



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7  
901 NORTH 5TH STREET  
KANSAS CITY, KANSAS 66101

MAR 30 2012

**MEMORANDUM**

**SUBJECT:** Process for Elevating Policy and Legal Issues and Developing Remedies to Allow Affected SIP Actions to Proceed

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**TO:** Air Division Directors, Regions 1-10  
Air Program Managers for SIPs (Regions, AQPD, OTAQ and ARLO)

This memorandum outlines the agreement reached between the Air Quality Policy Division (AQPD) in the Office of Air Quality Policy and Standards (OAQPS) and the Office of Transportation and Air Quality (OTAQ) in the Office of Air and Radiation (OAR), the Air and Radiation Law Office (ARLO) in the Office of General Counsel (OGC) and the ten Regional Air Program Divisions to resolve national policy and/or legal issues affecting a category of State Implementation Plan (SIP) revisions formally pending before the Regional Offices. This memorandum provides a process to resolve such national policy and legal issues within timeframes for the Regions to proceed with rulemaking in order to meet the Clean Air Act's (CAA) deadlines and to help eliminate SIP backlogs.

These principles have been agreed upon by the Regional Air Division Directors, the Division Director of AQPD and ARLO's Associate General Counsel. Hereafter in this memorandum, the term Division Directors collectively refers to all of these officials.

**Purpose and Scope of This Memorandum**

A pending SIP revision is a formally submitted SIP revision that has been determined complete or has become complete by operation of law six months after its submittal date. Under the CAA, the U.S. Environmental Protection Agency has twelve months from the time a SIP revision is determined complete or becomes complete by operation of law to promulgate a final rulemaking action.



Generally, the EPA issues a national rule or guidance to guide the states in preparing SIP revisions which the Regions use when preparing actions on pending SIPs and in responding to any adverse public comments. The SIP Consistency Process, as outlined in the Agency's Delegations Manual and the September 7, 2005, memo, addresses those situations where a Region would be the first to take rulemaking action on a SIP that would change the way a regulation or policy has been applied in the past, change a current EPA interpretation or pursue an action where a policy has not yet been developed.

However, a policy or legal issue may arise with national implications such that it becomes clear that the EPA should strengthen the basis for its decisions before continuing to take additional rulemaking actions on pending SIP revisions affected by the issue even though these actions would be consistent with the existing national guidance in terms of result. These situations may originate where there is a lack of clarity in guidance or where public comment or legal action has revealed vulnerability in the basis for the guidance. Given the statutory timeframe, when such a national issue has been identified for a category of pending SIPs and requires resolution prior to the Regions taking additional rulemaking actions, it is necessary to elevate the issue and to resolve it expeditiously. Resolution will consist of an agreement to proceed with the pending actions using a specific record-strengthening document or regulatory language ("the remedy") in the pending actions.

### **Principles**

1. Consensus of the Division Directors on the applicability of this memorandum and approval of the specific remedy constitutes final resolution under this agreement.
2. The Division Directors are responsible for determining and representing their senior management's views in the consensus process, for ensuring that all views and potential consequences have been adequately considered and for ensuring that the process gets to timely completion.
3. This process does not supersede the EPA Delegations Manual.

### **Process Steps**

1. Bringing an issue to the Division Directors

When a national policy or legal issue causing a situation of the type described above is identified that affects a category (or portion of a category) of pending SIP revisions and requires resolution prior to the Regions taking or completing rulemaking actions, the need for a remedy will be elevated expeditiously to the Division Directors for resolution.

The Division Director of the office identifying such a national policy or legal issue will send an e-mail to the Lead Region Coordinator requesting that a Division Directors' conference call be scheduled as soon as possible, and he or she will copy other Division Directors to notify them that the issue is being raised and that they should await a decision regarding whether the issue will be elevated under this memo before moving forward on actions within this category of SIPs. The requesting office will prepare a briefing document (see attachment 2) within 5 working days which explains the issue/concern, lists the pending SIP(s) or SIP category affected (to the extent known) and provides options for resolution. The Lead Region Coordinator will schedule a Division Directors' conference call with the briefing document attached. On the conference call, the Division Directors will discuss the briefing document. The Division Directors will determine if the matter is properly within the scope of this memorandum.<sup>1</sup>

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<sup>1</sup> The presenting action(s) may instead fall within the scope of the SIP Consistency Process.

If it is, the Division Directors will provide directions for developing the remedy, charge a work group (described in Step 2 below) with developing the remedy specific to the identified issue for use in the rulemaking actions on these SIPs and provide a date for the work group to report back. The affected pending SIPs will be tracked on the SIP dashboard until the issue is resolved and the Regions are advised to proceed with rulemaking actions.

