



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
RESEARCH TRIANGLE PARK, NC 27711

DEC 13 1995

OFFICE OF  
AIR QUALITY PLANNING  
AND STANDARDS

Mr. Charles W. Williams  
Commissioner, Minnesota Pollution Control Agency  
520 Lafayette Road  
St. Paul, Minnesota 55155-4194

Dear Mr. Williams:

This is in response to your September 27, 1995 letter to Carol Browner requesting clarification from the United States Environmental Protection Agency (EPA) concerning the scope of construction-related activities that may occur prior to issuance of a Prevention of Significant Deterioration (PSD) permit under the Federal regulations at 40 CFR 52.21, which are also incorporated into Minnesota's rules. Your letter requests the EPA's interpretation on four related issues that are addressed below. The EPA's policy on most of the issue; is explained in the attached memorandum of March 28, 1986 entitled "Construction Activities Prior to Issuance of a PSD Permit with Respect to Begin Actual Construction" from Edward E. Reich, Director, EPA's Stationary Source Compliance Division (March 1986 Memo).

First, Minnesota interprets the Federal PSD regulation to allow an applicant to enter into binding agreements or contractual obligations prior to receiving a PSD permit. The PSD regulations at 40 CFR 52.21(i)(1) require an applicable source to obtain a PSD permit before it may "begin actual construction." The PSD rules at 40 CFR 52.21(b)(11) define "begin actual construction" as the " -initiation of physical on-site construction activities on an emissions unit which are of a permanent nature.... With respect to a change in the method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change." Since entering into binding agreements or contractual obligations is not prohibited under this definition, the EPA agrees with the Minnesota view that these activities are allowed under the Federal PSD rules prior to obtaining a PSD permit. We also agree that the owner or operator who chooses to undertake

these activities prior to obtaining the required PSD permit does so at its-own risk that a permit may not be issued or may not contain the terms the applicant desires.

Second, Minnesota interprets the Federal PSD rules to not prohibit site clearing activities prior to receiving a PSD permit, but that there is a prohibition on beginning construction activities that are of a permanent nature. The EPA agrees with Minnesota that site clearing and grading are not prohibited by this definition. Allowed preconstruction activities would also include ordering materials and temporary storage on site (see March 1986 memorandum).

Prohibited (permanent and/or preparatory) preconstruction activities under 40 CFR 52.21(b)(i)(1) and (b)(11) would include any construction that is costly, significantly alters the site, and/or permanent in nature. This would include, but is not limited to: (1) excavating, blasting, removing rock and soil, and backfilling, and (2) installing footings, foundations, permanent storage structures, pipe, and retaining walls. See May 13, 1993 memorandum from John Rasnic to Region III, "Construction Activities at Georgia Pacific"(GP memo); see also November 4, 1993 memorandum from Dave Howekamp to Region IX, "Preconstruction Review and Construction Activities Prior to Permit Issuance."

As explained in the GP memo (and those preceding), absent a prohibition on any costly, significant or permanent preconstruction, affected sources could defeat the preconstruction requirement or its enforcement by making a costly, substantial, and/or permanent investment and later argue that retrofitting of PSD requirements or a denial of the permit would unreasonably interfere with their investment.

Further, it is EPA's longstanding policy that section 52.21(i) reasonably prohibits any preconstruction "intended to accommodate" an "emissions unit" or which is an "integral part of the source or modification." This is supported by the definition of "emissions unit" at 52.21(b)(7), which "means any part of a stationary source which emits or would have the potential to emit any pollutant . . ." (see March 1986 memo). The meaning of "intended to accommodate" was also discussed in the GP memo which states: "[i]f the construction activity is an integral part of the PSD source or modification, the source must obtain a PSD permit prior to construction. In other words, if the construction would not serve in accordance with its original intent except for inclusion of the emissions unit, such construction is prohibited prior to obtaining a PSD permit."

Finally, you have asked whether there is flexibility under the Clean Air Act (Act) or rules to allow construction of footings for emissions units without a PSD permit in cold weather States such as Minnesota. EPA's general view is that such an exemption is not authorized under the Act or the Federal PSD rules. Historically, foreseeable circumstances such as a short construction season have been factored into the design, planning, and permitting of any affected construction project. However, the EPA believes that Minnesota has raised legitimate concerns. As a part of the NSR Reform, such concerns were raised and considered, but no agreement was reached on specific changes to the NSR rules. EPA intends to ask the NSR Reform Subcommittee to consider again rule reforms that would address possible extenuating circumstances under which certain limited construction-related activities could take place prior to receipt of a final permit. In the interim, I encourage the State to continue its discussions with the Regional Office to develop a solution, within the current rules, that considers EPA's concerns about allowing certain construction-related activities prior\*to receipt of a PSD permit. Specifically, should a source request to establish footings prior to cold weather without receiving the required PSD permit, the EPA may be willing to discuss compliance options, consistent with the rules.

I hope this letter clarifies EPA's interpretation of the Federal PSD rules regarding permissible activities prior to obtaining a PSD permit. If you have any questions concerning the application or enforcement of the PSD rules, you may contact Ron Van Mersbergen of EPA Region 5 at (312) 886-6056.

Sincerely,

John S. Seitz  
Director  
Office of Air Quality Planning  
and Standards

Enclosures