

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

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OFFICE OF  
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Applicability of the PSD Regulations to a  
Modification at the Little America Refinery

FROM: Peter H. Wyckoff, Attorney  
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THRU: Michael A. James, Associate General Counsel  
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TO: Wendy Weiss, Attorney-Advisor  
General Enforcement Section, Region VIII (8E-EL)

During our telephone conversation on October 25, 1978, we discussed whether EPA should halt construction of a catalytic cracker at a refinery in Little America, Wyoming. You asked, among other questions, whether the PSD regulations which EPA promulgated on June 19, 1978, apply to the cracker. The purpose of this memorandum is to answer that question.

BACKGROUND

The company which controls the refinery began physical, on-site construction of the catalytic cracker in late September or early October 1977. The cracker would emit at least sulfur dioxide, at a rate potentially equal to or greater than 100 tons per year. The company, however, had secured, or was securing, emission reductions at the refinery which would more than offset the emissions of sulfur dioxide and the emissions, if any, of particulate matter from the cracker. As a result, the PSD regulations then in effect did not apply. 40 CFR 52.21(d)(1)(1977). But the preconstruction, new source review (NSR) requirements of the state implementation plan (SIP), especially its requirement for best available control technology (BACT), did apply. Although the company know at least constructively that they did, it nevertheless failed to get the required NSR permit before beginning construction.

In November 1977, EPA proposed comprehensive amendments to the PSD regulations then in existence in order to incorporate into them the new PSD requirements of the Clean Air Act Amendments of 1977. 42 FR 57479 (November 3, 1977). As proposed, the amendments would have imposed BACT on a major modification regardless of whether offsetting reductions at the site would accompany the modification. Id. at 57480, 57485. The amendments, however, would have required no analysis of ambient air impact, if adequate offsets were to accompany the modification. Id. In December 1977, EPA announced by way of clarification that it proposed to apply the new amendments to, among others, any major modification not subject to the old PSD regulations which had not received all permits required under the SIP, including any NSR permit, by March 1, 1978. 42 FR 62020, 62021 (December 8, 1977).

In January 1978, the Wyoming air pollution control authority noticed that the company was constructing the cracker, but had not obtained, nor applied for, a NSR permit. In February, the authority issued a notice of violation. Since then, it has assessed a stiff penalty against the company, but allowed the company to continue construction while it pursues a NSR permit.

During discussions with the company in April and May of this year, Region VIII advised it that the PSD amendments as proposed would apply to the cracker, since the cracker was a major modification and the company had failed to get the required NSR permit by March 1, 1978. Region VIII urged the company to file an application for a PSD permit. On May 17, it did. Recently, Region VIII informed the company that its application was complete, and began the review process.

Meanwhile, in June, EPA promulgated final amendments to the old PSD regulations. Among them is the requirement that a major new facility at an existing site, like the cracker, apply BACT regardless of reductions elsewhere. 43 FR 26406-07 (§52.21(j)(2),(4)). The final regulations, however, require no analysis of ambient impact, if reductions elsewhere at the site would offset emissions of the pollutants as to which the modification would be major. Id. at 26407 (§52.21(k)(1)(iv)). As proposed, the BACT requirement, as well as the other new ones, apply to any major modification

not subject to the old regulations which did not have each SIP permit by March 1, 1978. Id. at 26406 (552.21(i)(1),(3)).

Here, it appears that the new regulations apply to the cracker. It was not subject to the old regulations, and the company has yet to obtain the required NSR permit. Since the new regulations apply, it also appears that the company had to have a PSD permit in order lawfully to continue construction after their promulgation. Id. at 26406 (§52.21(i)(1)) To get a permit, however, the company would have to meet, of the basic non-procedural PSD requirements, only the one for BACT, since the company has secured or will secure sufficiently offsetting emission reductions at the site.

You point out that Section 167 of the Clean Air Act and other enforcement provisions and policies may well require Region VIII to halt construction of the cracker, if the new PSD regulations do indeed apply to it. You add that halting construction would not, as a practical matter, benefit the environment. Wyoming is requiring BACT, and the cracker would cause no net increase in emissions of the relevant pollutants from the refinery.

