

3/14/90

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
BETHENERGY (BETHLEHEM STEEL) Docket No. CAA-120-70204
CORPORATION),)
)
Respondent)

ACCELERATED DECISION

This matter arises under the Clean Air Act (Act), 42 U.S.C. §§ 7401-7642. Pursuant to Section 120 of the Act, 42 U.S.C. § 7420, a Notice of Noncompliance (NON) was issued March 15, 1989 by the United States Environmental Protection Agency (sometimes complainant or EPA), Region II.

On December 8, 1989, respondent filed a motion for accelerated decision (motion) pursuant to 40 C.F.R. § 22.20, seeking a dismissal of this proceeding in its entirety on the ground that the New York State regulation under which the complainant issued its NON is not part of the applicable federally approved

and federally enforceable New York State Implementation Plan (NYSIP).^{1/} (In its motion, respondent also requested that any further action required by orders of the Administrative Law Judge be deferred pending a decision on the motion.)

Complainant submitted a cross-motion for an accelerated decision on December 26, 1989. Complainant contends that EPA approved the New York State regulation at issue, that the approval was clearly published in the Federal Register and identified in the Code of Federal Regulations, and that the regulation is, therefore, part of the federally enforceable NYSIP.

Respondent filed a reply to the cross-motion on January 11, 1990 and complainant submitted its reply to this on February 2, 1990. Respondent owns a facility in Lackawanna, New York, which operates coke oven batteries. The NON alleged that, on September 7, 1988, duly authorized EPA inspectors made light detection

^{1/} Section 120(a)(2)(A) of the Act, 42 U.S.C. § 7420(a)(2)(A), provides, in pertinent part that:

[t]he Administrator shall assess and collect a non-compliance penalty against every person who owns or operates -

(i) a major stationary source . . . , which is not in compliance with any emission limitation, emission standard or compliance schedule under any applicable implementation plan

Section 110(d) of the Act, 42 U.S.C. § 7410(d), defines an "applicable implementation plan" as "the implementation plan, or most recent revision thereof, which has been approved under subsection (a) of this section" Subsection (a) provides for approval by the Administrator of a state implementation plan, or any portion thereof, if he determines that it meets certain criteria listed in Section 110 (a)(2) of the Act, 42 U.S.C. § 7410(a)(2).

and ranging (lidar) measurements of emissions from the Battery Number 9 waste heat stack at respondent's Hamburg Turnpike, Lackawanna, New York, facility, and recorded average opacity values of 36, 40, and 44 percent, each for a period of over three minutes. The NON alleged this to be in violation of Section 214.3(b) of Title 6, Chapter III, of the Compilation of Rules and Regulations of the State of New York (6 NYCRR § 214.3(b)), which prohibits emissions with average opacity greater than 20 percent for a period over three minutes during any consecutive sixty-minute period.^{2/} The NON specifies that respondent's facility is subject to 6 NYCRR § 214, "which is part of the federally-approved and federally-enforceable New York State Implementation Plan . . . with a State effective date of August 23, 1979."^{3/}

Respondent does not contest the waste heat stack emissions opacity measurements set forth in the NON. Rather, respondent asserts that those opacity measurements do not constitute a violation of the NYSIP, because the regulation that respondent was charged with violating, the 1979 version of 6 NYCRR § 214, was not approved by EPA. As noted by respondent, a Notice of Proposed Revisions to the NYSIP was published in the Federal

^{2/} NON at 2-4.

^{3/} Id. at 2. The regulation at issue, 6 NYCRR § 214, is hereinafter, sometimes generally, referred to as "Part 214." The revision of that regulation with the State effective date of August 23, 1979, is hereinafter referred to as "the 1979 version."

