

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Office of Air Quality Planning and Standards
Research Triangle Park, North Carolina 27711

DATE: FEB 9 1981

SUBJECT: Petitions for Review of PSD Regulations

FROM: Michael Trutna, Chief
New Source Review Section (MD-15)

TO: New Source Review Contacts
Regions I-X

The Agency has received several petitions for reconsideration of the PSD regulations promulgated on August 7, 1980. Attached are initial responses to three of the parties: the American Petroleum Institute, the Utility Air Regulatory Group, and the American Mining Congress.

These documents were prepared by our Office of General Counsel, after consultation with OAQPS. The policy approaches chosen were carefully considered for their potential to limit the scope of litigation. Although litigation may result, at the present time it appears that it will not be nearly as extensive as that in Alabama Power. Review of these memoranda should provide guidance on several issues arising from the regulations.

Attachments

cc: W. Barber
P. Wyckoff (w/o attachments)
D. Tyler

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

THE ADMINISTRATOR

January 19, 1981

David F. Peters, Esquire
Hunton & Williams
707 East Main Street
P.O. Box 1535
Richmond, Virginia 23212

Dear Mr. Peters:

In your letter of October 6, 1980, the American Petroleum Institute (API) petitioned EPA to reconsider those portions of the recent amendments to the Part 52 PSD regulations which established that the fugitive emissions of certain sources and modifications are to be taken into account in determining whether the permit requirements of the PSD regulations apply to them. The amendments appear at 45 FR 52676 (August 7, 1980).

EPA hereby denies that petition on the ground that API made no argument against the new approach to fugitive emissions which EPA had not already heard and considered during the rulemaking. EPA intends to put a notice of this denial in the Federal Register in the near future.

In the October 6 letter, API also asked for clarification of two of the new PSD provisions, specifically, Sections 52.21 (b) (3) (iv) and 52.21 (b) (23) (ii). EPA has just responded to a request from the Utility Air Regulatory Group for clarification of the same two provisions, among others. A copy of the response is attached. Those portions of the response which appear under the headings "Question 2" and "Question 4" answer API's questions.

Thank you for seeking clarification of the new amendments in advance of litigation. If you have any questions about this letter, please contact Lydia Wegman (755-0788) or Peter Wyckoff (755-0766) in the Office of General Counsel.

Sincerely yours,

Douglas M. Costle

cc: All counsel of record in litigation on 45 FR 52676
(August 7, 1980)
Patrick Cafferty, Esquire, Department of Justice
Elizabeth Stein, Esquire, Department of Justice

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

THE ADMINISTRATOR

January 19, 1981

Andrea S. Bear, Esquire
Hunton & Williams
1919 Pennsylvania Avenue, N.W.
P.O. Box 19230
Washington, DC 20036

Dear Ms. Bear:

This is EPA's response to your letter of October 31, 1980, in which you asked for clarification of some of the recent amendments to 40 CFR 52.21 (1980), the PSD regulations governing new source review in most states. The amendments appear at 45 FR 52676 (August 7, 1980).

QUESTION 1

In your view, the new version of 40 CFR 52.21 provides that any increase in actual emissions which occurs (1) as a result of a fuel switch, (2) between August 7, 1977, and the applicable baseline date and (3) at any major stationary source would contribute exclusively to the baseline concentration, if the switch is not a "major modification" by virtue of Section 52.21 (b) (2) (iii). 1/ Your first question is whether the agency agrees with that interpretation.

