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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MEMORANDUM:

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DATE: August 3, 1981

SUBJECT: Appeal Procedures for PSD Permits under the Consolidated Permit Regulations

FROM: Director  
Division of Stationary Source Enforcement

TO: William K. Sawyer  
General Enforcement Branch, Region II

I would like to offer the following comments and answers to the questions raised in your memo of June 25, 1981. I will respond to the questions in order.

1. The service of notice occurs upon mailing of notice. The applicant and/or any person as described in 40 CFR 124.19(a) may file an appeal within 30 plus 3 days from the date of service of notice or from some later date as specified in the notice. The Regional Office may use the date of receipt as the date from which the 30-day period for effectiveness (124.15(b)(1) or appeals (124.19(a) 3rd sentence) is to run. (See 40 CFR 124.19, 20).
2. The Regional Administrator must notify the applicant and each person who submitted written comments or requested notice of the final permit decision. (See 40 CFR 124.15(a)). A Federal Register notice does not need to be published until the permit becomes effective.
3. Under 40 CFR 124.19, any person who filed comments or participated in a public hearing concerning a PSD permit may petition the Administrator to appeal any condition of the permit (See 40 CFR 124.19(a)).
4. Any material change in a permit condition cannot be made without advance notice and opportunity for public comment. The Administrator may, however, remand a permit condition back to the Regional Office without notice and public comment. (See 40 CFR 124.19(c)).
5. If no changes are made between the draft and final permit, a person is prohibited from seeking judicial review if he did not comment on or take part in the public hearing for the preliminary PSD permit.

I have reviewed your letter to NYSE & G Corp. and I do not think any changes are necessary. If you have any comments regarding this memo please contact Janet Farella of my staff at 755-2564.

Edward E. Reich

cc: Mike Trutna (OAQPS)  
Peter Wyckoff (OGC)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION II

DATE: JUN 25 1981

SUBJECT: Final Phases of Issuing PSD Permit and Appeals under Consolidated Permit Regulations

FROM: William R. Sawyer, Attorney  
General Enforcement Branch  
Enforcement Division

TO: Richard Biondi (EN-341)  
Chief, Regulations Analysis Section  
Compliance Monitoring Branch  
Stationary Source Enforcement Division

I am enclosing a copy of the letter Region II is now sending PSD permit applicants at the end of the PSD review process. The letter advises the source that the final PSD determination does not become effective until the provisions of the Consolidated Permit regulations relating to administrative appeals (40 CFR Part 124.19) have been satisfied. Your comments on this letter are welcomed.

In the course of composing this letter, the following questions arose about 40 CFR Section 124.19:

- (1) When is service of notice? (When EPA's letter is mailed or received?) (Until advised otherwise, we will use receipt.)
- (2) Must anyone other than source be sent a copy of final PSD determination? must it be published? (Based on prior telephone calls, we will only send copies to people who commented.)
- (3) Can a person who only commented on condition of the preliminary PSD permit appeal condition Y of the final PSD permit to the EPA Administrator? (The language of Section 124.19 makes it possible to argue that he can, but this seems illogical.)
- (4) If the answer to question 3 is affirmative and the EPA Administrator grants the appeal of condition Y, must the action of the EPA Administrator undergo any public review?
- (5) Region II believes that a party which did not comment on the preliminary PSD permit is foreclosed from seeking judicial relief later if no changes are made in the final PSD permit. (The non-commenter could not file an appeal under 40 CFR 124.19 and Section 124.19(e) says filing an administrative appeal is a prerequisite to the ability to file suit). Is Region II correct?

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(Upon the assumption that we are, we will alert sources to the need to exhaust their administrative remedies in order to preserve their ability to challenge the final action taken by the agency.)

Enclosure

cc: Edward E. Reich (EN-341) w/enc.  
Kenneth Eng, 2PM-PA w/o enc.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION II  
26 FEDERAL PLAZA  
NEW YORK NEW YORK 10278

DRAFT

Mr. A. E. Kintigh  
Vice President - Generation  
New York State Electric and  
Gas Corporation  
4500 Vestal Parkway East  
Binghamton, New York 13902

Dear Mr. Kintigh:

On March 26, 1981, the United States Environmental Protection Agency (EPA), Region II Office, advised you that the application submitted by the New York State Electric and Gas Corporation (NYSE&G) for a Prevention of Significant Deterioration of Air Quality (PSD) permit to construct a new 635 MW coal fired power plant in Somerset, New York, was approvable subject to public comment. A notice requesting public comments and soliciting comments on the need to hold a public hearing relative to the project was published in the Niagara Gazette, the Medina Journal and the Lockport Union Sun on April 3, 1981. The public comment period expired on May 4, 1981. During the public comment period, the EPA received neither a request for a public hearing on the proposed NYSE&G project nor any comments from the general public. The only comments received were those contained in your letter of April 27, 1981, wherein you requested several changes to proposed PSD permit conditions.

