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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF ENFORCEMENT

MEMORANDUM:

SUBJECT: Alabama By-Products Corporation (ABC)

FROM: Director
Division of Stationary Source Enforcement

TO: Marvin B. Durning
Assistant Administrator for Enforcement

The attached response to Gene Lewis of ABC states our position regarding the applicability of the Agency's recently promulgated PSD regulations to ABC's coke battery No. 4. We have discussed the substance of this response with Region IV, which concurs with this determination.

ABC's basic argument is that the Agency's decision to make the recently promulgated PSD regulations effective as of March 1, 1978, is not legally supportable. Therefore ABC contends that its permit application should be evaluated under the Agency's pre-existing PSD regulations. The significance of applying these former regulations is that ABC would be given the opportunity to offset any emissions associated with the rehabilitation of battery No. 4 and thereby avoid the installation of best available control technology (BACT) on this facility.

ABC has indicated to the Department of Justice that it will cancel its plans to rehabilitate battery No. 4 if the Agency requires it to satisfy the recently promulgated PSD regulations and instead proceed to trial in the federal enforcement action filed against it. For this reason, the Department of Justice has urged the Agency to reevaluate its position and exempt ABC from the PSD requirements. Specifically, the Department is concerned that if this case goes to trial the court will declare that the present federal coke oven regulations contained in the Alabama SIP do not provide for pushing controls. (These are the same regulations that were at issue in the U.S. Steel-Fairfield case). If this occurs ABC may refuse to install the positive push controls on batteries Nos. 1, 5, and 6 as it has tentatively committed to under the terms of the settlement negotiations.

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Additionally, ABC may allege that Region IV did not act in good faith during the PSD permitting process. First, although Region IV personnel learned of ABC's plans to rehabilitate battery No. 4 on December 2, 1977, they did not inform ABC of the need to obtain a PSD permit prior to March 1. Additionally, neither the Regional Office nor the State of Alabama informed ABC that the permit review process could be expedited by submitting the permit application to State authorities directly rather than to Jefferson County. ABC's failure to complete its permit application until December 29, 1977, eliminated any absolute right it might have had to receive a permit prior to March 1, even if it had submitted the application directly to the State. In a similar instance, however, the Martin-Marietta Corporation submitted its PSD permit application directly to the State authorities, and obtained an expedited review of its application by both the State and EPA. This expedited review enabled Martin Marietta to obtain a permit prior to

March 1, despite the fact that it had not submitted its application until December 13. ABC therefore might argue that the Regional Office, as a matter of equity, should have informed ABC that the State authorities could conduct the PSD review process much more quickly than the County.

Although ABC has indicated that it will proceed to trial if EPA subjects it to the recently promulgated PSD regulations, recent action of the Alabama Air Pollution Control Commission may cause ABC to reconsider. On July 11, 1978, the Commission amended its coke oven regulations to require the installation of positive push controls. This action was taken as part of the overall SIP revision process required by the Act for nonattainment areas. These regulations are currently enforceable by the State authorities, and are now being reviewed by EPA, Region IV. If approved by EPA, these regulations will become part of the SIP and will be federally enforceable. Thus, since ABC is already under an obligation to install push controls to satisfy State law and may be required to install positive push controls on its batteries when Alabama's SIP is revised, it may decide that litigation would not be advantageous.

Finally, it appears that as a practical matter the Agency's PSD determination should have little influence on ABC's decision whether to challenge the provisions of EPA's enforcement action. Regardless of whether PSD review is conducted under the pre-existing or the newly promulgated regulations, ABC apparently will be required to desulfurize its coke oven gas (BACT). ABC had anticipated that it

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could avoid the significant costs associated with this type of control if review were conducted under the Agency's pre-existing regulations. These regulations would not have required the installation of BACT if ABC had been able to offset the emissions associated with battery No. 4. ABC had expected to obtain the necessary offsets by shutting down battery No. 2 and upgrading several scrubbers presently installed on the coal preheater stacks. If evaluated under the currently effective PSD regulations, ABC will be required to install a desulfurization unit regardless of any emissions offsets achieved. Because of the considerable costs associated with the installation of this unit ABC was quite anxious to be reviewed under the pre-existing PSD regulations.

In several recent discussions, however, Bernard Bloom of DSSE and Bruce Miller of Region IV have concluded that ABC probably could not have obtained the offsets required under the pre-existing regulations without the installation of a desulfurization unit. Therefore, from the standpoint of cost to ABC, it is likely to be irrelevant whether the Agency reviews ABC's permit application under the pre-existing or recently promulgated PSD regulations. For this reason, ABC's future strategy in the Agency's enforcement action should not be greatly influenced by the decision to subject ABC to the new PSD regulations.

