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

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OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Approval of Local Implementation Plans

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THRU: Peter H. Wyckoff
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TO: Bruce P. Miller
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This memorandum contains our views on the four legal questions concerning local implementation plans contained in your memorandum dated June 18, 1987. I apologize for the delay in responding, but many other very pressing issues intervened.

Your questions concern local plans in three separate states, each with their own factual and state law variations. Time constraints have precluded a careful analysis of these facts and state law issues. Some uncertainty remains in my mind on such questions as (i) what precise changes would be made in the state implementation plans ("SIPs") by virtue of EPA's approval of the local plans; (ii) what authority does each state actually have to enforce local regulations (or the state equivalent); and (iii) what leverage could EPA bring to compel state or local officials to do better. Accordingly, this memorandum will discuss in a broad manner the questions you have raised, and will not focus on any particular state law provisions or actual factual circumstances. Also, the memorandum does not necessarily reflect the views of other headquarters offices. As you know, OAQPS, in particular, may have strong doubts about the wisdom of approving some of the local NSR regulations.

Question 1: You asked whether the following basic position is legally correct:

> Providing that each local regulation is equal to the corresponding EPA-approved State regulation, EPA may approve the local regulations as merely a transfer of enforcement authority, rather than as a substantive revision to the SIP. Thus, the regulations would not have to be accompanied by new attainment demonstrations, SIP narratives, and other provisions of Part 51 applicable to SIP revisions.

We think this position is legally defensible, assuming that the record shows that the net effect of the approval would be to strengthen the enforceability of the regulatory regime as a whole, as your memorandum suggests it would.

First, EPA could argue that section 110(a) implicitly authorizes the approval of a rearrangement in the SIP whenever its net effect would be to improve the SIP in relation to the requirements of section 110(a), regardless of whether the SIP after the change would fully satisfy those requirements. This argument finds support in several judicial decisions: Michigan v. Thomas, 805 F.2d 176 (6th Cir. 1986); National Steel Corp. v. Gorsuch, 700 F.2d 314 (6th Cir. 1983); Public Service Co. v. EPA, 682 F.2d 626 (7th Cir.), cert denied 459 U.S. 1127 (1982). In any event, the Agency has embraced the argument firmly in the Final Emissions Trading Policy Statement, 51 Fed. Reg. 43838 (December 4, 1986).

The recent opinion of the Ninth Circuit in Abramowitz v. EPA, No. 84- 7642 (9th Cir., Nov. 3, 1987) (petition for rehearing pending), however, casts some doubt on the strength of this argument. The opinion suggests that EPA must reject an individual SIP revision if the SIP after the revision would not fully satisfy the requirements of sections 110 and 172. See pages 14-15 of the attached copy of the opinion. See also Connecticut Fund for the Environment v. EPA, 672 F.2d 998, 1011 (2d Cir. 1982), cert. denied sub nom., Manchester Environmental Coalition v. EPA, 459 U.S. 1035 (1982). EPA is asking the Ninth Circuit to clarify or reconsider its opinion. In any event, its decision would have only persuasive, not binding, significance for your situations.

Second, EPA could argue that the prior attainment demonstration, in the case of a SIP that currently enjoys full approval, is adequate support for approval of a SIP revision that would strengthen the SIP, at least in the absence of any conclusive evidence in the agency's possession to the contrary. This is also an argument embraced by the Final Emissions Trading Policy. We gather, however, that it may not be applicable to many of situations.

While the position you seek is defensible, it should be accompanied by express statements that EPA, in approving the local measures in question, is not intending to determine the adequacy of the SIP as a whole or of the measure in relation to applicable NSR or RACT requirements in the Act.

Question 2: You asked whether the following basic position is legally correct:

> The local regulations cannot be treated as separable from the SIP which the State submits and implements, but must be considered as part of it. Thus, the regulations must be submitted by the State to EPA along with a request that they be made a part of the SIP.

