

MEMORANDUM

SUBJECT: Nitrogen Oxides (NOx) Reasonably Available Control
Technology (RACT) Findings Letters

FROM: Steven J. Hitte, Acting Director
Air Quality Management Division (MD-15)

TO: Director, Air, Pesticides and Toxics
Management Division, Regions I and IV
Director, Air and Waste Management Division,
Region II
Director, Air, Radiation and Toxics Division,
Region III
Director, Air and Radiation Division,
Region V
Director, Air, Pesticides and Toxics Division,
Region VI
Director, Air and Toxics Division, Regions VII, VIII,
IX, and X

As we discussed at the recent Division Director's meeting, the Environmental Protection Agency (EPA) has agreed to send finding letters by July 1, 1994 to various States for failure to submit NOx RACT rules. This office and the Office of General Counsel (OGC) have prepared an example findings letter that explains the impact of the March 8, 1994 court order that invalidated much of EPA's authority to approve committal State implementation plans (SIP's). Attachment 1 includes the example letter. You will also find this example letter in the Management and Accountability Process System (MAPS) on the Ozone directory under "NOxRACT.let." Attachment 2 includes a list of States that we believe need this letter.

We are concerned about the question: At what stage in the submittal process for NOx exemption requests do we say that a findings letter is not necessary? As Mary Nichols indicated in her June 20, 1994 declaration to the District of Columbia Circuit Court, EPA will not be sending findings letters to States which submit NOx exemption requests that appear to be ultimately approvable based on a preliminary review of the data submitted in

support of those exemption requests. The EPA believes it is inappropriate to issue findings for those areas which would have, as a consequence, the triggering of sanctions clocks. We would expect the Regions to monitor these actions in order to determine whether any changed circumstances would warrant issuance of findings.

If you foresee problems in sending out the letters by July 1, please let us know. We would appreciate copies of the findings letters that you mail. Putting the letters on MAPS and alerting us that this has been done would be adequate. The contact person for this action is Ted Creekmore (919-541-5699.)

cc: Air Branch Chief, Regions I-X
T. Helms
R. Ossias
J. Paisie
M. Prosper
J. Seitz
J. Silvasi
J. Tierney
L. Wegman

OAQPS:AQMD:OCMPB:TED CREEKMORE:JKING:EXT. 5699:6/27/94
DISK: SILVASI.JK FILE: NOXRACT.LET

ATTACHMENT 1
EXAMPLE LETTER ON FINDINGS FOR NOX RACT

Dear Governor _____:

The Clean Air Act as amended in 1990 (Act), establishes a number of new requirements that must be met for areas designated as nonattainment for ozone. In addition, because of the concern regarding ozone transport in the Northeast, the Act established the northeast ozone transport region (NOTR). Areas not designated nonattainment, but located in the NOTR must also meet certain requirements under the Act.

This letter addresses the requirement for the submittal of State implementation plans (SIP's) governing the application of reasonably available control technology (RACT) to major stationary sources of nitrogen oxides (NOx) under section 182(f) of the Act. As you may know, for certain programs required under the Act (including NOx RACT), the Environmental Protection Agency (EPA) had earlier adopted a policy pursuant to section 110(k)(4) of the Act to conditionally approve SIP's which committed to provide the Agency with specific enforceable measures within 1 year of the date of approval of the commitment. Under this policy, EPA effectively extended the deadline for State submission of NOx RACT rules approximately 2 years. That interpretation was challenged in Natural Resources Defense Council v. Browner; three consolidated lawsuits brought in the United States Court of Appeals for the District of Columbia Circuit. In a full opinion, dated May 6, 1994 (and in a March 8, 1994 order and April 22, 1994 amended order issued earlier), the court found that EPA's conditional approval interpretation exceeded the Agency's statutory authority, but concluded that "EPA properly extended" the deadline for submittal of fully-enforceable NOx RACT SIP's.

However, in its discussion of the NOx RACT SIP submittals, the court erroneously assumed that "EPA granted a narrow one-year extension for NOx RACT submissions," that is, until November 15, 1993. Based on this premise, the court stated that "the statutory period for reviewing NOx RACT submittals should commence as of the extended submittal deadline of November 15, 1993, expiring 14-18 months as the Amendments require." The court went on to say that "the EPA must approve or disapprove [such] submittals no later than May 15, 1995." The EPA assumes that the court intended the May 15, 1995 approval/disapproval deadline to apply only to NOx RACT SIP submittals EPA has received to date. On June 20, 1994, EPA filed a motion for

clarification,¹ in part, to affirm that this was indeed the court's intention.