Register on August 15, 1980, which included an extensive discussion of Part 214.^{4/} In that notice, EPA proposed to conditionally approve the New York State plan revision if the State committed to correct certain deficiencies listed in the notice.^{5/} Respondent asserts that no final action appears in that notice as to Part 214, and that no further notice has been found that purports to approve or disapprove Part 214.^{6/}

Respondent concedes that in 46 Fed. Reg. 55690, 55692 (November 12, 1981), a table entitled "EPA-approved New York State regulations" includes Part 214.^{7/} However, respondent characterizes the table as an "after-the-fact summary table" which "does not satisfy EPA's obligation to provide formal notice in the Federal Register of such a significant action as the approval of a New York regulation under the Clean Air Act,"^{8/} as required by the Administrative Procedures Act, 5 U.S.C. § 552(a).^{9/} The table contains two listings of Part 214 with reference to coke oven batteries: one with the State effective date of August 12, 1972, and one with the State

^{4/} 45 Fed. Reg. 54372, 54375-54378.

^{5/} Id. at 54384.

^{6/} Motion at 4.

^{7/} Id. at 5.

^{8/} Id. at 4. See also, respondent's reply at 2, 3.

^{9/} Respondent also cites *Appalachian Power Co. v. Train*, 566 F.2d 451, 455 (4th Cir. 1977), and section 307(b)(1) of the Act, 42 U.S.C. § 7607(b)(1). Motion at 6-7.

effective date of August 23, 1979, accompanied by the parenthetical note, "with provisions as noted," and the comment, "Sections 214.2(a) and 214(b)(1) are only incorporated provisionally pending additional RACT evaluation (40 C.F.R. § 52.1678(b)(1) and (b)(2))."^{10/} Respondent argues that the table indicates that the latter listing, the 1979 version of Part 214, was not approved by EPA because it refers solely to Sections 214.2(a) and 214(b)(1), and not to the entire Part 214, or to the provision at issue in this proceeding, Section 214.3(b).^{11/} Respondent further argues that the mere listing of the 1979 version of Part 214 in the table could not be construed as demonstrating approval by EPA, because that would lead to the conclusion that both the 1972 and the 1979 versions of Part 214 were incorporated into the NYSIP.^{12/} Respondent notes that other provisions listed in the table are accompanied by a "latest EPA approval date," except for the 1979 version of Part 214 and Part 216, the latter of which has a parenthetical note and comment similar to the former.^{13/}

^{10/} 46 Fed. Reg. 55692 and 40 C.F.R. § 52.1679.

^{11/} Motion at 5-6; respondent's reply at 2.

^{12/} Motion at 6.

^{13/} Id., see 46 Fed. Reg. 55690, 55692-55693; 40 C.F.R. § 52.1679; respondent's reply at 2.

Respondent argues stoutly that there is no evidence that EPA ever finally approved the 1979 version of Part 214 and that this proceeding, therefore, cannot be maintained by EPA. Under Section 120(a) of the Act, 42 U.S.C. § 7420(a), EPA is authorized to enforce its provisions only if the source is "not in compliance with any emission limitation, emission standard or compliance schedule under any applicable implementation plan." Respondent concludes that because it was charged with violating the 1979 version of Part 214, and that provision was not approved by EPA as part of the NYSIP, then EPA cannot enforce the regulation and this proceeding should be dismissed.

Complainant argues essentially that the 1979 version of 6 NYCRR Part 214 was approved by EPA as part of the NYSIP, as evidenced by the summary table of New York regulations approved by EPA contained in 46 Fed. Reg. 55690, 55692 (November 12, 1981) and codified in 40 C.F.R. § 52.1679, which complainant contends constitutes proper final rulemaking.^{14/} Regarding the 1972 and 1979 versions of Part 214 contained in the table, complainant states that EPA intended that both versions are part of the NYSIP.^{15/} Complainant interprets the listing of the 1979 version, with the comment, "Sections 214.2(a) and 214(b)(1)

^{14/} Cross-motion at 4, 8; reply at 3.

^{15/} Cross-motion at 5-8, citing 45 Fed. Reg. 54372, 54376 (August 15, 1980). Complainant also notes the cumulative history aspect of the NYSIP as presented in 40 C.F.R. § 52.1670.

are only incorporated provisionally," as the incorporation of the rest of Part 214 into the NYSIP without any provision.^{16/} It is admitted that some parts of Part 214 have been revised, but complainant emphasizes that the 20 percent opacity standard of which respondent is in violation has remained the same since 1972, and therefore, it has violated the 1972, 1979, and 1984 versions of Part 214.^{17/} It is also observed that respondent had adequate notice concerning the 20 percent opacity standard by, inter alia, the specific notification of violation set forth in the NON, and that the version relied upon in the NON is beside the point; if the 1979 version is not enforceable by EPA, then the 1972 version is.^{18/} In its reply, complainant stresses that because respondent failed to timely challenge or petition for review the regulation at issue under Section 307(b) of the Act, or under 40 C.F.R. § 66.4, respondent cannot now challenge the regulation.

