

APPENDIX A

Criteria for Approval of State Delayed Orders and Issuance of Federal Delayed Compliance Orders under Section 113(d) of the Clean Air Act

(1) Inability to comply: The delayed compliance order (DCO) must include a finding that the source is unable to comply with the SIP requirement involved.

Discussion: Under the Act, a source is not eligible for a State or federal DCO "if the delay is sought simply for convenience or for economic advantages which would accrue from delayed compliance" (1977 Senate Report at p. 46). If the source truly needs additional time to install necessary controls, make appropriate process changes, etc., the time needed to comply may be provided in a DCO in accordance with the limitations described in item (6) below. For purposes of this criterion of eligibility for a DCO, a source is eligible if it is not able to comply immediately at the time the DCO is being considered, regardless of its past history. The source's present inability to comply need not be for reasons entirely beyond the source's control to qualify it for DCO eligibility. (Past compliance efforts are relevant to the exercise of discretion to issue a DCO, even though not relevant in determining technical eligibility.)

Care should be taken in making the determination of inability to comply. Although the standard is as stated above for purposes of determining eligibility for a DCO under §113(d), a much more stringent standard must be met for a major source to obtain an exemption from mandatory administrative noncompliance penalties under §120(a)(2)(B)(iv). To obtain such an exemption, a source must be subject to an administrative order based on its inability to comply and that inability must result from "reasons entirely beyond the control of the owner or operator of such source or of any entity controlling, controlled by, or under common control with the owner or operator of such source". The legislative history of this provision suggests that it should be read very narrowly. At the time of applying for a DCO, sources may press to obtain findings that their inability to comply is for reasons entirely beyond their control, because of the protection from Section 120 penalties such findings may afford them. However, since the standard for eligibility for a DCO appears on its face to be less restrictive than that for exemption from §120 penalties, it would be wise at this stage to avoid making any formal determination on the question of the reasons for the source's

inability to comply and to make it clear that those reasons were not relevant, nor were they considered, in determining eligibility for a DCO. (Detailed explanation of the exemptions from administrative noncompliance penalties will be included in the preamble and regulations implementing Section 120 of the Act.)

(2) Notice and opportunity for public hearing: The order must have been issued after notice to the public of the content of the proposed order and opportunity for public hearing.

Discussion: Generally, thirty days is considered adequate notice under both State and federal law. The form of notice (newspaper, State Register, etc.) is generally prescribed by State law. EPA will, at a minimum, give public notice of its proposed DCOs in the Federal Register. (Actual notice to the State of proposed DCOs will also be given.) In evaluating the approvability of State DCOs, EPA will as a minimum require that the notice be adequate under State law and that persons living in the vicinity of the source have had adequate opportunity to comment on the proposed State order. Thirty days notice will be considered adequate and will be required for EPA approval of a State DCO unless the State has obtained prior EPA approval of some other procedure consistent with 40 CFR §51.4(e).

(3) Compliance schedule: The order must contain a schedule and timetable for compliance, including increments of progress.

Discussion: Section 302(p) of the Act defines "schedule and timetable of compliance" as "a schedule of required measures including an enforceable sequence of actions or operations leading to compliance with an emission limitation, other limitation, prohibition or standard". Each increment of progress must be required to be met as expeditiously as practicable. As a minimum, the increments of progress described in 40 CFR §51.1(q) must be included or must have already been achieved. If an increment has already been achieved, the order or supporting materials supplied to EPA must attest to this fact.

(4) Interim controls: The order must contain requirements for use of the best practicable system or systems of emission

reduction (taking into account the requirement with which the source must ultimately comply) for the period the order is in effect and for compliance with reasonable and practicable interim requirements including (a) those necessary to avoid an imminent and substantial endangerment to human health, and (b) a requirement to meet the SIP, insofar as the source is able.