From the outset, EPA has had serious concerns about the committal SIP litigation because it clearly had the potential of resulting in very far-reaching adverse consequences for EPA's administration of title I SIP programs under the Act. However, the May 6, 1994 decision took an approach that, overall, was far more sympathetic to the Agency's position than initially anticipated. As the court itself said: "While we hold that the EPA misconstrued and misapplied section 110(k)(4), we nevertheless conclude that equity and practicality require that we approve the [deadline] extensions in part and that we adopt more moderate remedial measures []." On the other hand, the litigation was complicated by numerous pleadings to the court, including several motions for clarification, requests for modification or amendment of orders, and petitions for rehearing, involving additional briefing of issues. Some of these actions prompted the court, at the conclusion of its April 22 amended order, to state: "[W]e believe that all parties have had ample opportunity to address remedial issues and that no additional briefing is necessary." Based on this statement, and on other indications from the court, EPA has concluded that any additional representations to this court that could be construed as further argument or requests for modification of the court's holding would be looked upon with disfavor and could, in any event, jeopardize a generally favorable outcome.

Taking all these factors into consideration, and particularly in light of the various concerns expressed in the court's opinion and the need for prompt action in implementing the overall remedy in this case, EPA has informed the court that it intends to treat November 15, 1993 as the operative deadline for State submission of NOx RACT SIP's. An important result of this decision is that, for those areas for which NOx RACT SIP's or exemption requests have not yet been submitted, the Agency intends to issue findings by July 1, 1994 that the affected States have failed to submit complete NOx RACT SIP revisions as required under the Act.

Consequently, by today's letter, EPA is notifying **[State]**

¹On the same day, NRDC filed a "Suggestion for Rehearing en banc," asking the D.C. Circuit as a whole to reconsider the May 6, 1994 opinion, including the portion devoted to the NOx RACT issues, in part because NRDC believed that "[t]he opinion conflicts with numerous decisions holding that plain statutory language establishing mandatory deadlines is dispositive."

that pursuant to section 179(a)(1) [for NOTR cite "179(a)(1) and (3)"] of the Act, EPA is making a finding of failure to submit a complete NOx RACT SIP for [list, or otherwise describe the relevant nonattainment areas]. Under the Act, a finding of failure to submit a complete SIP triggers the mandatory sanctions provisions of the Act. If within 18 months of this letter, [State] has not submitted NOx RACT rules that EPA determines are complete, or EPA has not approved a NOx RACT exemption, one of the two sanctions under section 179(b), as selected by the Administrator, will be imposed. [See EPA's proposed rule establishing the order of sanctions under section 179(a) (58 FR 51270, Oct. 1, 1993)].

The section 179(b) sanctions include a prohibition on the awarding of grants by the Secretary of Transportation for certain transportation projects, and an increase in the ratio of emissions reductions necessary as offsets for permitting new or modified sources. The EPA also has the discretionary authority under section 110(m) to impose either of these sanctions at any time after EPA has made a finding of failure to submit complete rules under section 179(a). In addition, section 110(c) of the Act provides that EPA promulgate a Federal implementation plan no later than 2 years after a finding under section 179(a).

I want to emphasize that this finding implies no judgment as to the State's intent. I would also like to note that the deadline for submission of the NOx RACT rules under EPA's original committal SIP policy is now just 4½ months away. Thus, although EPA's decision may be unexpected or even unwelcome news for your State, any adverse sanctions consequences will likely be avoided because, once NOx RACT SIP's are found complete or NOx exemption requests are approved, the sanctions clocks would stop. I would like to remind you that EPA has an obligation to promptly implement requirements imposed by the courts. The EPA also takes very seriously its responsibility to administer the Act in a fair and just manner, and this finding is a conscientious attempt by EPA to balance both responsibilities. We look forward to working closely with you and your staff to ensure that the Act's requirements are met in a timely and effective manner without adverse consequences.

ATTACHMENT 2
STATES WHICH REQUIRE FINDINGS FOR NOX RACT²

Region	Areas Subject to Letters
III	VA: Richmond WV: Charleston; Parkersburg; Huntington
IV	NC: Charlotte KY: Louisville; Cincinnati Ashland
V	IN: Chicago; Louisville OH: Cincinnati IL: St. Louis; Chicago MI: Detroit; Grand Rapids Muskegon WI: Kewaunee; Manitowoc; Milwaukee
VI	TX: Dallas, El Paso LA: Baton Rouge
VII	MO: St. Louis
IX	AZ: Phoenix CA: Mojave, Sacramento

²Findings for AZ for Phoenix, MI for Detroit, and TX for El Paso and Dallas will not be made because the States have submitted exemption requests. These exemption requests will be approved as expeditiously as practicable.