MEMORANDUM:

DATE: April 11, 1978

SUBJECT: Offset Policy - Marathon Oil Company, Garyville, Louisiana

FROM: Director,
Division of Stationary Source Enforcement

TO: Howard G. Bergman, Director
Enforcement Division (6AE) - Region VI

This is in response to your request dated March 28, 1978, concerning Marathon Oil Company's proposed construction plans and their applicability to the emission offset policy. In your memo you describe a situation where Ecol received, in 1974, a permit for a new refinery from the Louisiana Air Control Commission (LACC). Since receipt of this permit, Ecol has sold its assets to Marathon Oil prior to Ecol's completion of the project. Rather than completing the project as permitted, Marathon has chosen to alter its plans and has obtained a new permit from LACC. This new permit allows for in excess of 100 tons per year of additional hydrocarbon emissions. Marathon Oil and LACC now want to apply Ecol's originally permitted, but not constructed, facilities as offsets for the construction of Marathon's new source.

Upon review of your memo two questions come to mind. (1) Was the permit issued to Ecol consistent with the requirements of Section 51.18? That is, did the LACC approve the construction of the Ecol refinery upon completion of an ambient air quality analysis and imposition of necessary permit conditions to assure compliance with Section 51.18? (2) What was the status of the construction as of December 21, 1976? Both of these questions become very important when considering the availability of emission offsets, the adequacy of previously issued state permits and the enforcement options which may be available at this time.

If the original LACC new source permit is determined the emission offset policy would have had to go through a rigorous pre-construction review in order to obtain their original permit. For this reason, I am not concerned that this source may now use this permitted level as the basis for emission offsets, since they would previously complied with the requirements of the offset policy.

If you have any additional questions or comments concerning this issued, please contact Rich Biondi (755-2564) of my staff.

Edward E. Reich

cc: Mike Trutna - CPDD
Kent Berry - OAQPS

EN-341:RBiondi:ncb:3202:4/11/78:x52564

MEMORANDUM

OFFICE OF ENFORCEMENT

SUBJECT: New Source Review/Emission Offset Policy -- Legal Action Against State Permits that Have Been Improperly Issued

TO: Enforcement Division Directors;
Air & Hazardous Materials Division Directors;
Regions I-X

As you are aware, the Agency has published its new source review/"emission offset" policy in the form of an interpretative ruling (41 FR 55524, December 21, 1976). Since implementation of the policy is an essential tool for purposes of attaining and maintaining the national ambient air quality standards, we believe it imperative that EPA carefully examine State and local permits and other forms of new source review approvals to determine whether they comply with EPA's minimum new source review requirements as articulated in the ruling. In certain cases, it may be necessary to initiate legal action to obtain a judicial declaration that a State or local construction permit or approval is invalid and to seek injunctive relief against construction of a new source.

We consider a thorough overview by the regional offices of State and local construction permits and approvals issued since the publication of the ruling to be one of the Agency's highest priorities. Where deficiencies are noted, swift EPA action to prevent construction until a valid approval is obtained is critical to assuring that the new source review program will not be undermined.

In those instances where a State or local new source review approval was obtained prior to the publication of the ruling and such approval meets at least the minimum requirements of the ruling, the approval would still be valid. If, however, a State or local approval issued prior to publication of the ruling does not satisfy its terms, or if construction of a new source has been undertaken without a new source review approval, the EPA regional office should examine the facts in the case before deciding whether to take action to prevent further construction until a valid approval is obtained. In making judgments on whether to take action on approvals issued prior to the ruling, the regional offices should consider the following:

(1) the extent to which the source had (or should have had) actual notice of the Federal new source review requirements;

(2) the extent to which the State or local permit or approval was issued in reliance on and is consistent with earlier drafts of the "emission offset" policy;

(3) the extent to which on-site construction had progressed prior to publication of the ruling;

(4) the degree of actual good faith reliance on a State or local permit or other indication of new source review approval;

(5) the degree of hardship which compliance would impose upon the owner or operator of the source;

(6) the seriousness of the impact of the source's projected emissions on ambient air quality and the degree to which mitigating measures are being applied.

The fact that a source appears to satisfy one or more of these criteria is not necessarily determinative. The regional office should consider the total circumstances of each situation (including availability of resources and likelihood of success on the merits) in making any decision on whether to proceed.

Recent permits or approvals issued prior to the December ruling should be reviewed to the maximum extent possible consistent with the need to devote primary attention to those permits and approvals issued after the ruling. We would recommend that, as a general rule, a low enforcement priority be placed on halting construction or operation where a new source has already been constructed or has commenced on-site construction and the owner or operator of the new source has relied in good faith on a State or local permit or other indication of new source review approval. Of course, where there are other actions which might be taken practicably (including

installation of controls while the facility is in operation), EPA action may still be appropriate. Again, it should be emphasized that priority should be given to a prospective application of the policy. We recognize that the resources constraints on many regional offices may severely limit the ability to review permits or approvals issued prior to the ruling's publication.

A formal notification to the State or local reviewing authority and to the source that EPA has determined a permit or approval to be invalid may be sufficient in many cases to obtain compliance from the affected source. Where such notice is not sufficient, however, it may be necessary to secure a judicial declaration that the permit or approval is invalid. The source's construction may be enjoined pending the resolution of the issue. Once a court rules that there was no valid new source review approval, the source's construction will be subject to Section 113 enforcement as a violation of the SIP. In addition, there may be a number of other possible remedies, the pursuit of which may be advisable in certain situations. The regional office should consult the Division of Stationary Source Enforcement (DSSE) before initiating any action to have the permit or approval declared invalid and/or the source's construction enjoined.

If you should have any questions or comments on the policy set forth in the memorandum, please feel free to contact Ed Reich, Director, DSSE, at 755-2550 or Martha Prothro, Chief, Enforcement Proceedings Branch, DSSE, at 755-2523.

Stanley W. Legro

DATE: April 11, 1978

SUBJECT: Offset Policy - Marathon Oil Company, Garyville, Louisiana

FROM: Howard G. Bergman
Director
Enforcement Division (6AE)

TO: Edward E. Reich
Director, Division of Stationary
Source Enforcement (EN-341)

In 1974 Ecol received a permit from the Louisiana Air Control Commission (LACC) for a new refinery. Ecol failed to complete construction and sold its assets to Marathon. Marathon could have constructed under that permit but instead extensively revised the proposed refinery and obtained a new permit in October of 1977. The hydrocarbon emissions from the facilities not covered by the original permit (mainly storage tanks) are substantially over an allowable rate of 100 tons per year. The LACC took the position that the permitted but never constructed facilities were permissible as offset sources. We are unsure if this position is proper. Therefore, we are requesting your interpretation.

We are not advocating a position because we perceive good arguments for different interpretations. Our only concern is that if the LACC interpretation is approved that a caveat be included that only good faith changes, as in this case, in permitted but never constructed facilities are permissible offset sources in order to prevent circumvention of the offset policy.