August 2, 1993

MEMORANDUM

SUBJECT: Interim Title V Program Approvals

FROM: John S. Seitz, Director /s/
Office of Air Quality Planning and Standards (MD-10)

TO: Air Division Director, Regions I-X

The States are developing operating permits programs for submittal to the Environmental Protection Agency (EPA) by November 15, 1993, as required by title V of the Clean Air Act Amendments of 1990 (the Act) and the implementing regulations at 40 CFR part 70. Although submittal of these programs is required by November 15 of this year, the Act does give the Administrator of EPA the option of granting an interim approval, for a period of no more than 2 years, to State programs that "substantially meet" the requirements of part 70. This guidance explains the EPA's criteria with respect to granting interim approvals. However, the policies set out in this memorandum and its attachments are intended solely as guidance, do not represent final Agency action, and cannot be relied upon to create any rights enforceable by any party.

I wish to stress that EPA is working with State and local air pollution control agencies to develop operating permits programs that fully meet the criteria set forth in part 70. Interim approval is discretionary with the Agency and will be granted only where such is found to be in the best interests of the title V permitting program after careful consideration of the individual State's circumstances. This guidance should not be construed as an assurance that States failing to meet particular requirements of part 70 will be automatically granted interim approval.

Interim Program Approvals

The Act provides that EPA may grant interim approval to a program that substantially meets the requirements of title V, but is not fully approvable. The key term, "substantially meets,"

was not expressly defined in the statute. The EPA's July 21, 1992 promulgation of part 70 addresses this issue, but in fairly broad terms, specifying eleven core program elements. These include permit fees, the ability to implement applicable requirements, and public and EPA participation. Attachment 1 provides further EPA guidance as to the meaning of these provisions. That attachment also provides guidance regarding the information which a State may be called upon to submit to substantiate requests for interim approval.

Source Category-Limited Interim Approvals

The July 21, 1992 promulgation also indicated that EPA could consider approving source category-limited interim programs upon a showing of "compelling reasons" by a State. Attachment 2 addresses the criteria for implementing this language. It should be noted that any program granted interim approval must also substantially meet the requirements of part 70. Thus, even upon a showing of compelling reasons for a source category-limited interim approval, a State or local agency must still demonstrate that it will issue permits to a sufficient number of sources so as to substantially meet the requirements of part 70 and the broader goals of the Act.

For purposes of establishing a benchmark as to whether a State is proposing to address enough sources in the interim approval, this guidance enunciates a presumption that the interim program should address 60 percent of all part 70 sources, and that those sources should be ones responsible for 80 percent of the emissions from the population of permitted sources. In addition, a State seeking such an approval must demonstrate in detail how it will develop a fully-approvable program, including milestones and a comprehensive transition schedule for the issuance of all permits.

Although the legislative history is sparse, it was reasonable for EPA to conclude that Congress recognized that some States, facing exceptional challenges in the initial phase-in of the program nationally, might appropriately be provided additional time for the initial permit issuance. There is, however, no indication of congressional intent that States submitting their initial programs significantly after the November 15, 1993 date specified by the Act should be shown the same special deference. Consequently, it is EPA's policy not to grant interim approval to any program providing for initial issuance of permits beyond the statutorily-mandated 3 years unless the initial permits will have been issued to all part 70 sources by November 15, 1999. This cutoff date was selected because it is 5 years after the date required for EPA final action on a timely-submitted, approvable program.

Partial Program Approvals

Section 502(f) of the Act indicates certain criteria for approval of partial programs. The term "partial program" has been the subject of some confusion and should be clarified. The Act is ambiguous with

respect to partial programs, except to specify that they must ensure compliance with all requirements of titles I, IV, and V of the Act. The EPA's approach to partial programs is set forth in section 70.4(c), which specifies that a partial program may apply "to all part 70 sources within a limited geographic area (e.g., a local agency program covering all sources within the agency's jurisdiction)."

The concept of partial program approval should not be confused with source category-limited interim programs, which address fewer than all categories of part 70 sources. It is important to note that although the granting of partial program approval for a geographically-limited area does not stay the imposition of sanctions statewide, it does do so for the geographic areas within the jurisdictions with approved partial programs.

For further information, please contact Mr. Kirt Cox or Ms. Joanna Swanson, Operating Permits Policy Section, at (919) 541-5399 and (919) 541-5282, respectively.

Attachments

cc: Air Branch Chief, Regions I-X
Regional Counsel, Regions I-X
A. Eckert
M. Winer
A. Schwartz
E. Hoerath

Attachment 1

CRITERIA AND PROCESS FOR GRANTING INTERIM APPROVALS OF STATE AND LOCAL PERMITTING PROGRAMS

Section 502(g) of the Clean Air Act (Act) states that "[I]f a program (including a partial permit program) substantially meets the requirements of this title but is not fully approvable, the Administrator may by rule grant the program interim approval." This interim approval may last no longer than 2 years and may not be renewed. In making the interim approval, the Environmental Protection Agency's (EPA's) Administrator must specify the changes that are necessary before the program can achieve full approval. The interim approval stays the imposition of sanctions during its term.