I hope that this memorandum explains satisfactorily some of the ramifications of our decision to subject ABC to the more stringent PSD requirements imposed by the Clean Air Act Amendments of 1977. If you have any questions on this matter or require any additional information please call me or Bob Homiak (755-2580) of my staff.

Edward E. Reich

cc: John Johnson
Region IV

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

OFFICE OF ENFORCEMENT

July 28, 1978

Gene W. Lewis
Vice President - Operations
Alabama By-Products Corp. (ABC)

P. O. Box 10246
Birmingham, Alabama 35202

Dear Gene:

I have received your letter of June 19, 1978, in which you state that ABC's coke battery No. 4 should not be subject to the Agency's recently promulgated regulations for prevention of significant deterioration (PSD). Upon a careful review of the materials submitted, and after discussing this matter with EPA's Region IV Office in Atlanta, I have concluded that battery No. 4 is subject to these new PSD regulations. This determination is mandated by the provisions of the Clean Air Act and the Agency's implementing regulations and was not influenced by the enforcement action that EPA has commenced against ABC.

First, I would like to address an apparent area of uncertainty regarding the applicable new source regulations for coke battery No. 4. Your letter seems to indicate that PSD requirements are being used as a substitute for the Agency's Interpretative Ruling for Nonattainment Areas. These two policies, however, are quite different. The Interpretative Ruling ("offset policy"), published in the December 21, 1976, Federal Register (pages 55524-30), affects new sources constructing in or impacting nonattainment areas. The PSD program governs construction affecting those areas where air quality currently is better than the national ambient air quality standards (i.e., attainment areas). These two Agency policies require independent preconstruction reviews and impose different pollution control requirements. Since Jefferson County is an attainment area for SO₂ and a nonattainment area for particulate matter, coke battery No. 4 must undergo both a PSD review for SO₂ and an offsets review for particulates.

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Your letter advances several arguments for not subjecting ABC's coke battery No. 4 to the Agency's recently promulgated PSD regulations. First you allege that the Notice published in the November 3, 1977, Federal Register, in which EPA stated its intent to apply the new PSD requirements as of March 1, 1978, is without any legal effect because it accompanied proposed rather than final regulations, and because it was not subject to public comment.

The November 3, 1977, Federal Register Notice provided ABC with notice of the Agency's policy for implementing the PSD regulations. The fact that the statement appeared in the preamble to proposed regulations that were subject to amendment does not make it ineffective to provide such notice. Moreover, this Notice stressed that, in order to assure receipt of a final PSD permit by March 1, 1978, sources should file a completed permit application no later than December 1, 1977:

It is important to note that EPA's current PSD regulations contemplate at least a 90 day period from completed application submittal to permit issuance. Accordingly, sources which have not filed completed applications by December 1, 1977, should not assume that a final permit approval will be issued by March 1, 1978, and should therefore plan to be reviewed under the new rules. (42 Fed. Reg. 57479 (1977)) (emphasis added).

Publication of this Notice on November 3 provided ABC with adequate time to prepare and submit a completed PSD permit application for coke battery No. 4 by the December 1, 1977, date. Additionally, your statement that selection of these dates was not subject to public comment is erroneous. EPA received numerous comments both from industry groups and the general public on the appropriateness of the March 1 deadline. (See 43 Fed. Reg. 26389-90 (1978)).

Your second argument is that EPA chose to implement the PSD program on March 1, 1978, simply because this was the date on which it expected to publish the regulations. Since ABC filed a completed PSD permit application more than 90 days prior to the date on which the final regulations were published in the Federal Register (i.e., June 19, 1978), you believe it should be evaluated under the pre-existing regulations.

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This argument is not persuasive for two reasons. First, it fails to recognize that EPA's firm adherence to the March 1 date was necessary to minimize consumption of the increments prior to the time the States adopted the PSD program. Additionally, it ignores the fact that EPA gave the public ample notice of its intent to use this March 1 date even when it became evident that the final regulations would not appear as scheduled. (42 Fed. Reg. 62020, 64378 (1977)).

The Agency explained its rationale for selecting March 1, 1978, as the date of implementation in its June 19, 1978, Federal Register Notice. Briefly, the rationale is that in developing the Clean Air Act Amendments of 1977, Congress left standing contradictory indications of when it intended the new PSD requirements to be effective. Faced with this contradiction EPA was required to fashion a program for implementing the new requirements. EPA had to balance three major considerations in developing this program. First, EPA recognized the Congressional intent that consumption of the air quality increments be minimized. The other two major considerations were that economic disruption should be minimized and that orderly administration of the new requirements should be maximized. Thus, while EPA initially selected March 1, 1978, because it represented the date of expected publication of the final regulations, effectuation of these three competing considerations required that EPA adhere to this date even if publication of the regulations was delayed. (For a full discussion of the Agency's policy in implementing the new PSD requirements, see 43 Fed. Reg. 26389-91 (1978)).