EPA does agree with it, on the assumption that each of the major stationary sources you had in mind is a source whose construction commenced on or before January 6, 1975. Any increase in actual emissions that occurs on or before the baseline date at such a source contributes exclusively to the baseline concentration, unless it results from "construction" that commences after January 6, 1975. See 40 CFR 52.21 (b) (13), 45 FR 52737; 45 FR 52678 (3d column), 52714 (2d column), 52717 (3d column), 52719-20. Here, the fuel switch would not be "construction." The new regulations define "construction" as "any physical change or change in the method of operation . . . which would

1/ Section 52.21 (b) (2) (iii), which appears in the new definition of "major modification" at 45 FR 52735-36, excludes certain changes at a source from the phrase "physical change or change in the method of operation" and includes others.

result in a change in actual emissions." 40 CFR 52.21 (b) (8), 45 Fr 52736. EPA intended Section 52.21 (b) (2) (iii) to govern the boundaries of the phrase "physical change or change in the method of operation" for the purposes of the definition of "construction," as well as the definition of "major modification," and you posited that Section 52.21 (b) (2) (iii) would exclude the fuel switch from that phrase.

EPA would not agree entirely with your interpretation, however, if any of the major stationary sources you had in mind is a source whose construction commenced after January 6, 1975. Any increase in actual emissions at such a source, including any increase before the baseline date, affects increment consumption. See 40 CFR 52.21 (b) (13) (ii) (a), 45 FR 52737. 2/

QUESTION 2

The new version of 40 CFR 52.21 establishes that, in determining whether a proposed change at a source would amount to a "major modification," one may take into account any contemporaneous and otherwise creditable decreases in emissions at the source. New Section 52.21 (b) (3) (iv), 45 FR 72736, further provides in part that a decrease which occurs before the applicable baseline date is creditable only if it affects increment consumption.

Against that background, you focus in your second question on reductions in capacity utilization which do not result from demolition, such as an operational shutdown or derating of an electric utility steam generating unit at a power plant. You ask: under what conditions would a decrease in actual emissions that occurs as a result of such a reduction and between January 6, 1975, and the applicable baseline date affect increment consumption?

Such a decrease would affect increment consumption if the unit at which it occurs is a major stationary source or major modification whose construction commenced after January 6, 1975. Any decrease in actual emissions which occurs at such a unit, as well as any increase, counts towards increment consumption. See 40 CFR 52.21 (b) (13) (ii) (a), 45 FR 52737.

2/ In footnote 6 of your letter, you state that EPA at 45 FR 52714 (1st column) "indicates that only post-baseline date voluntary fuel conversion emission increases are excluded from baseline concentration." In that passage of the preamble, however, EPA focused solely on such post- baseline increases; it said nothing explicitly or implicitly about pre-baseline increases.

Even if such a decrease in emissions occurs at a major stationary source whose construction commenced on or before January 6, 1975, the decrease would still affect increment consumption, if the "short-of- demolition" reduction in capacity utilization from which it results amounts itself to "construction." Any decrease in actual emissions which results from "construction" that commences after January 6, 1975, and on or before the applicable baseline date at any major stationary source affects increment consumption. See 40 CFR 52.21 (b) (13) (ii) (a), 45 FR 52737; 45 FR 52719-20.

In EPA's view, the regulations offer only two conditions under which a "short - of - demolition" reduction in capacity utilization would amount to "construction." One condition is that it became federally enforceable under a construction permit condition established under a permit program contained in the state implementation plan (SIP). Section 52.21 (b) (2) (iii) provides for the purposes of the definition of "construction," as well as the definition of "major modification," that the phrase "physical change or change in the method of operation" in both of those definitions includes any increase in hours of operation or production rate that would require a relaxation of "any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 or 40 CFR 51.24." 40 CFR 52.21 (b) (2) (iii) (f), 45 FR 52736. It follows that the phrase also includes the inverse of such an increase, namely, any decrease in hours of operation or production rate which became federally enforceable under any such permit condition. See also 45 FR 52720 (1st and 2d columns).