In addressing interim approvals, section 70.4(d) uses the "substantially meets" language of the Act and indicates that a program, including a partial permit program, would be eligible for interim approval if it met the requirements for eleven key program areas. Some of these, such as a fee program meeting the requirements of section 70.9, are relatively fixed. Others, however, allow EPA flexibility in recognizing certain State program practices as substantially meeting part 70 for interim approval purposes, even though not fully consistent with part 70.

It must be stressed that part 70 and the Act continue to be the criteria for program approvability. Although EPA has the flexibility to grant interim approvals, if consistent with these criteria and where such would advance the goals of title V, there is no automatic assurance of approval of any State program not fully meeting part 70. The purpose of this guidance is to define further the appropriate EPA review practice for those cases in which the State submittal does not yet fully meet the requirements of part 70 in certain specified areas.

Accordingly, this guidance is primarily in the form of general principles with respect to EPA options for granting interim approvals. A comprehensive principle that EPA will consider in all evaluations of approvability of interim programs will be whether the proposed program can ensure the issuance of good permits. The EPA has more flexibility with respect to the requirements of part 70 that are directed more toward the general characteristics of the State's program than to the attributes of the individual permits themselves. Thus, EPA has more flexibility in granting interim approval to a program that has limited enforcement authority or operational flexibility provisions, than to a program that fails to address appropriately the applicable requirements of the Act or to provide for permits that are complete and enforceable as a practical matter.

It is not practical for EPA to attempt to provide a comprehensive list of all the ways in which a program could substantially but not fully meet the requirements of part 70. Such an approach could, in addition, create confusion and delay, and limit Regional Office flexibility in responding to the issues presented by each of their individual States. In those cases in which this guidance does address

specific practices, it is done in response to particular situations already presented to the EPA by States facing specific technical or legal constraints.

Consistent with this approach, the following constitutes EPA's general objectives in implementing the eleven criteria in section 70.4(d) that will be used in determining whether interim approval can be granted. In interpreting these program criteria in a specific context, EPA may require further demonstrations and commitments.

(1) Adequate fees. To be approvable, any State program must fully comply with the provisions of section 70.9. It should be noted, however, that there is implicit flexibility in that the fee adequacy determination for any program can have a temporal component. For example, a program might not show adequate fee revenue for the first year or two to fund all permit program costs. Such a program could, however, be considered fully approvable if it were demonstrated that this was part of the plan for transition, within a short time period, to full funding of the program by permit fees and that the initial deficits would be repaid from these permit fees.

(2) Applicable requirements. Section 502(f) and (g) of the Act authorizes EPA to grant interim approval to programs that address only requirements arising from titles I, IV, and V of the Act. With that exception, all applicable requirements and the requirements regarding permit content in section 70.6, including the requirement to include periodic monitoring and testing, must be addressed in the permits issued by a program receiving interim approval.

(3) Fixed term. The program must provide for the issuance of permits with fixed terms, consistent with section 70.4(b)(3)(iii) and (iv) [i.e., not to exceed 5 years (except in the case of municipal waste combustors)].

(4) Public participation. Section 70.4(d) requires that "[T]he program must provide for adequate public notice of and an opportunity for public comment and a hearing on draft permits and revisions" except for minor permit modifications. Because public participation is a core program element, it is important that States attempt to fully meet these provisions. To the extent that a State program submittal fails in some respect to fully meet the public participation requirements of part 70, EPA will

consider on a case-by-case basis whether interim approval is appropriate. It should be kept in mind that the initial phase-in of the title V program may be a period in which public participation is especially important. Consequently, EPA will closely scrutinize any part 70 submittals not fully complying with the public participation requirements.

(5) EPA and affected State review. Interim approval cannot be granted unless the provisions of section 70.8(b), regarding notice and opportunity to comment on permit issuance by affected States, and

(c), EPA 45-day opportunity to object to the issuance of inadequate permits, are met.

(6) Permit issuance. The proposed permit must not issue if EPA objects to its issuance. The EPA is aware that a few States have limitations in their enabling legislation that might provide for issuance of a title V permit despite an EPA veto of the proposed permit. Such programs would not be eligible for interim approval.

