provided guidance on approaches that are available to limit a source's potential to emit. The Agency recommends approaches that meet the criteria set forth in the June 28, 1989 Federal Register. Many States are taking action to adopt such programs. With respect to minor NSR permits, EPA believes that permits conditions issued in accordance with existing State minor NSR programs that have been approved into the SIP, and which are enforceable as a practical matter, are federally enforceable and can be used to limit potential to emit. Caution is advised, however, with respect to permits that do not meet procedural requirements. These programs are primarily preconstruction review programs although in many cases they can also limit a source's potential to emit in conjunction with operational changes.

As you have noted, title V issues are complicated and resource intensive. In order for the title V program to be successfully implemented, it is important that States and EPA work cooperatively in developing operating permits programs. Your comments and recommendations on program development issues are welcome.

We appreciate this opportunity to be of service and trust that this information will be helpful to you.

Sincerely,

/s/

John S. Seitz
Director
Office of Air Quality Planning
and Standards

cc: Air Division Director, Regions I-X