Your letter also implies that the conduct of EPA Region IV personnel may in some way have been responsible for ABC's failure to submit a permit application prior to December 1, 1977. This argument is without merit. EPA Region IV representatives did not learn of ABC's plans to rehabilitate battery No. 4 until December 2, 1977, during a meeting with ABC representatives in Birmingham, Alabama. Furthermore, at this time ABC informed Region IV of its intent to submit a permit application shortly. ABC submitted an incomplete application 3 days later. It is difficult to understand how Region IV, which did not learn of ABC's plans until the December 1 "deadline" had passed, can be held responsible for ABC's failure to make a timely PSD permit application.

Additionally, the permit review conducted by Jefferson County and EPA was not marked by any undue delay. ABC first filed its permit application with the Jefferson County

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Department of Health on December 5, 1977. In an accompanying letter, however, ABC acknowledged that this application was incomplete. On December 12, 1977, the County requested additional information. ABC supplied this information on December 29, 1977. In accordance with the then-applicable PSD regulations, this constituted the official date of receipt of the application for purposes of conducting PSD review. (40 CFR Section 52.21(e) (1977)).

Upon completion of the technical review, Jefferson County announced a 30-day comment period on March 4, 1978. Although it might be argued that the County's review took longer than the 60 days provided for in 40 CFR Section 52.21(e), given the numerous and complex issues that required resolution, this was not an unreasonable delay. Moreover, even if Jefferson County had completed the necessary reviews within the 60 day period, EPA would not have received ABC's processed application until February 26, 1978, assuming immediate receipt of all the necessary information. This would have left only two days in which to evaluate the County's technical analysis, review the public comments submitted, and issue a final approval. Such a "rubber stamp" procedure was not contemplated by the then applicable PSD regulations, which provided EPA 30-60 days in which to evaluate the permit and issue a final approval. (40 C.F.R. Section 52.21(e)(1)(v) and (vi)(1977)).

Additionally, you note that EPA exempted U.S. Steel-Fairfield from the March 1, 1978, deadline because of ongoing settlement negotiations, and you request that ABC be granted a similar exemption. The factual circumstances surrounding the Fairfield negotiations, however, are quite different from those involved in this case. In the U.S. Steel case, the applicability of the PSD regulations was not a significant issue, since it was absolutely

certain that there would be no net increase in emissions resulting from the modification. Rather, EPA intervened in the Fairfield suit primarily to ensure that the requirements of the "offset policy" were met with respect to control of the particulate emissions from the new batteries. During the settlement negotiations, EPA requested the County to withhold the issuance of construction permits pending resolution of the "offsets" issues. Since the post-March 1, 1978, issuance of permits in the Fairfield case was in no way connected with the PSD review and the delay was at the request of EPA, requiring U.S. Steel to meet additional PSD requirements would have been inequitable. The circumstances in the present case are quite different, since ABC's failure to obtain final PSD approval by March 1, 1978, resulted from its failure to submit a timely application.

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In summary, ABC was given sufficient notice of the need to obtain a PSD permit prior to March 1, 1978, or risk being evaluated under the Agency's new PSD regulations. Despite this notice, ABC did not obtain the necessary permit. ABC's failure to do so can not be attributed to the actions of EPA. At all times Region IV personnel dealt with ABC in good faith, and without regard to the pending enforcement action against the company. Therefore, if ABC intends to pursue its replacement strategy at the Tarrant coke plant, it must satisfy the requirements of the amended PSD regulations.

Finally, although it is clear that ABC's permit application must be evaluated under the recently promulgated regulations, there may be little practical significance to this decision. We understand that ABC had intended to offset the emissions associated with rehabilitation of battery No. 4 and thereby avoid the necessity to utilize best available control technology (BACT), as would be required by the new PSD regulations. However our engineering estimates, which may be discussed with Region IV personnel, indicate that ABC will not be able to achieve the necessary offsets without utilizing BACT. Therefore, regardless of whether PSD review is conducted under the pre-existing or newly promulgated regulations, ABC will be required to desulfurize a portion of its coke oven gas.

I hope that this letter satisfactorily responds to your objections regarding the PSD review for coke battery No. 4. I trust this determination will remove any uncertainty that ABC may have recently experienced, so that a final control strategy for coke battery No. 2 can be expeditiously selected and implemented.

Sincerely,

Marvin B. Durning
Assistant Administrator
for Enforcement

cc: Lloyd Guerci
Department of Justice

Henry I. Froshin
U.S. Attorney's Office
Birmingham, Alabama

John Johnson
Region IV