EPA may take the position that this statement is legally correct. Section 110(a) (1) states: "Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator [an implementation plan]." (Emphasis added). [See Footnote 1] Similarly, EPA regulations state: "Plans shall be adopted by the State and submitted to the Administrator by the Governor as follows: [setting out timing requirements, etc.]". 40 CFR Section 51.5(a) (emphasis added). Section 110(a)(3)(A), which concerns SIP revisions, is generally to the same effect, although it does not explicitly identify who should submit the SIP:

> The Administrator shall approve any revision of an implementation plan . . . it he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings."
> (Emphasis added.)

Because 40 CFR 51.5(a) indicates by its terms that SIPs must be submitted by the Governor, it is a short and logical step to conclude that SIP revisions, too, must be submitted by the Governor. This conclusion is consistent with the spirit of section 110(a)(3)(A), which tracks the SIP requirements for SIP revisions.

[FOOTNOTE 1] Similarly, section 107(a) states:

> Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State . . . . (Emphasis added.)

Moreover, the provisions cited above do not by their terms allow the Governor to delegate this authority to a political subdivision of the State. For this reason, EPA may take the position that no such delegation is at least at present permissible. Not allowing such delegation is also consistent with the proposition, discussed below, that Congress and EPA have sought to keep the state accountable for SIPs.

On the other hand, the provisions cited above do not expressly disallow delegation, and the concerns about consistency with other state laws that you expressed could be addressed by requiring any delegate to make a demonstration sufficient to allay the concerns. Furthermore, we have not researched EPA's actual practice over the years. It may be that EPA has countenanced delegation in the past. Has it done so for instance, in connection with submittals from the relevant agency for Jefferson County, Kentucky?

Question 3: You asked whether the following basic position is legally correct:

> Since State law requires that local regulations be equal to or more stringent than corresponding state regulations, the State must certify to EPA that each regulation has been reviewed by the State and found to meet this requirement.

We agree that EPA may take the position that each state is required to make this certification. Although we have no judgment as to whether this certification is necessary as a matter of state law, it can be required as part of the state's burden of demonstrating that the local regulations are authorized and enforceable and will not jeopardize attainment or maintenance of the NAAQS.

Question 4: You asked whether the following basic position is legally correct:

> Irrespective of any transfer of authority to local agencies, the State must retain overall authority and responsibility for developing and implementing the SIP. Thus, the State must have the ability to enforce either the local regulations or identical state regulations if the local fails to enforce.

EPA may take the position that this statement is legally correct. Several provisions of the Clean Air Act provide direct support for this statement. Section 110(a)(2)(F) states that one of the requirements for approval of a SIP (or SIP revision) is that -- "it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan". (Emphasis added.) Section 113)(a)(2) provides:

> Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State.

(Emphasis added.) These provisions do not by their terms authorize states to delegate these responsibilities to local governments.[SEE FOOTNOTE 2]

EPA regulations are more explicit on the responsibilities of the state.Under 40 CFR 51.11(a):

> Each plan shall show that the State has legal authority to carry out the plan, including authority to . . . (2) [e]nforce applicable laws, regulations, and standards, and seek injunctive relief.

The regulations authorize the state to share this responsibility with local government, but not to delegate it away:

> The State may authorize a local agency to carry out a plan, or portion thereof, within such local agency's jurisdiction: . . . . Provided, That such authorization shall not relieve the State of responsibility under the Act for carrying out such plan, or portion thereof. (Emphasis added.)

I hope this discussion has been helpful. Please let me know if you have any questions.

cc: Rich Biondi
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ORC Air Team Leaders, Regions I-III, V-X

[FOOTNOTE 2] Indeed, other Clean Air Act provisions may be read to suggest that Congress sought to limit the role of political subdivisions of states to (i) promulgating regulations stricter than Clean Air Act requirements, if they so chose; and (ii) consulting with the states. See section 116 (Clean Air Act requirements preclude states or political subdivisions thereof from adopting stricter controls than provided under the Act); Section 121 (requiring the state, in carrying out various Clean Air Act requirements, to "provide a satisfactory process of consultation with general purpose local governments").