

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

MEMORANDUM

DATE: July 1, 1978

SUBJECT: "Commence Construction" under PSD

FROM: Director,
Division of Stationary Source Enforcement

TO: David Kee, Chief Air Enforcement Branch
Region V

This is in response to your memo of April 7, 1978, requesting guidance on how to apply the definition of "commence construction" under the new PSD regulations.

One of the requirements a major new source or major modification must satisfy in order to have commenced construction is that the owner or operator must have obtained and must continue to hold all necessary preconstruction approvals required under the applicable SIP. If all necessary preconstruction approvals have not been obtained and maintained, construction has not commenced. Your memo requests guidance on the application of this requirement in cases where a State grants limited permits, grants permits in stages, or allows site work without a permit. Rather than providing you with general examples to follow, we would prefer to address individual situations involving these State permitting procedures on a case by case basis. In this manner, consistency can be maintained in applying the regulations to unique and complex situations which might not fit a general example. If you are aware of specific cases where unusual State permitting procedures affect applicability of PSD, please feel free to refer them to us.

In addition to obtaining all required permits, a source must also satisfy one of two additional requirements in order to commence construction. A source must either 1) begin a continuous program of physical on-site construction or 2) enter into a contractual obligation to undertake a program of on-site construction to be completed within a reasonable time. Three specific questions regarding these requirements were raised in your memo and are addressed below.

1) What constitutes physical on-site construction?

We have interpreted physical on-site construction to refer to placement, assembly, or installation of materials, equipment, or facilities which will make up part of the ultimate structure of the source. In order to qualify, these activities must take place on-site or must be site specific. Placement of footings, pilings and other materials needed to support the ultimate structures clearly constitutes on-site construction. As stated in the preamble to the draft regulations, "it will not suffice merely to have begun erection of auxiliary buildings or construction sheds unless there is clear evidence (through contracts or otherwise) that construction of the entire facility will definitely go forward in a continuous manner". Activities such as site clearing and excavation work will generally not satisfy the commence construction requirements.

2) What constitutes a contractual obligation to undertake a program of construction?

In order to satisfy the commence construction requirements, a contractual obligation must be a site specific commitment. The types of activities which will be considered site specific for purposes of a contract are identified in question #1 above. Contracts for work on footings, pilings, and other site specific materials and equipment will clearly satisfy the requirement while contracts for site clearing and excavation will not. The legislative history clearly indicates that contracts for non site specific equipment, such as boilers, will typically not suffice, regardless of any penalty clauses contained in the contracts.

A Contractual obligation for purposes of commencing construction must also be one which cannot be cancelled or modified without substantial loss. The PSD regulations provide guidance on determining whether a loss should be deemed "substantial". A loss which would exceed 10% of the total project cost will clearly be considered substantial. Whether a loss of less than or equal to 10% of the total project cost will be considered substantial will be determined on a case by case basis.

3) What constitutes a reasonable time?

In order to assure that construction proceeds in a continuous manner and is completed within a reasonable time, the

regulations require that a break in construction of greater than 18 months or failure to commence construction within 18 months of PSD permit issuance will generally invalidate a source's PSD permit. This 18 month period may be extended by the Administrator upon a satisfactory showing that an extension is justified.

Your memo raises a question as to what test should be used to decide, for enforcement purposes, if construction has commenced when a source has proceeded on a project without a permit. The PSD regulations state that no major stationary source or major modification shall be constructed until the preconstruction approval requirements are met. If a source subject to PSD review has begun on-site construction without a PSD permit, the source is in violation of Section 52.21.

Additionally, your memo requests guidance on Sections 113(a) (5), 113(b) (5), and 167. My staff is currently preparing a guidance document which addresses implementation of these sections and which will be forwarded to you upon completion.

If you require any further assistance, please contact Libby Scopino (755-2564) of my staff.

Edward E. Reich

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