#### QUESTION PRESENTED

You have identified one circumstance here that distinguishes the catalytic cracker from other major modifications which failed to have each SIP permit by March 1, 1978: physical, on-site construction on the cracker began before EPA proposed the new regulations in November 1977. In view of this distinction, you ask whether EPA intended to apply the new regulations to a modification which was not subject to the old regulations and on which construction had already begun by November 1977. We understand, though, that at bottom your question is: do the new regulations indeed apply to the cracker?

#### ANSWER

We would conclude that the new regulations do apply to the catalytic cracker. In our view, EPA intended that a modification escaping the old regulations could escape the new ones only if, among other things, it had received any permit the SIP required by March 1. We would also conclude that there is no way to read the regulations as waiving the SIP permit requirement for a modification on which construction began before November 1977.

DISCUSSION

Section 52.21(i)(3) of the new PSD regulations spells out the terms of the relevant grandfather exemption. It provides that the new regulations do not apply to any modification which escaped the old ones, if the owner or operator -

(i) obtained all final Federal, State and local preconstruction permits necessary under the applicable State implementation plan before March 1, 1978;

(ii) Commenced construction before March 19, 1979; and

(iii) Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time.

43 FR 26406 (emphasis added). This provision plainly demands that a modification which escaped the old regulations must have the required SIP permits by March 1 in order to escape the new ones, too. If EPA had had an intention to grandfather facilities on which construction began before November 1977, it would at least have left some ambiguity. But there is none. Hence, we would conclude that EPA had no such intention.

Aside from the plain language of section 52.21(i)(3), there are at least two other indications that EPA intended that receipt of the required SIP permits by March 1 would be an essential condition of the exemption.

First, in clarifying the proposed March 1 permit deadline as it applied to sources which were not subject to the old regulations, EPA stated:

EPA's intent is that any source not covered by EPA's current PSD regulation would be subject to the new PSD rules beginning on March 1, 1978, unless such source both (a) obtains before March 1, 1978, all final preconstruction permits which are necessary under the applicable [SIP], and (b) commences construction before December 1, 1978.

42 FR 62020 (December 8, 1977) (emphasis added). As one can see, EPA, in proposing the deadline, regarded success in

meeting it as essential to obtaining the exemption. It must, consequently, have regarded pre-proposal construction as immaterial.

Second, EPA ultimately lifted the proposed March 1 deadline only as to any source whose application for a PSD permit EPA would have evaluated by March 1, but for an extension of the public comment period. 43 FR 26406 (§52.21(i)(4)). EPA did consider requests for a waiver of the deadline as to other circumstances, but denied them. For example, certain companies who proposed construction not covered by the old PSD regulations had encountered insurmountable processing delays in obtaining the required SIP permits from the air pollution control authority in Kern County, California. They, and the particular governmental authority, asked for relief. EPA refused to grant it. Hence, it is apparent that EPA intended to apply the March 1 deadline except in just that one unusual set of circumstances where additional public comment precluded permit issuance before March 1.

Other observations support the conclusion that EPA meant what it said in section 52.21(i)(3). First, there is no indication to the contrary in the regulations, in their preamble, or anywhere else. Next, there is no equitable reason to substitute pre-proposal construction for the conditions of section 52.21(i)(3). Surely, it was not unfair in November 1977 to impose on someone who had begun construction before then without first getting the pre-construction permits required by the SIP the requirement that the person get those permits by March 1. The person should have obtained them in advance anyway, and in any event was given four months to get them. Finally, hinging the exemption on receipt of all SIP permits by a certain time is consistent with the approach for grandfathering sources that Congress adopted in the PSD provisions of the Clean Air Act. For example, Section 168(b) of the Act provides that the old regulations, and not any of the new PSD requirements, apply to sources on which construction commenced before August 7, 1977. Under section 169(2), construction does not "commence" unless and until all SIP permits have been obtained.

We express here no view as to whether section 167 or any other enforcement provision would indeed require EPA to halt construction on the catalytic cracker forthwith.

We have presented this memorandum to DSSE and OAQPS. They concur in it.

If you would like to discuss this matter any further, please let me know.