The other and alternative condition is permanency. Under a standing interpretation of 40 CFR 52.21, a reduction in capacity utilization would constitute a "physical change or change in the method of operation" for PSD purposes if it was permanent. ^{3/} See Memorandum, September 6, 1978, Reich to Dvorkin (copy attached). Whether a reduction was permanent depends upon the intention of the owner or operator at the time of the reduction as determined from all of the facts and circumstances. In particular, a reduction was permanent if the owner or operator intended to abandon the productive capacity in question, that is, to withdraw it forever from use in the production of income, including sale, exchange, or other disposition. EPA would presume that a reduction was permanent

^{3/} A corollary of this proposition is that any return to the level of operation that prevailed just before a permanent reduction would be itself a "physical change or change in the method of operation," and therefore a candidate for PSD review.

upon any strong indication of such an intention, for example: establishment of any federally enforceable limitation that would prohibit any return to the previous level of operation; passage of two years or more without any return to that level; or removal of the productive capacity from the emissions inventory of the state.

QUESTION 3

The new definition of "major modification" excludes from that term any voluntary fuel switch that meets certain conditions. One of those conditions is that the source was "capable of accommodating" the fuel before January 6, 1975. See 40 CFR 52.21 (b) (2) (iii) (e) (1), 45 FR 52735-36.

In your letter, you asked EPA to issue guidance on the meaning of the term "capable of accommodating." You indicated that a memorandum which drew the distinction between a "capable" and an "incapable" source by using case examples would suffice. In addition, you offered to provide information that would help draw the distinction.

EPA is willing to provide the guidance you seek, but only if you first provide the specific fact patterns that would form the foundation for the memorandum you have in mind. To deal at the outset with cases that are both concrete and important to you should prove more efficient than for the agency to hypothesize a range of possibilities.

If you are willing to provide those cases, please send them to Michael Trutna, Chief, New Source Review Section, OAQPS, Mutual Building, Durham, North Carolina (919-541-5292). He will have the lead for developing the guidance. In your communications to him, please point out any fact pattern which reflects a case on which the agency has already spoken and indicate which EPA office made the determination.

QUESTION 4

The first part of the definition of the term "significant" in the new regulations contains a list of pollutants and specifies a de minimis emissions level for each of them. See 40 CFR 52.21 (b) (23) (i), 45 FR 52737. The second part then provides that for any pollutant "subject to regulation under the Act that [the first part] does not list," the term means any emissions rate at all. Id. Section 52.21 (b) (23) (ii).

You ask that the agency delete the second part of the definition. EPA agrees to do so, when it promulgates in the near future technical and conforms amendments to the regulations.

In reassessing the second part of the definition, EPA has concluded that it is superfluous. On the one hand, the first part already lists each of the pollutants that were regulated under the Act when EPA promulgated the part. On the other hand, EPA plans to establish a de minimis threshold for any currently unregulated pollutant, when it regulates that pollutant.

QUESTION 5

You interpret the new regulations as providing that a "minor" addition to a "minor" source would escape PSD review and, if it occurred before the applicable baseline date, would contribute to the baseline concentration. Your fifth question is whether the agency intended the regulations to so provide. EPA hereby confirms that it did.

QUESTION 6

Section 52.21 (i) (7) of the new regulations, 45 FR 52739, exempts any major modification which meets certain conditions from the air quality assessments relating to Class II areas. In your last question, you ask EPA to confirm that it did not intend to limit a source to just one such exemption. EPA hereby confirms that it did not.

Thank you for seeking clarification of new regulations in advance of litigation. We hope that the answers here are responsive to your questions. Because of the importance of those answers, we plan to incorporate them into the preamble to technical and conforming amendments that we are preparing. If you have any questions about this response, please contact Lydia Wegman (755-0788) or Peter Wyckoff (755-0766) in the Office of General Counsel.

Sincerely yours,

Douglas M. Costle

cc: All counsel of record in litigation on 45 FR 52676
(August 7, 1980)
Patrick Cafferty, Esquire, Department of Justice
Elizabeth Stein, Esquire, Department of Justice

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

THE ADMINISTRATOR

January 19, 1981

Robert T. Connery, Esquire
Holland & Hart
P. O. Box 8749
Denver, Colorado 80201

Dear Mr. Connery:

Under a letter dated December 1, 1980, you submitted on behalf of the American Mining Congress and several other mining companies (collectively, "AMC") a petition for reconsideration of the treatment of fugitive emissions in the August 1980 PSD regulations. ^{1/} EPA hereby grants Part I of the petition and will respond to the balance as soon as possible.

