

## MEMORANDUM

TO: Jeffrey Wennberg, Commissioner  
Department of Environmental Conservation

FROM: Richard Valentinetti, Director  
Air Pollution Control Division

DATE: December 29, 2005

SUBJECT: Submittal of statement of Vermont's intent to retain all of its existing New Source Review (NSR) rules and State Implementation Plan (SIP) provisions related to NSR with attached documentation supporting the conclusion that the VT program is at least as-stringent-as the newly adopted federal NSR rules, as required for compliance with the federal Clean Air Act.

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### Background:

On December 31, 2002 and on August 27, 2003 changes to the federal New Source Review (NSR) program, a program required to be in state implementation plans (SIPs) by parts C and D of Title 1 of the Clean Air Act, were adopted by EPA. These were changes in the base program describing the minimal NSR program which SIPs must carry out in order to comply with the Clean Air Act. States had three years to submit revisions to their existing programs showing that the changes had been adopted or alternatively, to demonstrate that the existing state program met the newly adopted federal regulatory requirements. There has been controversy and court challenge surrounding these federal regulatory changes during the past three years. States are not required to adopt the new federal rules verbatim, however if they do not adopt something similar by January 2, 2006, they must demonstrate to EPA (also by January 2, 2006) that their existing state NSR programs approved in the federal SIP are somehow "equivalent" to the federal program. States have not found it easy to interpret exactly what they need to submit in order to demonstrate so called "equivalency". STAPPA and ALAPCO have produced sets of options for states to draw from in responding to these changes. Many states have concluded that the newly adopted federal rules significantly narrow the applicability of the federal NSR process. Many states have opted to simply retain their existing NSR programs because they believe their existing programs are working well and are at least as-stringent-as the new federal one. The Vermont Air Division has reached this conclusion with respect to our NSR program.

## Action Required:

Vermont must make a submittal to EPA demonstrating either that its existing program conforms to the newly adopted federal NSR program through an uncertain “equivalence” test which EPA has not offered criteria for, or that it conforms to the criteria in Section 116 (“Retention of State Authority”) of the Clean Air Act. The CAA allows a state NSR program adopted as a SIP **to be even more stringent than the federal one**, thus presumably meeting the objectives of the Clean Air Act (assuming the federal program meets the intent of the Act). Failure to make a submittal to EPA by January 2, 2006 could lead EPA to issue a “failure to submit” notice (probably within days) and to start a series of two clocks which would end in sanctions being applied to the State of Vermont. The two clocks are 18 months and 24 months. The eighteen month clock when expired (without adequate remedial action on the part of the state in the interim) would initiate enhanced “offset” ratio requirements for new major sources of air pollution being permitted in Vermont. This would obviously make it more difficult for new sources to locate in the state. The twenty-four month clock when expired (again without adequate remedial action on the part of the state) would initiate withholding of federal highway funds.

The Air Division demonstration makes the case that our existing NSR program adopted and federally approved in the Vermont SIP (including the existing SIP adopted rules and SIP narrative language), for a variety of reasons, is at least as-stringent-as the federal NSR program and thus does not require the state to adopt any changes to its existing NSR program. It also makes the more important points that the Vermont NSR program has been developed with the small state perspective in mind, that it is more “user friendly” to Vermont scale industry and development, that it already offers the “flexibility” that appears to be the objective of some of the federal changes, and that it has been working well to control emissions growth in Vermont from new stationary sources, whereas if the newly adopted federal program were adopted its applicability criteria would be mismatched for Vermont’s situation and would likely result in far less effectiveness as a pollution control program.

Attached is a cover letter to the EPA Region I Administrator, with supporting documentation. The letter asks the Administrator to concur with Vermont’s interpretation of its existing NSR program.

There are a number of alternative possibilities associated with this submittal to EPA:

- 1) Should the Administrator concur with our position, the existing NSR program would go on un-interrupted, operating as it has since it was previously approved by EPA on February 10, 1982.
- 2) The Administrator might not agree that our existing program is “equivalent” or more stringent and could then presumably rule that there are deficiencies in the existing Vermont NSR program and thus require a SIP revision to correct these deficiencies. In this scenario, it is assumed that EPA would have to articulate why or where in the existing SIP NSR program these deficiencies exist. Such a ruling would likely require a federal register notice and allow for comment and review by the state before becoming final and initiating any sanction clocks.
- 3) An intermediate possibility is that the Administrator would find the submittal incomplete. It is believed that in this scenario there is no need for the Administrator to publish a federal register and allow comment, but that the Administrator would issue a letter to the state informing us of the incompleteness determination (and presumably what was missing) before starting the sanction clocks.

Under any of the scenarios that would involve possible future sanctions, the state obviously has the time during which the clocks are running to remedy the situation that started the sanction clocks.

It is the Air Division’s belief that the approach being taken, i.e. of demonstrating our existing program to be essentially more stringent than the newly adopted federal one, is the best approach for the State of Vermont to take at this time.