On the basis of all information available on the NYSE&G project including any and all comments received by the EPA relative to the project, the EPA concludes that the project will meet all of the requirements of the PSD regulations codified at 40 CFR 52.21, 45 FR 52676) and the Clean Air Act (the Act). On the basis of these findings, the Regional Administrator hereby issues this final determination of approvability (the final permit decision) to the NYSE&G for its proposed coal fired power plant. Please note that in developing the conditions contained in the final permit decision, the EPA considered NYSE&G's proposed changes to the EPA preliminary determination of approvability. The language in the final permit decision reflects those recommended changes deemed appropriate by the EPA.

In addition to the PSD regulations, the Consolidated Permits Regulations codified at 40 CFR Part 124 (45 FR 33405), apply to the EPA processing of this PSD Final permit decision. Specifically, Part 124.19 provides for an administrative appeal of this final determination. If no such appeal is made, this permit will become effective 30 days from your receipt of this letter.

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Title 40, CFR 124.19, establishes the following procedures for administrative appeals. Any person who filed comments on the preliminary determination of approvability or participated in the public hearing (if one was held) may petition the EPA Administrator in Washington to review any condition of the permit decision. Any person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review only to the extent of the changes from the draft to the final decision. Any petition for review under this Part must be made within thirty (30) days of service of notice of the final permit decision by the Regional Administrator. The petition for review shall include a statement of the reasons supporting that review, including:

- (1) A demonstration (if required under these regulations) that any issues being raised were raised during the public comment period and the public hearing; and when appropriate,
- (2) A showing that the contested portion of the permit is based on:
  - (A) A finding of fact or conclusion of law which is clearly erroneous; or
  - (B) An exercise of discretion or an important policy consideration which the Administrator should, in his or her discretion, review.

All requests for administrative review must be addressed to:

Administrator  
United States Environmental Protection Agency  
401 M Street, SW  
Washington, D.C. 20460  
Attention: Mr. Ronald McCallum

Judicial Officer, A101, Rm 1133  
(201) 755-2735

A copy of the request must be sent to Mr. Kenneth Eng at the EPA, Region II Office. His telephone number is (212) 264-4711. If a request for review is made by a party other than the permit applicant, a copy of such a request must also be sent to the applicant.

As already noted, this final permit decision will become effective 30 days from receipt of this letter unless a review is requested under Section 124.19. If a review is requested, the final permit decision will become effective:

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- (i) When the Administrator issues notice to the parties that review has been denied;
- (ii) When the Administrator issues a decision on the merits of the appeal and the decision does not include a remand of the proceedings;
- (iii) Upon the completion of remand proceedings if the proceedings are remanded, unless the Administrator's remand order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies.

If the applicant is notified that a request(s) for review has been filed with the Administrator, it is incumbent upon the applicant to call the EPA Region II Office contact person to ascertain the status of the review request(s).

Once it has become effective, the final permit decision will be final agency action and will be published in the Federal Register. If a petition for review under Section 124.19 has previously been filed, this final action may be challenged by filing a petition for judicial review in the United States Court of Appeals for the appropriate circuit within 60 days of the date of the Federal Register notice. Under Section 307(b) (2) of the Act, this final action shall not be subject to later judicial review in civil or criminal proceedings for enforcement.

You are authorized to commence construction on this project when this final permit decision becomes effective. If construction is not commenced within eighteen months of this date, discontinued for a period of eighteen months or more, or not completed within a reasonable time, such authority shall become invalid. Commence as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals or permits and either has:

- (i) Begun or caused to begin a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or
- (ii) Entered into binding agreements or contractual obligations which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

In accordance with the regulations set forth in 40 CFR 52.21 (q), the final permit decision shall be made available for public inspection by the New York State Department of Environmental Conservation, Region Office, 600 Delaware Avenue, Buffalo, New York 14202.

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If you have any questions concerning the final determination herein communicated to you, please call Mr. Kenneth Eng at (212) 264-4711.

Sincerely yours,

Richard T. Dewling, Ph.D.  
Acting Regional Administrator

Attachment

cc: Mr. Thomas Allen  
New York State Department of  
Environmental Conservation

Mr. Alan Domaracki  
New York State Department of  
Public Service