^{16/} Cross-motion at 6.

^{17/} *Id.* at 3, 9; complainant's exhibit H; complainant's reply at 1.

^{18/} Cross-motion at 10; complainant's reply at 1-3. Complainant presents additional observations and notices of violation issued by EPA against respondent concerning 6 NYCRR § 214.3(b), buttressing its argument that respondent had notice of the opacity standard. Exhibits F, G, and I of cross-motion. However, respondent points out in its reply, at 1, such observations and notices are irrelevant to the proceeding at issue.

DISCUSSION

After the above mind-numbing journey through the pleadings, a brief review of the pertinent history since 1972 of 6 NYCRR Part 214 may contribute to clarity. EPA's approval of the 1972 version of Part 214 appeared in 37 Fed. Reg. 19814 on September 22, 1972. The 1979 version of Part 214 appeared in a submission to EPA on August 10, 1979 of proposed NYSIP revisions from the New York State Department of Environmental Conservation.^{19/} On August 15, 1980, a Notice of Proposed Revision to the NYSIP was published in the Federal Register.^{20/} Revisions to Part 214 were discussed in detail therein, and EPA proposed to conditionally approve the NYSIP revisions if the State committed itself to correct certain minor deficiencies by January 1, 1981.^{21/} A Proposed Revision to the NYSIP, published in 46 Fed. Reg. 19829 (April 1, 1981), included a table summarizing EPA's actions being proposed. Part 214 is listed in that table with respect to the August 10, 1979 submission.^{22/}

^{19/} 45 Fed. Reg. 54372, 54373 (August 15, 1980).

^{20/} Id.

^{21/} Id. at 54384.

^{22/} 46 Fed. Reg. at 19829, 19830, 19834. No proposed action was required as to Part 214, inter alia, as indicated in the table, and no discussion was included concerning Part 214 because certain regulations, including Part 214, were "being handled through other rulemaking actions." Id. at 19830.

On November 12, 1981, a final rule was published announcing approval by EPA of revisions to the NYSIP, and adding "a new section to the Code of Federal Regulations which clearly identifies those New York State regulations which are a part of the SIP."^{23/} This new section, 40 C.F.R. § 52.1679, "identifies all New York State regulations approved by EPA as part of the New York SIP, the dates when the regulations were made effective by the State and the dates (and Federal Register citations) when they were last approved by EPA for incorporation into the New York SIP."^{24/} The new section consists of a table entitled "EPA-approved New York State Regulations," which lists both the 1972 and 1979 versions of Part 214.^{25/} However, no "latest EPA approval date" and Federal Register citation appear for Parts 200, 216 and the 1979 version of Part 214.^{26/} In the column headed "comments," no comment appears for Part 200. Parts 214 and 216, accompanied by the parenthetical note "with provisions as noted," list a comment stating that certain named sections of the regulation are only incorporated provisionally. Parts

^{23/} 46 Fed. Reg. at 55690.

^{24/} Id. at 55692.

^{25/} Id.

^{26/} Id. at 55692, 55693.

225 and 227 are the only other regulations listed which are accompanied by a comment, such comment stating that certain named sections are disapproved.^{27/}

Respondent's contention that the table does not indicate EPA's approval of the 1979 version of Part 214 is footless. First, regarding the interpretation of the table on its face, there is no reason to assume that the 1979 version of Part 214 listing pertains only to the provisions noted as being incorporated provisionally, and that only the 1972 version was approved. If that assumption were true, then the similarly listed Part 216 would require an "older" approved version of Part 216 to account for the remaining provisions of that Part that were not merely incorporated provisionally. Moreover, the lack of Federal Register citation and EPA approval date does not imply lack of approval by EPA since Part 200 is unaccompanied by any comments.