Discussion: As a minimum, the order must include a finding that (a) the best practicable system of interim emission reduction has been required or, in rare cases, that no system of interim emission reduction is practicable in the case at hand, and (b) that the source remains subject to enforcement of emergency provisions designed to prevent imminent and substantial endangerment to human health (under §303 of the Clean Air Act and any similar State authority). Generally, a source should be required to meet an interim emission limitation based, at a minimum, on its present emission rate. Improved operation and maintenance procedures, temporary switches to less polluting fuels, and similar specific requirements should also be considered. It may be appropriate to require that the source conduct ambient air quality monitoring and periodically reduce emissions, or even periodically shut down, when air quality is expected to contravene health related standards. A case by case determination will be necessary to support a finding on the reasonableness and practicability of interim control requirements. Ambient air quality and density of population in the area should be considered in determining what controls are reasonable. Cost and the length of delay in compliance allowed by the DCO are relevant both to the reasonableness and practicability of the interim control requirements.

(5) Monitoring and reporting: The order must include a requirement for reasonable emission monitoring and reporting.

Discussion: If the DCO will remain in effect for any substantial period of time, it will generally be reasonable to require continuous emission monitoring wherever technology exists for meeting such a requirement. The continuous monitoring of other process parameters may be appropriate in addition to or instead of continuous emission monitoring where technology is less advanced. Monitoring should normally be required for the period the DCO will be in effect. However, if EPA or the State determines that a monitoring requirement is not reasonable in a particular case, a finding to this effect must be made and included either in the DCO itself or in supporting documentation.

Where the SIP already requires continuous monitoring, the DCO need not address continuous monitoring after the final compliance date in the DCO. Where EPA intends to require continuous monitoring after the DCO's final compliance date and no independent SIP requirement exists, this may be included in the DCO but the authority of Section 114 and Section 113(a) of the Clean Air Act must be relied upon for this requirement. Whether States must also rely on their own separate reporting requirement authorities is a matter of State law. Reports must be required at times and in sufficient detail to enable the authority issuing the DCO to determine whether interim requirements, increments of progress, and final compliance have been achieved in a timely way.

(6) Final compliance: The order must provide for final compliance as expeditiously as practicable but no later than July 1, 1979, or three years after the date for final compliance specified in the SIP, whichever is later.

Discussion: Generally, the July 1, 1979, date will be controlling since it will be more than three years after the SIP compliance date. However, where the "attainment date" is later than July 1, 1976, as in areas which were subject to two year extensions under §110(e) of the Act, the SIP compliance date may be as late as mid-1977 and a DCO could extend to mid-1980.* Where an attainment date is later in

* In the case of particulate matter requirements for the State of Ohio, the immediately effective final compliance date of April 15, 1974 has been extended to the attainment date of April 15, 1977 for some sources, even though an extension for these sources was not formally approved by the State or EPA. The special exception for these sources is based on the unique circumstances concerning the particulate matter standards in Ohio. The EPA-promulgated particulate matter plan for Ohio was challenged in the United States Court of Appeals for the Sixth Circuit. As part of that case, EPA represented to the Court that the April 15, 1977 attainment date in the plan was based on a determination that many Ohio utilities would need a full three years from the 1974 promulgation date to comply with plan requirements. In some cases, sources relied on these representations and timely applied for State variances deferring compliance until April 15, 1977, but did not receive variances because of State inaction. For these sources, the final compliance date "specified in [the] plan" as that phrase is used in Section 113(d)(1)(D), can be considered to be April 15, 1977 for particulate matter requirements.

time than a SIP compliance date, the three year time frame permitted for final compliance in a DCO runs from the compliance date. (Note also that §113(d)(3), §13(d)(4), and §113(d)(5) specify different deadlines for compliance in DCOs issued under their terms. However, all §113(d) orders must provide for compliance as expeditiously as practicable and Congress clearly intended that violators should not be given a "free ride" up to the absolute deadlines provided by §113(d)).)

(7) Notice of possible liability for noncompliance penalties: If the order is to a major source, it must notify the source that, unless exempted under Section 120(a)(2)(B) or (C) of the Act, it will receive a notice of noncompliance and noncompliance penalties will be assessed and collected under Section 120 in the event the source fails to comply by July 1, 1979, or such later date as is provided in accordance with Section 120(b)(3).

Discussion: "A notice of noncompliance" is a term of art under Section 120 of the Act. Once such a notice is issued, the source would have 45 days to submit certain financial data for purposes of assessment of an administrative non-compliance penalty. Until the noncompliance penalty program is implemented under regulations promulgated by EPA, no "notice of noncompliance" need be included in a DCO. However, the DCO must notify the source that it will receive such a notice and will be liable for noncompliance penalties if it does not comply by mid-1979 and is not entitled to an exemption or delay in the applicability of Section 120 of the Act (or a State program thereunder).