## 2. Responsibilities of the APM-level work group

The affected Regions, AQPD, OTAQ and ARLO will participate in an Air Program Manager (APM)-level work group to develop and implement the remedy as charged by the Division Directors by drafting template rulemaking language or some other appropriate document specific to the identified issue, e.g., template language for rulemaking notices and technical support documents for the pending SIP revisions, or additional documentation to include in the administrative records for the rulemakings on these SIP revisions.

The APM of the Sublead Region for the subject area of the pending SIPs will convene a conference call of all impacted Regional APMs and staff and their management counterparts and staff in AQPD, OTAQ (if involved) and ARLO. If there is no Sublead Region for the subject area, the Lead Region APM will convene the call. On the call, the assignment for the first draft of the rulemaking language or other appropriate remedy will be made to a specific Regional Office (hereafter the originating Region). The assignment will take into consideration available expertise and resources to address the identified issue. The originating Region will then forward the first draft to the APMs of the other Regions, AQPD, OTAQ and ARLO, providing a due date for their comments.

Throughout this process, the Regions will share the draft and solicit comments from their subject matter experts, experienced federal register rule-writers, the Office of Regional Counsel and any other relevant internal EPA stakeholders. The originating Region will develop a second draft to address the comments submitted by the APMs of the other offices on the work group. If necessary, a conference call will be held to review and resolve any concerns of the participating APMs in order to reach consensus. In the event that consensus cannot be reached at the APM level, the Lead Region Coordinator will reconvene a Division Directors' conference call with an updated briefing document in order for the Division Directors to provide additional directions.

Once the Regional, AQPD, OTAQ and ARLO APMs reach consensus on a final draft rulemaking template or other appropriate remedy, the Sublead Region will arrange a call with the Division Directors of the Lead Region, the originating Region (if different from the sublead), AQPD, OTAQ and ARLO to brief the remedy. This Division Directors group may agree with the draft remedy or return the draft to the APMs with additional directions. Once the Division Directors agree, ARLO is given the opportunity to provide any final editorial comments by a given due date (of not less than 5 working days). After ARLO has cleared the appropriate remedy, the Division Director of the Lead Region will distribute the remedy to all, so rulemakings may be completed, and the dashboard updated.

**Note 1:** No category of SIPs automatically becomes subject to this memorandum merely because a Region receives adverse comments on its notice of proposed rulemaking (NPR) for a SIP revision in the category. If the nature of adverse comments received on any NPR raises national policy or legal issues, either the Region that received the comments, AQPD, OTAQ or ARLO may commence the elevation and resolution process as described in this memorandum.

Please also note, however, that paragraph a. of section 7-10 Approval/Disapproval of State Implementation Plans of the Agency's Delegations Manual pertaining to the receipt of adverse comments remains in effect.

**Note 2:** This elevation process should not be confused with nor does it replace the SIP Consistency Process referenced in paragraph b. of section 7-10 Approval/Disapproval of State Implementation Plans of the Agency's Delegations Manual.

