

OCT 26 1983

Mr. Jeb Stuart
Air Pollution Control Officer
South Coast AQMD
9150 Flair Drive
El Monte, CA 91731

Dear Jeb,

The purpose of this letter is to respond to your request for clarification of current EPA policy regarding the use of closures and curtailments for offsets, and more specifically, to answer the questions you posed concerning both how EPA defines a "replacement" and what types of trades constitute a replacement.

As you are aware, current EPA NSR regulations, 40 CFR 51.18(j)(3)(ii)(c), limit the use of credits from prior shutdowns to replacements. This means prior shutdowns can only be used on-site and not as external offsets. While that distinction leaves little room for interpretation, there is some flexibility attached to the concept of replacement. We cannot generalize, however, and make generic determinations in answering the questions raised in your letter of September 7, 1983. In most instances, a case-by-case review will be necessary. Secondly, we are not free to pre-empt rulemaking through policy interpretations of regulatory language.

EPA has proposed eliminating the restrictions on the use of credits from prior shutdowns per the CMA settlement agreement (38742 FR August 25, 1983), a proposal which is currently out for public comment. If the shutdown restriction is deleted as a result of the CMA settlement, prior shutdowns will become available for all types of transactions, subject only to EPA's remaining air quality tests, and the issues raised by your questions will no longer be relevant. If, on the other hand, the existing regulation remains unchanged, EPA may take a closer look at its replacement policy and develop more detailed guidelines. Until that time, however, Region 9 staff has conferred with the appropriate legal and

technical personnel at EPA headquarters, and we believe we can answer your questions based on both the original intent of the restriction and on what is considered to be legally defensible under the current regulation. The answers below are numbered to correspond with your question numbers.

1. The definition of "replacement of production capacity" includes the idea of "functional equivalence." A replacement need not be an identical piece of equipment or process, as long as the equipment or process would serve the same function" and would ultimately produce the same end product. If the equipment or process is not identical, the change would be subject to a case-by-case determination to see if it continues to meet the replacement requirement.

You also pose the question as to whether a credit is usable "industry-wide." While change of ownership itself does not constitute a transaction subject to federal permitting requirements, we again would refer to the restriction on use of credits for replacements as only allowing use at the same source site. Thus, a new tire production facility on one side of the Basin could not be seen as a replacement for a facility on the other side of the Basin.

2. There are no special restrictions on the use of prior shutdowns for netting. The shutdown replacement restriction applies once NSR has been triggered and offsets required. With the dual-source definition, however, the opportunities for netting would be less frequent. EPA could, for instance, consider use of inter-permit unit credits at existing major stationary sources (100 TPY plant-wide) as "offsets", and thus subject to the restriction, under the narrow definition of installation. Otherwise, prior shutdowns occurring on-site can be used for offsets under NSR if the replacement test of "functional equivalency" is met.
3. No, if by contemporaneous the District means a transaction in which an offsetting emission reduction (from a shutdown or curtailment) occurs after the application for construction of a new or modified source.

4. The original intent behind the restriction on prior shutdowns was that they could only be available for on-site use, and that their use as inter-site (external) offsets was prohibited. Therefore, a company with multiple locations in the District could not curtail operations at one location to allow future expansion at another location. The concept of replacement is closely tied to the same site where the reduction is made. Allowing such transfers could provide an advantage to larger companies who either have or could purchase other sites to obtain their offsets, which raises questions pertaining to equity.
5. If this relocation is of a prior shutdown, (such as if a company has been closed for four years and now wants to reopen the same operation at a different location) the restriction is the same one that is applied to Question 4 above. However, if the company wants to change locations and can meet the requirements of contemporaneous, the offsets would be valid.
6. No, not unless the new construction includes within its source boundaries the site of the source which has been shutdown or curtailed.

If the above answers do not provide you with enough information for specific pending permit applications, EPA would be if more than willing to assist you with your replacement applicability determinations. If you have any further questions, please feel free to call Richard Grow at (415) 974-8238 or Nancy Harney at (415) 974-8213.

Sincerely,

Original Signed by:

David P. Howekamp
Director
Air Management Division

cc: M. Trutna, OAQP5, MD-15
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