Second, respondent's assertion of EPA's noncompliance with the Administrative Procedure Act (APA), and the Act, by failing to provide formal notice in the Federal Register of EPA approval of the 1979 version of Part 214, is without adequate support. The APA, 5 U.S.C. § 552, provides, in pertinent part, merely as follows:

^{27/} Id.

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public-

* * *

(D) substantive rules of general applicability adopted as authorized by law . . . ; and

(E) each amendment, revision, or repeal of the foregoing.

EPA satisfied this requirement concerning Part 214 by way of the Federal Register notices described above. No special format is set forth in the APA for notices of EPA approval of State regulations; nor is same dictated by the Act, such as in the provision cited by respondent:

Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register 28/

The Act merely requires EPA to approve any revision of an implementation plan provided it meets requirements set forth in Section 110(a)(2), 42 U.S.C. § 7410(a)(2), and has been adopted by the State after reasonable notice and public hearings.29/

The Act does not specify how long EPA has to accept or reject a proposed revision. However, one of respondent's

28/ Section 307(b)(1), 42 U.S.C. § 7607(b)(1). See footnote 33, infra.

29/ Section 110(a)(3)(A), 42 U.S.C. § 7410(a)(3)(A).

arguments,^{30/} is that EPA is foreclosed from enforcing the 1979 version of Part 214 because of its failure to approve that regulation revision within four months, according to the four-month rule, citing American Cyanamid Co. v. U.S. EPA, 810 F.2d 493 (5th Cir. 1987). As noted by complainant,^{31/} in the present case, unlike American Cyanamid, the standard at issue did not change through revision of the regulation. That case holds that proceedings to assess a penalty for noncompliance may not be commenced if EPA has failed to approve or disapprove a proposed revision of the state implementation plan within four months of the time such revision was submitted by the State.^{32/} However, the fact that EPA had not approved or disapproved the revision at issue in American Cyanamid as of the date of that court's decision, and that respondent there was in compliance

^{30/} Motion at 2, footnote "***."

^{31/} Cross-motion at 4.

^{32/} The four-month rule has been applied to proposed revisions of state implementation plans also in Duquesne Light Co. v. EPA, 698 F.2d 456, 471-472 (D.C. Cir. 1983); Council of Commuter Organizations v. Gorsuch, 683 F.2d 648, 651-652 n. 2 (2d Cir. 1982); Council of Commuter Organizations v. Thomas, 799 F.2d 879, 888 (2d Cir. 1986); and General Motors Corp. v. EPA, 871 F.2d 495, 498 (5th Cir. 1989). Also applying the four-month rule, two recent appellate court decisions discuss the issue extensively and conclude that enforcement proceedings are not barred by EPA's failure to act within the four-month period. General Motors Corp., 876 F.2d 1060, 1066 (1st Cir. 1989), cert. granted, (Dec. 4, 1989) (No. 89-369); United States v. Alcan Foil Products Division, 889 F.2d 1513, 1520-21 (6th Cir. 1989) (holding that dismissal of an enforcement action is not an appropriate remedy for EPA's failure to act on the proposed revision within four months; the remedy depends upon each party's proof).

with the proposed revision (but not with the "old" version of the regulation at issue) clearly distinguish that case from this matter.

Perhaps the fact that the 1979 version of Part 214 was approved conditionally (in the August 15, 1980 Federal Register) creates some obscurity. However, the conditional approval appears to explain why the 1972 version of Part 214 was listed in the table set forth in the November 12, 1981 Federal Register notice and in 40 C.F.R. § 52.1679, and that no approval date or Federal Register citation was provided for the 1979 version. Conditional approval allows EPA "to approve portions of the State's plans which had only minor deficiencies while specifying a schedule for submission of the needed corrections."^{33/} The determination of the adequacy of the submissions are published in the Federal Register "as either a proposed action or as a final rulemaking depending on the nature of the State's submittal and the need for further public evaluation and comment."^{34/}

^{33/} 44 Fed. Reg. 67182 (November 23, 1979); see also, 44 Fed. Reg. 38583 (July 2, 1979). Conditional approval and its effects are discussed in *Connecticut Fund for Environment v. EPA*, 672 F.2d 998, 1005-1011 (2nd Cir. 1982) cert. denied, 459 U.S. 1035. "[T]he conditional approval [of a Connecticut SIP] in this case is 'final action' reviewable under [Section 307(b) of this Act, 42 U.S.C.] § 7607(b), The conditional approval was promulgated in a formal manner as a final rulemaking," at 1007 n. 18.