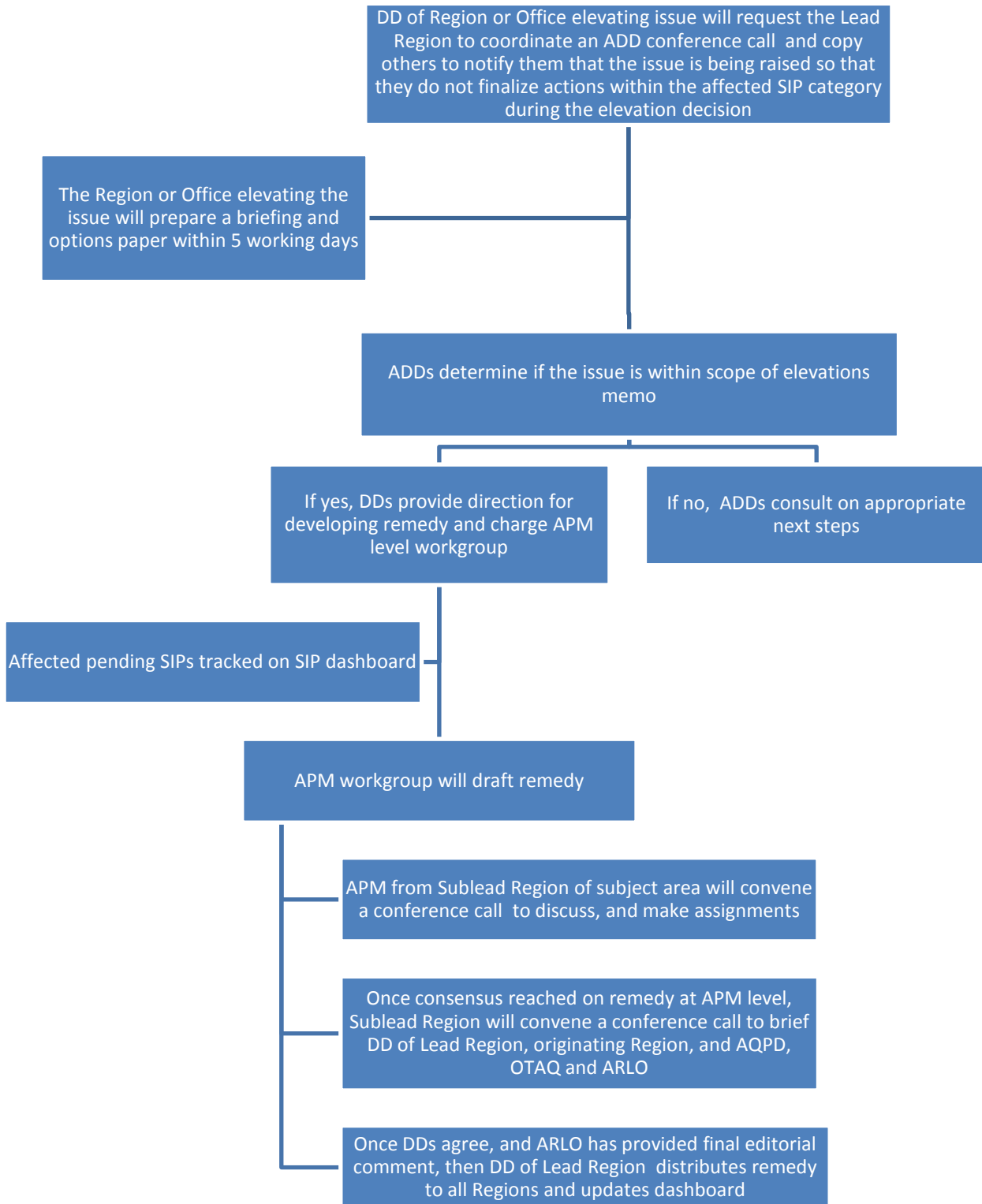
**Under Chapter 7 – the Clean Air Act – Section 7-10 Approval/Disapproval of State Implementation Plans** of the Agency's Delegation Manual, the authority to make decisions and take rulemaking actions on SIP revisions is delegated to the Regional Administrators (RAs) subject to certain limitations which state:

- a. This delegation does not apply to any federal register notice taking final action on a SIP submittal or redesignation request for which adverse comments were received and for which OGC was not provided an opportunity for review.
- b. This delegation does not apply to proposed or final federal register notices that establish an alternative interpretation from any established Agency policies where these interpretations have not been reviewed through the consistency process described in the SIP Improvement Workgroup Final Report dated April 1995.

Attachment 1. Flowchart for Elevating Policy and Legal Issues

Attachment 2. Template for Briefing Document to Elevate National Policy and Legal Issues and Develop Remedies to Allow Affected SIP Actions to Proceed

**Attachment 1 – Flowchart for Elevating Policy and Legal Issues**



## **Attachment 2 – Template for Briefing Document to Elevate National Policy and Legal Issues and Develop Remedies to Allow Affected SIP Actions to Proceed**

**Date:**

**Office Raising the Issue:**

**Point of Contact:**

**Brief Statement of the Issue and Category of SIP Revisions Affected:**

**Background:**

- Explain the category of affected pending SIPs revisions (e.g., Infrastructure SIP element, RACM, ROP plans, 185 fee programs, etc.);
- Provide applicable statutory and/or regulatory citations;
- List the pending SIP(s) currently known to be affected;
- Include any deadlines for rulemaking actions on these SIPs, in addition to the 12-month timeframe for final action on complete SIPs (e.g., deadlines in a Consent Decree or Court order); and
- Include any other necessary and relevant background information.

**Description of the Issue:**

- Explain the issue/concern;
- Identify the possible consequences of taking rulemaking actions prior to the development of the remedy;
- Provide the timeframe for resolution necessary to make rulemaking deadlines; and
- Include any other information.

**Options Remedies to Allow Affected SIP Actions to Proceed**

Provide one or more options to resolve the issue. These options may include:

- Development of template language to be inserted in all rulemaking notices for these pending SIP revisions;
- Development of template language to be inserted in all technical support documents for these pending SIP revisions;
- Development of a document to be included in the administrative records for the rulemaking actions on these pending SIP revisions (e.g., clarifying memorandum to the record regarding statutory or regulatory requirements); or
- Other appropriate remedy.

**Recommendation:** The recommendation of the office that raised the issue.