(7) Enforcement. Section 70.4(d)(3)(vii) states that in order to qualify for interim approval, the permitting authority must have "authority to enforce permits including the authority to assess penalties against sources that do not comply with their permits or with the requirement to obtain a permit." Therefore, to qualify for interim approval, the permitting authority must have basic authority to enforce permits and the requirement to obtain a permit, including the authority to assess appropriate penalties, for the full duration of the interim approval. However, the permitting authority need not have authority to assess civil penalties at the full $10,000 per day, per violation level required by section 70.11(a)(3)(i). In addition, a State is not required to have the criminal authority specified in section 70.11(a)(3)(ii) and (iii) for its program to be considered for interim approval.

If, during this interim approval period, State enforcement authority is inadequate to address a particular violation, EPA always has concurrent authority to enforce permit terms and conditions and the requirement to obtain a permit. Pursuant to section 113 of the Act, violating sources face Federal liability of up to $25,000 per day, per violation, for strict liability civil violations and felony level fines and incarceration for criminal violations. The EPA Regions will work with the permitting authorities pursuant to EPA's February 7, 1992 guidance on Timely and Appropriate Enforcement Response to Significant Air Pollution Violators to monitor how permitting authorities with interim approval address violations and determine when Federal enforcement is warranted.

(8) Operational flexibility.Section 70.4(d)(3)(viii) provides that program must allow certain changes to be mathe Statede without requiring a permit revision if the changes are not title I modifications and "do not exceed the emissions allowable under the permit." The preamble to the July 21, 1992 rulemaking further indicates that interim programs need include "only the ability to generally implement this section" [57 FR 32271].

Each of the three approaches to operational flexibility set forth by section 70.4(b)(12) describes an approach to implementing the language of the statutory mandate for operational flexibility contained in section 502(b)(10) of the Act. The EPA interprets the regulation and preamble to mean that a State program would be eligible for interim approval if it provides for the implementation of any one of these three approaches to providing operational flexibility contained in section 70.4(b)(12).

(9) Streamlined procedures. Consistent with the requirements of title V, this provision requires that State programs provide streamlined procedures for issuing and revising permits and for expeditiously determining whether applications are complete. There may be some opportunity for flexibility in applying these criteria in the case of interim approvals; EPA will address State requests for such on a case-by-case basis.

(10) Permit application. Part 70 provides detailed requirements regarding permit applications and reporting forms. Although there are core criteria that all permit application forms must meet, such forms are created to address a variety of issues specific to both particular source categories and individual States. It would be infeasible, and possibly counterproductive, for EPA to attempt to spell out a list of ways in which State programs may substantially meet the requirements of part 70 with respect to applications and reporting forms. For these reasons, EPA does not plan to issue specific interim program guidance on this topic. However, EPA realizes there can be minor problems with initial State efforts at preparing title V permit application and reporting forms. If a State provides adequate assurances that the permitting process will be implemented appropriately, the interim approval period can provide a valuable opportunity to work out any minor concerns that may be presented by the initial application forms.

(11) Alternative scenarios. This provision requires that programs provide for the issuance of permits that incorporate alternative scenarios consistent with section 70.6(a)(9). This is good permitting practice that States have traditionally followed in their own programs, and EPA expects programs to provide for this option in order to be eligible for interim approval.

It bears repeating that the above are general principles to be used by EPA in acting on State program submittals. Reviews of these programs will be conducted in the context of the overall nature of the submitted State regulations. Thus, resolution of some interim program issues will necessarily turn on State-specific circumstances.

Attachment 2

CRITERIA AND PROCESS FOR
SOURCE CATEGORY-LIMITED INTERIM APPROVALS

Background

Section 503(c) of the Clean Air Act (Act) requires that permitting authorities, including those implementing an interim program, establish a schedule for issuing the permits subject to the program such that "at least one-third of such permits will be acted on by such authority annually over a period not to exceed 3 years after such effective date." By rulemaking, the Environmental Protection Agency (EPA) spelled out an option by which it can make source category-limited interim approvals. Thus, although the State is required to issue permits within 3 years to all sources subject to the interim approval, some sources will not be subject to the requirement to obtain a permit until full approval is granted. Because those part 70 sources not addressed until the full approval are also subject to the 3-year phase-in required by section 503(c), completion of the initial permitting of all Part 70 sources might not be completed until as late as 5 years after the granting of interim approval.

The July 21, 1992 part 70 preamble indicates that "for EPA to grant interim approval to a source category-limited program (other than for geographical reasons), there must be compelling reasons why the State cannot address all sources in the interim. These reasons will be judged on a case-by-case basis" [57 FR 32270].

Compelling Reasons

Specific criteria for what constitutes a "compelling reason" to justify interim approval of a source category-limited program were not discussed in the July 21 promulgation. In developing the part 70 rule, EPA looked upon this program approval option as a special remedy to be granted only in cases in which a State faced exceptional resource demands in its efforts to issue all of its initial permits within the 3 years provided by the Act. For example, a State may face an exceptional ramp-up workload as a result of not previously having an operating permits program, or because the State has an unusual or particularly complex source population that presents special challenges.