^{34/} 44 Fed. Reg. 67182.

Accordingly, the April 1, 1981 Federal Register notice announced the proposed action regarding the 1979 version of Part 214, and invited public comment concerning whether the proposed SIP revision should be approved or disapproved.^{35/} Thereafter, EPA approval was announced in the November 12, 1981 Federal Register.

The purpose for including the 1972 version of Part 214 therein, in the table of EPA-approved New York State regulations (46 Fed. Reg. at 55692 and 40 C.F.R. § 52.1679), is explained in the August 15, 1980 Federal Register as follows:

Part 214, as discussed in today's notice, is a revision to an existing regulation, which is a part of the New York SIP currently in effect. In accordance with EPA's interpretation of the Clean Air Act, as articulated in the April 4, 1979 Federal Register at 44 C.F.R. 20372, the control requirements contained in the revised Part 214, not being inconsistent with the presently approved Part 214, do not supersede or replace the requirements of the existing regulation until the affected sources come into compliance with these new requirements. Instead, the existing requirements of Part 214 will remain as an enforceable provision of the SIP and will co-exist with the new requirements. The present emission control requirements are to be retained in order to ensure that the affected sources do not operate without adequate emission controls while

^{35/} 46 Fed. Reg. at 19834.

they are moving toward compliance with (or possibly challenging) the new requirements of Part 214. Failure of a source to meet an applicable existing regulatory requirement may result in appropriate enforcement action being taken, including the assessment of noncompliance penalties.^{36/}

Respondent is charged with violating the 20 percent opacity standard, which is a regulatory requirement of the co-existing 1972 version and 1979 version of Part 214. It does not deny that the standard was violated. Therefore, respondent is subject to enforcement action, according to the Federal Register instruction cited above, as well as under 40 C.F.R. § 52.23 which provides in pertinent part, as follows:

Failure to comply with any provisions of this part, or with any approved regulatory provision of a state implementation plan . . . shall render the person . . . so failing to comply in violation of a requirement of an applicable implementation plan and subject to enforcement action under section 113 of the Clean Air Act.

Accordingly, and because no issues of material fact have been presented concerning liability, it is concluded that respondent is in violation of 6 NYCRR § 214.3(b), a requirement of the New York State Implementation Plan, which is enforceable by the EPA under Section 113 of the Act, 42 U.S.C. §

^{36/} 45 Fed. Reg. at 54376.

74.13.37/ The penalty is not in issue here. That question is to be resolved under the appropriate regulations, and further proceedings if necessary. (40 C.F.R. Part 66).

IT IS ORDERED that, pursuant to 40 C.F.R. § 22.20, a decision be entered in favor of the complainant on the issue of liability without further proceedings.38/


 Frank W. Vanderheyden
 Administrative Law Judge

Dated: March 14, 1990

37/ Any issues presented by the parties and not addressed herein were deemed not essential to the outcome of this decision.

38/ The Consolidated Rules of Practice provide that an accelerated decision "constitutes an initial decision" of the Presiding Officer. 40 C.F.R. § 22.20(b). Respondent may appeal an initial decision within 20 days after service of same. 40 C.F.R. § 22.30. See also, In the Matter of Louisiana Pacific Corporation, Docket No. CAA-120-V-84-A-2, Appeal No. 87-2, May 19, 1987, at 3-4.

IN THE MATTER OF BETHENERGY (BETHLEHEM STEEL CORPORATION),
Respondent,
Docket No. CAA-120-70204

Certificate of Service

I certify that the foregoing Accelerated Decision, dated 3/14/90, was provided/sent this day in the following manner to the following:

Original Hand Delivered to:

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Marion I. Walzel
Marion I. Walzel
Secretary

Dated: March 14, 1990