On their face, the new Part 52 PSD regulations ^{2/} require that, in calculating whether any source is or would be "major", one must take its quantifiable fugitive emissions into account, as well as its non-fugitive emissions. See 40 CFR 52.21 (b) (1) (i), 45 FR 52735; id. 52.21 (b) (4), 45 FR 52736. They add, with respect to a modification, that one must take into account not only its quantifiable fugitive emissions, but also any increases and decreases in fugitive emissions at the source that are quantifiable, contemporaneous with the modification and otherwise creditable. See 40 CFR 52.21 (b) (2) (i), 45 FR 52735; id. 52.21 (b) (3), 45 FR 52736; and id. 52.21 (b) (2), 45 FR 52737. The regulations, however, then exempt from the PSD permit requirements any source or modification which would be major only if fugitive emissions were taken into account and which would fall outside the categories on a specific list. See 40 CFR 52.21 (i) (4) (vii), 45 FR 52739.

In Part I of the petition, AMC identified three ways in which those rules, if taken at face value, would affect AMC. First, any mining operation in a particular class of mining

^{1/} 40 CFR 51.24, 45 FR 52729-35 (August 7, 1980); 40 CFR 52.21, 45 FR 52735-41.

^{2/} In the interest of brevity, we focus here only on the relevant Part 52 rules. The relevant Part 51 rules parallel them.

operations, 3/ would consume increment even before the baseline date, if construction on it commenced after January 6, 1975. See 40 CFR 52.21 (b) (13) (ii) (a), 45 FR 52737. Second, if a company filed a complete application for a PSD permit for a mining operation in that class under the 1978 PSD regulations 4/ and the application was the first one for the area in question, the filing would trigger the baseline date, even though the operation would not have to have a PSD permit under the 1980 PSD regulations. See 40 CFR 52.21 (b) (14) (i), 45 FR 52737. Finally, if an addition to a mining operation in the particular class would have significant non-fugitive emissions, it could have to have a PSD permit, because of the "major" status of the operation. See 40 CFR 52.21 (b) (2), 45 FR 52735.

AMC pointed out that the preamble to the 1980 regulations indicates strongly that the agency did not intend the regulations to have those consequences. See, e.g., 45 FR 52680, 52689 and 52690-93. AMC therefore asked EPA to clarify whether it intended those consequences and, if the agency did not, to amend the regulations to conform them to its original intention.

EPA hereby confirms that it intended to establish that any source which would be "major" only if fugitive emissions were taken into account is not to be considered "major" for any PSD purpose, unless the source belongs to one of the categories on the list which now appears in Section 52.21 (I) (4) (vii). Similarly, EPA intended to establish that any modification that would be "major" only if fugitive emissions were taken into account is not to be considered "major" for any PSD purpose, unless the source at which the modification would occur belongs to one of the categories on that list. EPA will amend the regulations as soon as possible to conform them to that intention. 4/ The agency, however, does not plan to use the language AMC suggested on page 9 of the petition.

In granting Part I of the petition, EPA does not intend to express any view on the merits of AMC's statements about the relevant portions of the opinion in Alabama Power or about the nature and significance of particulate matter from mining operations.

3/ I.e., those which (1) would emit particulate matter in "major" amounts, (2) would emit it through no stack or other functionally equivalent opening and (3) would emit no other pollutant in a significant amount.

4/ 40 CFR 52.21 (1980).

5/ EPA also agrees to promulgate parallel amendments to the Part 51 regulations.

Thank you for seeking clarification of the new regulations in advance of litigation. If you have any questions about this response, please contact Peter Wyckoff (202/755-0766) in the Office of General Counsel.

Sincerely yours,

Douglas M. Costle

cc: All counsel of record in litigation on 45 FR 52676 (August 7, 1980).
Patrick Cafferty, Esq., Dept. of Justice
Elizabeth Stein, Esq., Dept. of Justice