It is not feasible for EPA to provide a set of uniform criteria, applying to all States, that could indicate whether any particular State faces compelling reasons that would justify a source category-limited interim approval. As a general matter, in determining the approvability of a request for extended phase-in of the permitting program, EPA will look primarily to whether the basis for the State's request arises from external circumstances over which the State's government does not have direct control. For example, a source population that presents exceptional resource demands might well be the basis for a showing of compelling reasons. On the other hand, the fact that a State now cannot provide for timely issuance of permits because it failed to hire new staff or failed to provide resources to hire new staff (unless adequately skilled individuals were not obtainable despite diligent

efforts by the State to recruit them) does not constitute a reasonable basis for making this claim. Individual States will each present their own particular concerns. The EPA will evaluate requests for source category-limited interim approvals consistent with these principles and in light of the totality of the circumstances faced by those States.

The EPA reserves the right to consider any special factors presented by a State's population of part 70 sources. Such factors could include whether there are sources that consist of large numbers of units or that require exceptional numbers of permit modifications. Also to be considered is whether these sources present much greater than usual regulatory and technical challenges, such as those that might arise from emissions of hazardous air pollutants. A State may also face technical issues such as the need to quantify numerous sources of fugitive emissions or to create disproportionate amounts of gap-filling monitoring and compliance terms in the initial permit issuance process. Each of these factors, singly or in combination, could form the basis for a source category-limited interim approval.

"Substantially Meets" as it Relates to Source Category-Limited Interim Approvals

Regardless of the type of compelling reasons that a State may show in supporting the approval of a source category-limited interim approval, all programs seeking interim approval must substantially meet the requirements of part 70. It is important to note that the criteria for what substantially meets part 70 define the outer bound of EPA discretion. A State proposing to address only a small percentage of its sources during the period of the interim approval could not be viewed as substantially meeting part 70, regardless of how compelling a set of reasons it faces. Thus, EPA would not be authorized by the Act to grant such a program interim approval.

A certain critical mass of sources must be subject to the interim program for it to be considered as substantially meeting part 70. The EPA will presume that a source category-limited program which applies to at least 60 percent of all part 70 sources, and covers sources which are responsible for at least 80 percent of the aggregate emissions from part 70 sources, qualifies for interim approval. [Such programs must, of course, also satisfy the general criteria discussed elsewhere in this guidance for receiving interim approval.] The EPA added the requirement for coverage of 80 percent of emissions to help assure that a program granted interim approval is addressing sources which represent a significant portion of the State's emissions.

The EPA realizes, however, that such determinations can turn on State-specific circumstances and will review each program submittal on its own merits. The individual reviews will carefully evaluate the State's demonstration of need, focusing on the workload faced by the State program, the schedule for issuing permits, and particular sources covered by the program.

The State Demonstration

The preamble to the July 21, 1992 promulgation indicates that a State must submit a showing to substantiate any claim of compelling reasons. Such a showing must include a detailed statement of the need for interim approval and supporting facts demonstrating a State's efforts to prepare for timely implementation of the permits program. This showing must include a series of specific actions that a State will take to remedy the problems within 18 months of program approval and the schedule for taking these actions. This is essential if full approval is to be granted before the interim program automatically terminates.

States requesting source category-limited interim approvals must also describe in detail the comprehensive plan for permitting all sources within 5 years (or such lesser time as EPA may specify) of initial program approval. The interim program approval cannot continue for more than 2 years and, as noted above, should address at least 60 percent of all part 70 sources. This would be done in the form of permitting at least one-third of the sources subject to the interim approval (i.e., 20 percent of all part 70 sources) in each of the 3 years after the effective date of the interim approval.* One-third of the remaining sources must be permitted during each of the 3 years after the expiration of the interim approval. The request for interim approval must indicate the plan for permitting all of these sources, spell out particular milestones to be reported during this transition period, and demonstrate a State's basis for concluding that this will be achieved.

The EPA's review of these issues is necessarily State specific, and any State anticipating that it will make such a request should contact its Regional Office to discuss the development of this demonstration.

---

* Note that, although it lasts for no longer than 2 years, the interim approval is granted in the anticipation of a full program being approved before its expiration. The Act specifies that the interim approval provide for submittal of applications for some sources that will not be permitted until after its expiration, when the full program has been approved. The existence of this overlap period also has the effect of imposing a larger permitting obligation on a State program during the year immediately after an interim program has lapsed, and the full program has gone into effect, than in other years of the permit program phase-in.

Specifically, this overlap means that States receiving such approvals will be responsible for issuing permits to one-third of all part 70 sources in the third year after approval of the interim program. Thus, a State addressing 60 percent of all part 70 sources in its interim program would be obligated to permit at least 20 percent of all part 70 sources in each of the first 2 years, but one-third of all part 70 sources in the third year.