

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

DEC 14 1983

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

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TO: Regional Counsels Regions I-X

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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 Section 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 Section 167 of the Act provides with a significant enforcement mechanism in addition to Section 113, the Agency's main enforcement tool, but it does not preclude resort to any remedies available under Sections 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, Sections 113 or 120 provide more appropriate remedies.

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 Section 167 to prevent the source from constructing or operating in violation of the PSD requirements;
- (b) Issue an order to comply under Section 113(a);
- (c) Seek civil remedies under Section 113(b);
- (d) Seek criminal penalties under Section 113(c);
- (e) Assess and collect noncompliance penalties under Section 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. Section 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 Section 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 Section 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 Section 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 Sections 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 before and after the PSD SIP revisions have been approved. [SEE FOOTNOTE 1].

Additionally, Section 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 Section 113(a)(5) and (b)(5) to prevent illegal construction or operation of new sources in nonattainment areas.

[FOOTNOTE 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 Section 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 Section 113(b) and (c).

Under Delegation Number 7-38, the Administrator has delegated authority to issue Section 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 Section 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 Section 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 Section 167 and Section 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 Section 167 by means of an administrative order or by obtaining judicially imposed injunctive relief.

When using Section 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 Section 167 while proceeding concurrently, through Sections 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 Section 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 Section 167 order, but

the Section 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 Section 167 court filing before meeting NOV procedural requirements, prompt issuance of the NOV will allow EPA to take action under Section 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 Section 113. In these cases, the Agency may choose to commence a civil action under Section 113 for injunctive relief and/or monetary penalties instead of acting under Section 167 where remedies are limited to injunctive relief.

Civil penalties are available against a source for violation 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's 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. [See Footnote 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 determination is defined

[FOOTNOTE 2] Even if the source has derived no economic benefit by installing the nonconforming equipment, EPA still should seek penalties under Section 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, the Assistant Administrator for Enforcement. Appendix I updates the 1981 guideline to reflect organizational changes, and to elaborate upon some of the examples.

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 requirement.

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 Section 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 Section 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 Section 167 should be accompanied by a Section 113 action to collect penalties.

When using Section 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 limitation. 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. Section 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 Section 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 Section 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 Section 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, Section 167 is an effective enforcement tool.

C. Consent Decrees

In civil actions filed under both Section 167 and Section 113, against preoperational 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 Section 167 and Section 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 Section 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 Section 163.

When the pollution increments established by Section 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 Section 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 stipulate 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 include in consent decrees is contained in the October 19, 1983 memorandum from Courtney Price, GM-16.)

III. Additional Enforcement Remedies

A. Criminal Penalties Under Section 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 Section 120

By the terms of Section 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 Section 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 (382-2826) if it is a technical question.