

NOTE

2/14/92

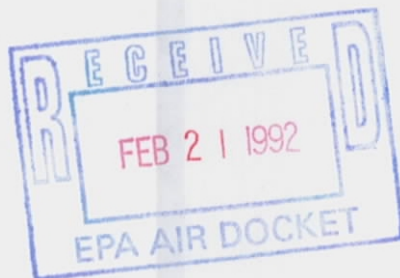
SUBJECT: Change Pages for Stay/Rule Clarification Packages for
the Benzene Waste NESHP (40 CFR Part 61, Subpart FF)

FROM: K.C. Hustvedt, EPA/OAQPS *K.Hustvedt*

TO: Troy Hillier, OMB

Attached are change pages for the final stay and proposed rule clarification packages for Subpart FF. Changes to the stay package include your sentence deletion (on page 20) plus other edits made as a result of EPA review. Changes to the rule clarification package reflect comments made during EPA review and your discussion with Bob Martineau yesterday.

Attachments



issuing waivers of compliance for the amended rule.

Only one comment was received objecting to the proposed stay. The commenter objecting to the proposed stay contends that EPA does not have the authority to issue a stay of effectiveness longer than 90 days in duration. As discussed in the Response to Comments section of this preamble, EPA believes that it does have the authority to issue a stay of effectiveness for Subpart FF. ^{deletion} Therefore, in this notice of final rulemaking the Agency is issuing a stay of effectiveness of Subpart FF. Concurrent with the issuance of this stay, EPA is proposing clarifying amendments in a separate notice of proposed rulemaking in today's FEDERAL REGISTER.

The following paragraphs describe the factors that led EPA to propose a stay of effectiveness for Subpart FF, summarize comments submitted on the December 9, 1991 notice of proposed stay, and present EPA's responses to those comments.

B. Background to the Stay Proposal

Evidence of Confusion About the Current Rule. As discussed in the notice of proposed rulemaking proposing the stay, several types of evidence indicated that affected sources misunderstood the promulgated standards. These indicators included direct conversations and correspondence with the regulated community and EPA, review of the 90-day

March 7, 1992 is unlikely, if not impossible for many facilities. The API petition for reconsideration discussed at length that industry-wide compliance could not be timely. To support this claim, API subsequently conducted two surveys of its member companies to determine the extent of the petroleum refining industry's inability to comply with Subpart FF by March 7, 1992. According to API, these surveys indicated that from 40 to 52 refineries subject to the control requirements of Subpart FF, which represent roughly 50 percent of U.S. refining capacity, would be unable to comply by March 7, 1992. Further, the surveys indicated that, to a large degree, uncertainty about applicability of the rule has had the effect of lengthening the time needed by facilities to comply.

*Substituted
wording*

The EPA's Approach to Resolving Confusion About the Current Rule. To resolve the confusion concerning the current rule, the Agency has elected to stay the current rule while clarifying amendments are developed. The EPA believes that confusion about the rule regarding applicability determinations has led many facilities to assume incorrectly that controls are not required. Some facilities have realized only recently that controls must be installed to comply with the rule. Given the substantial confusion about basic rule requirements, it is the Agency's view that to cite these facilities for noncompliance with Subpart FF after March 7, 1992, would unfairly penalize

Air Act. Rather, Section 307(d)(7)(B) should be read as a limited exception to the notice and comment rulemaking requirements of the Clean Air Act. The Agency has not implemented this exception in proposing a stay of effectiveness for Subpart FF. Consequently, a stay in this case is not necessarily limited to 3 months.

added specific citation

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The commenter's contention that the rules of statutory construction support its position that the proposed stay is illegal is also without merit. While EPA agrees that it is a general principle of statutory construction that specific provisions should govern more general, that rule is inapposite here. As noted above, the language of Section 307(d)(7)(B) is really a grant to the Agency to administratively stay a rule for a limited time and for a specific purpose without notice and comment rulemaking. It is not a constraint on the Agency's general rulemaking authority under Section 301 of the Act. Moreover, EPA's interpretation of the provision is consistent with another fundamental principle of statutory construction -- that two provisions of a statute should be read in harmony wherever possible. Thus, rather than being inconsistent with the principles of statutory construction, EPA's reading is wholly consistent with those principles.

WORD CHANGE

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Comment: One commenter, also a litigant on Subpart FF, claimed that the proposed stay was not pursuant to their signed settlement agreement with the Agency, because the

authority to grant a waiver of compliance for a source for up to 2 years beyond the effective date of a standard "if he finds that such period is necessary for the installation of controls and that steps will be taken to assure that the health of persons will be protected from imminent endangerment."

Quote added

Regulations to implement this authority are promulgated in §§61.10 and 61.11 of the General Provisions of 40 CFR Part 61. Section 61.11(b)(4) states that a waiver of compliance granted by EPA "will specify any additional conditions which the Administrator determines necessary to assure installation of the necessary controls within the waiver period and to assure the health of persons during the waiver period." Nothing in the statutory or regulatory language would preclude the Administrator from taking factors such as contamination to other media into account in deciding whether to grant the waiver. Indeed, the statutory and regulatory language is broad enough to authorize EPA to take steps to protect the "health of persons" during the waiver period.

Sentence added

For sources ^{word deleted} unable to comply with Subpart FF by the effective date of the amended rule, EPA has identified reasonable and necessary measures ^{words deleted (duplicative)} that should be taken to protect public health by sources that receive waivers. Due to the extent of non-compliance projected and to provide information to affected sources for planning purposes, the EPA has articulated in advance the general policy that will

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be used in considering waiver applications for Subpart FF. Guidance is being developed by EPA that will more specifically articulate this policy and instruct sources on information that should be included in a waiver application.

The EPA views its articulation of a waiver policy for

Subpart FF as an appropriate exercise of its authority to specify conditions necessary to protect public health during the period of any waiver granted for this rule. Waiver applications for Subpart FF will be considered by EPA on a case-by-case basis and appropriate conditions included in each waiver issued. *Sentence deleted*

D. MISCELLANEOUS

1. Paperwork Reduction Act

There are no information collection requirements associated with this stay of effectiveness.

2. Executive Order 12291

Under Executive Order 12291, EPA is required to judge whether this regulation is a "major rule" and therefore subject to certain requirements of the Order. The EPA has determined that issuing a stay for Subpart FF will result in none of the adverse economic effects set forth in Section I of the Order as grounds for finding a regulation to be a "major rule." This regulation should not be considered major because its annual effect on the economy is not expected to exceed \$100 million, the regulation does not significantly increase process or production costs, and the regulation does not cause significant adverse effects on domestic competition, employment, investment, productivity, innovation, or competition in foreign markets.

The Agency has not conducted a Regulatory Impact