June 29, 1995

Reply To
Attn Of: AT-082

John J. Ruscigno, P.E., Manager
Program Operations Section
Air Quality Division
Oregon Department of Environmental
Quality
811 SW Sixth Avenue
Portland, Oregon 97204-1390

Dear Mr. Ruscigno:

EPA staff have reviewed the June 16, 1995 letter from Pacific Gas Transmission Company (PGT) to John Kinney which you forwarded to David Bray on June 21, 1995. Based on that letter and discussions with your staff, EPA understands that PGT wants the Oregon Department of Environmental Quality (DEQ) to make a finding that there have been no physical changes or changes in the method of operation at the PGT facility during the past 24 years that could have triggered the requirement for a permit to construct, except for one modification to Station 11 which triggered PSD review. PGT further requests that this finding be embodied in its title V permit by including a provision that shields PGT against any subsequent contrary determination.

PGT bases its request for a determination that new source review has not applied to past changes at the facility on the fact that DEQ is proposing to issue a permit to PGT without requirements based on new source review (except for the PSD permit for Station 11). PGT therefore asserts that DEQ "necessarily" determined that the new source review is not applicable to the source and that the source is entitled to the permit shield provided in OAR 340-28-2190. EPA strongly disagrees with this analysis. Nothing in Part 70 provides or implies that a source may be shielded from requirements that are not addressed in a title V permit. To the contrary, 40 C.F.R. 70.6(f), and the corresponding provision in Oregon's rule, provide that compliance with the conditions of the permit shall be deemed compliance with any applicable requirement as of the date of permit issuance **only if**:

> "(i) Such applicable requirements are included and are specifically identified in the permit; or

(ii) The permitting authority, in acting on the permit application or revision, determines in writing that other applicable requirements specifically identified are not applicable to the source, and the permit includes the determination or a concise summary thereof."

In other words, before the permit shield can extend to requirements that are not imposed on the source in the permit, the permitting authority must specifically determine, based on information provided by the source in the permit application, that such other requirements do not apply to the source.

The amount of information a source must provide for a permitting authority to make a particular determination of nonapplicability for purposes of the permit shield will vary depending on the complexity of the determination. A source seeking a determination of nonapplicability of new source review requirements to a particular change would need to provide the permitting authority with detailed information regarding that change. That change would then have to be evaluated under the new source review rules that were in effect at the time of the change. As you know, EPA has recently stated that, in preparing its application and compliance certification, a source is required to review current major and minor source review permits and other permits containing federal requirements, State implementation plans and other documents and other federal requirements in order to determine the applicable requirements for emission units, but is not required, as a matter of federal law, to revisit previous applicability determinations. See June 20, 1995, Letter from Mary Nichols, Assistant Administrator for Air and Radiation, to Representative John D. Dingell. As a corollary, EPA believes that a compliance certification would not alone provide a sufficient basis for a finding that past changes at the source were not subject to new source review.

A context-specific review of the materials enumerated above is necessary for new source review because applicability depends on conditions which existed at the time of the change, rather than the current conditions at the source. Only by following this process would the granting of a shield for non-applicability of new source review to a specific change be factually supportable and therefore legally defensible against a judicial challenge or EPA objection.

With respect to PGT's specific request for a determination that it has made no changes that have been subject to new source review (except for the one major modification to Station 11), EPA does not believe there is sufficient information in the permit application to support such a determination. The application includes a list of all applicable requirements and PGT has marked on this list that new source review is not applicable to its facility. We were unable to find in the permit application,

however, any information with respect to any specific changes at the facility. Although a responsible official for PGT has certified the application, and therefore, the statement that new source review did not apply to past changes at the PGT facility, EPA does not believe, as stated above, that this is sufficient information to support a nonapplicability determination for purposes of the permit shield.

EPA shares the Department's concerns about the significant resources that may be required for the Department to make nonapplicability determinations in the new source review context for purposes of the permit shield, especially with respect to minor new source review. Any additional expenditures relating to such determinations must, of course, be considered title V related activities in any future evaluation of the adequacy of the State's title V fees. As you know, although Part 70 authorizes States to provide sources a shield from requirements specifically found to be inapplicable to a source, Part 70 does not require States to provide such a shield. To control the costs that may be associated with new source review applicability determinations for purposes of the permit shield, Oregon could decide to limit the shield in the new source review context.

I hope that this letter clearly explains EPA's position on this issue. If you have any further questions, or would like to discuss our position further, please give me a call or contact David Bray, Permits Program Manager, at (206) 553-4253.

Sincerely,

Ann Pontius, Chief
Air Compliance and Permitting Section