APPENDIX B

Summary of Procedures for Issuance and Approval of DCOs

In issuing its own DCOs, EPA will follow informal rulemaking procedures. Under informal rulemaking procedures, EPA must publish, in the Federal Register, notice of its proposed DCO, soliciting public comment and offering opportunity for a public hearing. This notice may be after or simultaneous with the actual notice to the State required by Section 113(d)(1) of the Act. A thirty day comment period is generally considered reasonable and is required if notice to the State is simultaneous to Federal Register notice. After this comment period (and any public hearing), the final order must be published in the Federal Register and may, for good cause, be made immediately effective.

Informal rulemaking will also be employed for EPA's action on State DCOs to major sources and for EPA disapproval of State DCOs to minor sources. Note, however, that EPA is not required to provide an opportunity for public hearing on a State DCO. If the State does not provide opportunity for public hearing prior to issuing its order, EPA will not approve the State DCO. Final EPA action on a State DCO is required within 90 days of receipt of the order and notice of its issuance by the regional Enforcement Division Director. EPA will strive to act within this time frame in all cases.

The Division of Stationary Source Enforcement (DSSE) will establish a new Part 65 of Title 40 of the Code of Federal Regulations. EPA-issued DCOs (except 113(d)(5) DCOs to coal conversion sources)^{1/} and EPA approvals and disapprovals of State DCOs will be promulgated in this Part. EPA regional offices will prepare the Federal Register documents for proposal and promulgation in accordance with guidance issued by DSSE. These documents (and necessary copies) will be forwarded, along with copies of a State DCO on which EPA is taking action, to DSSE for processing. Once DSSE has

^{1/} Section 113(d)(5) DCOs may be issued only by EPA. They will be promulgated in existing 40 CFR Part 55, "Energy Related Authority".

reviewed the documents for national consistency, they will be handcarried to EPA's Federal Register Officer for forwarding to the Federal Register (if a proposal) or to the Administrator (if a final action). (After a regional office gains experience in the DCO process, the requirement for DSSE review will be waived and DCOs will be handled in a manner analogous to "special action"/normal action" SIP revisions. In the case of "special actions", however, only Office of Enforcement concurrence will be required and the review period will be shortened to five working days from the date of receipt.)

EPA will provide whatever assistance it can to States in developing approvable State DCOs. In the early stages of the DCO program and upon request by the regional office, DSSE will also review and provide assistance on preliminary drafts of State and federal DCOs to the extent resources and other priorities permit.



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OFFICE OF
AIR, NOISE AND RADIATION

SUBJECT: Use of Section 120 Noncompliance Penalties
to Promote Compliance by Stationary Sources

FROM: Kathleen M. Bennett *Kathleen M. Bennett*
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TO: Regional Administrators, Regions I-X

Directors, Air and Waste Management Divisions
Regions I-IV, VI-VIII, X

Directors, Air Management Divisions
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Approximately one year has passed since the Agency began to implement the Section 120 noncompliance penalty program under the Clean Air Act. Section 120 was added to the Act as part of the 1977 amendments and is designed to recapture, in an administrative proceeding, the economic savings realized by source owners in violation of applicable emission limits. At this point, I would like to share with you some thoughts on how we can use Section 120 more effectively.

To date, only 12 notices have been issued under Section 120, seven of them in Region II. The administrative complexity of Section 120, involving a potential for multiple adjudicatory hearings, has tended to discourage a wider use of Section 120. Yet, as the Region II experience shows, Section 120 can be a very effective tool in proper circumstances in resolving long-standing instances of noncompliance.

While Section 120 is, by its terms, a penalty provision only, the prospect of a Section 120 penalty can serve as a useful stimulant to prompt a source to come into compliance. As the attached memorandum detailing Region II's experience with the program shows, Section 120 can serve as a powerful tool for promoting swift compliance. A Notice of Noncompliance can often prove effective where other actions have not.

Even where a State is taking the lead in resolving a case, a Notice of Noncompliance may sometimes provide the additional leverage needed to prompt a source to agree to an appropriate compliance schedule. In discussions with States about the

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