

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Washington, D.C. 20460

September 20, 1992

NOTE TO: John S. Seitz, Director
Office of Air Quality Planning and Standards

FROM: Mamie Miller, Branch Chief
Compliance Monitoring Branch

THRU: John B. Rasnic, Acting Director
Stationary Source Compliance Division

SUBJECT: BACT/LAER Cutoff Date Policy and Recent PSD Appeal Decision.

During the last year, the State of Michigan has twice requested EPA to review our policy on the BACT/LAER cutoff date for a new source permit. Our policy, as stated in a February 24, 1989 memorandum from you to David Kee, is that the BACT/LAER determination is not set until the final permit is issued. We affirmed this policy in our initial response to Michigan (December 22, 1989) and drafted a similar response for Michigan's second request for a review. While reviewing this draft response, Mike Shapiro raised some concerns that our policy may be too inflexible. Ron Shafer and Scott Throwe provided a briefing in May for Lydia Wegman to discuss SSCD's reasons for maintaining the present policy.

Since that time, it has come to our attention that three PSD Appeal Decisions (Pennsauken County Resource Recovery Facility, PSD Appeal No. 88-8 (November 10, 1988), St. Lawrence County Solid Waste Disposal Authority, PSD Appeal No. 90-9 (July 20, 1990) and Columbia Gulf Transmission Company, PSD Appeal No. 88-11 (July 3, 1990)) have been made by the Administrator which contain language that is contradictory to our policy. Copies of these decisions are attached. The contradictory language is stated in the Pennsauken decision and referenced in the two recent Appeal decisions. As explained in the Pennsauken language, "Absent unusual delay between the close of public comment period and the date of permit issuance, or the presence of other extraordinary circumstances, the close of public comment period can be used as the reference by which the adequacy of the administrative record is judged."

The Pennsauken decision, which preceded our February 1989 policy, states the close of public comment period, not the issuance of the final permit, as the time at which the BACT/LAER determination should be made. However, the recent St. Lawrence County decision contains the following language which supports our policy, "In general, BACT determinations should be made contemporaneously with the issuance of the final permit determination." In the Columbia Gulf decision it is stated that "the need to base the permit determination on current information is fundamental to any determination of 'best available control technology,' for old technologies are constantly being replaced by newer more advanced ones; and in the absence of overriding considerations -- for example, those bearing on the orderly administration of the permit program -- information on the latest control technology should ordinarily receive consideration."

While the Pennsauken decision does establish a cutoff date earlier in the permit process, it also includes the caveat "absent unusual delays between the close of public comment period and the date of permit issuance." It is the "unusual" delays or possibility of delays between close of public comment and issuance of the final permit which led us to select the latter as the cutoff date.

One case where we applied our BACT/LAER cutoff policy involved the company Miller Metal in Region V. A LAER determination was made in Miller Metal's draft permit which the company agreed to achieve. It was determined that the company was out of compliance at another location in the state. A final permit was not issued because the nonattainment new source review regulations require statewide compliance. While Miller Metal was addressing their compliance problem, a more stringent LAER determination was made for surface coating operations. Had Miller Metal's final LAER determination been made prior to the issuance of the permit, the company would have been able to maintain that LAER determination until they came into statewide compliance and thus, circumvent the intent of applying the lowest achievable emission rate. Miller Metal has since decided to take federally enforceable restrictions and remain a minor source. However, had the company proceeded as a major source they would have had to apply the more stringent LAER determination.

In light of the PSD Appeals and the above mentioned example regarding Miller Metal, it is our recommendation that we maintain our present BACT/LAER cutoff policy. While the Pennsauken decision offers another option, it also recognizes the possibility of delays in the permit process which must be considered. In addition, the St. Lawrence and Columbia Gulf decisions contain language which clearly support our cutoff policy. I currently have the draft response from the Assistant Administrator to Delbert Rector of the Michigan

DNR regarding the second inquiry. If you wish us to proceed with issuing the response or have any questions, please contact me at 475-7034.